RAJESH PATEL

v.

STATE OF JHARKHAND

(Criminal Appeal No. 1149 of 2008)

MARCH 15, 2013.

[CHANDRAMAULI KR. PRASAD AND V. GOPALA GOWDA, JJ.]

PENAL CODE, 1860:

s.376 - Conviction by courts below - Held: In the instant case, prosecution version as narrated by prosecutrix, is most improbable and unnatural - The witness who is stated to have rescued the prosecutrix from the place of occurrence and the employer of the prosecutrix did not support the prosecution case - The doctor who medically examined the prosecutrix and the IO were not examined - Courts below erred in holding that their non-examination did not prejudice the defence - Further, the inordinate delay of 11 days is fatal to prosecution case - The testimony of the prosecutrix is most unnatural and improbable to believe and, therefore, it does not inspire confidence for acceptance of the same for sustaining the conviction and sentence - Prosecution case has created reasonable doubt - Therefore, the benefit of doubt must enure to the appellant - The impugned judgment is set aside - Constitution of India, 1950 - Art.136.

The appellant was prosecuted for committing rape on her acquaintance and class-mate, who was working as a nurse. The trial court convicted the appellant u/s 376 IPC and sentenced him to undergo 7 years RI. The High Court affirmed the conviction and the sentence.

Allowing the appeal, the Court

A HELD: 1.1 The prosecution story as narrated by the prosecutrix is most improbable and unnatural. The prosecutrix is the solitary witness to prove the charge. Her version is sought to be corroborated by her mother PW2 who has supported the prosecution case on the B basis of narration of the alleged offence by the prosecutrix to her. It is an undisputed fact that both the appellant and the prosecutrix were class-mates and had good acquaintance with each other as they were exchanging books. The prosecutrix stated that on 14.2.1993, she C went to the house of the appellant to take her book and when she entered the house he locked the door from inside, and committed rape on her and threatened her with a knife; that the appellant then locked her in the house and went away; that after about half an hour, PW3, D a common friend of both, unlocked the room. During this period she did not raise alarm to draw the attention of the neighbours. This would clearly go to show that the testimony of the prosecutrix is most unnatural and improbable to believe and it does not inspire confidence. [para 8] [418-H; 419-B-F]

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1.2 Further, there is an inordinate delay of nearly 11 days in lodging the FIR. The explanation given by the prosecutrix is that she went to her house and narrated the incident to her mother, and on assurance of PW3 that F he would take action in the matter, her mother remained silent for 2-4 days. The inordinate delay of 11 days in lodging the FIR is fatal to the prosecution case. The findings and observations made by the courts below in accepting the delay in lodging the FIR by assigning G unsatisfactory reasons cannot be accepted by this Court as the findings and reasons are erroneous in law. [para 9] [420-B-C; 421-B-C]

1.3 Besides, PW3, who is a common friend of the appellant and the prosecutrix and stated to have rescued

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her from the place of occurrence, has categorically stated that he does not know anything about the case. He has, thus, not supported the version of the prosecution. PW4 has stated in his evidence that the prosecutrix was getting nursing training privately in his chamber. He has been treated as hostile and was cross-examined by the prosecution. In his cross-examination he has categorically stated that he had told the police that he did not know anything about the incident. He has further stated that neither the prosecutrix nor her mother told him about the incident. The evidence of PW3 and PW4 has seriously affected the prosecution case. [para 10 and 12] [421-D-E, F-G; 422-F]

1.4 Further, neither the Doctor, who is stated to have medically examined the prosecutrix, nor the I.O. has been examined before the trial court to prove the prosecution case. The appellant was right in bringing to the notice of the trial court as well as the High Court that non-examination of the said two important witnesses has prejudiced his case. Therefore, the finding and reasons recorded by both the trial court as well as the High Court that non-examination of the doctor and the I.O. has not prejudiced the case of the appellant is totally an erroneous approach. For this reason also, the findings and reasons recorded in the impugned judgment that the trial court was justified in holding that the prosecution has proved the charge against the appellant and that he has committed the offence on the prosecutrix, is totally erroneous and the same is wholly unsustainable in law. [para 11-12] [421-H; 422-A; 423-C-E]

1.5 The courts below could not have, at any stretch of imagination, on the basis of the evidence on record held that the appellant is guilty of committing the offence punishable u/s 376, IPC. The prosecution case is neither natural nor consistent nor probable to believe to sustain the conviction and sentence of the appellant. Therefore,

A **the benefit of doubt must enure to the appellant. The impugned judgment requires to be interfered with by this Court in exercise of its jurisdiction, and is accordingly set aside. [para 12, 15 and 16] [422-F-G; 425-D-F-G]**

B *Raju v. State of Madhya Pradesh* **(2008) 5 SCC 133 - referred to**

Ram Kumar v. State of Haryana **(2006) 9 SCC 589 - cited.**

C **Case Law Reference:**

(2006) 9 SCC 589	**cited**	**para 5**
(2008) 5 SCC 133	**referred to**	**para 14**

D CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1149 of 2008.

From the Judgment & Order dated 14.11.2006 of the High Court of Jharkhand in Criminal Appeal No. 58 of 1999.

E Sanjay Hegde, Shankar N., Arijit Majmudar (For N. Annapoorani) for the Appellant.

