JUDICIAL ACADEMY JHARKHAND

SNIPPETS

OF

SUPREME COURT JUDGMENTS

(July 08-July 12, 2019)

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1. *Sheoli Hati v. Somnath Das, (2019 SCC OnLine SC 847)*

Decided on :- 11.07.2019

Bench :- 1. Hon'ble Mr. Justice Ashok Bhushan
2. Hon'ble Mr. Justice Navin Sinha

(Child custody and visiting rights – The Appeal was against the order of the Jharkhand High Court passed through the Division Bench comprising Hon'ble Mr. Justice Aparesh Kumar Singh and Hon'ble Mr. Justice Ratnakar Bhengra, which was upheld by the Hon'ble Supreme Court in this appeal)

Facts

The Appellant and the Respondent had amicably reached a settlement through Jharkhand Legal Services Authority wherein the amount of permanent alimony was decided and as per the settlement the custody of their daughter was to remain with the appellant and the respondent was given the right to visit their daughter once in every two months. The respondent alleging obstruction by the appellant in his visiting rights filed an application seeking custody of the child under Sections 7 and 12 of the Guardian and Wards Act, 1890 at Bengaluru. The said proceedings under Guardian and Wards Act were transferred to Family Court at Jamshedpur under order of the Supreme Court dated 27.03.2012.

In the Guardianship proceedings the respondent gave up his claim of the custody of child and confined his case to alternative prayer, i.e., direction to admit the child in a boarding school. The Family Court, Jamshedpur held that the "*minor daughter of the petitioner and respondent Aditi Bishaskha Das shall continue in the care, custody and guardianship of her mother till she reaches the age of 11 years and shall continue to pursue her education from Jamshedpur along with her mother. However, the petitioner shall have the visitation right as is continuing since before i.e. during the pendency of the case. However, the petitioner shall be entitled to the custody of the child for half of each vacation of the school where Aditi is or shall be studying and for the first half of vacation Aditi shall be in the care and custody of her father i.e. petitioner and for the second half of the vacation she shall be under the care and custody of her mother…… The entire cost of such Boarding School shall be borne by the petitioner and once Aditi gets into the Boading School then the respondent shall have the right to visit her daughter as permitted by the School calendar but at the cost of the petitioner and the petitioner shall pay such cost which shall include the travelling airfare and other expenses in advance.*"

Aggrieved by the aforesaid judgment of the Family Court, Jamshedpur, both the parties preferred separate Appeals against the judgment before the Jharkhand High Court. While the appeals bearing F.A. No. 59/2016 and F.A. No. 68/2016 are still pending before the High Court, the appellant in the present case before the Supreme Court was aggrieved by the order of the Hon'ble Court passed on 26.04.2018 by the Division Bench comprising Hon'ble Mr. Justice Aparesh Kumar Singh and Hon'ble Mr. Justice Ratnakar Bhengra wherein it

directed the child to be admitted in Good Shepherd International School, Ooty in Class IV which is a residential institution affiliated to ICSE for the Session 20182019, which commenced from 21.07.2018. This order was challenged before the Supreme Court wherein the Court refused to grant stay on the order of the High Court and opined as follows :-

> *".....This arrangement, as per the High Court's order, is made for the Academic Year 201819. We also find that the High Court has passed this order after weighing and discussing all the alternatives and 2 pros and cons of the matter and has formed its opinion that it is one of the most suitable solutions.*
>
> *We feel that once such an order is given on objective considerations, it is better that the child is admitted in the said School in the current academic year in order to find out as to how she is able to cope up with and studies in the said School at Ooty and what kind of progress she is able to make on shifting her from the present atmosphere to a boarding School."*

Decision and Observation

The Hon'ble Court took notice of the fact that the High Court called for a report of the child from her school and appraised her progress which was recorded in the judgment of the High Court. The Hon'ble Court also referred to the report of the District Probation Officer, East Singhbhum, Jamshedpur, which was called for by the High Court before passing the order which was impugned before the Hon'ble Court. Looking into the aforementioned factors, which were considered by the High Court, the Hon'ble Supreme Court was of the view that the impugned order passed by the High Court did not need any interference owing to the fact that the Appeal has not been finally disposed of and the High Court is monitoring the progress of the child and calls for the compliance report and progress report for the purpose and had passed the order after taking into considerations several factors as noted by the Hon'ble Supreme Court.

Apart from this, the Hon'ble Supreme Court also referred to the case of ***Vivek Singh v. Romani Singh***[1], wherein "parental alienation syndrome" was discussed in detail which affects the child witnessing the separation of his parents. The Hon'ble Court further referred to the case of ***Gaurav Nagpal v. Sumedha Nagpal***[2], wherein the Court had the occasion to consider the parameters while determining the issues of child custody and visitation rights, and reiterated the principle that while taking a decision regarding custody or other issues pertaining to a child, welfare of the child is of paramount consideration. The Hon'ble Court, referring to the case of ***Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka***[3], held that Every child has right to proper health and education and it is the primary duty of the parents to ensure that child gets proper education. ***The Courts in exercise of parens patriae***

[1] (2017) 3 SCC 231.
[2] (2009) 1 SCC 42.
[3] (1982) 2 SCC 544

jurisdiction have to decide such delicate question. It has to consider the welfare of the child as of paramount importance taking into consideration other aspects of the matter including the rights of parents also.

The Hon'ble Court referred to the case of ***Nutan Gautam v. Prakash Gautam***[4], and also to the observation made by the Jharkhand High Court in the present case that in embittered relationship between the parents and the attempt of one spouse poisoning the mind of other spouse has disastrous effect and that In the facts and circumstances of the present case the best way to serve the welfare and interest of the child will be to remove the child from the unhealthy atmosphere at home which has caused a very great strain on her nerves and has certainly affected her healthy growth, to a place where she can live a normal healthy life and will have a good opportunity of proper education and healthy growth.

The Hon'ble Court thus finally held as follows :-

> *"**22.** We, thus, are of the view that what is in the interest of the child depends on the facts and circumstances of each case and has to be decided on its own merits without adhering to any fixed formula or rule. The appeals being pending before the High Court, we are of the view that while deciding the appeals finally, High Court should also take into consideration subsequent materials which may be brought before it by the parties including the progress report of the child from Good Shepherd International School, Ooty. Learned counsel has also raised certain medical issues pertaining to the child. It is also open for the High Court to take decision on the said issues and if necessary to obtain medical reports as may be required. In so far as interacting with the child, the High Court during hearing of the appeals had already interacted with the child on many occasions and it is for the High Court to take a decision with regard to interacting with the child.*
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> * * * * * *
>
> ***24.** In view of the foregoing discussion, we do not find any good ground to interfere with the impugned judgment of the High Court. The High Court is requested to decide First Appeal No.59 of 2016 and First Appeal No.68 of 2016 after hearing the parties keeping in view the observations as made above. The appeals are disposed of accordingly."*

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[4] (2019) 4 SCC 734

2. *Trigun Chand Thakur v. State of Bihar and Others, (2019 SCC OnLine SC 879)*

Decided on :- 09.07.2019

Bench :- 1. Hon'ble Ms. Justice R.Banumathi
2. Hon'ble Mr. Justice A.S. Bopanna

("A teacher of a privately managed school, even though financially aided by the State Government or the Board, cannot maintain a writ petition against an order of termination from service passed by the Management Committee.")

Facts

The appellant was appointed as a Sanskrit teacher on 01.01.1985. On certain allegations, against the appellant by the School Department, a show cause notice was issued to him on 06.09.1994. On 01.10.1994, the appellant received the communication informing that he was suspended on account of his absence on the eve of Independence Day and Teachers' Day.

Being aggrieved, the appellant has filed the writ petition before the High Court. During the pendency of the writ petition, the service of the appellant was terminated on 23.12.1994. Learned Single Judge of the High Court vide Order dated 31.08.1995 disposed of the writ petition with the consent of both the parties observing that the appellant may agitate his rights before the Chairman of the Bihar Sanskrit Shiksha Board and the Chairman of the Board shall consider the representation of the appellant and dispose of the same in accordance with law. On 03.08.1996, the Chairman, Bihar Sanskrit Shiksha Board, considered the matter on the basis of representation of the appellant against the order of dismissal passed by the Managing Committee and found that the punishment of termination of the appellant from service was disproportionate and directed reinstatement of the appellant. Being aggrieved, Managing Committee filed an appeal before the Special Director, Secondary, Primary and Adult Education-Respondent no. 2, under Section 24 of the Bihar Sanskrit Shiksha Board Act, 1981. The Special Director (Secondary Education) by Order dated 13.12.1997 remanded the matter back to the Chairman, Bihar Sanskrit Shiksha Board, with a direction to reconsider the matter in the light of the grounds taken in the appeal.

Being aggrieved by remand of the matter to the Chairman, Bihar Sanskrit Shiksha Board, the appellant filed writ petition before the High Court seeking to quash Order dated 13.12.1997. Learned Single Judge placed reliance upon the Judgment of the Patna High Court in *Chandra Nath Thakur v. The Bihar Sanskrit Shiksha Board, 1999 (1) PLJR 529* and by Order dated 29.04.1999 dismissed the writ petition and held that in matters relating to the termination of the teachers by the Managing Committee of the private school, the writ petition is not maintainable and accordingly dismissed the writ petition.

