O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2017

(*SEPTEMBER*)

Odisha Judicial Academy, Cuttack, Odisha

ODISHA JUDICIAL ACADEMY

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

I N D E X

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2. Order 6 rule 17 of CPC

Joseph Pani & Others vs. Roman Catholic Doiocese of Berhampur represented by Bishop Dr.Sarat Chandra Nayak

Biswanath Rath, J.

In the High Court of Orissa, Cuttack.

Date of Judgment -12.09.2017

Issue

In the matter of amendment of written statement to introduce new facts contrary to the admissions already made by the defendants in the written statement.

This Civil Misc. Petition involves an order of rejection on an application under order 6 rule 17 of c.p.c. at the instance of the defendant-petitioners appearing at Annexure-4.

Short background involved in the case is that the opposite party, as plaintiff filed C.S. No.8/2013 on the file of Civil Judge (Sr.Divn.), Paralakhemundi against the present petitioners praying for eviction of the petitioners or any other persons claiming under them from the suit schedule premises and for delivery of possession of the suit premises to the plaintiff and/or his authorised agent. Plaintiff has also claimed compensation from the date of suit till actual delivery of possession of the suit schedule premises. On their appearance the defendants filed their written statement jointly denying the plaint allegation. After examination of the plaintiff witnesses got closed during course of evidence of D.W.3 coming to know that the suit property was purchased by some other persons of St. Marry Church, Chandiput by way of sale deeds and the said land wrongly recorded in the name of the plaintiff, the defendants instead of giving evidence filed amendment application under order 6 rule 17 of c.p.c. seeking amendment of their written statement. Application was seriously objected. Taking into consideration the plea of both the sides, the trial court rejected the application for amendment giving rise to the present Civil Misc. Petition.

Sri Pati, learned counsel for the petitioners (defendants in the court below) submitted that the amendment involving the facts was not within the knowledge of the defendants and came to their knowledge only during

course of examination of D.W.3. It is accordingly claimed that there was no illegality in bringing such amendment and further it is also alleged that the trial court not only decided the matter without application of appropriate mind but also rejected the application on the ground of delay in filing such application again appears to be inappropriate, particularly looking to the availability of information to the defendants on the materials sought to be brought by way of amendment. Further since the amendment was aimed in ensuring effective adjudication and restricting multiplicity of litigations for the interest of the parties, the application ought to have been allowed. It is on the above premises, Sri Pati, learned counsel for the petitioners submitted that the impugned order being erroneous and illegal should be interfered with and set aside.

Sri Panigrahi, learned counsel for the opposite party, particularly appearing for the plaintiff objecting each of the submission of the learned counsel for the petitioners, submitted that by way of proposed amendment, the defendants are attempting to withdraw their admission in their written statement. For the amendment being moved after the observation of the trial court dated 30.8.2016, the opposite party also claimed that the amendment application was filed with ulterior motive. It is also contended by Sri Panigrahi that the amendment has been brought at the particular stage of the suit with clear intention to not only delay the trial but also to have a de novo trial thereby forcing the plaintiff to amend his pleading in the plaint and recalling the witnesses examined so far. Referring to two decisions of the Honble apex Court in the cases of Heeralal vrs. Kalyan Mal & others reported in AIR 1998 SC 618 and Pramod Kumar Prusty & others vrs. Aina Prusty (since dead) represented by her legal heirs and others reported in 2014(II) CLR-928, Sri Panigrahi, learned counsel for the opposite party submitted that the said decisions have direct application to the case of the opposite party and further there being no infirmity in the impugned order, this Court should dismiss the Civil Misc. Petition.

Considering the rival contentions of the parties, this Court finds, the undisputed fact remains that admittedly there are admissions about the ownership of the plaintiff over the suit land in the written statement of the defendants clearly borne in paragraphs-4 & 8. Looking to the proposed amendment, this Court finds, the defendants attempting to introduce a new plea is wholly contrary to their admission in paragraphs-4 & 8. Further for the pleadings in the plaint and written statement for being already involved up till closure of the evidence of the plaintiff, the new facts sought to be introduced appear to be not germane to the pleading in the plaint and written statement but since it contradicts the admission already made by the defendants will certainly bring facts only to confuse the plea of the parties involving the suit as well as in the written statement. There may be possibility of change of nature and character of the suit in the process. Further for the rejection of sale deed involved in the new pleadings sought to be brought by way of amendment being introduced at the instance of the defendants being rejected and not challenged any further, allowing such amendment will also amount to sit over the rejection order dated 30.8.2016 passed by the trial court and remain unchanged. It is, therefore, observed that the trial court after considering all the above has found the amendment application as not permissible at that stage of the suit.

For the settled proposition of law that no amendment should be allowed to put the plaintiff to retrievably prejudice for being denied with opportunity of extracting the admission already made by the defendants, as held by the Honble apex Court in Heerala vrs. Kalyan Mal & others (supra), this Court finds, there is no infirmity in the impugned order. As a result, this Court declining to interfere with the impugned order dismisses the Civil Misc. Petition. No cost.

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3. Order 18 rule 17 of C.P.C read with 151 of C.P.C.

Rajanikanta mohanty and others vs. smriti bisoi & others

Biswanath Rath, J.

In the High Court of Orissa ,Cuttack.

Date of judgment -08.09.2017

Issue

In the matter of recalling a witness for further examination in chief by utilising inherent jurisdiction of the Court.

This Civil Miscellaneous Petition involves a challenge to the impugned order at Annexure-6 rejecting an application at the instance of the defendant Nos. 2 to 5 under order 18 rule 17 of c.p.c read with 151 of C.P.C.

Short background involved in the case is that after examination of D.W. 6 finding inadvertent omission in the affidavit in evidence submitted on behalf of the D.W. 6, an application under order 18 rule 17 of c.p.c. read with Section 151 of C.P.C was filed with a prayer to recall the D.W. 6 for his further examination in chief on the points indicated therein. On their appearance the defendant Nos.8 & 9 filed objection challenging the maintainability of the application and further, resisting the attempt of the petitioners on the premises that in the event of allowing such an application the defendant No.5 will be allowed to fill up the lacunas, which is not permissible in the eye of law. There was no objection by the other defendants except plaintiffs and defendant nos.8 & 9. Considering the rival contentions of the parties, learned trial Court further taking into consideration a decision of the Honble Apex Court in the case in between Ram Rati v. Manage Ram (D) Through Lrs. as reported in 2016 (Supp.-I) OLR (SC) 938 rejected the application giving rise the present Civil Miscellaneous Petition.

Assailing the impugned order, referring to the response in paragraph No.8 of the written statement so also referring to the application under order 18 rule 17 read with section 151 of c.p.c learned counsel for the petitioners submitted that though the examination of D.W. 6 is over but there has been bona fide omission of certain questions. Sri Baug, learned counsel for the petitioners further submitted that though the application considered in the impugned order was nomenclated as an application under order 18 rule 17 read with section 151 of the C.P.C but looking to the

prayer made therein, it appears, the application was to be treated as an application under section 151 of the c.p.c. The trial Court on the premises that application at the instance of the petitioners being filed under order 18 rule 17 referring to a decision of the Honble Apex Court dealing a matter strictly involving provision at Order 18 Rule 17 of C.P.C rejected the application without considering the fact that the petitioners have moved an application following section 151 of c.p.c. Referring to a decision in the case in between Salem Advocate Bar Association, T.N. v. Union of India as reported in 2005(VI)SCC344 particularly referring to the paragraph No.13 of the said decision, learned counsel for the petitioners submitted that the test of the moment was to find out whether the party satisfied that even after exercise of due diligence that part of the evidence was not within his knowledge or could not be produced when the party was leading evidence, the Court may permit for leading of such evidence at a later stage on such terms appears to be just.

Further, referring to a decision of the Honble Apex Court in the case in between K.K. Velusamy v. N. Palanisamy as reported in (2011) II SCC 275 particularly referring to paragraph Nos.3, 10 & 11 of the said decision, Sri Baug, learned counsel submitted that for the observation of the Honble Apex Court that for the request in such contingency, the matter should have been considered in exercise of power under section 151 of c.p.crather than confining the consideration under the provisions of order 18 rule 17 of c.p.c.

Referring to another decision of this Court in the case in between U.K. Ghosh v. M/s. Voltas Ltd., and another as reported in AIR 1994 Orissa 131 particularly referring to the paragraph No.4 of the judgment learned counsel for the petitioners submitted that this Court had only observation that this nature of application cannot be entertained for the reason there is an attempt to fill up the lacunas.

Challenging the order, referring the judgment of the Honble Apex Court by the trial Court, Sri Baug, learned counsel for the petitioners further referring to the facts available therein, the averments and findings of the Honble Apex Court submitted that the decision of the Honble Apex Court involved only consideration of the effect of order 18 rule 17 of c.p.c and claimed that the decision is clearly distinguishable. It is under the

above premises, learned counsel for the petitioners prayed for interference of this Court in the impugned order and rejecting the same.

Sri J. Mohanty, learned counsel for the defendant Nos.8 & 9 in the Court below referring to the objection filed by the defendant Nos.8 & 9 and further referring to the provision contained in order 8 rule 1 of c.p.c as well as the decision of the Honble Apex Court as reported in 2016(Sup.-I) OLR SC 938 contended that under no circumstance, attempt to fill up the lacunas in the affidavit evidence already submitted, can be permitted. It is, thus, contended that the trial court having relied on this decision has not committed any error in passing the impugned order leaving any scope to interfere with the same.

Sri R. Routray, learned counsel for the opposite party Nos.1 to 3 supported the stand taken by Sri J. Mohanty, learned counsel and submitted that for having no infirmity, the impugned order leaves no scope for this Court to interfere with the same.

Considering the rival contentions of the parties, this Court finds, there is no dispute that the petitioners have specific pleading involving the requirement of further examination of D.W. 6 as clearly borne from paragraph No.8 of the Additional written statement. Looking to the application filed by the petitioners this Court finds, though the petitioners have nomenclated the application to be an application under order 18 rule 17 of c.p.c read with 151 of c.p.c., but looking to the prayer made therein this Court finds, the petitioners have also specific prayer to recall D.W. 6 for his further examination in chief on the points stated therein. Reading of the application and the response in the additional written statement this Court finds, the petitioners attempt remaining with the pleadings already available on record, it is at this stage this Court takes into consideration the submission of the learned counsel for the opposite party nos.6 & 7 that the petitioners since have scope for putting such questions to the other defendants available for chief no further examination of the D.W. 6, will not prejudice the case of the petitioners, this Court observes, since evidence left out can be brought through other defendants, it is, on the other hand, there will be no prejudice if such evidence is brought through further chief of the D.W. 6.

Now coming to examine the decisions cited at Bar, this Court dealing with the decisions taken reliance by the trial court as reported in 2016(Sup.-I) OLR SC938 finds from paragraph no.1 of the said decision as follows : Whether a witness can be recalled under order 18 rule 17 of c.p.c for further elaboration of aspects left out in evidence already closed is the issue for consideration in this case.

Looking to the discussions and findings of the Honble Apex Court in the case referred to hereinabove, this Court finds, the case was considered in the spirit of the provision available under order 18 rule 17 of c.p.c exclusively. Further, for the clear pleading as well as prayer of the petitioners in the application taken up for consideration in the trial Court for further examination in the chief in D.W. 6, the decision referred to hereinabove has no application to the present case.

Considering the decision cited by the learned counsel for the petitioners in the case in between K.K. Velusamy v. N. Palanisamy as reported in (2011) II SCC 275 and looking to the specific relief claimed therein, this Court finds, the Honble Apex Court in paragraph Nos.7, 8, 9, 10, 11 & 16 has observed as follows:

7. The amended definition of evidence in section 3 of the evidence act, 1872 read with the definition of electronic record in section 2(1)(t) of the information technology act 2000, includes a compact disc containing an electronic record of a conversation. section 8 of the evidence act provides that the conduct of any party, or of any agent to any party, to any suit, in reference to such suit, or in reference to any fact in issue therein or relevant thereto, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

In R. M. Malkani v. State Of Maharashtra this Court made it clear that electronically recorded conversation is admissible in evidence, if the conversation is relevant to the matter in issue and the voice is identified and the accuracy of the recorded conversation is proved by eliminating the possibility of erasure, addition or manipulation. This Court further held that a contemporaneous electronic recording of a relevant conversation is a relevant fact comparable to a photograph of a relevant incident and is

admissible as evidence under Section 8 of the Act. There is therefore no doubt that such electronic record can be received as evidence.

Order 18 rule 17 of the code enables the court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness under Order 18 Rule 17 can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said power. The power is discretionary and should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. (Vide Vadiraj Naggappa Vernekar v. Sharadchandra PrabhakarGogate2.)

Order 18 rule 17 of the code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling any witness either suo motu, or at the request of any party, so that the Court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.

There is no specific provision in the Code enabling the parties to reopen the evidence for the purpose of further examination-in-chief or cross- examination. section 151 of the code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the absence of any provision providing for reopening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under section 151 of the code, subject to its limitations, can be invoked in appropriate cases to reopen the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under order 18 rule 17 of the

code to recall any witness to enable the Court to put such question to elicit any clarifications.

Neither the trial court nor the High Court considered the question whether it was a fit case for exercise of discretion under Section 151 or Order 18 Rule 17 of the Code. They have not considered whether the evidence sought to be produced would either assist in clarifying the evidence led on the issues or lead to a just and effective adjudication. Both the courts have mechanically dismissed the application only on the ground that the matter was already at the stage of final arguments and the application would have the effect of delaying the proceedings. For the decision of the Honble Apex Court considering such nature of cases in the spirit of provision at section 151 of c.p.c this Court finds, the decision referred to hereinabove has a clear support to the petitioners case.

For the observation of this Court that the petitioners had moved the application also for consideration of the Court applying the provision of section 151 of c.p.c and further, for the attempt of the petitioners is not going beyond the pleadings available in the additional written statement and for the petitioners having a scope to bring this evidence by examining the other defendants available for the purpose of chief and further for the scope of defendants to have the scope of cross examination and for the decision of the Honble Apex Court in the case in between K.K. Velusamy v. N. Palanisamy as reported in (2011) II SCC 275 this Court finds, the observation as well as the findings of the trial Court are improper and the impugned order having been passed without consideration of all the above aspects cannot be sustainable in the eye of law.