Anil Kumar Jha, S.K. Divakar for the Respondent.

The Judgment of the Court was delivered by

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V. GOPALA GOWDA, J. 1. This criminal appeal is directed against the judgment of the High Court of Jharkhand at Ranchi passed in Criminal Appeal No.58 of 1999 dated 14.11.2006 wherein it has confirmed the judgment and order G passed by the 1st Additional Sessions Judge, Jamshedpur in S.T.No.168 of 1994/172 of 1995. By the said judgment, the appellant herein was convicted under Section 376, I.P.C. and was sentenced to undergo rigorous imprisonment for a period of seven years.

H 2. The prosecution case in nutshell is stated hereunder for

the purpose of appreciating the rival legal contentions urged in this appeal. A

3. The prosecutrix in this case has made a statement before the police at Ghatsila police station, stating that she has narrated the incident which took place on 14.2.1993 at 11.00 a.m. in the house of the appellant. She stated that she was working as a nurse in the Nursing Home of Dr. Prabir Bhagat at Moubhandar in the jurisdiction of Ghatsila, East Singhbhum District. The house of the appellant Rajesh, who appears to be a classmate of prosecutrix, is situated near the Nursing Home in which the prosecutrix was working as a nurse. It is the case of the prosecution that at the request of the appellant she went to his house in order to get back her book from him. As soon as she entered the house of the appellant, he closed the door from inside. At that time the members of the appellant's family were not present inside the house. When the prosecutrix tried to raise alarm, she was terrorized by the appellant who threatened her that she would be killed by a knife if she raises alarm. Thereafter, the appellant committed rape on her. When she felt pain on her private part, she wanted to cry but she was silenced by the appellant by displaying a knife to her. After committing the offence of rape the appellant left the house and locked the door from outside. After half an hour, one Purnendu Babu of Chundih came and unlocked the house and the prosecutrix returned to her house silently. It is further the case of the prosecution that she went to her house and narrated the incident to her mother. However, the mother of the prosecutrix remained silent for two to four days on the assurance of Mr. Purnendu Babu that he would take action in the matter. Additionally, it was alleged that the appellant at the time of committing the offence had also threatened the prosecutrix that she would be killed if she lodges a complaint against him. B C D E F G

4. The trial court convicted the accused and sentenced him to undergo imprisonment of seven years. The correctness of the same was challenged before the High Court of Jharkhand H

A by filing Criminal Appeal No.58 of 1999 urging various legal contentions. After considering the legal contentions on behalf of the appellant, the High Court has affirmed the conviction and sentence of the accused and dismissed the appeal. The correctness of the same is challenged in this appeal urging the
B following legal contentions: that the courts below have failed to appreciate that the sole testimony of the prosecutrix could not have been used against the appellant to hold him guilty of offence under Section 376, IPC; that the prosecution has not examined either the doctor who conducted the medical
C examination of the prosecutrix or the investigating officer. Therefore, the finding of fact holding that the appellant is guilty of the offence is erroneous in law and liable to be set aside. Another ground urged by Mr.Sanjay Hegde, the learned counsel for the appellant, is that the courts below failed to appreciate
D that the story of confinement of the prosecutrix in the house of the appellant cannot be sustained. This is because PW3 Purnendu Babu, a common friend of the appellant and the prosecutrix, who is alleged to have rescued the prosecutrix from the alleged confinement, did not support the same, thereby breaking the chain of events of the prosecution story. Further,
E it is urged by him that the courts below failed to note the delay in lodging the FIR which has not been adequately explained. The Courts below have explained the delay in filing FIR on the basis of the intervention of PW3 and PW4, namely, Purnendu Babu and the Doctor of the Nursing Home in which the
F prosecutrix was working, as they assured the victim to settle the matter between the parties. However, both of these witnesses were declared either tendered by the prosecution or hostile during the course of the trial. Further, the appellant contends that the learned courts below failed to take into
G consideration of the serious contradiction in the version of the prosecutrix and her mother. The prosecutrix in her cross examination has stated that Dr. Prabir Bhagat – PW4 was in his chamber in the evening when the appellant along with Purnendu Babu- PW3 went to the Nursing Home whereas the
H mother of the prosecutrix in her testimony has stated that the

incident could not be reported to Dr.Prabir Bhagat on the date of the occurrence since the Doctor was in TATA. According to the appellant, the courts below have ignored the contradiction in the version of the prosecutrix. On one hand she says that she never met the appellant till 21.2.93, on the other hand she has stated that on the evening of the alleged occurrence, she met the appellant at the dispensary of Dr.Prabir Bhagat. It was further contended by the appellant regarding the prosecution explanation that she could not raise alarm when the house was locked and offence was being committed on her as she was threatened by the appellant with a knife is improbable to believe her statement. This is because she could have raised an alarm when the appellant allegedly locked the prosecutrix inside the house for half an hour after the appellant committing offence of rape on her. For all the abovementioned grounds, the appellant's counsel contends that the conviction and sentence imposed upon the appellant cannot be allowed to sustain.