Decision and Observation

The order of the Single Judge was also challenged before the Division Bench which upheld the order of the Single Judge. The order of the Division Bench of the Patna High Court was under challenge in the present case. The Hon'ble Supreme Court referred to the case of *Chandra Nath Thakur* v. *The Bihar Sanskrit Shiksha Board*, 1999 (1) PLJR 529, referred to by the Division Bench of the Patna High Court in the LPA and held that ***a teacher of a privately managed school, even though financially aided by the State Government or the Board, cannot maintain a writ petition against an order of termination from service passed by the Management Committee.*** The Hon'ble Court also agreed with the the Division Bench that it had also pointed out that the consent order passed by the High Court in C.W.J.C. NO. 10698 of 1994 cannot confer jurisdiction on the Court and does not make the Managing Committee "State" within the meaning of Article 12 of the Constitution of India. After making the aforementioned observations, the Hon'ble Court agreed with the observations made by the Division Bench of the Patna High Court and held that there is no ground for interference in the order passed in the LPA.

3. *Peerless General Finance and Investment Company Ltd. v. Commissioner of Income Tax*

Decided on :- 09.07.2019

Bench :- 1. Hon'ble Mr. Justice R.F. Nariman
2. Hon'ble Mr. Justice Sanjiv Khanna

(Whether receipts of subscriptions in the hands of the assessee-Company for the previous years relevant to the assessment years 1985-86 and 1986-97 should be treated as income and not capital receipts inasmuch as the assessee has in its books of accounts shown this sum as income.)

Facts

In the present case, the assessee was asked to bring to tax such amounts as income for the two years in question, inasmuch as, according to the Assessing Officer, it had treated the whole amount as income, 3% of which is not disputed to be income before us for the years in question. The Assessing Officer treated these amounts as income inasmuch as under the accounting system followed by the assessee, these amounts were credited to the profit and loss account for the years in question as income. The Commissioner of Income Tax (Appeals) dismissed the appeal from the original assessment orders and confirmed the same. The Income Tax Appellate Tribunal, on the other hand, allowed the appeals by relying upon the judgment of this Court in *Peerless General Finance and Investment Co. Limited v. Reserve Bank of India, (1992) 2 SCC 343* in which, according to the Appellate Tribunal, this Court finally decided the question in the assessee's own case stating that such amounts cannot be treated to be income but are in the nature of capital receipts. These were not only because of the interpretation of an RBI Circular of 1987, but also because, on general principles, such amounts must be treated to be capital receipts or otherwise they would violate the provisions of the Companies Act. It further went through the various clauses contained in the scheme at hand, and found that in point of fact no subscription certificate had, in fact, been forfeited, as a result of which it was clear that there would be no income in the hands of the assessee for these two years. It also dealt with certificates that were surrendered prior to the stated time, and stated that in such cases as well whatever would remain as surplus in the hands of the assessee would be treated as income. It went on to state that there would be no estoppel in law against the assessee making a claim that these amounts were in the nature of capital receipts and not income, and also relied upon certain judgments of this Court to buttress the proposition that this Court had also held that what is the true position in law cannot be deflected by what the assessee may or may not do in its treatment of the matter at hand in its accounts. So doing, the appeal against the Commissioner of Income Tax was allowed by the Income Tax Appellate Tribunal. In the first round, the High Court, by its judgment dated 09.09.1999, stated that since no question of law arose, the reference applications before it were dismissed. The Hon'ble Supreme Court remanded the case to the High Court after

formulating questions. When remanded to the High Court, by the impugned judgment dated 06.10.2005, the High Court of Calcutta allowed the appeal against the Appellate Tribunal holding that a perusal of the subscription scheme of the appellant company would show that since forfeiture of the amounts deposited is possible, this amount should be treated as income and not as a capital receipt. Further, it relied heavily upon the fact that the assessee had itself treated such amounts as income and credited them to its profit and loss account for the years in question and would, therefore, be estopped by the same. On going through the judgment of the Supreme Court, namely, *Peerless General Finance and Investment Co. Limited* (supra) it went on to state that since the said judgment dealt with an RBI Circular of 1987, which itself was only prospective, any law declared as to the effect of Clause 12 of that Circular would be prospective in nature and would, therefore, not apply to the assessment years in question. The order has been challenged before the Supreme Court.

Observations and Decision

The Hon'ble Court opined that What is clear, even on general principle, on the facts of this case, is that subscriptions were received in the years in question from the public at large under a collective investment scheme, and these subscriptions were never at any point of time forfeited and that it is clear that deposits by way of amounts pursuant to these investment schemes made by subscribers which have never been forfeited can only be stated to be capital receipts. The Hon'ble Court further held as follows:-

> ***"13.*** *While it is true that there was no direct focus of the Court on whether subscriptions so received are capital or revenue in nature, we may still advert to the fact that this Court has also, on general principles, held that such subscriptions would be capital receipts, and if they were treated to be income, this would violate the Companies Act. It is, therefore, incorrect to state, as has been stated by the High Court, that the decision in Peerless General Finance and Investment Co. Limited (supra) must be read as not having laid down any absolute proposition of law that all receipts of subscription at the hands of the assessee for these years must be treated as capital receipts. We reiterate that though the Court's focus was not directly on this, yet, a pronouncement by this Court, even if it cannot be strictly called the ratio decidendi of the judgment, would certainly be binding on the High Court. Even otherwise, as we have stated, it is clear that on general principles also such subscription cannot possibly be treated as income. Mr. Ganesh is right in stating that in cases of this nature it would not be possible to go only by the treatment of such subscriptions in the hands of accounts of the assessee itself."*

The Hon'ble Court finally, after referring to several judgments[5] of the Supreme Court, held :-

> ***19.*** *The "theoretical" aspect of the present transaction is the fact that the assessee treated subscription receipts as income. The reality of the situation, however, is that the business aspect of the matter, when viewed as a whole, leads inevitably to the conclusion that the receipts in question were capital receipts and not income.*
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> ***20.*** *In the circumstances, we set aside the judgment of the High Court and restore that of the Income Tax Appellate Tribunal. The appeal is allowed. There shall be no order as to costs."*

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[5] *Ram Janki Devi* v. *Juggilal Kamlapat*, (1971) 1 SCC 477; *Poona Electric Supply Co. Ltd., Bombay* v. *Commissioner of Income-tax, Bombay* AIR 1966 SC 30; *Reserve Bank of India* v. *Peerless General Finance and Investment Co. Ltd.* (1987) 1 SCC 424; *CIT* v. *India Discount Co. Ltd.* [1970] 75 ITR 191; *Godhra Electricity Co. Ltd.* v. *CIT* [1997] 225 ITR 746 (SC); *Chowringhee Sales Bureau P. Ltd.* v. *CIT* [1973] 87 ITR 542 (SC); *Sinclair Murray and Co. P. Ltd.* v. *CIT* [1974] 97 ITR 615; *Parimisetti Seetharamamma* v. *CIT* [1965] 57 ITR 532 (SC); *CIT* v. *Lakshmi Vilas Bank Ltd.* [1996] 220 ITR 305; *Commissioner of Income-Tax, Madras* v. *V.MR. P. Firm, Muar* (1965) 56 ITR 67; *Ram Janki Devi* v. *Juggilal Kamlapat*, (1971) 1 SCC 477; *oona Electric Supply Co. Ltd., Bombay* v. *Commissioner of Income-tax, Bombay City I, Bombay*, AIR 1966 SC 30.

4. *Raman Singh v. District Inspector of Schools, Jalaun at Orai and Others (2019 SCC OnLine SC 849)*

Decided on :- 08.07.2019

Bench :- 1. Hon'ble Mr. Justice Dhananjaya Y. Chandrachud
2. Hon'ble Ms. Justice Indira Banerjee

(The appellant had no right or entitlement to claim that his appointment on an ad-hoc basis in a leave vacancy should be converted into a substantive appointment, the appointment whereof can be made only in accordance with law.)

Facts

This appeal arises from a judgment dated 30 October 2017 of the Division Bench of the High Court of Judicature at Allahabad dismissing the Special Appeal filed by the appellant and affirming the judgment of the Single Judge dated 9 October 2013.

The appellant was appointed by the Committee of Management of the third respondent as an ad-hoc Lecturer in English on 11 August 1993 against a short-term vacancy which arose upon the grant of three months' leave to the then incumbent in the post. On 1 October 1993, the regularly appointed lecturer who was on leave died. As a result, the appellant continued in service. On 30 June 1994, the management sought to absorb the appellant in the substantive vacancy which arose on the death of the regularly appointed candidate.

The management sought the approval of the District Inspector of Schools (DIOS) on 2 July 1994 and again on 18 March 1996, but no intimation was received. Aggrieved, in April 1996, the appellant filed a writ petition before the High Court seeking a mandamus to treat his ad hoc appointment as an appointment on a permanent basis and for a direction to the State to release his salary, since the institution is an aided institution.