Under the circumstances, while interfering with the impugned order this Court sets aside the order vide Annexure-6 and allows the application at the instance of the petitioners vide Annexure-4 and directs the trial Court to fix a date for appearance of the D.W. 6 for further examination with liberty to the contesting parties to cross examine the D.W. 6 to be produced for further examination. Further considering that there is delay in disposal of the suit of the year 2005 and keeping the request of Sri Mohanty, learned counsel for the opposite party Nos.6 & 7, this Court directs the learned Civil Judge (Sr. Divn.), Bhubaneswar to conclude the trial within two months from the date of receipt of a certified copy of this judgment. This Court also records the undertaking of all the counsels appearing that respective parties will not resort to unnecessary adjournment.The writ petition succeeds and in the circumstances, there is no order as to cost.

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4. Order 39 Rule 1 & 2 of CPC

Pramod Kumar Sahoo Vs. Jhilli Gochayat and Ors.

Biswanath Rath, J.

In the High Court of Orissa, Cuttcak.

Date of Judgment -11.09.2017

Issue

In the matter of interim injunction in a case based on specific performance of contract for sale of the suit land.

This Civil Miscellaneous Petition involves an order passed by the appellate court reversing a status quo order granted by the trial court involving an application under Order 39, Rules 1 and 2 of the Code of Civil Procedure.

Admittedly, the suit is for specific performance of contract as well as permanent injunction. The suit is based on a plaint case on the basis of an agreement between the plaintiff and the defendant Nos. 1 to 3 for sale of the disputed property indicating the receipt of a sum of Rs. 15,00,000/- (Rupees fifteen lakhs) from the plaintiff by the defendant Nos. 1 to 3 endorsing therein delivery of possession in favour of the petitioner. It is alleged in the suit that after entering into the agreement for sale of the disputed property, there has been subsequent sale in favour of the defendant No. 3, the present contesting opposite party involving the same property. The defendant Nos. 1 to 3 along with plaint filed an application under order 39, Rules 1 and 2 read with Section 151 of the Code of Civil Procedure. Claim of the plaintiff in the application and whole reading of the Interim Application appears to be based on the averments in the plaint and strictly based on the unregistered agreement claimed to have been entered into between the plaintiff and defendant Nos. 1 to 3. This application was being objected by all the defendants, i.e. defendant Nos. 1 to 3 objecting the claim of the petitioner involving the Interim Application, particularly, the response made in paragraph-11 of the objection at the instance of the defendant Nos. 1 to 3 in the Interim Application reads as follows:

"11. That the facts stated in para-6 of the petition does not arise at all in this case. It is false to say that the petitioner has got strong prima-facie case and balance of convenience also lies in favour of the petitioner. It is further false to say that the petitioner will suffer irreparable loss and injury

unless and until the opposite parties are restrain from interfering in the peaceful possession of the petitioner in the suit schedule land. In fact when the opposite parties No. 1 to 3 have not entered into any agreement for sale in favour of the petitioner nor they have received any amount as advance from the petitioner or delivery peaceful possession of the suit schedule land in favour of the petitioner, the question of three golden principle of allowing ad-interim injunction does not arise at all."

There is also a serious objection to the claim of the petitioner by the defendant No. 4 therein. Considering he rival contention of the parties, the trial court allowed the Interim Application No. 65 of 2016 with the sole observation that there exists an unregistered agreement between the plaintiff and defendant Nos. 1 to 3 involving a sum of Rs. 15,00,000/- (Rupees fifteen lakhs) only and when the property is protected from being further alienated or change in the nature and character, the plaintiff is likely to be affected and prejudiced. This order being challenged by the defendant No. 4 in the appeal, the appeal was registered as F.A.O. No. 44 of 2016. The appeal was decided on contest and with an order of reversal giving rise to filing the present Civil Miscellaneous Petition.

Assailing the impugned order, Sri A.R. Dash, learned counsel appearing for the plaintiff-petitioner referring to his claim in the plaint further referring to the endorsement in the unregistered agreement involving the parties contended that for the involvement of the agreement and specific pleading in the plaint, the plaintiff has a prima facie case and then this fact being taken into consideration by the trial court, the trial court has passed the justified order. Assailing the appeal order, Sri Dash, learned counsel further contended that for the clear pleading and for the availability of a document in favour of the petitioner, it appears the appellate authority has failed in appreciating the existence of prima facie case in favour of the petitioner. Taking this Court to the observations of the appellate court, Sri Dash further contended that there has been no reversal finding by the appellate authority in reversing the finding of the trial court. Further, Sri Dash referring to the two decisions rendered in the cases of Julien Educational Trust v. Sourendra Kumar Roy and others, 2010 (1) Supreme Court Cases (Civ) 120 and Rageshree Mohanty v. Subhrakanta Das

Mhapatra, 2015 (II) ILR-CUT-282 contended that both the decisions had the support of the case of the plaintiff-petitioner.

In his opposition, Sri S.K. Dash, learned counsel appearing for the contesting opposite party-defendant No. 4 while disputing the stand taken by Sri A.R. Dash that in absence of any denial by the defendant Nos. 1 to 3 taking this Court to the response filed by the defendant Nos. 1 to 3 in the Interim Application particularly in paragraph-11 of the same submitted that the defendant Nos. 1 to 3 admittedly the vendors of the property have a clear expression that neither they have entered into any such agreement claimed by the plaintiff nor they have received any such amount. It is for the clear response of the defendant Nos. 1 to 3 and further for the appellate court doubting in the availability of prima facie case in favour of the plaintiff at this stage of the matter contended that there is no infirmity in the order passed by the appellate authority requiring interference of this Court.

Considering the rival contention of the parties appeared herein, this Court finds there is no dispute that the plaintiff by filing the suit had made all the claim therein involving unregistered agreement for sale of the disputed property whereas the defendants case relates to a registered sale deed involving the same disputed property and also the particular land owner. Further, taking into consideration the endorsement in the unregistered sale deed and the specific response by the defendant Nos. 1 to 3 in paragraph-11 of their objection to the Interim Application No. 65 of 2016, this Court does not find any prima facie case in favour of the petitioner in substantiating the claim of the petitioner with regard to the possession over the disputed property and as a consequence, this Court also finds no prima facie case in favour of the petitioner. Taking into consideration to the decision relied on by Sri A.R. Dash, learned counsel for the petitioner, getting into the facts available on both the cases, this Court finds for the difference in the facts involved in both the cases with the facts involved in the case at hand, none of the decisions has any application to

the present case except application of paragraph-23 involving (2010) 1 Supreme Court Cases (Civ) 120 where the Hon'ble Apex court has observed that in a suit for specific performance while granting interim order, same is to be based on materials available before the court.

Considering the observations of this Court with regard to the clear objection of the defendant Nos. 1 to 3, the vendor involving disputed property as well as the agreement for sale, this Court finds, it is on the other hand the defendant No. 4 has satisfied the case with regard to his possession. As a result, this Court finds no infirmity in the observation and the finding of the appellate court, leaving no scope for interfering in the impugned order and as a consequence, the Civil Miscellaneous petition stands dismissed for having no merit in the case.

Considering the request of Sri A.R. Dash, learned counsel for the petitioner to target the suit, this Court directs the learned Civil Judge (Senior Division), Jagatsinghpur to conclude the Civil Suit No. 64 of 2016 within a period of one year hence but however recording the undertaking of the plaintiff through his counsel that he shall not move any interim application during the course of trial and this Court also records that for rejection of the interim application ultimately this Court observes that the defendant No. 4 shall not claim any equity involving any development concerning the disputed property taken place in the meantime in the event any decree is passed in favour of the plaintiff.

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5. Section 311 read with 482 Cr.P.C

Ratanlal Vs. Prahlad Jat and Ors.

Jasti Chelameswar & S. Abdul Nazeer, JJ.

In The Supreme Court of India

Date of Judgment - 15.09.2017

Issue

In the matter of re-examination of witnesses under section 311 of Criminal Procedure Code.

Relevant Extract

This appeal is directed against the order dated 22.5.2012 in S.B. Criminal Miscellaneous Petition No. 1679 of 2012, whereby the High Court of Rajasthan (Jaipur Bench) has allowed the criminal miscellaneous petition filed Under Section 482 of Code of Criminal Procedure, 1908 (sic 1973) and has set aside the order dated 24.04.2012 passed by Additional Sessions Judge (Fast-Track), Sikar.

A charge sheet No. 22 of 2009 dated 20.3.2009 was presented Under Sections 302, 201, 342, 120-B Indian Penal Code against Respondent Nos. 1 and 2 and three others. Charges have been framed under the aforesaid Sections against the Accused persons. Statements of 28 witnesses have been recorded in the trial. The statements of Sawarmal and Chandri have been recorded as PW4 and PW5 respectively. Thereafter, both moved applications before the Sessions Judge Under Section 311 of Code of Criminal Procedure for re-recording their statements on the ground that the previous statements were made under the influence of the police. In the applications, the witnesses have stated that Respondent Nos. 1 and 2 had no role in the incident.

The Sessions Judge by the order dated 24.4.2012, dismissed the applications observing that the 28 witnesses had already been examined in the case so far. The witnesses were also cross-examined at length and it cannot be said that they were in any kind of pressure and that the applications were filed with a view to favour the Accused persons. Prahlad Jat and Mahavir, the two Accused persons, moved the petition before the

High Court for quashing the said order and the High Court has allowed the applications of PW4 and PW5.

Learned Counsel for the Appellant, urged that PW4 and PW5 were examined in the Court on different dates in the months of November and December 2010 and in March 2011. Out of total 35 witnesses, 28 witnesses have already been examined and they were cross-examined at length. PWs 4 and 5 filed applications before the trial court for further examination on 27.2.2012 and 26.3.2012 respectively. During police investigation and examination conducted by the prosecution, they had supported the prosecution story. The applications have been filed with an intention to provide assistance to the Accused persons which cannot be permitted in law. The applications are highly belated and no reason, whatsoever, has been assigned for the delay. Therefore, the High Court was not justified in setting aside the well-reasoned order of the Sessions Judge.

On the other hand, learned Counsel appearing for Respondent No. 4 submits that the Appellant has no locus standi to file this appeal. It is contended that the Sessions Judge has ample power to examine or re-examine any witness Under Section 311 of the Code of Criminal Procedure to bring on record the best possible evidence to meet the ends of justice. Keeping this principle in mind the High Court has allowed the petition. Learned Counsel appearing for the third Respondent has supported the case of the Appellant. We have carefully considered the arguments of the learned Counsel made at the Bar.

The Appellant is the paternal brother of the deceased and is one of the prosecution witnesses. The evidence of PW4 and PW5 was recorded on different dates in the months of November and December 2010 and in March 2011. Both of them had supported the case of the prosecution. After passage of about 14 months, PW4 and PW5 filed applications Under Section 311 of the Code of Criminal Procedure, inter alia, praying for their re-examination as witnesses for the reason that the statements recorded earlier were made on the instructions of the police. The Sessions Judge dismissed the application by holding as under:

" The charges have already been framed Under Sections 302, 201, 342, 120 B Indian Penal Code against the Accused persons. Statements of 28 witnesses have already been recorded in the trial. The statements of applicant namely Sawarmal has already been recorded as witness PW4 and the statements of applicant namely Chandri have also already been recorded as witness PW5. Thereafter, the said applications have been filed. Said witnesses have already undergone a lengthy cross examination. During the police investigation and examination conducted by the prosecution, wherein they have supported prosecution story, it cannot be said that at such time, the witnesses were under any pressure. In such circumstances, it is not justified to make the Court as weapon to adjudicate in own favour and the above both applications are without any merit and presented with the intention to provide assistance to the Accused persons, due to which, the same are not liable to be admitted. Resultant, the above presented both applications dated 27.02.2012 and 26.03.2012 Under Section 311 Code of Criminal Procedure on behalf of the applicants are not liable to be admitted, therefore, the same are dismissed."

This order of the Sessions Judge has been set aside by the High Court.

Having regard to the contentions urged, the first question for consideration is whether the Appellant has locus standi to challenge the order of the High Court.

However, criminal trial is conducted largely by following the procedure laid down in Code of Criminal Procedure Locus standi of the complaint is a concept foreign to criminal jurisprudence. Anyone can set the criminal law in motion except where the statute enacting or creating an offence indicates to the contrary. This general principle is founded on a policy that an offence, that is an act or omission made punishable by any law for the time being in force, is not merely an offence committed in relation to the person who suffers harm but is also an offence against the society. Therefore, in respect of such offences which are treated against the society, it becomes the duty of the State to punish the offender. In A.R. Antulay v. Ramdas Sriniwas Nayak and Anr. (1984) 2 SCC 500, a Constitution Bench of this Court has considered this aspect as under:

"In other words, the principle that anyone can set or put the criminal law in motion remains intact unless contra-indicated by a statutory provision. This general principle of nearly universal application is founded on a policy that an offence i.e. an act or omission made punishable by any law for the time being in force [See Section 2(n) Code of Criminal Procedure] is not merely an offence committed in relation to the person who suffers harm but is also an offence against society. The society for its orderly and peaceful development is interested in the punishment of the offender. Therefore, prosecution for serious offences is undertaken in the name of the State representing the people which would exclude any element of private vendetta or vengeance. If such is the public policy underlying penal statutes, who brings an act or omission made punishable by law to the notice of the authority competent to deal with it, is immaterial and irrelevant unless the statute indicates to the contrary. Punishment of the offender in the interest of the society being one of the objects behind penal statutes enacted for larger good of the society, right to initiate proceedings cannot be whittled down, circumscribed or fettered by putting it into a strait-jacket formula of locus standi unknown to criminal jurisprudence, save and except specific statutory exception."

In Ramakant Rai v. Madan Rai and Ors. (2003) 12 SCC 395, and Esher Singh v. State of A.P. (2004) 11 SCC 585, it was held that the Supreme Court can entertain appeals against the judgment of acquittal by the High Court at the instance of interested parties also. The circumstance that Code of Criminal Procedure does not provide for an appeal to the High Court against an order of acquittal by a subordinate court at the instance of a private party has no relevance to the question of power of Supreme Court Under Article 136.