5. Alternatively, the learned counsel contends that if, the physical relationship between the appellant and the prosecution is established, it was a case of consensual sex. Both of them were majors to enter into such alliance and they were classmates and familiar with each other as well as on visiting terms prior to the alleged occurrence of offence. Therefore, the appellant has not committed offence as alleged. On the issue of sentencing, the learned counsel has relied upon the decision of this Court in the case of *Ram Kumar v. State of Haryana*[1], as the appellant in the present case had already undergone the imprisonment of more than 1 year and 8 months and more than 20 years have elapsed from the date of commission of the offence and therefore the appeal may be allowed by passing appropriate order. The prosecutrix and the appellant are both married and settled in life and further the appellant is of a young age. Therefore, this Court may exercise its power by recording special and adequate reasons as provided under proviso to Section 376, IPC and the sentence imposed may be reduced

1. (2006) 9 SCC 589.

A to the period already undergone in judicial custody by the appellant and treat the same as imprisonment and relief may be granted to him to this extent as was observed in *Ram Kumar* case (Supra), if the case urged on behalf of the appellant is not acceptable.

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6. On the other hand, the prosecution sought to justify the concurrent findings of fact recorded by the High Court and the Trial Court on the charge against the accused. The learned counsel for prosecution would contend that the Courts below, while accepting the testimony of the prosecutrix and her mother, C have rightly convicted and sentenced the accused to undergo imprisonment for seven years and the same need not be interfered with by this Court in this appeal in exercise of its jurisdiction. Further, it is contended by the learned counsel that the judgment referred to supra by the appellant's counsel is D inapplicable to the facts situation of the present case and therefore, discretionary power of this court for reduction of the sentence need not be exercised and prayed for dismissal of this appeal.

E 7. With reference to the aforesaid rival legal contentions urged on behalf of the parties, we have carefully examined the case to find out as to whether the impugned judgment warrants interference of this Court on the ground that the concurrent finding of fact by the High Court on the charge leveled against F the appellant under Section 376, IPC, and the finding recorded on this charge against the appellant on the basis of the evidence on record is erroneous in law and if so, whether it requires interference of this Court in exercise of its jurisdiction. The said points are answered in favour of the appellant by G assigning the following reasons:

8. The prosecution case is that the appellant has committed the offence of rape on the prosecutrix on 14.2.1993. She is the solitary witness to prove the charge. The same is sought to be corroborated by her mother PW2 who has H supported the prosecution case on the basis of narration of the

alleged offence by the prosecutrix to her. It is an undisputed fact that both the appellant and the prosecutrix are class-mates and had good acquaintance with each other as they were exchanging books. The case of the prosecution is that she had given her book to the appellant. She asked him to return the same and he asked her to go to his house on 14.2.93 to take back the book. Accordingly, she went to the house of the appellant. When she entered the house he locked the door of the house from inside. At that time she has not raised an alarm, except stating that she insisted not to lock the door of the house as there were no other inmates in the house at that point of time. The version of the prosecutrix is that she could not raise alarm as the appellant has threatened her with knife. Further case of the prosecution is that he had then committed offence of rape on her. Further she has stated that while the appellant was committing rape on her she got pain in her private part at that point of time also she wanted to raise alarm, but he has shown the knife to her not to raise alarm. Thus, the prosecution story as narrated by the prosecutrix is most improbable and unnatural. This contention of the appellant is further supported by the contention urged on his behalf that after the offence was committed, the appellant locked her in the house and went away from the house. After about half an hour Mr.Purnendu Babu –PW3, who is a common friend of both the appellant and the prosecutrix came there and unlocked the room till then she did not raise alarm drawing the attention of the neighbours. The aforesaid circumstance would clearly go to show to come to the conclusion that the case of the prosecution is not natural and probable. Neither the prosecutrix nor the PW3 has informed the police with regard to the alleged offence said to have committed by the appellant after the prosecutrix was unlocked from the house. The reason given by the prosecution is that PW3 was making sincere efforts to bring about the settlement of marriage between the appellant and the prosecutrix. The same did not materialize and, therefore, the complaint was lodged with the jurisdictional police on 25.2.93. The above said version of PW1 regarding settlement between her and the

A appellant is not proved as PW3 has stated in his evidence that he does not know anything regarding the alleged offence.

9. Further, there is an inordinate delay of nearly 11 days in lodging the FIR with the jurisdictional police. The explanation B given by the prosecutrix in not lodging the complaint within the reasonable period after the alleged offence committed by the appellant is that she went to her house and narrated the offence committed by the appellant to her mother and on assurance of Purnendu Babu – PW3, the mother remained silent for two to four days on the assurance that he will take action in the matter. C Further, the explanation given by the prosecutrix regarding the delay is that at the time of commission of offence the appellant had threatened her that in case she lodges any complaint against him, she would be killed. The said explanation is once again not a tenable explanation. Further, the reason assigned D by the High Court regarding not lodging the complaint immediately or within a reasonable period, it has observed that in case of rape, the victim girl hardly dares to go to the police station and make the matter open to all out of fear of stigma which will be attached with the girls who are ravished. Also, the E reason assigned by the trial court which justifies the explanation offered by the prosecution regarding the delay in lodging the complaint against the appellant has been erroneously accepted by the High Court in the impugned judgment. In addition to that, further observation made by the High Court regarding the delay F is that the prosecutrix as well as her mother tried to get justice by interference of PW3, who is a common friend of both of them and PW4, the Doctor with whom the prosecutrix was working as a Nurse. When the same did not materialize, after lapse of 11 days, FIR was lodged with the jurisdictional police for the G offence said to have been committed by the appellant. Further, the High Court has also proceeded to record the reason that prosecutrix had every opportunity to give different date of occurrence instead of 14.2.93 but she did not do it which reason is not tenable in law. Further, the High Court accepted the H observation made by the learned trial Judge wherein the