The High Court issued an interim order on 16 April 1996 to the effect that until the next date of listing or until a regularly appointed candidate is available, whichever is earlier, the appellant shall be allowed to continue against the payment of due salary.

On 30 June 1997, a candidate by the name of Nem Singh was appointed by the U.P. Secondary Education Service Selection Board. According to the State, the appellant and the management colluded to prevent the selected candidate from joining the post, though this was a matter of dispute. The admitted position was that the selected candidate did not join the post. In consequence, the appellant continued to be employed in the post. The salary of the appellant was stopped.

The writ petition filed by the appellant was dismissed by a learned Single Judge of the High Court on 9 October 2013. The appellant filed a Special Appeal against the dismissal of the petition.

By the impugned order dated 30 October 2017, the Special Appeal was dismissed by the Division Bench. The High Court held that the appellant was appointed in a leave vacancy, in terms of the Second Removal of Difficulties Order 1981. The High Court observed that in the absence of approval to his appointment by the competent authority, any further direction for his continuance or for payment of salary is not permissible in law. The Division Bench further directed that the salary which was paid over till the date of the judgment shall not be recovered, but the appellant will not be entitled to any further emoluments.

Assailing the decision of the Division Bench in Special Appeal, the appellant moved the Supreme Court under Article 136 of the Constitution of India.

Decision and Observations

The Hon'ble Court observed that the appellant was appointed purely on an ad hoc basis in a leave vacancy which arose in the institution. On the death of the regularly appointed candidate, the leave vacancy ceased to exist. Once a substantive vacancy arose, it was required to be filled up in accordance with law. The appellant had no right or entitlement to claim that his appointment on an ad-hoc basis in a leave vacancy should be converted into a substantive appointment.

The Hon'ble Court further observed that the purported appointment of the appellant to a substantive post was without the approval of the DIOS. The DIOS had rejected the application of the management to absorb the appellant to a substantive post over 24 years ago on the ground that his appointment would be in violation of the applicable law. According to the Hon'ble Court, no procedure as required by law was followed in making the appointment. The appellant however instituted proceedings and has continued in service by virtue of the interim orders which were passed in the writ proceedings by the learned Single Judge and thereafter, during the pendency of the Special Appeal, by the Division Bench. Eventually, the management proposed to post him as an in-charge Principal. Nem Singh, who was appointed in accordance with law in 1997, was allegedly prevented from joining his post. The method adopted by the appellant and the management is unsustainable in law.

16. Hence, the Hon'ble Court was of the view that the ends of justice would be met if a direction is issued to the effect that necessary steps be taken to fill up the post on a regular basis as expeditiously as possible within a period of four months from the receipt of a certified copy of this order. In order to ensure that there should be no dislocation of work in the educational institution, the appellant, having regard to facts and circumstances of the present case, was allowed to continue purely on an ad-hoc basis until a regularly appointed candidate is selected. The Hon'ble Court also directed, in exercise of the jurisdiction under Article 142 of the Constitution of India, that his salary should be paid over for the period for which he works until a regular candidate is appointed.

5. *Vishnu Kumar Tiwari v. State of Uttar Pradesh through Secretary Home, Civil Secretariat Lucknow and Another, (2019 SCC OnLine SC 877)*

Decided on :- 09.07.2019

Bench :- 1. Hon'ble Mr. Justice Sanjay Kishan Kaul
2. Hon'ble Mr. Justice K.M. Joseph

(Procedure to be followed in cases of Protest Petitions in a Criminal Case – "Magistrate could not be compelled to take cognizance by treating the protest petition as a complaint")

Facts

The second respondent, in this appeal generated by special leave, got registered a First Information Report which invoked Sections 201, 304B and 498A of the Indian Penal Code, 1860 (hereinafter referred to as 'the IPC' for short) and Sections 3 and 4 of the Dowry Prohibition Act, 1961. The Investigating Officer, however, on the basis of the investigation, after taking the statements, filed a final report under Section 178 of The Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Cr.PC.' for short).

The second respondent thereupon filed a protest petition. The Chief Judicial Magistrate passed an order concluding that the daughter of the second respondent/complainant, wife of the appellant, died due to her illness. It was further found that the accused persons had not caused any harassment or torture to her nor has committed dowry death. There was no prima facie case made out against the accused persons under Section 498A, 304B and 201 of the IPC and Sections 3 and 4 of the Dowry Prohibition Act, 1961. It was found that there is no sufficient ground made out for action and the protest petition was dismissed and final report accepted. The second respondent thereupon lodged revision petition before the Additional Sessions Judge. The Additional Sessions Judge did not find merit and dismissed the criminal application. This led to a writ petition before the High Court at Allahabad. This petition was filed invoking Article 226 of the Constitution of India. By the impugned judgment, the High Court set aside the orders passed by the Chief Judicial Magistrate and the Additional Sessions Judge. The Chief Judicial Magistrate was directed to consider the protest petition afresh in the light of the observations made therein. Feeling aggrieved by the said order, the present special leave petition was filed.

Cases referred to by the Hon'ble Court

1. *Abhinandan Jha and others v. Dinesh Mishra*[6] - When a report is submitted that there is no material that any case is made out for sending the accused for trial, the Magistrate cannot compel the Police to change their opinion. However, it was held that the Magistrate is free to not accept such report and he may take suitable action.

[6] AIR 1968 SC 117.

The Magistrate may direct further investigation under Section 156 (3) of the Code. It was further held that it would be in a case where the Magistrate feels that the investigation is unsatisfactory or incomplete. It may be also in a case where there is scope for further investigation.

2. ***H.S. Bains, Director, Small Saving-cum-Deputy Secretary Finance, Punjab, Chandigarh v. State (Union Territory of Chandigarh)***[7] – A Magistrate who on receipt of a complaint, orders an investigation under Section 156(3) and receives a police report under Section 173(1), may, thereafter, do one of three things: (1) he may decide that there is no sufficient ground for proceeding further and drop action; (2) he may take cognizance of the offence under Section 190 (1)(b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the police in their report; (3) he may take cognizance of the offence under Section 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. If he adopts the third alternative, he may hold or direct an inquiry under Section 202 if he thinks fit. Thereafter he may dismiss the complaint or issue process, as the case may be.[8]

   On the basis of this case, the Hon'ble Court, in the present case, held that ***when a Magistrate proceeds to take action by way of cognizance by disagreeing with the conclusions arrived at in the police report, he would be taking cognizance on the basis of the police report and not on the complaint. And, therefore, the question of examining the complainant or his witnesses under Section 200 of the Code would not arise.***

3. ***Mahesh Chand v. B. Janardhan Reddy***[9] - As held in *Pramatha Nath Talukdar* case [AIR 1962 SC 876], second complaint could be dismissed after a decision has been given against the complainant in previous matter upon a full consideration of his case. Further, ***second complaint on the same facts could be entertained only in exceptional circumstances,*** namely, where the previous order was passed on an incomplete record or on a misunderstanding of the nature of complaint or it was manifestly absurd, unjust or where new facts which could not, with reasonable diligence, have been brought on record in the previous proceedings, have been adduced.

4. ***Kishore Kumar Gyanchandani v. G.D. Mehrotra***[10] - Where the Magistrate accepts the final form submitted by the police, the right of the complainant to file a regular

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[7] (1980) 4 SCC 631.

[8] *See* also, *Gangadhar Janardan Mhatre v. State of Maharashtra*, (2003) 1 SCC 734, wherein it was also held that there is no express provision for "protest petition" in the CrPC. However, when in a case where the Magistrate to whom a report is forwarded under sub-section (2)(i) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. But as indicated in *Bhagwant Singh* case, (1985) 2 SCC 537, the right is conferred on the informant and none else.

[9] (2003) 1 SCC 734.

[10] (2011) 15 SCC 513.

complaint is not taken away and in fact on such a complaint being filed the Magistrate follows the procedure under Section 201 of the Code and takes cognizance if the materials produced by the complainant make out an offence. This question has been raised and answered by this Court in the case of *Gopal Vijay Verma v. Bhuneshwar Prasad Sinha* [(1982) 3 SCC 510] whereunder the view of the Patna High Court to the contrary has been reversed. The Court in no uncertain terms in the aforesaid case has indicated that the acceptance of final form does not debar the Magistrate from taking cognizance on the basis of the materials produced in a complaint proceeding.[11]

Decision and Observations

Referring to the aforementioned cases, the Hon'ble Court held as follows :-

> *"In the facts of this case, having regard to the nature of the allegations contained in the protest petition and the annexures which essentially consisted of affidavits,* ***if the Magistrate was convinced on the basis of the consideration of the final report, the statements under Section 161 of the Code that no prima facie case is made out, certainly the Magistrate could not be compelled to take cognizance by treating the protest petition as a complaint. The fact that he may have jurisdiction in a case to treat the protest petition as a complaint, is a different matter.*** *Undoubtedly, if he treats the protest petition as a complaint, he would have to follow the procedure prescribed under Section 200 and 202 of the Code if the latter Section also commends itself to the Magistrate. In other words, necessarily, the complainant and his witnesses would have to be examined. No doubt, depending upon the material which is made available to a Magistrate by the complainant in the protest petition, it may be capable of being relied on in a particular case having regard to its inherent nature and impact on the conclusions in the final report. That is, if the material is such that it persuades the court to disagree with the conclusions arrived at by the Investigating Officer, cognizance could be taken under Section 190(1)(b) of the Code for which there is no necessity to examine the witnesses under Section 200 of the Code. But as the Magistrate could not be compelled to treat the protest petition as a complaint, the remedy of the complainant would be to file a fresh complaint and invite the Magistrate to follow the procedure under Section 200 of the Code or Section 200 read with Section 202 of the Code. Therefore, we are of the view that in the facts of this case, we cannot support the decision of the High Court."* (Emphasis supplied)

The Hon'ble Court also dealt with another facet in this case which was that the Chief Judicial Magistrate accepted the final report and decided not to proceed against any of the accused including the appellant. This stood confirmed by the Additional Sessions Judge. Before the High court, neither the appellant nor any of his relatives were made parties. Under this situation, the Hon'ble Court was faced with two questions:-

[11] *Rakesh Kumar v. State of Uttar Pradesh,* 2014 (13) SCC 133.