In Amanullah and Anr. v. State of Bihar and Ors. (2016) 6 SCC 699, this Court has held that the aggrieved party cannot be left to the mercy of the State to file an appeal. It was held as under:

"19..... Now turning our attention towards the criminal trial, which is conducted, largely, by following the procedure laid down in Code of Criminal Procedure. Since, offence is considered to be a wrong committed against the society, the prosecution against the Accused person is launched by the State. It is the duty of the State to get the culprit booked for the

offence committed by him. The focal point, here, is that if the State fails in this regard and the party having bona fide connection with the cause of action, who is aggrieved by the order of the court cannot be left at the mercy of the State and without any option to approach the appellate court for seeking justice."

It is thus clear that Article 136 does not confer a right to appeal on any party but it confers a discretionary power on the Supreme Court to interfere in suitable cases. The exercise of the power of the court is not circumscribed by any limitation as to who may invoke it. It does not confer a right to appeal, it confers only a right to apply for special leave to appeal. Therefore, there was no bar for the Appellant to apply for special leave to appeal as he is an aggrieved person. This Court in exercise of its discretion granted permission to the Appellant to file the special leave petition on 03.08.2012 and leave was granted on 24.02.2014.

That brings us to the next question as to whether the High Court was justified in setting aside the order of the Sessions Judge and allowing the application filed by PWs 4 and 5 for their re-examination, For ready reference Section 311 of the Code of Criminal Procedure is as under:

"311. **Power to summon material witness, or examine person present.** - Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and reexamine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 311 are enacted whereunder any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. The object of the provision as a whole is to do justice not only from the point of view of the Accused and the prosecution but also from the point of view of an orderly society. This

power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order.

In Vijay Kumar v. State of Uttar Pradesh and Anr., (2011) 8 SCC 136, this Court while explaining scope and ambit of Section 311 has held as under:

"Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said Section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of Code of Criminal Procedure and the principles of criminal law. The discretionary power conferred Under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously."

In Zahira Habibullah Sheikh (5) and Anr. v. State of Gujarat and Ors. (2006) 3 SCC 374, this Court has considered the concept underlining Under Section 311 as under:

"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."

In State (NCT of Delhi) v. Shiv Kumar Yadav and Anr., (2016) 2 SCC 402, it was held thus:

"..... Certainly, recall could be permitted if essential for the just decision, but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, there is no ground to justify the recall of witnesses already examined."

The delay in filing the application is one of the important factors which has to explained in the application. In Umar Mohammad and Ors. v. State of Rajasthan, (2007) 14 SCC 711, this Court has held as under:

"Before parting, however, we may notice that a contention has been raised by the learned Counsel for the Appellant that PW 1 who was examined in Court on 5-7-1994 purported to have filed an application on 1-5-1995 stating that five Accused persons named therein were innocent. An application filed by him purported to be Under Section 311 of the Code of Criminal Procedure was rejected by the learned trial Judge by order dated 13-5-1995. A revision petition was filed thereagainst and the High Court also rejected the said contention. It is not a case where stricto sensu the provisions of Section 311 of the Code of Criminal Procedure could have been invoked. The very fact that such an application was got filed by PW 1 nine months after his deposition is itself pointer to the fact that he had been won over. It is absurd to contend that he, after a period of four years and that too after his examination-in-chief and cross-examination was

complete, would file an application on his own will and volition. The said application was, therefore, rightly dismissed."

Coming to the facts of the present case, PWs 4 and 5 were examined between 29.11.2010 and 11.3.2011. They were cross-examined at length during the said period. During the police investigation and in their evidence, they have supported the prosecution story. The Sessions Judge has recorded a finding that they were not under any pressure while recording their evidence. After a passage of 14 months, they have filed the application for their re-examination on the ground that the statements made by them earlier were under pressure. They have not assigned any reasons for the delay in making application. It is obvious that they had been won over. We do not find any reasons to allow such an application. The Sessions Judge, therefore, was justified in rejecting the application. In our view, High Court was not right in setting aside the said order.

In the result, the appeal succeeds and it is accordingly allowed. The order of the High Court in S.B. Criminal Miscellaneous Petition No. 1679 of 2012, dated 22.5.2012 is hereby set aside. All pending applications also stand disposed of.

We find from the records that after the order of the High Court, PWs 4 and 5 were re-examined before the Trial Court. The Trial Court is directed to proceed with the matter without taking into consideration the evidence of PWs 4 and 5 recorded after the order of the High Court.

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6. Section 329 Criminal Procedure Code

Snehaswakshayar Samal vs. State of Orissa

B.K. Nayak, J.

In The High Court of Orissa , Cuttack

Date of Judgment - 21.09.2017

Issue

In the matter of suspension of trial of the accused sfacing trial under section 302/307 of IPC on the ground of unsoundness of mind .

Order dated 03.11.2016 passed by the learned 1st Additional Sessions Judge, Bhubaneswar in C.T. No. 03/43 of 2015 rejecting the application of the petitioner to suspend the trial and get the petitioner examined by the Board of Doctors about his mental condition has been assailed in this writ petition.

The petitioner is facing trial in the aforesaid C.T. Case for commission of murder of three persons and attempting to murder some others. During the course of trial the petitioner filed a petition under section 329, CrPC for getting the petitioner examined and until the examination report was received to suspend the trial on the ground that petitioner is of unsound mind and therefore unable to understand the proceeding and unable to make his defence. It was also stated in the petition that on his own prayer the petitioner was examined by the Director-cum-Superintendent of Mental Health Institute, Cuttack and report dated 14.09.2015 has been submitted by the Director of the Mental Health Institute stating that the petitioner-accused is of unsound mind but in spite of such report, no treatment was provided to the petitioner. The petitioner was incapable of making his defence and in spite of the same charge was framed on 07.09.2016, when the accused did not utter a word.

The petition was resisted by the prosecution stating that as per report of the Director-cum-Medical Superintendent Mental Health Institute, Cuttack the accused suffers from personality disorder but features of unsoundness of mind is not present. It was also stated that the report of the Doctor of Circle Jail, Choudwar also indicated that the accused was mentally and physically well and sound. It was also contended that the accused was pretending himself to be unsound mind inside the Court and that outside the Court his behavior was quite normal and only to protract the trial the petition under section 329, CrPC was filed.

Learned counsel for the petitioner contended that since the petitioner was sent for examination by the Director-cum-Superintendent of Mental Health Institute, Cuttack as per previous order of the Trial Court, it was incumbent on the Trial Court to try the fact of unsoundness of mind of the petitioner and his incapacity to make his defence by taking evidence and to record a finding on the issue and only on the finding that the petitioner was not of unsound mind and not incapable of making his defence, the Court should proceed with trial of the case. He has relied upon the decision of Punjab & Hariyana High Court reported in 1986, Cri.L.J. 1505; Gurjit Singh V. State of Punjab and the decision of the Hon'ble Supreme Court dated 08.10.2013 in Criminal Appeal Nos. 1676-1677 of 2013 (Sheila Kaul through Ms. Deepa Kaul V. State through C.B.I.).

Learned State Counsel on the other hand submitted that Section 329, CrPC contemplates two stages. In the first stage it must appear to the Magistrate or Court that the accused is of unsound mind and consequently incapable of making his evidence. After recording of such prima-facie satisfaction, the second stage of trial of the fact of unsoundness of mind and incapacity to make the defence is to be conducted. It is his submission that since the Court below was not of the view that the petitioner appeared to be of unsound mind the question of conducting trial of that fact did not arise.

Sections 328 and 329 of the Cr.P.C., 1973 deal with the question as to what the Magistrate or the Court has to do when it has reason to believe or it appears to him that the person against whom the inquiry or trial is held is of unsound mind and consequently incapable of making his defence. While section 328, CrPC makes provision to inquire into the fact of unsoundness of mind of the person against whom the Magistrate is conducting an inquiry, section 329, CrPC makes provision for trial of the fact of unsoundness of mind of the accused and his consequential incapacity to make his defence at trial, if it appears to the Court that the person is of unsound mind.

In the instant case since the question of unsoundness of mind of the accused-petitioner arose at trial before the learned 1st Additional Sessions Judge, the provisions of section 329, CrPC are applicable.

Section 329, Cr.P.C. provides as under:-

"329. Procedure in case of person of unsound mind tried before Court--(1) If at the trial of any person before a Magistrate or Court of Session, it appears to the Magistrate or Court that such person is of unsound mind and consequently incapable of making his defence, the Magistrate or Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Magistrate or Court, after considering such medical and other evidence as may be produced before him or it is satisfied of the fact, he or it shall record a finding to that effect and shall postpone further proceedings in the case.

(1-A) If during trial, the Magistrate or Court of Sessions finds the accused to be of unsound mind, he or it shall refer such person to a psychiatrist or clinical psychologist for care and treatment, and the psychiatrist or clinical psychologist, as the case may be, shall report to the Magistrate or Court whether the accused is suffering from unsoundness of mind:

Provided that if the accused is aggrieved by the information given by the psychiatric or clinical psychologist, as the case may be, to the Magistrate, he may prefer an appeal before the Medical Board which shall consist of--

(a) head of psychiatry unit in the nearest Government hospital; and

(b) a faculty member in psychiatry in the nearest medical college;

(2) If such Magistrate or Court is informed that the person referred to in sub-section (1-A) is a person of unsound mind, the Magistrate or Court shall further determine whether unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate or Court shall record a finding to that effect and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if the Magistrate or Court finds that no prima facie case is made out against the accused, he or it shall, instead of postponing the trial, discharge the accused and deal with him in the manner provided under section 330:

Provided that if the Magistrate or Court finds that a prima facie case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the trial for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused.

(3) If the Magistrate or Court finds that a prima facie case is made out against the accused and he is incapable of entering defence by reason of mental retardation, he or it shall not hold the trial and order the accused to be dealt with in accordance with section 330."

It is apparent that sub-section-1 of section 329, Cr.P.C. contemplates two stages of procedure. The first stage is that it must appear to the Magistrate or the Sessions Court at the trial that the accused is of unsound mind and consequently incapable of making his defence. It is only after the first stage was reached that the second stage of trying the fact of unsoundness of mind of the accused and his consequential incapacity to make the defence arises. The provision does not indicate as to how the requirement of the first stage would be satisfied, that is to say, as to how it would appear to the Court that the accused is of unsound mind, so that the Court would proceed to the second stage of conducting trial of the issue of unsoundness of mind of the accused at the first instance.

The expression, "it appears to the Court", would mean that either from the answers given by the accused to some questions put by the Court, or from his conduct and demeanor or from some other fact or material produced, the Court entertains a doubt, in contrast to full satisfaction, that the accused is of unsound mind. The slightest doubt in the mind of the Court as to the soundness of the mind of the accused would be enough for the Court to proceed to the second stage of trying the issue of unsoundness of mind of the accused and his consequential incapacity of making his defence. The trial of the issue would involve taking of all such evidence in a legal way so as to reach a finding on the issue.

In the case of I.V. Shivaswamy V. State of Mysore;AIR 1971 SC 1638, when on examining the accused it did not appear to the Sessions Judge, that the accused was insane, it was held by the Hon'ble Supreme Court, under the pari materia provision of Section 465 of the Cr.P.C., 1898 (old Code)

that it was not incumbent on the Sessions Judge to hold an inquiry into the fact of unsoundness of mind of the accused.

However, in the case of Dr. Jai Shankar V. State of Himachal Pradesh, 1972 Supreme Court 2267, where an application was made on behalf of the accused raising the question of unsoundness of mind of the accused, the Hon'ble Supreme Court held that the Magistrate was bound to inquire into the fact of unsoundness of mind under section 464 of the old Code before proceeding further.

In the recent case of Sheila kaul through Ms. Deepa Kaul V. State through CBI in Criminal Appeal Numbers 1676-1677 of 2013, decided on 08.10.2013, where on the application filed on behalf of the defence the accused was referred to a Medical Board, which kept the accused under observation for four days and submitted a report concluding that the accused was not suffering from any major psychiatric disorder, but the possibility of senile dementia could not be ruled out, the Hon'ble Supreme Court in terms of the provision of Section 329, CrPC observed; "suffice it to that the process of appreciation of material concerning the medical condition of the appellant and her alleged incapacity to make her defence was inevitable."

In the case in hand, it is apparent from the impugned order that on the application of the defence filed earlier that the petitioner was of unsound mind, the Court below passed order directing for examination and treatment of the petitioner at the Mental Health Institute, Cuttack and accordingly the petitioner was under treatment at the Institute for three weeks after which he was discharged. The report of the Director-cum-Medical Superintendent of the Mental Health Institute dated 14.09.2015, indicated that the accused was under trauma due to the ghastly incident committed by him and there was fear psychosis. It was further reported that the accused was having personality disorder and he had been addicted to benzodiazepine. In the opinion of the Director of the Mental Health Institute though unsoundness of mind of the accused was absent, he had however suicidal tendency. Further on the prayer of the Superintendent of Special Jail, Bhubaneswar the petitioner was shifted to Circle Jail, Choudwar, Cuttack for his psychiatric treatment and accordingly he was under treatment for sometime and returned to the Special Jail,

Bhubaneswar on 10.01.2016. The report of the treating psychiatrist was that during the period of his treatment from 25.09.2015 to 13.10.2015 the petitioner did not show any fear psychosis and his behavior was normal, and he had not any suicidal or homicidal tendency and he was mentally and physically sound. It also transpires from the impugned order that at the time of framing of charge, the petitioner at the first instance did not utter anything but on repeated query by the Court, he stated that he did not plead guilty.

From the narration of facts appearing from the impugned order as above, it is apparent that on the initial application filed on behalf of the petitioner, it appeared to the Court below that the petitioner was of unsound mind and therefore, it passed order to send the petitioner to the Mental Health Institute, Cuttack for his examination and treatment. Even after discharge from the Mental Health Institute, on the prayer of the Superintendent of Special Jail, Bhubaneswar the petitioner was shifted to the Circle Jail, Choudwar at Cuttack for his treatment under a Psychiatrist. In the circumstances, it must be held that the first stage as contemplated under sub-section-(1) of section 329, Cr.P.C. has been complete, for which it was incumbent on the Trial Court to first of all conduct trial of the fact of unsoundness of mind and consequent incapacity of the accused-petitioner to make his defence by taking evidence before proceeding further. Therefore, the impugned order is unsustainable. Further trial of the petitioner cannot be held without first conducting trial of the fact of unsoundness of his mind.