explanation given by the prosecutrix in her evidence about being terrorized to be killed by the appellant in case of reporting the matter to the police, is wholly untenable in law. The same is not only unnatural but also improbable. Therefore, the inordinate delay of 11 days in lodging the FIR against the appellant is fatal to the prosecution case. This vital aspect regarding inordinate delay in lodging the FIR not only makes the prosecution case improbable to accept but the reasons and observations made by the trial court as well as the High Court in the impugned judgments are wholly untenable in law and the same cannot be accepted. Therefore, the findings and observations made by the courts below in accepting delay in lodging the FIR by assigning unsatisfactory reasons cannot be accepted by this Court as the findings and reasons are erroneous in law.

10. Further in the case in hand, PW3, who is a common friend of the appellant and the prosecutrix, according to the prosecution case, he has categorically stated that he does not know anything about the case for which he had received the notice from the court to depose in the case. PW4 has stated in his evidence that the prosecutrix was getting nursing training privately in his chamber for the last three years as on the date of his examination, namely, on 16.11.95. He has stated in his examination-in-chief that on 14.2.93 when he opened his chamber the prosecutrix came to his chamber and further stated that her mother did not tell him anything. He has been treated as hostile by the prosecution, he was cross-examined by the prosecutor, in his cross-examination he has categorically stated that he has told the police that he does not know anything about the incident. He has further stated that neither the prosecutrix nor her mother told him about the incident and further stated that he does not know anything about the case.

11. Further, neither the Doctor nor the I.O. has been examined before the trial court to prove the prosecution case. The appellant was right in bringing to the notice of the trial court

A as well as the High Court that the non-examination of the aforesaid two important witnesses in the case has prejudiced the case of the appellant for the reason that if the doctor would have been examined he could have elicited evidence about any injury sustained by the prosecutrix on her private part or any B other part of her body and also the nature of hymen layer etc. so as to corroborate the story of the prosecution that the prosecutrix suffered unbearable pain while the appellant committed rape on her. Non-examination of the doctor who has examined her after 12 days of the occurrence has not C prejudiced the case of the defence for the reason that the prosecutrix was examined after 12 days of the offence alleged to have committed by the appellant because by that time the sign of rape must have disappeared. Even if it was presumed that the hymen of the victim was found ruptured and no injury D was found on her private part or any other part of her body, finding of such rupture of hymen may be for several reasons in the present age when the prosecutrix was a working girl and that she was not leading an idle life inside the four walls of her home. The said reasoning assigned by the High Court is totally erroneous in law.

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12. In view of the above statement of evidence of PW3 and PW4 whose evidence is important for the prosecution to prove the chain of events as per its case, the statement of evidence of the aforesaid witnesses has seriously affected the F prosecution case. Therefore, the courts below could not have, at any stretch of imagination, on the basis of the evidence on record held that the appellant is guilty of committing the offence under Section 376, IPC. Further, according to the prosecutrix, PW3 who is alleged to have rescued her from the place of G occurrence of offence, has clearly stated in his evidence that he does not know anything about the incident in his statement thereby he does not support the version of prosecution. The High Court has erroneously accepted the finding of the trial court that the appellant has not been prejudiced for non-H examination of the doctor for the reason that she was working

as a Nurse in the private hospital of PW4 and being a nurse she knew that the information on commission of rape is grave in nature and she would not have hesitated in giving the information to the police if the occurrence was true. Further, the finding of the courts below that non-examination of the I.O. by the prosecution who has conducted the investigation in this case has not caused prejudice to the case of the appellant, since the prosecution witnesses were unfavorable to the prosecution who were either examined or declared hostile by the prosecution, which reasoning is wholly untenable in law. Therefore, the finding and reasons recorded by both the trial court as well as the High Court regarding non-examination of the above said two witnesses in the case has not prejudiced the case of the appellant is totally an erroneous approach of the courts below. For this reason also, we have to hold that the findings and reasons recorded in the impugned judgment that the trial court was justified in holding that the prosecution has proved the charge against the appellant and that he has committed the offence on the prosecutrix, is totally erroneous and the same is wholly unsustainable in law.

13. The finding with regard to the sentence of the appellant recorded by the trial court which is accepted by the High Court on the basis of the solitary testimony of prosecutrix which is supported by the evidence of her mother PW2 is once again an erroneous approach on the part of the High Court. The offence of rape alleged to have committed by the appellant is established without any evidence as the prosecution failed to prove the chain of events as stated by the prosecutrix. Since the evidence of PW3 & PW4 did not support the prosecution case, but on the other hand, their evidence has seriously affected the story of prosecution. Therefore, the courts below could not have found the appellant as guilty of the charge and convicted and sentenced him for the offence of rape.