1. *When the order was passed by the High Court accepting the report and directing reconsideration, was it necessary for the second respondent/complainant to implead the appellant and other relatives?*
2. *Can we set aside the judgment of the High Court qua only the appellant, or can we in the facts in this case, also interfere with the order of the High Court against all the accused?*

The Hon'ble Court, on this aspect, held as follows :-

> *"**49.** It may be true that till process is issued, the accused may not have the right to be heard (See the judgment of this court in Iris Computers Limited v. Askari Infotech Private Limited[12]).*
>
> ***50.** The High Court, in fact, at paragraph 11 of the impugned order, which we have extracted at paragraph 6 of our judgment, contemplated consideration of the protest petition so that cognizance may be taken under Section 190(1)(b) of the Code. This premise being without any basis even qua the other accused who are the relatives of the appellant, we would think that the impugned order must be set aside. Having regard to the nature of the allegations and in exercise of our powers also under Article 142 of the Constitution of India, we must set aside the Order of the High Court.*
>
> ***51.** We would think that in the facts of this case, the High Court erred in intervening and that there was no justification in the facts for the High Court in setting aside the orders.*
>
> ***52.** Resultantly, the appeal will stand allowed, the impugned order of the High Court will stand set aside. We, however, make it clear that this would be without prejudice to the rights of the second respondent to file a complaint as already noticed in the order of the Additional Sessions Judge."*

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[12] (2015) 14 SCC 399.

6. *All Manipur Pensioners Association by its Secretary v. State of Manipur (Civil Appeal No. 10857 of 2016)*

Decided on – 11.07.2019
Bench – (1) Hon'ble Mr. Justice M.R. Shah
(2) Hon'ble Mr. Justice A.S. Bopanna

(Whenever a cut-off date is fixed to categorise one set of pensioners for favourable consideration over others, the twin test for valid classification or valid discrimination therefore must necessarily be satisfied.)

Facts

State of Manipur adopted the Central Civil Services (Pension) Rules, 1972, as amended from time to time. As per Rule 49 of the Central Civil Services Rules, 1972, in case a government employee retired in accordance with the provisions of the rules after completing qualifying service of not less than 30 years, the amount of pension shall be calculated at 50% of the average emoluments subject to a maximum of Rs. 4500/- per month.

The Government of Manipur issued an office memorandum dated 21.4.1999 revising the quantum of pension. However, provided that those Manipur Government employees who retired on or after 1.1.1996 shall be entitled to the revised pension at a higher percentage and those who retired before 1.1.1996 shall be entitled at a lower percentage. The appellant herein - All Manipur Pensioners Association approached the learned Single Judge of the High Court of Manipur by way of Writ Petition by which the learned Single Judge held that the method of calculating the revised pension in paragraph 4.1 of the office memorandum dated 24.4.1999 in respect of pre-1996 pensioners is different from the method of calculating the revised pension for the Government employees who retired/died in harness on or after 1.1.1996 which is arbitrary and violative of Article 14 of the Constitution of India. The Division Bench of the High Court of Manipur allowed the appeal preferred by the respondent - State and quashed and set aside the judgment and order passed by the learned Single Judge. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the Division Bench of the High Court of Manipur the original writ petitioners preferred the present appeal.

Issues

Whether the decision in the case of *D.S. Nakara* v. *Union of India*[13] shall be applicable or not, and in the facts and circumstances of the case and solely on the ground of financial constraint, the State Government would be justified in creating two classes of pensioners,

[13] (1983) 1 SCC 305

viz., pre-1996 retirees and post-1996 retirees for the purpose of payment of revised pension and whether such a classification is arbitrary, unreasonable and violative of Article 14 of the Constitution of India or not?

Decision and Observations

The Apex Court noted that the State Government has justified the cut-off date for payment of revised pension solely on the ground of financial constraint. In the case of *D.S. Nakara* such a classification is held to be arbitrary, unreasonable, irrational and violative of Article 14 of the Constitution of India.

The Apex Court opined that there is no valid justification to create two classes, viz., one who retired pre-1996 and another who retired post-1996, for the purpose of grant of revised pension, In our view, such a classification has no nexus with the object and purpose of grant of benefit of revised pension. All the pensioners form a one class who are entitled to pension as per the pension rules. Article 14 of the Constitution of India ensures to all equality before law and equal protection of laws. At this juncture it is also necessary to examine the concept of valid classification. A valid classification is truly a valid discrimination. It is true that Article 16 of the Constitution of India permits a valid classification. However, a very classification must be based on a just objective. The result to be achieved by the just objective presupposes the choice of some for differential consideration/treatment over others.

A classification to be valid must necessarily satisfy two tests. Firstly, the distinguishing rationale has to be based on a just objective and secondly, the choice of differentiating one set of persons from another, must have a reasonable nexus to the objective sought to be achieved. The test for a valid classification may be summarised as a distinction based on a classification founded on an intelligible differentia, which has a rational relationship with the object sought to be achieved. Therefore, ***whenever a cut-off date (as in the present controversy) is fixed to categorise one set of pensioners for favourable consideration over others, the twin test for valid classification or valid discrimination therefore must necessarily be satisfied.*** In the present case, the classification in question has no reasonable nexus to the objective sought to be achieved while revising the pension. As observed hereinabove, the object and purpose for revising the pension is due to the increase in the cost of living. All the pensioners form a single class and therefore such a classification for the purpose of grant of revised pension is unreasonable, arbitrary, discriminatory and violative of Article 14 of the Constitution of India. ***The State cannot arbitrarily pick and choose from amongst similarly situated persons, a cut-off date for extension of benefits especially pensionary benefits. There has to be a classification founded on some rational principle when similarly situated class is differentiated for grant of any benefit.***

Further, the Apex Court noted that increase in the cost of living would affect all the pensioners irrespective of whether they have retired pre-1996 or post-1996. As observed hereinabove, all the pensioners belong to one class. Therefore, by such a classification/cut-off

date the equals are treated as unequals and therefore such a classification which has no nexus with the object and purpose of revision of pension is unreasonable, discriminatory and arbitrary and therefore the said classification was rightly set aside by the learned Single Judge of the High Court. At this stage, it is required to be observed that whenever a new benefit is granted and/or new scheme is introduced, it might be possible for the State to provide a cut-off date taking into consideration its financial resources. But the same shall not be applicable with respect to one and single class of persons, the benefit to be given to the one class of persons, who are already otherwise getting the benefits and the question is with respect to revision.

The judgment and order passed by the learned Single Judge was restored and it was held that all the pensioners, irrespective of their date of retirement, viz. pre-1996 retirees shall be entitled to revision in pension at par with those pensioners who retired post-1996.

7. *Pratap Singh @ Pikki v. State of Uttarakhand (Criminal Appeal No. 1890 of 2011)*

Decided on – 12.07.2019

Bench – (1) Hon'ble Mr. Justice A.M. Khanwilkar
(2) Hon'ble Mr. Justice Ajay Rastogi

(In terms of the scheme of Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules 2007, the committee constituted has to first consider if there is a matriculation certificate available, in the first instance)

Facts

The appellant along with three others were tried for an offence under Sections 147, 148, 302/149 and 323/149 of the Indian Penal Code. The appellant and one Vikas Kirola were convicted under Section 304 Part II/34 IPC and sentenced to undergo rigorous imprisonment for 10 years and other two persons Manoj Singh Rautela and Deepak Pathak were acquitted vide judgment dated 12th January, 1998. Both the unsuccessful convicted persons preferred criminal appeal against the judgment dated 12th January, 1998 before the High Court of Uttarakhand. In the case of appellant, the High Court observed that according to his marksheet of Secondary School Certificate Examination 1993, his date of birth is 13th June, 1977 while the incident was of 18th June, 1995 and he was not a juvenile on the date of the incident. At the same time, Vikas Kirola, whose date of birth was 26th December, 1977 on the basis of his secondary school certificate was given the benefit of Juvenile in view of Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 and their conviction under Section 304 Part II/34 IPC came to be confirmed vide impugned judgment of the High Court dated 9th November, 2010 which has been challenged by the appellant in the instant appeal. The strength of the appellant's case is that birth certificate issued to him by the competent authority dated 14th September, 2010 recorded his date of birth as 28thJune, 1977 which shows that he was less than 18 years of age on the date of incident.