It is therefore directed that the Trial Court shall first of all try the fact of unsoundness of mind of the accused-petitioner and the consequential incapacity to make his defence by taking such evidence as may be produced by the parties. The reports of the Superintendent of Mental Health Institute, Cuttack and the report of the Psychiatrist, who subsequently treated the petitioner shall also be led into evidence. Only after trial of the fact of unsoundness of mind of the petitioner, if the Trial Court comes to a finding that the petitioner is not of unsound mind, it shall proceed with further trial of the petitioner. The CRLMP is accordingly disposed of.

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7. Section 302 of Indian Penal Code

Ganpat Singh Vs. The State of Madhya Pradesh

N.V. Ramana and Dr. D.Y. Chandrachud, JJ.

In the Supreme Court of India

Date of Judgment -19.09.2017

Issue

Conviction of the appellant under section 302 of IPC-Challenged.

This appeal arises from a judgment of a Division Bench of the Madhya Pradesh High Court in its bench at Indore, rendered on 22 March 2007. The High Court affirmed the conviction of the Appellant Under Section 302 of the Indian Penal Code ("IPC").

Shantabai was a widow. Her husband Mangilal had died about a decade earlier. She resided together with her son Rakesh, who was a minor. The prosecution alleges that the Appellant would visit her frequently.

The case of the prosecution is that on 8 July 1996, the police station at Doraha received information of a dead body being found in a dry well. A 'missing report' had been lodged by Rakesh. Rakesh had alleged that the Appellant used to frequently visit the house where Shantabai resided and had started to live there. Rakesh informed the police that a few days earlier, the Appellant had come to the house and had left the next morning with his mother for Sihore soon thereafter. On the next day, when the Appellant returned alone, Rakesh enquired of the whereabouts of his mother. The Appellant allegedly informed him that she had stayed back at the home of Rakesh's maternal aunt. A First Information Report was registered. A post-mortem was conducted on the body which had been recovered from the dry well, which was identified to be that of Shantabai. The body was decomposed and there was a piece of cloth loosely tied around the neck. The period of death was estimated to be between two to four weeks prior to the recovery of the dead body. The Appellant is stated to have absconded immediately after the incident. He was arrested on 12 December 1997. The Appellant was tried on the charge of murder.

The prosecution examined fifteen eye-witnesses. Among them were Rakesh-PW4 and Rekha-PW5, the married daughter of the deceased. PW1-Kamlabai and PW2-Dhankunwarbai deposed that Shantabai had visited their homes with a request to lend certain silver ornaments to her since she intended to arrange the engagement of her son, PW4- Rakesh. The evidence of these two witnesses was sought to be buttressed by a recovery of silver ornaments from the house of the Appellant. PW3- Phool Singh was a witness for the prosecution in support of the seizure memo. PW4- Rakesh deposed that the Appellant had taken his mother along with him under the pretext of getting Rakesh engaged. PW4 stated that on the next day, when the Appellant returned alone, he enquired about the whereabouts of his mother when the Appellant informed him that she had stayed back with her sister. PW4 stated that he made inquiries with his maternal aunt who informed him that his mother had not visited her.

The Additional Sessions Judge by a judgment dated 23 June 1998 found the Appellant guilty of an offence Under Section 302 of the Indian Penal Code and sentenced him to imprisonment for life. The case rested entirely on circumstantial evidence. The circumstances which weighed with the trial court were that: (i) the deceased was last seen accompanying the Appellant; (ii) the deceased had taken with her the jewellery of PW1 and PW2 which was recovered from the Appellant; and (iii) the Appellant had no explanation of how the articles were found in his possession.

In appeal, the High Court by its judgment dated 22 March 2007, disbelieved the case of the prosecution on the recovery of the silver ornaments from the house of the Appellant. The High Court noticed that only three silver ornaments had been recovered which were identified by Rekha, PW5 who was the daughter of the deceased. Significantly, as the High Court noted, the prosecution had no explanation as to why there was no identification of the silver ornaments by PW1-Kamlabai and PW2-Dhankunwarbai who were alleged to have lent their ornaments to the deceased. The ornaments had no special marks of identification and were commonly available in the market. The High Court observed that Rekha, PW5 had no occasion to observe the ornaments since her mother had only visited briefly. PW5, in the course of her deposition, stated for the first time that one of the ornaments belonged to her but then changed her statement and stated that it belonged to her mother. The High Court noticed a clear

contradiction with her statement Under Section 161 of the Code of Criminal Procedure. The recovery of the ornaments from the house of the Appellant has hence been disbelieved. The High Court also noted in the course of the judgment that Rakesh, PW4 had exaggerated what he claimed to know, in the course of his deposition. PW4 stated that the Appellant had admitted to him that he had killed Shantabai but no such statement was made Under Section 161 of the Code of Criminal Procedure.

In the above background, the High Court did not rely upon the alleged recovery of the silver ornaments which was a material circumstance which the Additional Sessions Judge had found to link the Appellant with the murder of Shantabai. Nonetheless, three circumstances weighed with the High Court in affirming the conviction of the Appellant. These are summarized in the following extracts of the judgment of the High Court:

Thus, to summarize the facts:

(i) The deceased was last seen in the company of the Accused.

(ii) The Accused made false statement to the son of the deceased Rakesh (PW-4) that her mother had gone to the maternal aunt.

(iii) That the body of the deceased was recovered at the instance of the Accused.

During the course of the hearing of the appeal, it has been submitted on behalf of the Appellant that the third circumstance noted above reveals a clear error by the High Court since the body of the deceased was recovered on 8 July 1996 whereas the Appellant was arrested on 12 December 1997. This aspect has not been disputed by learned Counsel appearing on behalf of the Respondent-state. Hence, there is a manifest error on the part of the High Court in holding that the body of the deceased was recovered at the instance of the Appellant. The Appellant was arrested several months after the recovery of the body. Hence, the recovery of the body could not have been (and was not) at his instance. That essentially leaves the court only with the first two circumstances which have been relied upon by the High Court.

There are no eye-witnesses to the crime. In a case which rests on circumstantial evidence, the law postulates a two-fold requirement. First, every link in the chain of circumstances necessary to establish the guilt of the Accused must be established by the prosecution beyond reasonable doubt. Second, all the circumstances must be consistent only with the guilt of the Accused. The principle has been consistently formulated thus:

The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the Accused and inconsistent with his innocence.1

Evidence that the Accused was last seen in the company of the deceased assumes significance when the lapse of time between the point when the Accused and the deceased were seen together and when the deceased is found dead is so minimal as to exclude the possibility of a supervening event involving the death at the hands of another. The settled formulation of law is as follows:

The last seen theory comes into play where the time gap between the point of time when the Accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the Accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the Accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that Accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.

The case of the prosecution is riddled with unexplained contradictions, PW1-Kamlabai and PW2-Dhankunwarbai were crucial to the case of the prosecution for establishing that the deceased had visited them and that they had lent her silver ornaments ostensibly because she intended to arrange the engagement of her son Rakesh-PW4. Admittedly,

neither PW1 nor PW2 were called upon to identify the jewellery alleged to have been recovered from the house of the Appellant. PW1 stated that the jewellery which she had lent weighed more than half a kg. PW2 deposed that the ornaments which she had lent weighed about 1.25 kgs. In the course of her cross-examination, PW1 stated that it was true that the ornaments which she had lent were commonly worn by women in the villages. PW2 also admitted that there were no identification marks on the ornaments and they were of a nature that is commonly used. PW5-Rekha, the daughter of the deceased, had (as the High Court observed) no opportunity to observe the ornaments on the person of the deceased. The ornaments had no special marks of identification. PW5 materially improved upon her version during the course of the examination. On this state of the evidence, the recovery of the silver ornaments (which was an important link in the chain of circumstances relied upon by the Additional Sessions Judge) has been correctly disbelieved by the High Court.

An important circumstance which weighed with the High Court was that the body of the deceased was recovered at the behest of the Appellant. There is a manifest error on the part of the High Court in arriving at this conclusion since the record would indicate that the body of the deceased was recovered several months before the arrest of the Appellant. The mere circumstance that the Appellant was last seen with the deceased is an unsafe hypothesis to found a conviction on a charge of murder in this case. The lapse of time between the point when the Appellant was last seen with the deceased and the time of death is not minimal. The time of death was estimated to be between two to four weeks prior to the recovery of the body.

We must also place in balance the testimony of PW4 that when he enquired regarding whereabouts of his mother, the Appellant informed him that she had stayed back at the house of her sister. This, coupled with the fact that the Appellant had absconded after the date of the incident is a pointer to a strong suspicion that the Appellant was responsible for the death of Shantabai. However, a strong suspicion in itself is not sufficient to lead to the conclusion that the guilt of the Appellant stands established beyond reasonable doubt. There are material contradictions in the case of the prosecution. These have been noticed in the earlier part of its judgment and are sufficient in our view to entitle the Appellant to the benefit of doubt. The prosecution failed to establish a complete chain of circumstances and to exclude every hypothesis other than the guilt of the Appellant. We accordingly allow the appeal and set aside the conviction of the Appellant under Section 302 of the Indian Penal Code. The Appellant is on bail. His bail bonds are discharged.

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8. Section 376 (2)(g) of IPC

Sankirtan Khadia and Ors. Vs. State of Orissa

S.K. Sahoo, J.

In the High Court of Orissa , Cuttack

Date of Judgment- 16.09.2017

Issue

In the matter of challenging the judgment and order dt. 27.03.2012 passed by the CJM- cum-Asst. Sessions Judge ,Bargarh convicting the appellant under section 376 of IPC and sentencing to undergo rigorous imprisonment for ten years and to pay fine of Rs. 2000/- i.e. to undergo rigorous imprisonment for six months.

The appellant Raghu Sika in Jail Criminal Appeal No. 34 of 2012 and the appellant Sankirtan Khadia in Jail Criminal Appeal No. 35 of 2012 faced trial in the Court of learned Chief Judicial Magistrate -cum- Asst. Sessions Judge, Bargarh in C.T. Case No. 79/17 of 2010 for offence punishable under section 376(2)(g) of the Indian Penal Code for committing gang rape on the victim on 06.12.2009 at about 5 p.m. at village Panichhatra under Town police station, Bargarh.

The learned trial Court vide impugned judgment and order dated 27.03.2012 found both of them guilty of the offence charged and they were sentenced to undergo R.I. for 10(ten) years and to pay fine of Rs. 2,000/- (rupees two thousand) each, in default, to undergo R.I. for 6 (six)months.

Since both the jail criminal appeals arise out of a common judgment, with the consent of the parties, those were heard analogously and disposed of by this common judgment.

The prosecution case, in brief, is that the informant Santanu Bag (P.W. 1) earns his livelihood out of vegetable business as well as labour work. He was also staying with his family members consisting of his wife and his daughter at Panichhatar. The appellant Raghu Sikka is the neighbour of the informant and he was a worker in the hotel of one Saurav Meher (P.W. 3). On 06.12.2009 the wife of the informant returned home after selling vegetables and found her daughter (victim) was absent. She searched for her but could not trace her out. About one hour thereafter, the informant returned to his home and came to know from his wife that their daughter whose age was 15 years was not found at their home. While they

were searching for their daughter, she returned home at about 8 p.m. On being asked, she cried and disclosed that the appellant Raghu Sikka took her from the house telling her to give sweets and when darkness set in, the appellant Raghu Sikka and one of his associate forcibly committed rape on her and thereafter they left her.

The informant lodged the F.I.R. before the Inspector in charge, Town police station, Bargarh in pursuance of which Bargarh Town P.S. Case No. 366 dated 06.12.2009 was registered under section 376(2)(g) of the Indian Penal Code against the appellant Raghu Sikka and his associate and investigation was taken up. After completion of investigation, charge sheet was submitted against both the appellants.

During course of trial, in order to prove its case, the prosecution examined as many as twenty three witnesses.

P.W. 1 Santanu Bag is the informant in the case and he is the father of the victim and he stated that the victim disclosed before him that the appellant Raghu Sika committed rape on her.

P.W. 2 Asha Bag is the mother of the victim and she also stated about the disclosure made by the victim regarding commission of rape on her by appellant Raghu Sika.

P.W. 3 Saurav Meher is the hotel owner who stated about the presence of the appellant Raghu Sika and the victim inside the hotel.

P.W. 4 Govinda Saha stated about the disclosure made by the victim regarding commission of rape on her by the appellants.

P.W. 5 Jagannath Behera is a witness to the seizure of the wearing apparels of the victim as well as sample packet containing vaginal swab and public hair of the victim under seizure list Ext. 2.

P.W. 6 Krushna Bag is the brother of the victim who also stated about the disclosure made by the victim regarding commission of rape on her by the appellants.

P.W. 7 Dr. Sri Krishna Ballava Mohanty who was the Asst. Surgeon at District Head quarters Hospital, Bargarh who examined the appellant

Raghu Sika on police requisition and proved his report Ext. 3. He opined further that the said appellant was capable of doing sexual intercourse.

P.W. 8 Sushma Kiro was the constable who took the victim for medical examination and further stated about the seizure of wearing apparels of the victim under seizure list Ext. 2.

P.W. 9 Jagadish Mishra was the constable who stated to have taken appellant Raghu Sika to the hospital for examination and seizure of the wearing apparels of the appellants under seizure list Ext. 5.

P.W. 10 Ramakanta Rout was the constable who stated about the seizure of sealed packet containing vaginal swab, pubic hair as well as wearing apparels of the victim under seizure list Ext. 2.

P.W. 11 Dr. Suresh Chandra Tripathy was the Asst. Surgeon at D.H.H., Bargarh who examined the appellant Sankirtan Khadia and proved his report Ext. 6.

P.W. 12 Dr. Nayaran Prasad Mishra was the O & G Specialist, D.H.H., Bargarh who examined the victim and proved his report Ext. 7.

P.W. 13 Paresh Kumar Nayak took the X-ray of the victim and handed over the x-ray plates to the doctor.

P.W. 14 Narasingh Debta was the Havildar attached to Bargarh Town police station who accompanied the victim and the appellants to D.H.H., Bargarh for their medical examination. He further stated about the seizure of the wearing apparels of the victim and the appellants.

P.W. 15 Debananda Nayak was the constable who stated to have taken the appellants for their medical examination and then produced the wearing apparels of the appellants before police for its seizure.

P.W. 16 Gopabandhu Jagadala was the Home Guard who stated about the seizure of wearing apparels of the appellants and the victim.