14. Further, one more strong circumstance which has weighed in our mind is that they had good acquaintance with each other as they were class-mates and they were in terms

A of meeting with each other. The defence counsel had alternatively argued that the appellant had sex with her consent. The High Court proceeded not to accept the said argument by giving reasons that the appellant failed to explain as to under what circumstance he had sex with the consent of the B prosecutrix when she was confined in his house. The contention urged on behalf the appellant that it was consensual sex with the prosecutrix is to be believed for the reason that she herself has gone to the house of the appellant though her version is that she went there at the request of the appellant to take back C her book which she had given to him. This is a strong circumstance to arrive at the conclusion that the defence case of the appellant is a consensual sex. Further, the prosecution case is that after the offence was committed by the appellant he had locked the room from outside and left. After half an hour D Purnendu Babu- PW3 arrived and unlocked the room. This story is improbable to believe and the prosecutrix has not lodged the complaint either immediately or within reasonable period from the date of occurrence. The complaint was undisputably lodged after lapse of 11 days by the prosecutrix. In this regard, it is pertinent to mention the judgment of this Court in *Raju v. State* E *of Madhya Pradesh*[2], the relevant paragraph of which is extracted hereunder for better appreciation in support of our conclusion:

> "12. Reference has been made in Gurmit Singh case to F the amendments in 1983 to Sections 375 and 376 of the Penal Code making the penal provisions relating to rape more stringent, and also to Section 114-A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. G It is however significant that Sections 113-A and 113-B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two sections, thus, raise a clear

H 2. (2008) 5 SCC 133.

presumption in favour of the prosecution but no similar presumption with respect to rape is visualised as the presumption under Section 114-A is extremely restricted in its applicability. This clearly shows that insofar as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally, her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined."

15. For the aforesaid reasons the prosecution case is not natural, consistent and probable to believe to sustain the conviction and sentence of the appellant for the alleged offence said to have committed by him.

16. The trial court as well as the High Court should have appreciated the evidence on record with regard to delay and not giving proper explanation regarding delay of 11 days in filing FIR by the prosecutrix and non-examination of complainant witnesses, viz. the Doctor and the I.O. which has not only caused prejudice to the case of the appellant but also the case of prosecution has created reasonable doubt in the mind of this Court. Therefore, the benefit of doubt must enure to the appellant. As we have stated above the testimony of the prosecutrix is most unnatural and improbable to believe and therefore it does not inspire confidence for acceptance of the same for sustaining the conviction and sentence. Therefore, we are of the view that the impugned judgment requires to be interfered with by this Court in exercise of its jurisdiction. Accordingly, we allow the appeal and set aside the impugned judgment.

17. If the appellant has executed the bail bonds, the same may be discharged.

R.P. Appeal allowed.

A NAGENDRAPPA NATIKAR

v.

NEELAMMA

(Special Leave Petition (Civil) No. 11800 of 2013)

B MARCH 15, 2013

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

HINDU ADOPTIONS AND MAINTENANCE ACT, 1956:

C *s.18 - Suit claiming maintenance by wife - Held: Is maintainable inspite the compromise reached between the parties, under O. 23, r. 3 CPC and an order u/s 125 CrPC based thereon granting permanent alimony - Code of Criminal Procedure, 1973 - s.125 - Code of Civil Procedure,* D *1908 - O. 23, r.23 - Contract Act, 1872 - s.25.*

In the instant petition filed by the husband, the question for consideration before the Court was: whether a compromise entered into by husband and wife under O. 23, r. 3 CPC, agreeing for a consolidated amount E **towards permanent alimony, thereby giving up any future claim for maintenance, accepted by the court in a proceeding u/s 125 CrPC, would preclude the wife from claiming maintenance in a suit filed u/s 18 of the Hindu Adoption and Maintenance Act, 1956.**

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Dismissing the petition, the Court

HELD: 1.1 Any order passed u/s 125 Cr.P.C. by compromise or otherwise cannot foreclose the remedy available to a wife u/s 18(2) of the Hindu Adoptions and G **Maintenance Act, 1956. Section 125 Cr.P.C. is a piece of social legislation which provides for a summary and speedy relief by way of maintenance to a wife who is unable to maintain herself and her children. Section 125 is not intended to provide for a full and final**

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determination of the status and personal rights of parties, which is in the nature of a civil proceeding; and the order made u/s 125 Cr.P.C. is tentative and is subject to final determination of the rights in a civil court. [para 10-11] [431-B-D-E] A

1.2 Section 25 of the Contract Act provides that any agreement which is opposed to public policy is not enforceable in a court of law and such an agreement is void, since the object is unlawful. [para 11] [431-D-E] B

1.3 The Family Court and the High Court have rightly held that the suit u/s 18 of the Hindu Adoption and Maintenance Act, 1956 is perfectly maintainable, in spite of the compromise reached between the parties under O. 23. r. 3 C.P.C. [para 9] [431-A-B] C

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 11800 of 2013. D

From the Judgment & Order dated 28.03.2011 of the High Court of Karnataka, Circuit Bench at Gulbarga in MFA No. 31979 of 2010. E

Raja Venkatappa Naik, Raja Raghavendra Naik, S.K. Tandon, R.K. Gupta, Rameshwar Prasad Goyal for the Petitioner.