Decision and Observations

The Apex Court noted that it has been settled that the person below 18 years at the time of incident can claim benefit of Juvenile Justice Act at any time and taking note of the scheme of the Act and Rule 12 of the Juvenile Justice(Care and Protection of Children) Rules, 2007 in particular, it lays down the procedure in determination of age.

In terms of the scheme of Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules 2007, the committee constituted has been entrusted to hold inquiry by seeking evidence in support of the respective claim has to first consider if there is a matriculation certificate available, in the first instance. In absence thereof, the date of birth certificate from the school (other than the play school) first attended; and in absence, the birth

certificate given by the Corporation or a Municipal Corporation or a Panchayat in the descending form has to be considered as the basis for the purpose of determination of age of the juvenile.

In the instant case, the secondary school certificate was issued to the appellant in the year 1993 on 5th June, 1993 in which his recorded date of birth is 13th June, 1977. In the given circumstances, when the appellant failed to place any supporting material on record while obtaining the date of birth certificate at the later stage on 14th September, 2010, the reliable evidence on record can be discerned from his own certificate issued by the statutory board(CBSE) from where he passed out Secondary and Senior School Examination in the year 1993 and 1995 where his recorded date of birth is 13th June, 1977. In the given circumstances, the Apex Court was of the view that the appellant was not a juvenile and has crossed the age of 18 years by few days on the date of incident, i.e. 18th June, 1995 and the protection of the Juvenile Justice Act was not available to him.

On the issue of sentencing, the Apex Court considered the overall facts of the case in totality with the nature of crime, the tender age of the appellant at the time of offence, subsequent conduct and other ancillary circumstances, including that no untoward incident has been reported against him and the mitigating circumstances and found it appropriate that the sentence of rigorous imprisonment be altered to the period already undergone for offence under Section 304 Part II/34 IPC, to meet the ends of justice. On this point the Apex Court referred to ***Gopal Singh v. State of Uttarakhand***[14] which eloquently laid down the principles of proportionality of sentencing policy. The relevant paras are stated as under:—

> **"18.** *Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect — propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors. Needless to emphasise, these are certain illustrative aspects put forth in a condensed manner. We may hasten to add that there can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot*

[14] (2013) 7 SCC 545

be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment.

19. A court, while imposing sentence, has to keep in view the various complex matters in mind. To structure a methodology relating to sentencing is difficult to conceive of. The legislature in its wisdom has conferred discretion on the Judge who is guided by certain rational parameters, regard been had to the factual scenario of the case. In certain spheres the legislature has not conferred that discretion and in such circumstances, the discretion is conditional. In respect of certain offences, sentence can be reduced by giving adequate special reasons. The special reasons have to rest on real special circumstances. Hence, the duty of the court in such situations becomes a complex one. The same has to be performed with due reverence for the rule of law and the collective conscience on one hand and the doctrine of proportionality, principle of reformation and other concomitant factors on the other. The task may be onerous but the same has to be done with total empirical rationality sans any kind of personal philosophy or individual experience or any a priori notion."

8. *Pankaj Prakash v. United India Insurance Co. Ltd. (Civil Appeal Nos. 5340-5341 of 2019)*

Decided on – 10.07.2019

Bench – (1) Hon'ble Mr. Justice Dhananjaya Y. Chandrachud
(2) Hon'ble Ms. Justice Indira Banerjee

(Every entry in ACR of a public servant must be communicated to him/her within a reasonable period- reiterated.)

Facts

The dispute in the present case arises from the appellant's claim for promotion from Scale III to Scale IV in the services of the respondents. The year of promotion is 2014-2015. The grievance of the appellant is that the entries in his Annual Performance Appraisal Report[1] for 2010-11 and 2011-12 were not disclosed, as a result of which he was unable to submit a representation at the material time. The appellant had the following gradings in the APARs:

(i) 2010-2011 "C"

(ii) 2011-2012 "B"

(iii) 2012-2013 "A"

(iv) 2013-2014 "A"

Relying on the two-judge Bench decision of this Court in *Dev Dutt v. Union of India*[15] and the subsequent decision of the three-judge Bench in *Sukhdev Singh v. Union of India*[16], the appellant contended that the failure to communicate the entries for 2010-11 and 2011-12 is contrary to the law laid down by the Apex Court. Moreover, on 14 May 2009 and 13 April 2010, the Union of India in the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) had issued directions for implementation of the decision in *Dev Dutt* case. Thereafter, on 19 October 2012, the Union of India in the Ministry of Finance (Department of Financial Services) had drawn the attention of public sector insurance companies to the earlier Office Memorandum dated 14 May 2009 seeking immediate compliance. The High Court of Judicature at Allahabad, which was moved by the appellant in proceedings under Article 226, concluded that absent an adverse entry or an entry below the benchmark, the failure to communicate did not result in an actionable grievance. The High Court dismissed the writ petition by its judgment dated 6 October 2016 as well as the review petition by its judgment dated 17 January 2017. The present proceedings were instituted assailing the judgments of the High Court.

Decision and Observations

The Apex Court referred to Sukhdev Singh wherein it was held:

[15] (2008) 8 SCC 725
[16] (2013) 9 SCC 566

> *"8. In our opinion, the view taken in Dev Dutt that* ***every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives.*** *First, the communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice. We, accordingly, hold that every entry in ACR – poor, fair, average, good or very good – must be communicated to him/her within a reasonable period."*

It was noted by the Apex Court that the Union of India had also issued Office Memoranda on 14 May 2009 and 13 April 2010 seeking compliance by all Ministries and Departments. Moreover, on 19 October 2012, a specific communication was also addressed to public sector insurance companies. Even independent of these communications, the respondent was duty bound to comply with the law laid down by this Court. They cannot urge that the decision having been implemented from 2013-14, it has no application for the earlier years. The judgment of this Court is declaratory in nature.

The Apex Court noted that for one of the years under consideration (2011-12) for the promotional exercise for 2014-15, the appellant was graded a "B", while for the subsequent two years, he was graded an "A". Consequently, the fact that the appellant was given a lower grading for 2011-12 would materially affect whether or not he should be promoted from Scale III to Scale IV for the year in question. The non-communication of the entries is, therefore, a matter in respect of which a legitimate grievance can be made by the appellant, particularly having regard to the position in law laid down in *Dev Dutt* and *Sukhdev Singh*.

9. *Union of India v. Sitaram Mishra (Civil Appeal No. 6183 of 2010)*

Decided on – 11.07.2019

Bench – (1) Hon'ble Mr. Justice D. Y. Chandrachud
(2) Hon'ble Ms. Justice Indira Banerjee

(A disciplinary enquiry is governed by a different standard of proof than that which applies to a criminal case-The fact that the first respondent was acquitted in the course of the criminal trial cannot operate ipso facto as a ground for vitiating the finding of misconduct which has been arrived at during the course of the disciplinary proceedings)

Facts

The first respondent was enlisted as a constable in the CRPF on 20 September 1971. He was posted in the 41st Batallion in September 1989. In February 1998, he was functioning as Head Constable and was deployed at Ractiacherra, Police Station Jirania, West Tripura. A carbine was issued to him. It is alleged that, on 18 February 1998 at about 0945 hours, while he was cleaning the barrel of his loaded 9 MM carbine in the barracks, he did not remove the magazine and proceeded to clean the carbine carelessly. As a result, eight rounds were fired. One of the bullets hit a co-constable who was present in the barracks. He died as a result of the injuries which were sustained. A First Information Report was lodged. The Commandant initiated a disciplinary proceeding against the first respondent.

The first respondent was held to be guilty of misconduct by the disciplinary authority, as a result of which the penalty of dismissal from service was imposed under Section 11(1) of the CRPF Act 1949 read with Rule 27(a) of the CRPF Rules 1955. The appeal as well as the revision petition filed by the first respondent were dismissed.

The first respondent was also tried of an offence under Section 304 of the Indian Penal Code 1860. He was acquitted by the Judicial Magistrate, First Class, Agartala.

The writ petition filed by the first respondent under Article 226 of the Constitution to challenge his dismissal from service was dismissed by a Single Judge. However, in a writ appeal, the Division Bench interfered with the judgment of Single Judge on the ground that the charge of misconduct was not established.[17] Since the first respondent had, in the meantime, retired from service, the Division Bench directed that he be treated in service until he attained the age of superannuation and be paid full back wages after adjusting the subsistence allowance paid during the period of suspension.

[17] The High Court, by its impugned judgment in the writ appeal, held that:
(i) The charge of misconduct was belied by the depositions of PW 5 and PW 6 during the course of the disciplinary enquiry to the effect that the carbine was disassembled when it was being cleaned;
(ii) There was no evidence in support of the finding of misconduct;
(iii) The departmental proceedings as well as the criminal case were "same and identical"; and
(iv) The departmental proceedings were not sustainable after the acquittal of the first respondent from the criminal case.