P.W. 17 Kabita Bag is the sister-in-law of the victim and she stated about the disclosure of the victim that appellant Raghu Sika and another committed rape on her and the victim girl pointing out the appellant Sankirtan Khadia on the next day to her.

P.W. 18 Rashmita Suna and P.W. 19 Janaki Suna did not support the prosecution case for which they were declared hostile.

P.W. 20 Gananath Bhoi is the scribe of F.I.R.

P.W. 21 Pabitra Mohan Behera stated about the seizure of wearing apparels brought from D.H.H., Bargarh under seizure list Ext. 5.

P.W. 22 Rupakanti Singh stated about the disclosure made by the mother of the victim regarding commission of rape on the victim by the appellants.

P.W. 23 Rashmita Patel was the W.S.I. attached to Bargarh Town Police Station who is the Investigating Officer.

The prosecution exhibited twelve numbers of documents. Exts. 1 is the F.I.R., Exts. 2, 5 and 9 are the seizure lists, Ext. 3 is the medical report, Ext. 4 is the opinion report, Ext. 6 is the medical report of appellant Sankirtan Khadia, Ext. 7 is the medical report of the victim, Ext. 8 is the x-ray plates, Ext. 10 is the rough spot map, Ext. 11 is the office copy of letter sending the Exhibits and Ext. 12 is the Chemical examination report.

Miss. Geetanjali Majhi, learned counsel appearing for the appellants strenuously contended that the impugned judgment and order of conviction is not sustainable in the eye of law in as much as even though the victim was examined by the doctor on the next day of the occurrence, no injury on her private parts suggestive of rape and no sign and symptoms of sexual intercourse was found on her body and even though the vaginal swab was collected by the doctor and it was sent for chemical examination, no blood and no semen was found as per the chemical examination report. It is further contended that the victim has not been examined in the case as she was a mentally retarded girl. It is further contended that even though the victim was called to the Court on being summoned and the help of the interpreter who is the Asst. teacher of the School for mentally retarded under Management of Physically Handicapped School, Bargarh was taken but the victim could not speak anything and therefore, the learned Trial Court held that the victim girl is prevented from understanding the questions put to her and for giving rational answers to those questions because of mental retardation. It is further contended that the victim had

disclosed before her parents that it is the appellant Raghu Sika who had committed sexual intercourse with her against her will and since she has not implicated the other appellant Sankirtan Khadia in any manner before her parents immediately after the occurrence, the conviction of the said appellant is not sustainable in the eye of law. It is further contended that the evidence of P.W. 17, the sister in-law of the deceased that the victim pointed out to the appellant Sankirtan Khadia to her while she had been to the pond with the victim cannot be accepted. It is contended that there is absence of material to show that gang rape was committed on the victim and therefore, the appellants should be given benefit of doubt.

Mr. Prem Kumar Patnaik, learned Addl. Government Advocate on the other hand contended that even though the victim has not been examined in Court because of her mental weakness and retardation but apart from the disclosure made before her parents and others, the evidence of P.W. 3 Sourav Meher is very clinching against appellant Raghu Sika in whose company, the victim was found inside the hotel room which was closed from inside. The learned counsel further submitted that the doctor has stated while examining the victim that the private part suggested of recent sexual intercourse and therefore, there is no infirmity and illegality in the order of conviction passed by the learned Trial Court.

Coming to the non-examination of the victim before the learned trial Court, it appears that in Paragraph-6 of the impugned judgment, the learned Trial Court has held as follows:-

"6. In the present case, admittedly, the victim is a mentally retarded woman. The prosecution did not choose to examine this witness. Order dated 16.12.2011 passed in this case reveals that the Associate Lawyer had filed a memo for dispensing with the evidence of the victim girl stating that she is unable to depose before the court due to mental retardation, weakness, and illness. On being summoned by the court the victim girl was produced by her mother. An Interpreter, Sri Nepal Duan, Assistant Teacher of the School for the Mentally Retarded under Management of Physically Handicapped School, Bargarh was also present on being summoned by the court for the purpose of interpretation of the statement of the victim during her examination. The said Interpreter as well as the Associate Lawyer tried to get the victim speak, but she could not speak anything. The Interpreter

had disclosed that the victim was not able to speak due to her weakness, illness and mental retardation. It has been further submitted by him that the mental retardation with the victim is not curable. The order further reveals that the court has also observed that it was not possible to examine the victim girl as a witness as she was not able to talk or understand due to her mental retardation. As such her evidence was dispensed with and she was discharged. Thus, it is found that the victim girl is prevents from understanding the questions put to her and from giving rational answers to those questions because of her mental retardation. In such circumstance, non-examination of the victim girl in no way affects the prosecution case."

Therefore, it cannot be said that the prosecution deliberately did not examine the victim before the Trial Court. No doubt in a case of rape, the victim is a star witness but in the present scenario when attempt was made by the learned Trial Court to examine the victim with the help of the interpreter and it was found to be unsuccessful and the Court also came to hold that the victim was prevented from understanding the questions put to her and giving rational answers because of mental retardation, I am of the view that the learned trial Court was quite justified in not examining the victim.

Section 118 of the Indian Evidence Act which deals with who can testify indicates that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether or body or mind, or any other cause of the same kind. In the explanation portion, it is mentioned that a lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

Section 118 Evidence Act has been worded negatively. If the Court would consider that a particular witness does not understand the question put to him and fails to give rational answers to those questions, the Court would not proceed to take evidence of that witness.

Therefore, when the victim did not speak anything in spite of sincere effort made by the interpreter because of her weakness, illness and mental

retardation, the learned Trial Court could not have recorded her statement as she was prevented from understanding the questions put to her and giving rational answers to such questions.

Coming to the evidence of the parents of the victim, P.W. 1 who is the informant has stated that the victim disclosed before him that appellant Raghu Sika told her to give sweets and took her to mango garden at Panichhatar and he also committed sexual intercourse on her against her will.

P.W. 1 is totally silent about the implication of the appellant Sankirtan Khadia by the victim.

In the First Information Report which was lodged on 06.12.2009, the name of the appellant Sankirtan Khadia does not find place.

The victim has also not disclosed the name of appellant Sankirtan Khadia before her mother who has been examined as P.W. 2 in as much as she stated before her mother that the appellant Raghu Sika had taken her and committed rape on her by the side of the house.

The sister-in-law of the victim who has been examined as P.W. 17 has also stated about the disclosure made by the victim and she has stated that the victim disclosed before them that appellant Raghu Sika took her near a house in the mango grove and committed rape on her and another person had also committed rape on her but she could not disclose the name of the other person. This statement of P.W. 17 first of all does not indicate as to who is that other person the victim was referring to. Moreover, the participation of any other person other than the appellant Raghu Sika cannot be accepted as the victim had not disclosed about such aspect before her parents P.W. 1 and P.W. 2. The evidence of P.W. 17 further goes to show that on the next day morning when she along with the victim girl had been to a pond in their village and they were taking bath, the other person who had committed rape was passing by that road and the victim identified that person stating that he had committed rape on her. This statement of P.W. 17 is too difficult to be accepted particularly when the victim has disclosed at the first instance before her parents that only one person committed rape on her and that person is appellant Raghu Sika.

Apart from the disclosure aspect against appellant Raghu Sika, the evidence of P.W. 3 who is the hotel owner where appellant Raghu Sika was working as a sweeper and appellant Sankirtan Khadia was working as a cook is very relevant. P.W. 3 has stated that when he returned from market, he found the door of the hotel was locked from the inside and then he called the appellant Raghu Sika who opened the door of the hotel and he found that the victim was inside the room of the hotel and he asked the appellant why he had kept the victim with him in the hotel and asked him to leave her in the house and then the appellant Raghu took the victim with him to leave her at her house. The witness has further stated that at that point of time, the appellant Sankirtan was outside the hotel and he was taking fried rice (Mudhi and Chana). This is also another feature which excludes the participation of appellant Sankirtan Khadia in the crime rather the evidence of P.W. 3 regarding the presence of the appellant Raghu Sika and the victim inside the hotel room corroborates the disclosure made by the victim before her parents.

The victim was aged about 15 years at the time of occurrence as stated by her mother (P.W. 2) who has further stated that the victim attended puberty three years back at the age of twelve and she further stated that due to an accident, when the victim was seven years old, she was not of soundness of mind. Therefore, when the age of the victim was 15 years at the time of occurrence, the question of plea of consent also does not arise. Needless to say that the age factor of the victim has not been challenged by the defence during cross examination. The finding of the doctor that on examination of the private part, there was suggestive of recent sexual intercourse also corroborates the version of the victim.

Therefore, in view of the available materials on record, I am of the view that even though the victim has not been examined in Court during trial but in view of the materials available on record i.e. the presence of the appellant Raghu Sika and the victim inside the hotel room, the disclosure made by the victim before her parents regarding commission of rape by the appellant Raghu Sika and also the medical examination report regarding sign of recent sexual intercourse are sufficient enough to arrive at a conclusion that the prosecution has proved its case beyond all reasonable doubt against appellant Raghu Sika to have committed rape on the victim who was a minor on the date of occurrence.

So far as the other appellant Sankirtan Khadia is concerned, in absence of any clinching material against him and particularly when he was not present inside the room at the time of occurrence as stated by P.W. 3 and his name has not been disclosed by the victim at the first instance after the occurrence before her parents, I am of the view that he is entitled to be given benefit of doubt.

Accordingly, the appellant Sankirtan Khadia is acquitted of the charge under section 376(2)(g) of the Indian Penal Code. Since the prosecution has failed to establish that more than one person participated in the rape of the victim on the date of occurrence, the conviction of the appellant Raghu Sika under section 376(2)(g) of the Indian Penal Code is not sustainable in the eye of law. However, he is found guilty under section 376 of the Indian Penal Code. It appears that appellant Raghu Sika was arrested on 07.12.2009 and he was forwarded to Court on 08.12.2009. Neither in the Trial Court nor before this Court, he has been granted bail and therefore, it appears that he has already undergone substantive sentence of seven years and nine months.

Considering the submission made by the learned counsel for the appellant while altering the conviction of appellant Raghu Sika to one under section 376 of the Indian Penal Code, I sentenced him to the period already undergone. Therefore, the appellant Raghu Sika be released from custody forthwith, if his detention is not otherwise required in any other case. The appellant Sankirtan Khadia who has been acquitted of the charge under section 376(2)(g) of the Indian Penal Code should also be set at liberty forthwith if his detention is not otherwise required in any other case.

Accordingly, the Jail Criminal Appeal No. 35 of 2012 filed by appellant Sankirtan Khadia is allowed. Jail Criminal Appeal No. 34 of 2012 filed by the appellant Raghu Sika is dismissed subject to the modification of the order of conviction from one under section 376(2)(g) of the Indian Penal Code to one under section 376 of the Indian Penal Code and modification of sentence to the period already undergone. The appellant Raghu Sika be set at liberty forthwith if his detention is not otherwise required in any other case. The hearing fee for both the criminal appeals is assessed to be Rs. 5000/- (five thousand only) which would be paid to the learned counsel for the appellants immediately.

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9. Sections 498 -A, 406 of IPC read with Section 482 Cr. P.C.

Varala Bharath Kumar and Ors. Vs. State of Telangana and Ors.

Arun Mishra and Mohan M. Shantanagoudar, JJ.

In the Supreme Court of India

Date of Judgment - 05.09.2017

Issue

In the matter of quashing of criminal proceedings initiated against the appellants under section 498 A and 406 of IPC.

Leave granted. The impugned order dated 28.03.2016 passed by the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh in Criminal Petition No. 3302 of 2016, as well as, the criminal proceedings initiated against the Appellants in C.C. No. 442 of 2015 on the file of XIV Metropolitan Magistrate, Cyberabad at L.B. Nagar, arising out of Crime No. 151 of 2015 of Saroornagar Women Police Station, Cyberabad, registered for the offences punishable Under Sections 498A and 406 of the Indian Penal Code, are called in question.

The brief facts leading to this appeal are as under: The marriage between the first Appellant and the second Respondent (complainant) was solemnized at Hyderabad as per Hindu rites and rituals. They lived together for about 20 days in matrimonial house. Thereafter, the first Appellant left India and went to Australia, where he is working as an engineer. It is alleged by the second Respondent, that during her stay at the matrimonial house for the period of afore-mentioned 20 days, the first Appellant did not come close to the complainant and he was not even willing to talk freely with the complainant, despite her sincere efforts to come close to her husband. It is also alleged, that the first Appellant never behaved as a dutiful husband and used to evade the complainant whenever she approached to him; he maintained the distance even during nights; when asked, the first Appellant informed the complainant that he was suffering from viral fever; the first Appellant took treatment in the hospital for two-three days, and even after discharge from the hospital, he did not come closer to the complainant; the first Appellant postponed the nuptial night ceremony and he was not interested in co-habitation. Even after the first Appellant left for Australia, the family members of the first Appellant including the second Appellant were not talking to the complainant. The complainant left for her parents' house and started residing there. It is

further alleged, that the parents of the complainant had spent about rupees fifteen lakhs for the marriage ceremony and rupees twenty lakhs for the gold ornaments. On these, among other grounds, complaint came to be lodged by the second Respondent.

The police after registering the crime for the offences punishable Under Sections 498A and 406 of the Indian Penal Code investigated and filed the charge sheet, which culminated in CC No. 442 of 2015, pending on the file of XIV Metropolitan Magistrate, Cyberabad, L.B. Nagar.

The Appellants herein approached the High Court of Judicature at Hyderabad Under Section 482 of the Code of Criminal Procedure seeking to quash the proceedings initiated against the Appellants. The High Court by the impugned order has rejected the prayer of the Appellants to quash the proceedings initiated against them, and instead directed Appellant No. 1 to file an application Under Section 70(2) Code of Criminal Procedure seeking to recall NBW issued against him and directed Appellant No. 2 to file an application Under Section 205 Code of Criminal Procedure seeking to dispense with his presence before the trial Court. Hence, this appeal.