The Judgment of the Court was delivered by F

K.S. RADHAKRISHNAN, J. 1. Delay condoned.

2. The question that is raised for consideration in this case is whether a compromise entered into by husband and wife under Order XXIII Rule 3 of the Code of Civil Procedure (CPC), G agreeing for a consolidated amount towards permanent alimony, thereby giving up any future claim for maintenance, accepted by the Court in a proceeding under Section 125 of the Code of Criminal Procedure (CrPC), would preclude the wife from claiming maintenance in a suit filed under Section 18 H

of the Hindu Adoption and Maintenance Act, 1956 (for short "the Act').

3. The marriage between the petitioner (husband) and respondent (wife) took place on 24.5.1987. Alleging that the petitioner is not maintaining his wife, respondent filed an application under Section 125 CrPC for grant of maintenance before the 1st Additional JMFC at Gulbarga, being Misc. Case No. 234 of 1992. While the matter was pending, an application was preferred by the parties under Order XXIII Rule 3 CPC on 3.9.1994 stating that the parties had arrived at a compromise, by which the respondent had agreed to receive an amount of Rs.8,000/- towards permanent alimony and that she would not make any claim for maintenance in future or enhancement of maintenance. Consent letter dated 30.3.1990, which is in Kannada, the English translation of the same reads as follow:

"Consent letter:

I, Neelamma W/o Nagendra Natikar, Age 23 years, R/o Old Shahabad, do hereby execute this consent letter in favour of my husband Nagendra Natikar with free will and consent without coercion and misrepresentation. After my marriage with Nagendra Natikar, I could not lead marital life happy with my husband due to my ill health as prior to my marriage I was suffering from backache, Paralysis stroke to my left hand and left leg and was also suffering from epilepsy (Fits disease) and therefore I have myself decided to withdraw from marital life. I have given my consent for mutual divorce. I have no objection if my husband would contract second marriage with someone. Prior to my marriage I was suffering from chronic disease. I had asked my father not to celebrate her marriage with anyone. My father forcibly got marriage with Nagendrappa Natikar. Henceforth I will not make any further claims and also forfeit my rights in future and I will not claim compensation or maintenance or alimony. I am satisfied

with the payment of Rs.8000/- and I will not make any further claims against my husband. A

I have executed this consent letter in favoaur of my husband without any force of anybody and free from misrepresentation or coercion. My father-mother or nay other family members have no objection for executing this consent letter. B

Signature of Executant
Neelamma
(Signed in Kannada)) C

Signature of witnesses:

1. Tippanna (signed in Kannada)

2. Devindrappa (signed in Kannada) D

3. Syed Zabiullah Sahab (signed scribe)"

The Court, on the same day, passed the following order:

"Parties both present. Both parties and advocates files compromise petition. The contents of the compromise petition is read over and explained to them. They admit the execution of the same before court. Respondent paid Rs.8000/- (eight thousand) before court towards full satisfaction of the maintenance as per compromise recorded. In view of the compromise, petition dismissed." E F

4. Respondent wife then filed a Misc. Application no. 34 of 2003 under Section 127 Cr.P.C. before the Family Court, Gulbarga for cancellation of the earlier order and also for awarding future maintenance, which was resisted by the petitioner stating that the parties had already reached a compromise with regard to the claim for maintenance on 3.9.1994 and hence the application for cancellation of the earlier order is not maintainable. The Court accepted the plea of the husband and took the view that since such an order was still in G H

force and not set aside by a competent Court, it would not be possible to entertain an application under Section 127 Cr.P.C. The application was, therefore, dismissed on 31.7.2006.

5. We notice, while the application under Section 127 Cr.P.C. was pending, respondent wife filed O.S. No. 10 of 2005 before the Family Court, Gulbarga under Section 18 of the Act claiming maintenance at the rate of Rs.2,000/- per month. The claim was resisted by the petitioner husband contending that, in view of the compromise reached between the parties in Misc. Case No. 234 of 1992 filed under Section 125 CrPC, respondent could not claim any monthly maintenance and hence the suit filed under Section 18 of the Act was not maintainable. The question of maintainability was raised as a preliminary issue. The Family Court held by its order dated 15.9.2009 that the compromise entered into between the parties in a proceeding under Section 125 Cr.P.C. would not be bar in entertaining a suit under Section 18 of the Act.

6. The suit was then finally heard on 30.9.2010 and the Family Court decreed the suit holding that the respondent is entitled to monthly maintenance of Rs.2,000/- per month from the defendant husband from the date of the filing of the suit.

7. Aggrieved by the said order, petitioner took up the matter before the High Court by filing an appeal, being M.F.A. No. 31979 of 2010, which was dismissed by the High Court by its judgment dated 28.3.2011, against which this SLP has been preferred.

8. Shri Raja Venkatappa Naik, learned counsel appearing for the petitioner, husband, submitted that suit filed under Section 18 of the Act is not maintainable, in view of the order dated 3.9.1994, accepting the consent terms and ordering a consolidated amount towards maintenance under Section 125 Cr.P.C.

9. We are in complete agreement with the reasoning of the Family Court and confirmed by the High Court that the suit under Section 18 of the Act is perfectly maintainable, in spite of the compromise reached between the parties under Order XXIII Rule 3 C.P.C. and accepted by the Court in its order dated 3.9.1994.