Decision and Observations

The Apex Court noted that the High Court was manifestly in error in reappreciating the evidence which was adduced during the disciplinary enquiry. The issue, in the exercise of judicial review against a finding of misconduct in a disciplinary enquiry, is whether the finding is sustainable with reference to some evidence on the record. The High Court can, it is well-settled, interfere only in a situation where the finding is based on no evidence. In such a situation, the finding is rendered perverse.

Further, the Apex Court noted that ***a disciplinary enquiry is governed by a different standard of proof than that which applies to a criminal case***. In a criminal trial, the burden lies on the prosecution to establish the charge beyond reasonable doubt. The purpose of a disciplinary enquiry is to enable the employer to determine as to whether an employee has committed a breach of the service rules.

The fact that the first respondent was acquitted in the course of the criminal trial cannot operate ipso facto as a ground for vitiating the finding of misconduct which has been arrived at during the course of the disciplinary proceedings. In the opinion of the Apex Court, the High Court has drawn an erroneous inference from the decision in *Capt M Paul Anthony* v. *Bharat Gold Mines Ltd.*[18] The High Court adverted to the following principle of law laid down in the above judgment:

> *"…While in the departmental proceedings the standard of proof is one of preponderance of the probabilities, in a criminal case, the charge has to be proved by the prosecution beyond reasonable doubts. The little exception may be where the departmental proceedings and the criminal case are based on the same set of facts and the evidence in both the proceedings is common without there being a variance."*

The Apex Court concluded that it is undoubtedly correct that the charge in the criminal trial arose from the death of a co-employee in the course of the incident resulting from the firing of a bullet which took place from the weapon which was assigned to the first respondent as a member of the Force. But the charge of misconduct is on the ground of the negligence of the first respondent in handling his weapon and his failure to comply with the departmental instructions in regard to the manner in which the weapon should be handled. Consequently, the acquittal in the criminal case was not a ground for setting aside the penalty which was imposed in the course of the disciplinary enquiry. Hence, having regard to the parameters that govern the exercise of judicial review in disciplinary matters, the Apex Court was of the view that the judgment of the Division Bench of the High Court is unsustainable.

[18] (1999) 3 SCC 679

10. Pam Developments Private Ltd v. State of West Bengal (Civil Appeal No. 5432 of 2019)

Decided on – 12.07.2019

Bench – (1) Hon'ble Mr. Justice R.F. Nariman

(2) Hon'ble Mr. Justice Vineet Saran

(Effect of Section 36 of the Arbitration Act, vis-a-vis the provisions of Order XXVII Rule 8A of CPC - under the scheme of the Arbitration Act, no distinction is made nor any differential treatment is to be given to the Government, while considering an application for grant of stay of a money decree in proceedings under Section 34 of the Arbitration Act.)

Facts

In response to a notice inviting tender issued by the respondent, the appellant, alongwith others, had applied. The bid of the appellant was accepted on 26th March 2001, for which an agreement was registered on 2nd April, 2001. After several extensions were granted by the respondent for the delay which, according to the appellant, was entirely attributable to the respondent, the work under the agreement was completed by the appellant on 28.02.2002. Then, on 26th May 2003, the appellant raised its claims and dues before the Executive Engineer of Public Works (Roads) Department, Government of West Bengal. The claims of the appellant having not been paid, an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short 'the Arbitration Act') was filed by the appellant. By an order dated 14th August 2003, the Calcutta High Court appointed an Arbitrator to decide the disputes. By his award dated 21st January, 2010, the Arbitrator allowed some claims of the appellant and held the appellant to be entitled to a sum of Rs. 2,87,11,553/- plus interest at the rate of 18% per annum on a sum of Rs. 1,34,06,965/- from the date of the award till the date of the payment. Challenging the award passed by the Arbitrator, the respondent State of West Bengal filed an application under Section 34 of the Arbitration Act before the Calcutta High Court. The appellant filed its affidavit in opposition of the aforesaid, to which reply had also been filed by the respondent. The matter is still pending consideration before the Calcutta High Court.

Section 36 of the Arbitration Act has been amended by Act number 3 of 2016 with retrospective effect from 23.10.2015. In view of the pronouncement of the judgment by the Apex Court in the case of *Board of Control for Cricket in India* v. *Kochi Cricket Private Limited* (2018) 6 SCC 287, wherein it was held that the amended provisions of Section 36 of the Arbitration Act would also apply to the pending proceedings under Section 34 of the Arbitration Act, the appellant filed an execution application before the Calcutta High Court (registered as E. C. No. 297 of 2018). The respondent then sought time to file an application for staying the award.

In the executing proceedings, on 18.09.2018, the Executing Court adjourned the matter after recording that "*in the event the operation of the award is not stayed by the adjourned date, the*

petitioner shall be entitled to pray for attachment of the said amount in execution of the said award". In the meantime, the respondent filed stay application under the amended Section 36(2) of the Arbitration Act in the pending proceedings under Section 34 of the Arbitration Act before the Calcutta High Court. On 27.09.2018, the stay application of the respondent was dismissed in default. Consequently, on 03.10.2018, which was the adjourned date fixed by the Executing Court in E.C. No. 297 of 2018, the Executing Court passed an order attaching the sum of Rs. 2.75 Crores lying to the credit of the respondent-State of West Bengal with the Reserve Bank of India. It was further clarified that in the event there was no stay of operation of the award by the adjourned date (04.12.2018), it would be open to the appellant (award holder) to pray for release of the said amount. Relying on an order dated 05.09.2018 of a coordinate bench of the High Court wherein an unconditional stay of award had been granted to the State Government and the SLP against such order had been dismissed in limine, the Executing Court dismissed the execution petition filed by the appellant.

Without filing the application for recall of the order dated 27.09.2018, whereby the stay application of the respondent had been dismissed in default, the respondent filed a fresh application for stay of the award, in which the impugned order dated 13.12.2018 of unconditional stay was passed after relying on the provisions of Order XXVII Rule 8A, Code of Civil Procedure (for short 'CPC'). Challenging the said order, the present Appeal has been filed.

Decision and Observations

The Apex Court noted that the amended Section 36 of the Arbitration Act provides for: (a) after expiry of making an application to set aside the arbitral award (i.e. 90 days from the award) the award shall be enforced as if it was a decree of the Court; (b) filing of an application under Section 34 shall not by itself render the award unenforceable; (c) upon an application for grant of stay of the award, the Court has the discretion to grant stay, which may be subject to such conditions as it may deem fit; (d) while passing any stay order the Court is to "*have due regard*" to the provisions of CPC for grant of stay of money decree.

The Apex Court considered the effect of Section 36 of the Arbitration Act, vis-a-vis the provisions of Order XXVII Rule 8A of CPC. Sub-Section (3) of Section 36 of the Arbitration Act mandates that while considering an application for stay filed along with or after filing of objection under Section 34 of the Arbitration Act, if stay is to be granted then it shall be subject to such conditions as may be deemed fit. The said sub-section clearly mandates that the grant of stay of the operation of the award is to be for reasons to be recorded in writing "*subject to such conditions as it may deem fit*". The proviso makes it clear that the Court has to "*have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure*". The phrase "*have due regard to*" would only mean that the provisions of CPC are to be taken into consideration, and not that they are mandatory. While considering the phrase "*having regard to*", this Court in the case of ***Shri Sitaram Sugar Company Limited. v. Union of India*** (1990) 3 SCC 223 has held that "*the words 'having regard to' in sub-*

section are the legislative instruction for the general guidance of the Government in determining the price of sugar. They are not strictly mandatory, but in essence directory."

According to the Apex Court in the present context, the phrase used is '*having regard to*' the provisions of CPC and not '*in accordance with*" the provisions of CPC. In the latter case, it would have been mandatory, but in the form as mentioned in Rule 36(3) of the Arbitration Act, it would only be directory or as a guiding factor. Mere reference to CPC in the said Section 36 cannot be construed in such a manner that it takes away the power conferred in the main statute (i.e. Arbitration Act) itself. It is to be taken as a general guideline, which will not make the main provision of the Arbitration Act inapplicable. ***The provisions of CPC are to be followed as a guidance, whereas the provisions of the Arbitration Act are essentially to be first applied. Since, the Arbitration Act is a self-contained Act, the provisions of the CPC will apply only insofar as the same are not inconsistent with the spirit and provisions of the Arbitration Act***

A Full Bench of the Calcutta High Court, while considering the question as to whether in an appeal preferred by the Government, the Government is entitled to get stay of execution of decree impugned by taking aid of Order XXVII Rule 8A of the CPC, even if the conditions mentioned in Clauses (a) and (b) of sub-rule (3) of Rule 5 of Order XLI are not complied with, held as follows:

> *"36. In order to resolve the aforesaid controversy, one must examine the legislative intent for incorporating Order 27, Rule 8A in the Code. The aforesaid provision was engrafted to exempt the Government to furnish security as a guarantee for due performance of a decree as mentioned in Rules 5 and 6 of Order XLI. Notwithstanding such exemption, discretionary power of the Court to grant stay of execution of a decree can be exercised in favour of the Appellant Government only if it satisfies the Court as to the existence of clauses (a) and (b) of Rule 5(3) of Order XLI. As "substantial loss" to the appellant is a condition precedent to grant stay, execution of a money decree is ordinarily not stayed since satisfaction of a money decree does not amount to irreparable injury to the appellant as the remedy of restitution is available to him in the event the appeal is allowed. [See,* Sihor Nagar Palika Bureau *v.* Bhabhlubhai Virabhai, *(2005) 4 SCC 1, para 6]. Under such circumstances, when the court chooses to exercise its discretion in favour of the appellant State to grant stay of execution of a money decree it must be balance the equities between the parties and ensure that no undue hardship is caused to a decree holder due to stay of execution of such decree. Hence, in appropriate cases, the Court in its discretion may direct deposit of a part of the decretal sum so that the decree holder may with draw the same without prejudice and subject to the result of the appeal. Such direction for deposit of the decretal sum is not for the purpose of furnishing security for due performance of the decree but an equitable measure ensuring part satisfaction of the decree without prejudice to the parties and subject to the result of the appeal as a condition for stay of execution of the decree.*
>
> *37. To hold that the Court is denuded of such equitable discretion while granting stay of execution of a money decree in favour of the Government, would cause grave hardship to deserving decree holders who in the facts of a given case may be entitled to enjoy part satisfaction of the*

decree without prejudice and subject to the result of the appeal as a condition for stay of execution of the entire decree.