Respondent No. 2, though served, has chosen to remain absent. We have heard learned Counsel for the rival parties who are present and perused the record. Having carefully perused the first information report, as well as, the contents of the charge sheet, we find that the ingredients of Sections 498A and 406, Indian Penal Code are not forthcoming. The entire story narrated by the complainant does not attract the afore-mentioned provisions, as there has not been any dowry demand of the Appellants or harassment to the second Respondent. Before proceeding further, it would be relevant to note the provisions of Sections 498A, 405 and 406 of the Indian Penal Code, which read thus:

498A. Husband or relative of husband of a woman subjecting her to cruelty-Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation: For the purpose of this section, "cruelty" means-

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

405. Criminal breach of trust-Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".

Explanation [1]-A person, being an employer [of an establishment whether exempted Under Section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not] who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Explanation 2-A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

406. Punishment for criminal breach of trust-Whoever commits criminal breach of trust shall be punished with imprisonment of either

description for a term which may extend to three years, or with fine, or with both.

It is by now well settled that the extraordinary power Under Article 226 or inherent power Under Section 482 of the Code of Criminal Procedure can be exercised by the High Court, either to prevent abuse of process of the court or otherwise to secure the ends of justice. Where allegations made in the First Information Report/the complaint or the outcome of investigation as found in the Charge Sheet, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out the case against the Accused; where the allegations do not disclose the ingredients of the offence alleged; where the uncontroverted allegations made in the First Information Report or complaint and the material collected in support of the same do not disclose the commission of offence alleged and make out a case against the Accused; where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the Accused and with a view to spite him due to private and personal grudge, the power Under Article 226 of the Constitution of India or Under Section 482 of Code of Criminal Procedure may be exercised.

While exercising power Under Section 482 or Under Article 226 in such matters, the court does not function as a Court of Appeal or Revision. Inherent jurisdiction Under Section 482 of the Code though wide has to be exercised sparingly, carefully or with caution and only when such exercise is justified by the tests specifically laid down Under Section 482 itself. It is to be exercised ex debito justitiae to do real and substantial justice, for the administration of which alone courts exist. The court must be careful and see that its decision in exercise of its power is based on sound principles. The inherent powers should not be exercised to stifle a legitimate prosecution. Of course, no hard and fast Rule can be laid down in regard to cases in which the High Court will exercise its extra ordinary jurisdiction of quashing the proceedings at any stage.

We are conscious of the fact that, Section 498A was added to the Code with a view to punish the husband or any of his relatives, who harass or torture the wife to coerce her or her relatives to satisfy unlawful

demands of dowry. Keeping the afore-mentioned object in mind, we have dealt with the matter. We do not find any allegation of subjecting the complainant to cruelty within the meaning of Section 498A of Indian Penal Code. The records at hand could not disclose any willful conduct which is of such a nature as is likely to drive the complainant to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the complainant. So also, there is nothing on record to show that there was a demand of dowry by the Appellants or any of their relatives, either prior to the marriage, during the marriage or after the marriage. The record also does not disclose anywhere that the husband of the complainant acted, with a view to coerce her or any person related to her to meet any unlawful demand of any property or valuable security.

The ingredients of criminal breach of trust are also not forthcoming from the records as against the Appellants. The allegations contained in the complaint and the charge sheet do not satisfy the definition of criminal breach of trust, as contained in Section 405 of the Indian Penal Code In view of the blurred allegations, and as we find that the complainant is only citing the incidents of unhappiness with her husband, no useful purpose will be served in continuing the prosecution against the Appellants. This is a case where there is a total absence of allegations for the offences punishable Under Section 498A and Section 406 of the Indian Penal Code In the matter on hand, the allegations made in the First Information Report as well as the material collected during the investigation, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute the offences punishable Under Section 498A and 406 of the Indian Penal Code against the Accused/Appellants. So also the uncontroverted allegations found against the Appellants do not disclose the commission of the offence alleged and make out a case against the Accused. The proceedings initiated against the Appellants are liable to be quashed.

Accordingly, we allow this appeal, set aside the impugned order of the High Court, and quash the proceedings initiated against both the Appellants in CC No. 442 of 2015, pending on the file of XIV Metropolitan Magistrate, Cyberabad at L.B. Nagar, arising out of Crime No. 151 of 2015 of Saroornagar Women Police Station, Cyberabad, Registered for the offences punishable Under Sections 498A and 406 of the Indian Penal Code.

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10. Section 13 (B)(2) of Hindu Marriage Act

Amardeep Singh vs. Harveen Kaur

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

In the Supreme Court of India

Date of Judgment - 12.09.2017

Issue

In the matter of waiver of the six months waiting period for the second motion under Section 13 (B)(2) of Hindu Marriage Act, 1955.

Relevant Extract

The question which arises for consideration in this appeal is whether the minimum period of six months stipulated Under Section 13B(2) of the Hindu Marriage Act, 1955 (the Act) for a motion for passing decree of divorce on the basis of mutual consent is mandatory or can be relaxed in any exceptional situations.

Factual matrix giving rise to this appeal is that marriage between the parties took place on 16th January, 1994 at Delhi. Two children were born in 1995 and 2003 respectively. Since 2008 the parties are living separately. Disputes between the parties gave rise to civil and criminal proceedings. Finally, on 28th April, 2017 a settlement was arrived at to resolve all the disputes and seeks divorce by mutual consent. The Respondent wife is to be given permanent alimony of Rs. 2.75 crores. Accordingly, HMA No. 1059 of 2017 was fled before the Family Court (West), Tis Hazari Court, New Delhi and on 8th May, 2017 statements of the parties were recorded. The Appellant husband has also handed over two cheques of Rs. 50,00,000/-, which have been duly honoured, towards part payment of permanent alimony. Custody of the children is to be with the Appellant. They have sought waiver of the period of six months for the second motion on the ground that they have been living separately for the last more than eight years and there is no possibility of their re union. Any delay will affect the chances of their resettlement. The parties have moved this Court on the ground that only this Court can relax the six months period as per decisions of this Court.

There is conflict of decisions of this Court on the question whether exercise of power Under Article 142 to waive the statutory period Under

Section 13B of the Act was appropriate. In Manish Goel v. Rohini Goel (2010) 4 SCC 393, a Bench of two-Judges of this Court held that jurisdiction of this Court Under Article 142 could not be used to waive the statutory period of six months for fling the second motion Under Section 13B, as doing so will be passing an order in contravention of a statutory provision. It was observed:

14. Generally, no court has competence to issue a direction contrary to law nor can the court direct an authority to act in contravention of the statutory provisions. The courts are meant to enforce the Rule of law and not to pass the orders or directions which are contrary to what has been injected by law. (Vide State of Punjab v. Renuka Singla (1994) 1 SCC 175], State of U.P. v. Harish Chandra (1996) 9 SCC 309], Union of India v. Kirloskar Pneumatic Co. Ltd. (1996) 4 SCC 453], University of Allahabad v. Dr. Anand Prakash Mishra (1997) 10 SCC 264] and Karnataka SRTC v. Ashrafulla Khan (2002) 2 SC 560].

15. A Constitution Bench of this Court in Prem Chand Garg v. Excise Commr. AIR 1963 SCC 996] held as under: (AIR p. 1002, para 12)

12. ... An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws.

(Emphasis supplied)

The Constitution Benches of this Court in Supreme Court Bar Assn. v. Union of India (1998) 4 SCC 409] and E.S.P. Rajaram v. Union of India (2001) 2 SCC 186] held that Under Article 142 of the Constitution, this Court cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute. It is not to be exercised in a case where there is no basis in law which can form an edifice for building up a superstructure.

This Court noted that power Under Article 142 had been exercised in cases where the Court found the marriage to be totally unworkable, emotionally dead, beyond salvage and broken down irretrievably.

We find that in Anjana Kishore case, this Court was dealing with a transfer petition and the parties reached a settlement. This Court waived the six months period Under Article 142 in the facts and circumstances of

the case. In Anil Kumar Jain v. Maya Jain (2009) 10 SCC 415, one of the parties withdrew the consent. This Court held that marriage had irretrievably broken down and though the civil courts and the High Court could not exercise power contrary to the statutory provisions, this Court Under Article 142 could exercise such power in the interests of justice. Accordingly the decree for divorce was granted.

However, we find that the question whether Section 13B(2) is to be read as mandatory or discretionary needs to be gone into. In Manish Goel (supra), this question was not gone into as it was not raised. This Court observed:

The learned Counsel for the Petitioner is not able to advance arguments on the issue as to whether, statutory period prescribed Under Section 13-B(1) of the Act is mandatory or directory and if directory, whether could be dispensed with even by the High Court in exercise of its writ/appellate jurisdiction.

Accordingly, vide order dated 18th August, 2017, we passed the following order:

List the matter on 23rd August, 2017 to consider the question whether provision of Section 13B of the Hindu Marriage, Act, 1955 laying down cooling of period of six months is a mandatory requirement or it is open to the Family Court to waive the same having regard to the interest of justice in an individual case.

Mr. K.V. Vishwanathan, senior counsel is appointed as Amicus to assist the Court. Registry to furnish copy of necessary papers to learned Amicus.

Accordingly, learned amicus curiae has assisted the Court. We record our gratitude for the valuable assistance rendered by learned amicus who has been ably assisted by S/Shri Abhishek Kaushik, Vrinda Bhandari and Mukunda Rao Angara, Advocates.

Learned amicus submitted that waiting period enshrined Under Section 13(B)2 of the Act is directory and can be waived by the court where proceedings are pending, in exceptional situations.

It was submitted that Section 13B(1) relates to jurisdiction of the Court and the petition is maintainable only if the parties are living separately for a period of one year or more and if they have not been able to live together and have agreed that the marriage be dissolved. Section 13B(2) is procedural. He submitted that the discretion to waive the period is a guided discretion by consideration of interest of justice where there is no chance of reconciliation and parties were already separated for a longer period or contesting proceedings for a period longer than the period mentioned in Section 13B(2).

The Court must be satisfied that the parties were living separately for more than the statutory period and all efforts at mediation and reconciliation have been tried and have failed and there is no chance of reconciliation and further waiting period will only prolong their agony.

We have given due consideration to the issue involved. Under the traditional Hindu Law, as it stood prior to the statutory law on the point, marriage is a sacrament and cannot be dissolved by consent. The Act enabled the court to dissolve marriage on statutory grounds. By way of amendment in the year 1976, the concept of divorce by mutual consent was introduced. However, Section 13B(2) contains a bar to divorce being granted before six months of time elapsing after fling of the divorce petition by mutual consent. The said period was laid down to enable the parties to have a rethink so that the court grants divorce by mutual consent only if there is no chance for reconciliation.

The object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to enable them to rehabilitate them as per available options. The amendment was inspired by the thought that forcible perpetuation of status of matrimony between unwilling partners did not serve any purpose. The object of the cooling of the period was to safeguard against a hurried decision if there was otherwise possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of the parties when there was no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option.

In determining the question whether provision is mandatory or directory, language alone is not always decisive. The Court has to have the regard to the context, the subject matter and the object of the provision. This principle, as formulated in Justice G.P. Singh's "Principles of Statutory Interpretation" (9th Edn., 2004), has been cited with approval in Kailash v. Nanhku and Ors. 2005) 4 SCC 480 as follows:

The study of numerous cases on this topic does not lead to formulation of any universal Rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: 'No universal Rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.'

'For ascertaining the real intention of the legislature', points out Subbarao, J. 'the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered'. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory.

Applying the above to the present situation, we are of the view that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period Under Section 13B(2), it can do so after considering the following:

i) the statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year Under Section 13B(1) of separation of parties is already over before the first motion itself;

ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 Code of Civil Procedure/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

iv) the waiting period will only prolong their agony.

The waiver application can be fled one week after the first motion giving reasons for the prayer for waiver.

If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court.

Since we are of the view that the period mentioned in Section 13B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation.

Needless to say that in conducting such proceedings the Court can also use the medium of video conferencing and also permit genuine representation of the parties through close relations such as parents or siblings where the parties are unable to appear in person for any just and valid reason as may satisfy the Court, to advance the interest of justice.

The parties are now at liberty to move the concerned court for fresh consideration in the light of this order. The appeal is disposed of accordingly.

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11. Sections 35(a) & 61 of the Stamp Act

Soumendra Kumar Gahir vs E.Nagamani and Others

Biswanath Rath, J.

In the High Court of Orissa, Cuttack.

Date of Judgment : 22.09.2017

Issue

In the matter of impounding an unregistered deed of agreement after long lapse of time.

This Civil Miscellaneous Petition involves setting aside the order dated 28.7.2015 passed by the Civil Judge (Senior Division), Bargarh in Civil Suit No.110 of 2000 available at Annexure-3 rejecting a request at the instance of defendant no.1 under Section 35 (a) of the Stamp Act to determine the required stamp duty and penalty , if any, involving the document dated 8.11.1999 to be admitted in the evidence by the defendant no.1.

Heard Sri B.Panigrahi, learned counsel for the petitioner. None appeared for the opposite parties during hearing of the matter in spite of appearance of a set of counsel for the opposite parties.

Short background involved in the case is that opposite party no.1and the petitioner involved in an unregistered agreement dated 1.3.1999prepared for the purpose of transfer/ sale of M/s. Bijay Laxmi TradeCombine, a proprietary firm in favour of the petitioner for considerationamount of Rs.70,50,001/- out of which the petitioner already paid a sum ofRs.20,00,000/- to the opposite party no.1. It is subsequently found by thepetitioner that the said firm had some infirmities as it was already mortgagedwith a bank and the property was held by the opposite party no.1 along withher husband but the agreement was executed by opposite party no.1 only.