10. Section 125 Cr.P.C. is a piece of social legislation which provides for a summary and speedy relief by way of maintenance to a wife who is unable to maintain herself and her children. Section 125 is not intended to provide for a full and final determination of the status and personal rights of parties, which is in the nature of a civil proceeding, though are governed by the provisions of the Cr.P.C. and the order made under Section 125 Cr.P.C. is tentative and is subject to final determination of the rights in a civil court.

11. Section 25 of the Contract Act provides that any agreement which is opposed to public policy is not enforceable in a Court of Law and such an agreement is void, since the object is unlawful. Proceeding under Section 125 Cr.P.C. is summary in nature and intended to provide a speedy remedy to the wife and any order passed under Section 125 Cr.P.C. by compromise or otherwise cannot foreclose the remedy available to a wife under Section 18(2) of the Act.

12. The above being the legal position, we find no error in the view taken by the Family Court, which has been affirmed by the High Court. The Petition is, therefore, dismissed in limine.

R.P. SLP dismissed.

A SHANTILAL GULABCHAND MUTHA

v.

TATA ENGINEERING & LOCOMOTIVE CO. LTD. & ANR.

(Civil Appeal No. 6162 of 2005)

B MARCH 18, 2013.

[DR. B.S. CHAUHAN AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

C *CODE OF CIVIL PROCEDURE, 1908:*

O. 8, r.10 - Judgment on failure of defendant to file written statement - Held: Relief under O. 8, r. 10 is discretionary, and court has to be more cautious while exercising such power where defendant fails to file written statement -Court must be D *satisfied that there is no fact which need to be proved in spite of deemed admission by defendant, and court must give reasons for passing such judgment - In the instant case, trial court has not examined as to whether the suit was filed within limitation and whether on the basis of pleadings, the relief* E *granted by it could have been granted - Court did not even consider it proper to examine the case prima facie before passing the decree - As trial court failed to meet the parameters laid down by Supreme Court to proceed under O. 8 r. 10, judgment and decree passed by it is set aside and* F *the case is remanded to it to decide afresh - Appellant is at liberty to file written statement within the period provided.*

Balraj Taneja & Anr. v. Sunil Madan & Anr. **1999 (2) Suppl. SCR 258 = AIR 1999 SC 3381;** *Bogidhola Tea & Trading Co. Ltd. & Anr. v. Hira Lal Somani,* **2007 (12) SCR** G **1153 = AIR 2008 SC 911;** *Ramesh Chand Ardawatlya v. Anil Panjwani* **2003 (3) SCR 1149 = AIR 2003 SC 2508 - relied on.**

H

Case Law Reference:

1999 (2) Suppl. SCR 258	**relied on**	**para 3**
2007 (12) SCR 1153	**relied on**	**para 5**
2003 (3) SCR 1149	**relied on**	**para 5**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6162 of 2005.

From the Judgment & Order dated 22.06.2005 of the High Court of Judicature at Bombay in Appeal No. 478 of 2005 in Notice of Motion No. 503 of 2004 in Suit No. 1924 of 1998.

Prasenjeet Keswani, Pawan Kr. Bansal (for V.D. Khanna) for the Appellant.

Debmalya Banerjee (for Manik Karanjawala) for the Respondents.

The following order of the Court was delivered

O R D E R

1. This appeal has been preferred against the judgment and order dated 22.6.2005 of the High Court of Judicature at Bombay, passed in Appeal No.478 of 2005 in Notice of Motion No.503 of 2004 in Suit No.1924 of 1988.

2. Facts and circumstances giving rise to this appeal are:

A. That the appellant had purchased five Tata Diesel Vehicles from the respondent No.1 for a sum of Rs.9,58,913/- which was to be paid in 8 installments through respondent No.2 as per repayment schedule. The appellant alleges that eight Bills of Exchange were drawn by the respondent no.1 upon the respondent no.2 - banker of the appellant and by way of which the entire amount was paid. Respondent no.1 filed Suit No.1924 of 1988 on 2.6.1988 against the appellant as well as the banker for recovery of sum of Rs.5,66,000/- alongwith interest. Summons were served upon the appellant and he entered appearance through advocate to contest the suit.

A However, subsequently under the impression that the entire amount had already been paid, he did not file the written statement. The High Court decreed the suit vide judgment and decree dated 12.11.2003 under the provisions of Order VIII Rule 10 of the Code of Civil Procedure 1908, (hereinafter referred B to as 'CPC') without considering any issue involved therein or taking note of the pleadings in the plaint itself.

B. Aggrieved, the appellant took out a Notice of Motion bearing no.503 of 2004 in the said suit for setting aside ex parte decree dated 12.11.2003, however, it stood rejected vide C order dated 10.12.2004 holding it to be not maintainable in view of division bench judgment of the Bombay High Court wherein it had been held that any decree passed under Order VIII Rule 10 CPC could not be subjected to the application under Order IX Rule 13 CPC.

D C. Aggrieved, the appellant filed the appeal which has been dismissed vide order dated 22.6.2005 concurring with the learned Single Judge.

Hence, this appeal.

E 3. We have heard Shri Prasenjit Keswani, learned counsel for the appellant and Shri Debmalaya Banerjee, learned counsel for respondent no.1 and perused the record.