38. Hence, it is opined although Order 27, Rule 8A may exempt the appellant Government from the mandatory obligation of furnishing security in terms of Rule 1(3) for seeking stay of execution of a money decree as under Rule 5(5) of Order XLI, the said provision cannot be said to operate as an absolute clog on the discretion of the court to direct the deposit of the decretal amount as a condition for grant of stay of execution of the decree in appropriate cases more particularly when such direction is coupled with the liberty to the decree holder to withdraw a portion thereof in part satisfaction of the decree without prejudice and subject to the result of the appeal."

Even otherwise a plain reading of Order XXVII Rule 8A of CPC would make it clear that the same is only regarding security as mentioned in Rule 5 and 6 of Order XLI CPC, which is not to be demanded from the Government while considering the stay application filed by the Government. It, however, does not provide that the decretal amount cannot be required to be deposited in the appeal against a money decree.

It is also noteworthy that when Order XXVII Rule 8A of CPC was incorporated in the year 1937, at that time Rule 5 of Order XLI CPC had only four sub-Rules. Sub Rule (5) in Rule 5 of Order XLI was inserted by Act 104 of 1976 w.e.f. 01.02.1977. Prior to that, it was sub-Rule (3) (c) of Rule 5 aforesaid which provided that no order for stay of execution was to be made unless the Court was satisfied that security had been given by the applicant for performance of the decree. It was in such context ***when only security had to be given at the time of grant of stay that Rule 8A of Order XVII CPC was incorporated to give certain protection to the Government by providing for no requirement of security from the Government. It was probably for the reason that the Government is always considered to be solvent, thus was exempted from providing security under Rule 8A of Order XXVII of CPC.*** However, in 1976 Sub Rule (5) to Rule 5 of Order XLI CPC was inserted, which reads as follows:

(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of rule 1, the Court shall not make an order staying the execution of the decrees."

The same provides for making of deposit or furnishing security by the decree holder seeking stay. It would thus mean that after 1977, the Appellate Court had the power to direct for deposit of the decretal amount, which was earlier limited only to furnishing of security under sub-Rule (3) of Rule 5 of Order XLI CPC. It is noteworthy that after insertion of sub-Rule (5), there was no amendment to Order XXVII Rule 8A CPC to exempt the State Government for making such deposit, which would mean that ***Rule 8A does not exempt the Government from making deposit, which the Court has the power to now direct under Order XLI Rule 5(5) CPC.***

The Apex Court noted that the provision which was incorporated in the year 1937 during the British Raj, giving certain safeguards to the Government (which was then the British Crown) would not be applicable in today's time, when we have a democratic Government.

The Apex Court then stated the object and purpose of the Arbitration proceedings which is that the Arbitration proceedings are essentially alternate dispute redressal system meant for early/quick resolution of disputes and in case a money decree - award as passed by the Arbitrator against the Government is allowed to be automatically stayed, the very purpose of quick resolution of dispute through arbitration would be defeated as the decree holder would be fully deprived of the fruits of the award on mere filing of objection under Section 34 of the Arbitration Act. The Arbitration Act is a special Act which provides for quick resolution of disputes between the parties and Section 18 of the Act makes it clear that the parties shall be treated with equality. Once the Act mandates so, there cannot be any special treatment given to the Government as a party. As such, ***under the scheme of the Arbitration Act, no distinction is made nor any differential treatment is to be given to the Government, while considering an application for grant of stay of a money decree in proceedings under Section 34 of the Arbitration Act.***

Further, the Apex Court stated that it may be true that the CPC provides for a differential treatment to the Government in certain cases, but the same may not be so applicable while considering a case against the Government under the Arbitration Act. Section 36 of the Arbitration Act also does not provide for any special treatment to the Government while dealing with grant of stay in an application under proceedings of Section 34 of the Arbitration Act. Keeping the aforesaid in consideration and also the provisions of Section 18 providing for equal treatment of parties, the Apex Court made it clear that ***there is no exceptional treatment to be given to the Government while considering the application for stay under Section 36 filed by the Government in proceedings under Section 34 of the Arbitration Act.***

Also, even if it is assumed that the provisions of Order XXVII Rule 8A of CPC are to be applied, the same would only exempt the Government from furnishing security, whereas under Order XLI Rule 5 of CPC, the Court has the power to direct for full or part deposit and/or to furnish security of the decretal amount. Rule 8A only provides exemption from furnishing security, which would not restrict the Court from directing deposit of the awarded amount and part thereof.

The Apex Court opined that the impugned order passed by the Calcutta High Court granting unconditional stay of the arbitration award dated 21.01.2010, cannot be sustained in the eye of law.

11. *M/S. Sterling Industries v. Jayprakash Associates Ltd. (Civil Appeal Nos. 7117-7118 Of 2017)*

Decided on – 10.07.2019

Bench – (1) Hon'ble Mr. Justice S.A. Bobde
(2) Hon'ble Mr. Justice R. Subhash Reddy
(3) Hon'ble Mr. Justice B.R. Gavai

("It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach.")

Facts

The High Court entertained a writ petition under Article 227 of the Constitution of India against an order of the learned District Judge, Gautam Budh Nagar purportedly passed under Section 20 of the Arbitration and Conciliation Act, 1996(for short, "the Arbitration Act") read with Section 19 of the Micro, Small & Medium Enterprises Development Act, 2006 (for short, "the MSME Act").

Order and Observations

The Apex Court noted that the application was made to the District Judge by respondent No. 1- Jayprakash Associates Ltd. against a partial award made under Section 16 of the Arbitration Act. Such an application was not tenable vide Section 16 (6) of the Arbitration Act. Since such an application was not tenable, the Apex Court noted that in a writ petition filed against an order made by the District Judge in an untenable application, the High Court could not have set aside the partial award. The Apex Court referred to ***SBP & Co. v. Patel Engineering Ltd. & Anr***.[19] wherein it has been held as follows:

> *"45.It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible."*

[19] (2005) 8 SCC 618

12. P Ramesh v. State Represented by Police (Criminal Appeal No. 1013 of 2019)

Decided on – 09.07.2019

Bench – (1) Hon'ble Mr. Justice D.Y.Chandrachud
(2) Hon'ble Ms. Justice Indira Banerjee

(*The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court.***)**

Facts

The appellant was tried for the murder of his wife and for the commission of an offence under Section 498A of the Indian Penal Code. He was convicted and sentenced to life imprisonment for the offence punishable under Section 302 and to imprisonment for three years for the offence under Section 498A. During the course of the trial, the prosecution sought to adduce the evidence of PW-3 'S' and PW-4 'H', the children of the appellant and the deceased. On 19 May 2015 when their evidence was to be recorded, PW-3 was eight-years-old while PW-4 was six-years-old. The trial judge posed certain initial queries to both the witnesses to assess whether they were capable of deposing in evidence. One of the questions which were posed was whether they were aware of the person before whom they were standing. Both the witnesses stated that they were unaware of the person before whom they were standing in the court. At the same time, the child witnesses had stated that they had come to depose in evidence about the circumstances leading to the death of their mother. The trial judge came to the conclusion that the testimony of PW-3 could not be recorded as PW-3 as a witness did not know the judge and the lawyers. Similarly, in regard to PW-4 the trial judge observed that he was unable to state who the judge was. As a result, he was considered to be incapable to depose in evidence. No evidence of PW-3 and PW-4 was recorded.

Decision and Observations

The Apex Court noted that the child witnesses in this case were aware of the reason for their presence in the court. They stated before the trial judge that they were in court to tender evidence in regard to the circumstances pertaining to the death of their mother. Therefore, the trial judge was required to determine whether the children were in a fit and competent state of mind to depose and were able to understand the purpose for being present on the occasion. Prior to the recording of evidence of a child witness, the Trial Court must undertake the exercise of posing relevant questions to determine the capacity of the child witness to provide rational answers. This exercise would allow the court to determine whether the child has the intellectual and cognitive skills to recollect and narrate the incidents of the crime.