When the petitioner wanted to withdraw the agreement, the opposite party no.1 acknowledged her difficulty and consequently entered into cancellation of agreement dated 1.3.1999 vide another agreement dated 8.11.1999 upon making payment of a sum of Rs.2,00,000/- , promising therein to pay the balance advance amount of Rs.18,00,000 in monthly instalments. The second agreement entered herein was also an unregistered one and also not duly stamped. Finding opposite party no.1 not clearing the advance amount within the reasonable time, the petitioner

was constrained to file a suit for specific performance of contract involving the opposite party no.1 vide Civil Suit No.110 of 2000 on the file of Civil Judge (Senior Division), Bargarh. The agreement dated 1.3.1999 though unregistered and not duly stamped but already exhibited as Ext.2. The petitioner in order to prove his case relied upon the evidence of D.W.1 i.e. the scribe of the agreement dated 8.11.1999. The opposite party no.1 though did not dispute the signature or the execution of the agreement dated 8.11.1999, filed an objection on 23.6.2015 stating that the same cannot be exhibited as the same is inadmissible due to lack of proper stamp. Petitioner further contended that the agreement since is not a bond but is a continuation of the previous contract hence ought to be exhibited. It is thus alleged that the trial court failed to appreciate the difference between a document in acknowledgement and a bond. It is for this reason, the petitioner filed an application under Section 35 read with Section 61 of the Stamp Act to pay the deficit stamp duty with penalty on the document dated 1.3.1999. The court below under the observation that the agreement dated 1.3.1999 since a document agreeing to sale the said property with terms and conditions stipulated therein as a result of negotiation between the parties since not coming within the term of conveyance and as the agreement to sale of immovable property was not a deemed conveyance prior to Orissa Amendment Act, 2001 came into force since 2003 declined to pass order for impounding of the document. Finding no other remedy, petitioner was constrained to file an application under Section 35(a) of the Stamp Act to pay the deficit stamp duty with penalty on the document dated 8.11.1999 executed by opposite party no.1 in order to regularize the agreement dated 8.11.1999. Opposite party no.1 raising objection taken a technical ground of limitation and contended that the document was required to be impounded and stamped within three years of its registration but under the pretext that the document is unregistered till date submitted that provision contained in Section 33-1(a) of the Stamp Act does not apply to the present case. The trial court refused to impound the document on the premises that it was not stamped within stipulated time and no explanation has been also put forth by the petitioner to explain such delay.

Sri Panigrahi, learned counsel appearing for the petitioner contended that when the case of the petitioner is dependant upon the agreement dated 8.11.1999, the trial court failed to appreciate that such document cannot be admissible in evidence unless the same is impounded. Further, on the premises that the agreement to sale is an instrument, which requires payment of stamp duty applicable to a deed of conveyance, Sri Panigrahi, learned counsel claimed that the trial court ought to have allowed impounding of the instrument by permitting the petitioner to pay

the deficit stamp duty with penalty at least in the interest of justice. Referring to the decisions reported in the cases of Omprakash v. Laxminarayan and others, 2013 (4) RCR (Civil) 747, Avinash Kumar Chauhan v. Vijay Krishna Mishra, 2009 (1) RCR (Civil) 651 and (R.A.J.) 297 SCC 532, Sri Panigrahi, learned counsel for the petitioner submitted that the Ext.2 being insufficiently stamped cannot be received in evidence in view of the provisions contained under Section 35 of the Stamp Act and as such claimed that the Trial Court should have allowed the impounding. Further, taking the plea that the agreement dated 8.11.1999 since not a registered document, Sri Panigrahi submitted that there has been wrong application of provisions under Section 33-1(a) of the Stamp Act. It is under the above circumstance, Sri Panigrahi, learned counsel appearing for the petitioner prayed this Court for interfering in the impugned order and setting aside the same.

Considering the submission of the petitioner, this Court finds there is no denial to the existence of the document dated 8.11.1999. There is also no denial to the non-registration of the document dated 8.11.1999. Taking into consideration the provisions referred to by both the parties in the consideration of matter in the trial court, this court finds so far as impounding of document is concerned, following the provision contained in Section 33-1(a) of the Stamps Act (Orissa Amendment), the period of limitation for impounding of an instrument is three years from the date of registration. The document sought to be impounded being an unregistered one, there is no question of applying the limitation contemplated in Section 33-1(a) of the Indian Stamp Act. Accordingly, there is also no question for applying for impounding of an unregistered document. The application at the instance of petitioner for impounding the unregistered document was misconceived one. For the unregisteredness of the document sought to be impounded and for the Orissa Amendment involving Registration Act, since all such documents compulsorily need registerable, the document is wholly inadmissible and provision at Section 35(a) of the Indian Stamp Act is also wholly inapplicable at this stage.

Under the circumstance, though this Court finds the trial court has not taken the above into consideration, but for the observations made hereinabove, this Court is not inclined to entertain the Civil Miscellaneous Petition which is thus dismissed. Interim order operating stands vacated. The proceeding vide C.S. No.110 of 2000 is directed to be concluded by end of this year. No cost.

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12. Section 372 of the Indian Succession Act

Prakash Soni vs. Deepak Kumar and Ors.

Arun Mishra and Mohan M. Shantanagoudar, JJ.

In The Supreme Court of India

Date of Judgment - 15.09.2017

Issue

In the matter of issuance of succession certificate on the strength of a will.

This appeal arises out of the order dated 20.04.2006 passed by the High Court of Madhya Pradesh, Indore Bench in Civil Revision No. 63/2005, reversing the order dated 8.1.2005 passed by the Additional District Judge, Narsinghgarh, District Rajgarh, Madhya Pradesh in Civil Appeal No. 80-A/2004, consequently restoring the order dated 11.07.2002 passed by the Court of the Civil Judge, Class-I, Narsinghgarh, District Rajgarh, Madhya Pradesh in Succession Case No. 3/2002.

Brief facts leading to this appeal are, that the Appellant herein is the husband of Srimati Mooli Swarnkar, who was working as an Assistant Teacher in Government Girls Higher Secondary School Narsinghgarh, District Rajgarh, Madhya Pradesh; Srimati Mooli Swarnkar died on 18.11.2001, on account of liver cancer and disease of Hepatitis 'B'. The married couple, i.e., the Appellant and his wife-Srimati Mooli Swarnkar did not have any issue, and hence the Appellant being her husband and as her only successor claimed to be entitled to receive the retiral benefits, such as, Pension, G.P.F., Death-cum-Retirement Gratuity, Family Welfare Fund, Group Insurance Scheme account etc.

Hence, the Appellant filed an application on 7.5.2002 before the Civil Judge, Class-I, Narsinghgarh, District Rajgarh, Madhya Pradesh, Under Section 372 of the Indian Succession Act (hereinafter referred to as 'the Act'), for grant of a succession certificate of his wife late Srimati Mooli Swarnkar, so as to entitle him to receive the afore-mentioned retiral benefits. The Respondents herein, who were the sons of the brother of late Srimati Mooli Swarnkar also laid their claim in respect of the afore-mentioned retiral benefits of late Srimati Mooli Swarnkar, on the basis of the will, said to have been executed by her on 18.11.2001, i.e., on the day of her death. In other words, the Respondents filed counter claim in the application filed by the Appellant Under Section 372 of the Act. The

Respondents further claimed, that the deceased had submitted nomination forms dated 16.11.2001 (Ex. D/1 to D/5) to her employer in which the names of the Respondents were mentioned as her nominees.

Learned Civil Judge, Narsinghgarh vide his order dated 9.10.2004 passed in Succession Case No. 3/2002 dismissed the application filed by the Appellant for grant of a succession certificate, and allowed the counter claim put forth by the Respondents. Against the said order passed by the Civil Court, the Appellant preferred Civil Appeal No. 80-A/2004 before the Additional District Court, Narsinghgarh, which came to be allowed on 8.1.2005 and consequently the order of the Civil Court, dismissing the claim of the Appellant and allowing the counter claim of the Respondents was set aside. In effect, the Additional District Judge, Narsinghgarh ordered for grant of a succession certificate to the Appellant. However, the judgment of the Additional District Court was set aside by the High Court of Madhya Pradesh, as mentioned supra, in Civil Revision No. 63/2005 on 20.04.2006, and the order of the Civil Court rejecting the application for grant of a succession certificate filed by the Appellant was upheld. Hence, this appeal.

Learned advocates on both sides have taken us to the material available on the record. Learned Counsel for the Appellant submitted that the signature of Srimati Mooli Swarnkar affixed on Ex. D/6 (will in question), does not correspond to the signatures affixed on certain other documents. Learned Counsel for the Appellant contended, that the signatures of Srimati Mooli Swarnkar found on Ex. P/4, D/7 and D/8 do not tally with the signature found on Ex. D/6 (disputed signature). He further submitted that it was not at all possible for the deceased Srimati Mooli Swarnkar to execute the will on the date of its alleged execution, inasmuch as she was suffering from liver cancer and Hepatitis 'B' disease and was not in a position to take any decision on her own free will and immediately after the execution of the will, she expired. The execution of the alleged will is surrounded by suspicious circumstances, and such suspicious circumstances are not explained by the Respondents.

Per contra, learned Counsel for the Respondents contended, that the Civil Court as well as the High Court are justified in concluding that the will is duly proved, inasmuch as one of the attesting witnesses who was alive during the relevant point of time had supported the execution of the document in question. Since, there is no suspicious circumstance, learned

Counsel for the Respondents prays for upholding the order of the High Court.

The entire case centers around the proof of due execution of the alleged will. Ex. D/6 is said to have been executed by the deceased Srimati Mooli Swarnkar on 18.11.2001. Indisputably, the deceased Srimati Mooli Swarnkar died on 18.11.2001. The nomination forms in favour of the husband-Appellant herein were executed by the deceased on 3.3.1992. Similarly, nomination with regard to Provident Fund and Death-cum-Retirement Gratuity were also executed by the deceased in favour of the Appellant. However, just two days prior to her death, i.e., on 16.11.2001 at about 7 p.m., the deceased allegedly executed a nomination form as per Ex. D/1 in favour of the Respondents, and that too in Care Well Hospital at Bhopal. Similarly, other documents produced by the Respondents (Ex. D/2, D/3, D/4 and D/5) were also executed by the deceased in favour of the Respondents at the very point of time. The deceased allegedly executed the will in question before the Oath Commissioner on 18.11.2001 as per Ex. D/6 in the early hours of 18.11.2001. The letter allegedly written by the deceased Srimati Mooli Swarnkar as per Ex. D/7 discloses that she has informed the authorities that the Appellant has been asking money from her and he had beaten her quite often, and hence she is cancelling the nomination executed in favour of the Appellant, and then she has cancelled the nomination made in favour of the Appellant.

Shri Dhannalal Mahavar-Respondents' witness has deposed that on 18.11.2001 at about 7 to 8 a.m., deceased Srimati Mooli Swarnkar executed the will and that he signed the will as an attesting witness. The witnesses on behalf of the Respondents have also deposed, that there was no cordial relationship between the Appellant and the deceased for ten years prior to her death. They have also deposed about the cancellation of the nomination made earlier in favour of the Appellant.

Curiously, the High Court has not at all discussed the case as put forth by the Appellant. We find that the approach of the High Court is one sided. The non-consideration of the material placed by the Appellant herein before the High Court has constrained us to verify the entire evidence to satisfy our judicial conscience. On consideration of the entire material on record, we find that the will is surrounded by suspicious circumstances.

Ex. P/4 discloses that Srimati Mooli Swarnkar attended the school as a teacher up to 1.10.2001, and thereafter she remained on medical leave. It is also not in dispute, that the deceased was suffering from liver cancer and Hepatitis 'B' disease. Admittedly, the will was executed between 7 to 8 a.m. on 18.11.2001, and after few hours she expired on the very same date. The attesting witness of Ex. D/6, namely, Shri Dhannalal Mahavar (NAW/02) has admitted in the cross-examination that he is a government hospital compounder. The deceased was being treated in a hospital at Bhopal. At about 5.30 a.m. on 18.11.2001, a telephone call was received by Shri Brijmohan Soniji, who is the father of Respondent No. 1, and immediately thereafter he arrived at the site, i.e. in the hospital at Bhopal. It is admitted by the attesting witness and other witnesses who were allegedly present at the time of the execution of the will that the hands of Srimati Mooli Swarnkar were shivering while signing Ex. D/6. At that point of time, Srimati Mooli Swarnkar was very weak and she was administered drip. The health condition of Srimati Mooli Swarnkar had deteriorated when the drip was being administered. Therefore, in our considered opinion, the first appellate Court was justified in concluding that the propounder of the will was not successful in proving that the will was executed in a healthy state of mind as well as body of the deceased and without any pressure. The will is surrounded by suspicious circumstances mentioned supra. Similar observation needs to be made in respect of nomination forms also, which were allegedly executed by the deceased just prior to her death on 18.11.2001, i.e., on 16.11.2001. Admittedly, the deceased was on medical leave. The nomination forms allegedly signed by the deceased were placed before the concerned department by the relatives and other family members of the Respondents. Upon comparison of the disputed and other signatures of the deceased Srimati Mooli Swarnkar on Ex. P/4, D/7, D/8 and the alleged will Ex. D/6, the first appellate Court on facts has concluded that the signatures found on Ex. D/6 were totally different.

We find from the records that the condition of the testator's mind and body was very feeble and debilitated. The signature of the testator was allegedly taken on the death bed while she was administered drip. The dispositions made in the will may not be the result of the testator's free will

and mind. In such cases, the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy and unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last will of the testator. Since there are many suspicious circumstances narrated above, and as we are satisfied that the dispositions made in the alleged will may not be as a result of testator's free will and mind, the Civil Court as well as the High Court are not justified in coming to the conclusion that the will Ex. D/6 is duly executed by the deceased. The Respondents being the propounders of the will have failed to satisfy the judicial conscience of this Court regarding due execution of the will. Since the suspicious circumstances relate to the genuineness of the signatures of the testator, as well as the condition of the testator's mind and the dispositions made in the will being unfair, the judgment of the High Court restoring the judgment of the Civil Court is liable to be set aside.

Accordingly, the instant appeal is allowed, the judgment of the High Court dated 20.04.2006 passed in Civil Revision No. 63/2005, restoring the judgment of the Civil Court dated 9.10.2004 passed in Succession Case No. 03/2002 is set aside, and the judgment of the first appellate Court dated 8.1.2005 passed in Civil Appeal No. 80-A/2004 is restored. It is held that the Appellant, being successor of the deceased Srimati Mooli Swarnkar, is entitled to receive all retiral benefits of his wife, such as, Pension, Gratuity, G.P.F., Family Welfare Fund, Insurance etc. No order as to costs.

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13. Section 20 of Legal Services Authorities Act.

Labangalata Nayak vs. Ramesh Chandra Pattnaik and Ors.

Dr. Akshaya Kumar Rath, J.

In the High Court of Orissa , Cuttack

Date of Judgment - 18.09.2017

Issue

In the matter of challenging of award passed by permanent and continuous Lok Adalat under Article 226/227 of the Constitution of India

This petition challenges the orders dated 31.1.2014 and 6.2.2014 passed by the Judge, Permanent and Continuous Lok Adalat, Cuttack in Title Suit No. 221 of 1979.