4. This Court in *Balraj Taneja & Anr. v. Sunil Madan & Anr.*, AIR 1999 SC 3381 dealt with the issue and held that even F in such fact-situation, the court should not act blindly on the averments made in the plaint merely because the written statement has not been filed by the defendant traversing the facts set out by the plaintiff therein. Where a written statement has not been filed by the defendant, the court should **be little** G **cautious in proceeding under Order VIII, Rule 10, CPC**. Before passing the judgment against the defendant it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly by passed in favour of the plaintiff without requiring him to prove any fact H mentioned in the plaint. It is a matter of Court's satisfaction and,

therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who failed to file the written statement. However, if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. The power of the court to proceed under Order VIII, Rule 10 CPC is discretionary. The court further held that judgment as defined in Section 2(9) CPC means the statement given by the Judge of the grounds for a decree or order. Therefore, the judgment should be self-contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the court and in what manner. The process of reasoning by which the court came to the ultimate conclusion and decreed the suit should be reflected clearly in the judgment. The court further held as under:-

> "Whether it is a case which is contested by the defendants by filing a written statement, or a case which proceeds ex parte and is ultimately decided as an ex parte case, or **is a case in which the written statement is not filed and the case is decided under Order 8 Rule 10,** the court has to write a judgment which must be in conformity with the provisions of the Code or at least set out the reasoning by which the controversy is resolved." (Emphasis added)

5. In *Bogidhola Tea & Trading Co. Ltd. & Anr. v. Hira Lal Somani,* AIR 2008 SC 911, this Court while reiterating a similar view observed that a decree under Order VIII, Rule 10 CPC should not be passed unless the averments made in plaint are established. In the facts and circumstances of a case, the court must decide the issue of limitation also, if so, involved.

(See also: *Ramesh Chand Ardawatlya v. Anil Panjwani,* AIR 2003 SC 2508)

A 6. In view of the above, it appears to be a settled legal proposition that the relief under Order VIII Rule 10 CPC is discretionary, and court has to be more cautious while exercising such power where defendant fails to file the written statement. Even in such circumstances, the court must be B satisfied that there is no fact which need to be proved in spite of deemed admission by the defendant, and the court must give reasons for passing such judgment, however, short it be, but by reading the judgment, a party must understood what were the facts and circumstances on the basis of which the court must C proceed, and under what reasoning the suit has been decreed.

7. The instant case is required to be examined in the light of the aforesaid settled legal propositions. It is evident from the plaint that eight Bills of Exchange, all dated 4.6.1982 for the respective amounts had been inclusive of interest and each D one of the said bills were accepted by the appellant payable at the Mercantile Bank Ltd. Bombay and the said bills were discounted by the respondent/plaintiff with its bankers. It is further admitted in the plaint that the bank of the appellant paid the said amount to the respondent/plaintiff on the respective E dates, as the five amounts have been mentioned in para 5 of the plaint. However, as the same did not satisfy the entire demand, the suit was filed with the following prayer:-

> "That the Defendant No.1 and Defendant No.2 may be ordered and decreed to pay to the plaintiff the sum of F Rs.999388.30p. as mentioned in paragraph 7 above together with interest on the sum of Rs.5,66,000/- at the rate of 18.5% per annum from the date of suit till payments."

G 8. The Trial Court while deciding Suit No.1924 of 1988 decreed the suit vide judgment and decree dated 12.11.2003, which reads as under:-

> "Advocate for the plaintiffs is present. Nobody is present for the defendants. The matter is on board for proceeding H against the defendants for want of written statement. Suit

is of 1988. So far no written statement is filed. Therefore, there shall be decree in favour of the plaintiffs and against the defendants under Order VIII Rule10 of the Code of Civil Procedure for a sum of Rs.9,99,388.30 with interest on the amount of Rs.5,66,000/- at 12% p.a. from the date of the suit till realization and costs. Prayer (a) only of the plaint is granted in the above terms. Decree be drawn up accordingly."

9. The appellant take Notice of Motion to set aside the aforesaid judgment and decree which was dismissed and the said order of dismissal has been approved by the division bench. We are not examining the issue as to whether such a judgment and decree ex parte could be subjected to the provisions of Order IX Rule 13 CPC but the court has not examined as to whether the suit was filed within limitation and whether on the basis of pleadings, the relief granted by the court could have been granted. The court did not even consider it proper to examine the case prima facie before passing the decree, as is evident from the above quotation. The same is complete impugned judgment.

10. As the Trial Court failed to meet the parameters laid down by this court to proceed under Order VIII Rule 10 CPC, the judgment and decree of the Trial Court dated 12.11.2003 is set aside and the case is remanded to the Trial Court to decide afresh. The appellant is at liberty to file the written statement within a period of 3 weeks from today and the Trial Court is at liberty to proceed in accordance with law thereafter. As the matter is very old, we request the Trial Court to conclude the trial expeditiously. The Original Record, if any, may be sent back forthwith.

Before parting with the case, we would like to clarify that we have not decided the issue as to whether application under Order IX Rule 13 CPC in such a case is maintainable.

11. The appeal is disposed of accordingly.

R.P. Appeal disposed of.