The Apex Court mentioned Section 118 of the Evidence Act 1872 which deals with the competence of a person to testify before the court. Section 4 of the Oaths Act 1969 requires all

witnesses to take oath or affirmation, with an exception for child witnesses under the age of twelve years. Therefore, if the court is satisfied that the child witness below the age of twelve years is a competent witness, such a witness can be examined without oath or affirmation. The Apex Court referred to ***Dattu Ramrao Sakhare v. State of Maharashtra***[20], where it was held:

> *"5. … A child witness if found competent to depose to the facts and reliable one, such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."*

A child has to be a competent witness first, only then is her/his statement admissible. The rule was laid down in a decision of the US Supreme Court in ***Wheeler v United States***[21]

In ***Ratansinh Dalsukhbhai Nayak v. State of Gujarat***,[22] the Apex Court held :

> *"7. … **The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous.** This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."*

Further, the Apex Court said that in order to determine the competency of a child witness, the judge has to form her or his opinion. The judge is at the liberty to test the capacity of a

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[20] (1997) 5 SCC 341
[21] 159 U.S. 523 (1895)
[22] (2004) 1 SCC 64. Subsequently, relied upon in *Nivrutti Pandurang Kokate v State of Maharashtra* (2008) 12 SCC 565

child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. ***The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court.*** In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto.[23] A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined. In the circumstances, the Apex Court noted that the High Court was justified in coming to the conclusion that the non-recording of the testimonies of PW-3 and PW-4 was on account of a palpably erroneous approach on the part of the learned trial judge.

Further, the Apex Court discussed the scope of the High Court's powers in an appeal filed against conviction. Section 374 of the CrPC provides for appeals against convictions and allows any person convicted by a Sessions Judge or an Additional Sessions Judge to appeal before the High Court. ***Section 386 of the CrPC defines the powers of the Appellate Court while disposing of an appeal against an order of conviction or acquittal. The power under this section is not unlimited.*** The Apex Court opined that the provision is to be taken as giving the power to do only that which the lower court could and should have done in a criminal case.

The Apex Court in ***Mohd Hussain v. State (Govt of NCT of Delhi)***[24] while dealing with the powers of the Appellate Court to order a retrial under Section 386(b) of the CrPC, held thus:

> *"41. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A de novo trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no straitjacket formula can be formulated but the appeal court must closely keep in view that while protecting the right*

[23] *Dalsukhbhai Nayak v State of Gujarat* (2004) 1 SCC 64
[24] (2012) 9 SCC 408

of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked."

A similar position was adopted in ***Ajay Kumar Ghoshal v. State of Bihar***,[25] where it was held thus:

"11. Though the word "retrial" is used under Section 386(b)(i) CrPC, the powers conferred by this clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice. The circumstances that should exist forwarranting a retrial must be such that where the trial was undertaken by the court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings. ***An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidences or the court refused to hear certain witnesses who were supposed to be heard.****"*

The power of an Appellate Court to order a retrial on the limited point of re recording statements of witnesses was recently discussed in ***Atma Ram and Ors v. State of Rajasthan***[26]. During the trial, the court had recorded the evidence of twelve witnesses in absence of the accused persons. In an appeal against conviction preferred by the accused persons, the High Court exercised its powers under Section 386(b) of CrPC to quash and set aside the judgment of the Trial Court and remanded the matter back to Trial Court to the extent of recording statements of the twelve witnesses afresh after securing presence of the accused in the court.

The accused persons preferred a Special Leave Petition challenging the High Court's order of a de-novo trial for re-recording of statements of witnesses. Affirming the view taken by the High Court, the Apex Court held thus:

"22. … Section 386 then enumerates powers of the Appellate Court which inter alia includes the power to "reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial. The powers of Appellate Court are equally wide. The High Court in the present case was exercising powers both under Chapters XXVIII and XXIX of the Code. ***If the power can go to the extent of ordering a complete re-trial, the exercise of power to a lesser extent namely ordering de novo examination of twelve witnesses with further directions as the High Court has imposed in the present matter, was certainly within the powers of the High Court****. There is, thus, no infraction or jurisdictional error on the part of the High Court."*

"25. ... If there was an infraction, which otherwise does not vitiate the trial by itself, the attempt must be to remedy the situation to the extent possible, so that the interests of the accused as well as societal interest are adequately safeguarded. ***The very same witnesses were directed to be de novo***

[25] (2017) 12 SCC 699
[26] 2019 SCC OnLine SC 523

examined which would ensure that the interest of the prosecution is subserved and at the same time the accused will have every right and opportunity to watch the witnesses deposing against them, watch their demeanor and instruct their counsel properly so that said witnesses can be effectively cross-examined. In the process, the interest of the accused would also stand protected.

The Apex Court noted that in the present case, the High Court in the considered exercise of its appellate jurisdiction has remanded the proceedings back to the Trial Court to assess objectively the capacity of the two child witnesses and if the evidence is recorded, to furnish an opportunity to the accused to offer evidence in rebuttal. The accused will also be entitled to cross examine them. As on date, though a little over four years have elapsed since the exclusion of their evidence by the trial judge, both the witnesses continue to be minors. Hence, the High Court has issued necessary directions to the learned trial judge to assess objectively the capacity of the two child witnesses before recording their evidence.

Further, the Apex Court noted that it would be appropriate for the trial judge to ensure that the evidence of PW-3 and PW-4 is recorded in a child friendly environment as laid down in ***State of Maharashtra* v. *Bandu alias Daulat***[27].

[27] (2018) 11 SCC 163

13. *Kamlesh & Anr. v. The State of Rajasthan & Anr., Criminal Appeal No.1006 of 2019 (Arising out of SLP (Crl.) No.1530 of 2018)*

Decided on :- 09.07.2019

Bench :- 1. Hon'ble Mr. Justice Ashok Bhushan
2. Hon'ble Mr. Justice Navin Sinha

The Application for Anticipatory Bail cannot be rejected solely on the ground that the application under Section 482 CrPC for quashing the FIR had been dismissed.

(ORIGINAL ORDER PASSED BY THE HON'BLE SUPREME COURT)

O R D E R

Leave granted.

Heard learned counsel for the parties.

This appeal has been filed against an order dated 05.02.2018 passed by the High Court of Rajasthan at Jodhpur in S.B. Criminal Misc. Bail No.9977/2017.

The appellants are mother-in-law and father-in-law of the complainant. The appellants were accused in FIR No.269/2016. The High Court vide order dated 05.02.2018 rejected the application for anticipatory bail only on the ground that petition under Section 482 Cr.P.C., praying for quashing of FIR, has already been rejected.

We are of the view that the order of the High Court cannot be sustained. High Court ought to have considered the application on merits. The fact that petition under Section 482 Cr.P.C. was dismissed for quashing was not conclusive and could not be the reason for rejecting the application. The husband of the complainant has already filed special leave petition in which notice has been issued, which is pending in this Court. This Court had passed an order on 23.02.2018 not to arrest the appellants subject to their cooperation with the investigation.

Learned counsel for the State submits that the appellants are not cooperating with the investigation which statement is denied by the counsel for the appellants. Counsel for the appellants submits that appellants presented themselves before the Investigating Officer more than once and they are ready to appear as and when called by a notice.

In above view of the matter, we dispose of this appeal providing that the appellants shall cooperate with the investigation and appear as and when they are called by a written notice. However, appellants shall not be arrested during investigation. The interim protection granted by this Court is confirmed.

Appeal is, accordingly, disposed of.

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14. Pavan Diliprao Dike v. Vishal Narendrabhai Parmar, S.L.P. (Crl.) No(s). 3858/2019

Decided on :- 12.07.2019

Bench :- 1. Hon'ble Mr. Justice L. Nageswara Rao
2. Hon'ble Mr. Justice Hemant Gupta

(The trial court committed an error in placing heavy burden on the complainant to prove the debt in a case under Section 138 of the Negotiable Instruments Act)

(ORIGINAL ORDER PASSED BY THE HON'BLE SUPREME COURT)

O R D E R

Leave granted.

While setting aside the order of acquittal of the appellants under Section 138 of the Negotiable Instruments Act, 1981, the High Court convicted the petitioner and directed deposit of an amount of Rs.1,20,000/- within a period of two months. In case of default, the appellant was directed to undergo imprisonment of one year.

Pursuant to the order passed on 22.04.2019 while issuing notice, the appellant was directed to deposit a sum of Rs.1,20,000/- in the Registry. Subject to deposit of the said amount with the Registry of this Court, the Appellant was directed to be released on bail.

The learned counsel for the Appellant submitted that the judgment of the trial court is supported by reasons and the High Court ought not to have reversed the judgment.

We do not agree with the submission of the learned counsel. We are of the opinion that the High Court has 1 rightly reversed the order of acquittal passed by the trial court wherein the presumption under Section 138 has not been taken into account. The trial court committed an error in placing heavy burden on the complainant to prove the debt.

We are informed that an amount of Rs.1,20,000/- has been deposited in this Court. The Respondent is at liberty to withdraw the amount. For the afore-mentioned reasons, the order of the High Court is affirmed. The appeal is disposed of.