The brief facts necessary to appreciate the controversy are that one Puspendra Kumari, wife of Sailendra Narayan Singh, was the owner of the land measuring an area of Ac. 1.203 dec. appertaining to Khata No. 18, Plot No. 1032 of Mouza-Tulasipur, Cuttack town with a house standing thereon. She instituted Title Suit No. 287 of 1978 against Ramesh Chandra Pattanaik for declaration of right, title and interest, recovery of possession and permanent injunction in respect of Ac. 0.82 dec. 5 kadies of land. Ramesh instituted Title Suit No. 221 of 1979 for specific performance of contract against Puspendra Kumari in respect of Ac. 0.116 dec. of land. Rajanirani Samantasinghar, mother of Ramesh, instituted Title Suit No. 256 of 1979 against Sailendra, husband of Puspendra Kumari & others for specific performance of contract. Sukanti Pattnaik, wife of Ramesh, instituted C.S.(I) No. 38 of 2006 for a declaration that the sale deed No. 3552 dated 21.6.2005 executed by the learned Civil Judge (Senior Division), 1st Court, Cuttack as void, illegal and inoperative and to declare the judgment and decree dated 19.4.2003 and 2.5.2003 respectively passed by the learned Civil Judge (Senior Division), 1st Court, Cuttack in Title Suit No. 443 of 2000 as void and not binding. All the suits had been instituted in the court of the learned Civil Judge (Senior Division), 1st Court, Cuttack The schedule of properties, mentioned in all the suits, are as follows;

The petitioner as plaintiff instituted Title Suit No. 443 of 2000 for specific performance of contract against Puspendra Kumari. The suit was decreed. Since the defendant did not come forward to execute the sale deed, the decree was executed and the sale deed was registered in his

favour through process of court on 21.6.2005 in respect of the land appertaining to Hal Khata No. 730, Hal Plot No. 557, Ac. 0.105 dec.

Sukanti was not a party in T.S. No. 256 of 1979. She filed an application for impleadment. The same was allowed. Thereafter, Sukanti instituted C.S. No. 38 of 2006 seeking reliefs mentioned supra. Pursuant to the order of this Court, four suits continued simultaneously. All suits were posted for judgment on 30.1.2014. On the same day, opposite party No. 1 and opposite party Nos. 2 to 8 filed a petition for compromise in Title Suit No. 221 of 1979 and dismissal of connected suit, i.e., Title Suit No. 287 of 1978. On the very day aforesaid opposite parties filed another petition for compromise of T.S. No. 256 of 1979 and C.S(I). No. 38 of 2006. The petitions were rejected. Title Suit No. 256 of 1979 and C.S. No. 38 of 2006 were dismissed on contest. The compromise petition filed in Title Suit No. 221 of 1979 was sent to the Permanent and Continuous Lok Adalat, Cuttack. The petitioner made objection to the compromise on the ground that a portion of her land had been included in the compromise petition and the same was not the subject-matter of dispute in the suit. The compromise petition does not contain any specific schedule. The same only relates to Schedule-B of the plaint in T.S. No. 221 of 1979, i.e., Plot No. 558/1545. The compromise petition was not supported by affidavit. Though the area of Plot No. 558/1545 was Ac. 0.70 dec., but then the area Ac. 0.116 dec. was included in the compromise petition without any specification. The Judge, Permanent and Continuous Lok Adalat, Cuttack overruled the objection of the petitioner. On the basis of the memo filed by opposite party No. 2 indicating the area proposed to be transferred, the compromise was recorded and the suit was disposed of in terms of the compromise.

Heard Mr. D.P. Mohanty, learned counsel for the petitioner and Mr. S.P. Mishra, learned Senior Advocate along with Mr. K.M. Dhal and Mr.A. Mohanty, learned counsel for opposite party No. 1. Mr. Mohanty, learned counsel for the petitioner submitted that the petition under Article 227 of the Constitution is maintainable against the award passed by the Permanent and Continuous Lok Adalat. Aggrieved party can challenge the same under Article 226 and/or Article 227 of the Constitution. Since the petitioner was not a party to the compromise, but was substantially affected by the decree, the petition is maintainable. He further contended that the petitioner as plaintiff instituted T.S. No. 443 of 2000 for specific

performance of contract against Puspendra Kumari. The suit was decreed. As the defendant did not come forward to execute the sale deed, the sale deed was executed through process of court on 21.6.2005. A part of an area has been illegally included in the compromise petition filed by the parties. The petitioner was not a party to the said suit. Her objection was overruled without any rhyme or reason. The effect of compromise will take away the judgment and decree passed by the competent court of law. To buttress his submission, he relied on the decision of the apex Court in the case of State of Punjab v. Jalour Singh, AIR 2008 SC 1209.

Per contra Mr. Mishra, learned Senior Advocate for the opposite party No. 1 contended that the petitioner has no locus standi to challenge the legality and validity of the compromise decree/award passed by the Permanent and Continuous Lok Adalat. Title Suit No. 287 of 1978 and Title Suit No. 221 of 1979 were heard analogously and at the fag end of the trial of the suits, the parties entered into compromise, whereupon the defendant agreed to execute the registered sale deed in favour of the plaintiff-opposite party No. 1 in respect of the suit property in T.S. No. 221 of 1979 after receiving consideration of Rs. 21,46,000/-. The compromise petition was referred to the Permanent and Continuous Lok Adalat whereafter the award was passed. The petitioner was not party in both the suits. The consent decree was merely the record of contract between the parties. Since no sale deed has been executed and registered as yet by defendants-opposite parties 2 to 8 in favour of plaintiff-opposite party No. 1, the award is still in the domain of an executory contract. He further contended that the claim of opposite party No. 1 in the suit was for Ac. 0.116 dec. out of Sabik Plot No. 1032 with boundaries given in Schedule-B of the plaint. It is preposterous on the part of the petitioner to say that the Permanent and Continuous Lok Adalat took objection raised by the petitioner into consideration but in a most improper manner asked opposite party No. 2 to file a separate memo as to from which plot, balance area was proposed to be transferred under the compromise. Since the area of Hal Plot No. 558/1545 is Ac. 0.070 dec., opposite party No. 2 on the direction of the Permanent and Continuous Lok Adalat rightly filed a separate memo indicating therein that he was proposing to transfer the balance area of Ac. 0.046 dec. out of H.S. Plot No. 557 which stood recorded in the name of his mother. It is only after the sale deed is executed and registered, then only it

can be ascertained as to whether the right, title and interest of the petitioner over Hal Plot No. 557 is affected, since during Hal settlement operation Sabik Plot No. 1032 has been sub-divided into several Hal plots including Hal Plot No. 557. He further contended that the mother of opposite parties 2 to 8 filed T.S. No. 287 of 1978 for eviction of opposite party No. 1 and recovery of possession of Ac. 0.082 dec. 5 kadies of land out of Sabik Plot No. 1032 since opposite party No. 1 was in possession of that portion of Sabik Plot No. 1032. In the event T.S. No. 287 of 1978 is decreed, opposite party No. 1 is liable to be evicted from Ac. 0.082 dec. 5 kadies of land. Thus the petitioner has no valid and genuine grievance against the compromise decree/award. He further contended that it is open to the petitioner to file appeal under Sec. 96 CPC, as she was not a party to the suit or institute a separate suit. He relied on the decisions of this Court in the case of Kedar Nath Nayak @ others v. Sisira Dei (dead) substituted by L.Rs & others, 2015 (II) ILR - Cut. 504, Smt. Gourimani @ Umamani Devi & others v. Narayan Tripathy @ others, 2016 (I) CLR 398 and Ramakrushna Muda v. Raghunath Mudra & others, 2016 (Supp.-II) OLR 750.

The seminal point that inter alia hinges for consideration is as to whether the petition under Article 227 of the Constitution of India is maintainable against the award passed by the Lok Adalat?

In Jalour Singh (supra), the question arose before the apex Court as to what is the remedy available to the aggrieved person of the award passed by the Lok Adalat under Sec. 20 of the Legal Services Authorities Act. In that case, the award was passed by the Lok Adalat resulting in disposal of the appeal pending before the High Court pertaining to a claim case arising out of Motor Vehicle Act. Assailing the award, one party to the appeal filed a writ petition under Article 226/227 of the Constitution of India. The High Court dismissed the writ petition holding, inter alia, that the same is not maintainable. The aggrieved party filed an appeal by way of special leave before the apex Court. The apex Court, after examining the scheme of the Act allowed the appeal and set aside the order of the High Court. The apex Court held-

"12. It is true that where an award is made by the Lok Adalat in terms of a settlement arrived at between the parties (which is duly signed by parties and annexed to the award of the Lok Adalat), it becomes final and

binding on the parties to the settlement and becomes executable as if it is a decree of a civil court, and no appeal lies against it to any court. If any party wants to challenge such an award based on settlement, it can be done only by filing a petition under Article 226 and/or Article 227 of the Constitution, that too on very limited grounds. But where no compromise or settlement is signed by the parties and the order of the Lok Adalat does not refer to any settlement, but directs the respondent to either make payment if it agrees to the order, or approach the High Court for disposal of appeal on merits, if it does not agree, is not an award of the Lok Adalat. The question of challenging such an order in a petition under Article 227 does not arise. As already noticed, in such a situation, the High Court ought to have heard and disposed of the appeal on merits."

Taking a cue from Jalour Singh (supra), the apex Court in Bharvagi Constructions & another v. Kothakapu Muthyam Reddy & others (Civil Appeal No. 11345 of 2017 arising out of SLP(C) No. 23605 of 2015) disposed of on 07.09.2017) held thus;

"27. In our considered view, the aforesaid law laid down by this Court is binding on all the Courts in the country by virtue of mandate of Article 141 of the Constitution. This Court, in no uncertain terms, has laid down that challenge to the award of Lok Adalat can be done only by filing a writ petition under Article 226 and/or Article 227 of the Constitution of India in the High Court and that too on very limited grounds.

28. In the light of clear pronouncement of the law by this Court, we are of the opinion that the only remedy available to the aggrieved person (respondents herein/plaintiffs) was to file a writ petition under Article 226 and/or 227 of the Constitution of India in the High Court for challenging the award dated 22.08.2007 passed by the Lok Adalat. It was then for the writ Court to decide as to whether any ground was made out by the writ petitioners for quashing the award and, if so, whether those grounds are sufficient for its quashing.

29. The High Court was, therefore, not right in by passing the law laid down by this Court on the ground that the suit can be filed to challenge the award, if the challenge is founded on the allegations of fraud. In our

opinion, it was not correct approach of the High Court to deal with the issue in question to which we do not concur."

The law laid down by the apex Court in the case of Jalour Singh & Bharvagi (supra) proprio vigore apply to the facts of the case.

Thus inescapable conclusion is that notwithstanding the bar contained in Legal Services Authorities Act or Order 23 Rule 1-A(ii) CPC, the only remedy available to the aggrieved person is to challenge the award of the Permanent and Continuous Lok Adalat by filing a petition under Article 226 and/or Article 227 of the Constitution.

In Ramakrushna Mudra (supra), this Court relied on the decision of the apex Court in the case of Municipal Corporation of Delhi v. Sh. Jai Singh and others, 2010 AIR SCW 5968 wherein the scope of Article 227 of the Constitution had been dealt with. In Municipal Corporation of Delhi (supra), the apex Court held:

"xxx xxx xxx

Before we consider the factual and legal issues involved herein, we may notice certain well recognized principles governing the exercise of jurisdiction by the High Court under Article 227 of the Constitution of India. Undoubtedly the High Court, under this Article, has the jurisdiction to ensure that all subordinate courts as well as statutory or quasi-judicial tribunals, exercise the powers vested in them, within the bounds of their authority. The High Court has the power and the jurisdiction to ensure that they act in accordance with well established principles of law. The High Court is vested with the powers of superintendence and/or judicial revision, even in matters where no revision or appeal lies to the High Court. The jurisdiction under this Article is, in some ways, wider than the power and jurisdiction under Article 226 of the Constitution of India. It is, however, well to remember the well known adage that greater the power, greater the care and caution in exercise thereof. The High Court is, therefore, expected to exercise such wide powers with great care, caution and circumspection. The exercise of jurisdiction must be within the well recognized constraints. It cannot be exercised like a 'bull in a china shop', to correct all errors of judgment of a court, or tribunal, acting within the limits of its jurisdiction. This correctional jurisdiction can be exercised in cases where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice. The High Court cannot lightly or liberally act as an appellate court and re-appreciate the evidence. Generally, it cannot substitute its own conclusions for the conclusions reached by the courts below or the statutory/quasi-judicial tribunals. The

power to re-appreciate evidence would only be justified in rare and exceptional situations where grave injustice would be done unless the High Court interferes. The exercise of such discretionary power would depend on the peculiar facts of each case, with the sole objective of ensuring that there is no miscarriage of justice.

xxx xxx xxx"

On the anvil of the decisions cited supra, the instant case may be examined. The assertion of the petitioner is that the suit filed by her against Puspendra Kumari for specific performance of contract had been decreed. The sale deed was executed through process of court on 21.6.2005. She was not a party to Title Suit No. 221 of 1979 and Title Suit No. 287 of 1978. A portion of land which was alienated in her favour, had been included in the compromise petition. In the event the compromise decree is given effect to, then earlier decree passed in her favour and consequential execution of the sale deed will be non est. The same cannot be. Since the case requires adjudication of the aforesaid aspect, a detailed scrutiny of the record is to be made.

In view of the same, the impugned orders dated 31.1.2014 and 6.2.2014 passed by the passed by the Judge, Permanent and Continuous Lok Adalat, Cuttack in Title Suit No. 221 of 1979 are set aside. The matter is remitted back to the learned trial court. Liberty is granted to the petitioner to file a petition in support of her case. It is open to the opposite parties to file objection to the same. Learned trial court shall ascertain as to whether the suit schedule land alienated in favour of the petitioner through process of court by means of registered sale deed dated 21.6.2005 has been included in the compromise petition. In the event learned trial court comes to the conclusion that the petitioner's land has been included in the compromise petition, it shall exclude the same. Thereafter, the learned trial court shall dispose of the suits in terms of the compromise petition filed by the parties.

On a bare reading of the decisions in the case of Gourimani and Kedar Nath Nayak (supra), it is evident that the same are distinguishable on facts.

The petition is allowed to the extent indicated above. No costs.

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