

(2015) 11 OHC CK 0037
In the Orissa High Court
Case No : W.A. No. 122 of 2014

Kasinath Nayak

APPELLANT

Vs

State of Odisha and Others

RESPONDENT

Date of Decision : 19-11-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 156
Dowry Prohibition Act, 1961 — Section 4
Government of India Act, 1915 — Section 113
Government of India Act, 1935 — Section 107, 108, 229(1)
Penal Code, 1860 (IPC) — Section 302, 304-B, 34, 498-A

Citation : (2015) 11 OHC CK 0037

Hon'ble Judges : D.H. Waghela, C.J., P. Mohanty and Raghubir Dash, JJ.

Bench : Full Bench

Advocate : Nilamadhava Sarkar and S. Mahanta, Advocates, for the Appellant;
S.P. Mishra, Advocate General and Goutam Mishra, Amicus Curiae, for the Respondent

Final Decision : Dismissed

Judgement

P. Mohanty, J.—Is the instant writ appeal, filed against the judgment of the learned Single Judge rendered in a writ petition in which direction for further investigation in a criminal case was sought for, maintainable? This is the short question required to be answered in the reference.

2. When the writ appeal came up for hearing before a Division Bench of this Court, the State Government raised serious objection regarding its maintainability. Feeling that the question of maintainability may have a far reaching effect, the Division Bench was inclined to examine the matter in depth and accordingly vide order dated 20.08.2014 appointed Mr. Goutam Mishra as amicus curiae to assist the Court. As the learned amicus curiae apprised the Court that there are divergent views by different High Courts on the issue, vide order dated 11.09.2014 the Division Bench of this Court referred the matter to

the Full Bench. Hence, this Full Bench has been constituted and called upon to answer the following question:

"Whether any decision rendered by a Single Judge of this Court vis-?-vis a criminal matter in exercise of the writ jurisdiction under Article 226 of the Constitution of India is appealable under Clause-10 of the Letters Patent before a Division bench of this Court or not?"

3. While Mr. Sarkar, learned counsel for the appellant contended that an appeal under clause 10 of the Letters Patent is maintainable against a judgment passed by the learned Single Judge in a petition under Article 226, according to Mr. Misra, learned Advocate General appearing for the State an appeal under clause 10 of Letters Patent Appeal is not maintainable against the judgment of learned Single Judge even when passed under Article 226, if the power is exercised under criminal jurisdiction.

4. It is worthwhile to mention here that at the commencement of the 20th Century, Bengal Presidency was a vast province including Assam, Bihar and Orissa. Administrative exigencies required separation of such areas which originally did not form part of Bengal. Bihar and Orissa were separated from Bengal Presidency to form new province of Bihar. By a notification dated 22.03.1912 new province of Bihar and Orissa was formed. However, still the said new province of Bihar and Orissa was under the jurisdiction of Calcutta High Court. On 09.02.1916, in exercise of the powers under section 113 of the Government of India Act, 1915, the King of England issued Letters Patent constituting High Court of Patna. Orissa was placed under the jurisdiction of Patna High Court. On 01.04.1936 Orissa was made a separate province but no separate High Court was provided for it.... In exercise of the powers conferred by Section 229(1) of the Government of India Act, 1935, the Government of India, on 30.04.1948, issued Orissa High Court Order, 1948 declaring that from 05.07.1948 there shall be a Court of the Province of Orissa which shall be a Court of Record. Subsequently by Orissa High Court (Amendment) Order, 1948 issued on 08.06.1948, the date of establishment of High Court was changed from 05.07.1948 to 26.07.1948. Hence, on 26.07.1948 Orissa High Court was inaugurated by H.J. Kania, the then Chief Justice of the Federal Court of India. Since the bifurcation of Orissa High Court, the Letters Patent Appeals (present writ appeals) are being filed under Clause 10 of the Letters Patent Constituting the High Court of Judicature at Patna read with Article 4 of the Orissa High Court (Amendment) Order, 1948, which provided inter alia that the law in force regarding practice and procedure in the High Court in Patna shall be applicable to the Orissa High Court.

5. Clause-10 of the Letters Patent Constituting the High Court of Judicature at Patna, under which the writ appeal has been filed, reads thus:

"Clause-10. And we do further ordain that an appeal shall lie to the said High Court of Judicature at Patna from the judgment (not being a judgment passed in

the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of Government of India Act and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, made [on or after the first day of February one thousand nine hundred and twenty nine] in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided."

From a bare reading of the clause, as quoted above, it would be evident that a Letters Patent appeal can be laid to a Division Bench of this High Court from a judgment of a learned Single Judge, if it is not covered by the excluded category of cases as specified in the bracketed portion of the clause. In other words, filing of intra-Court appeal to a Division Bench of this Court is debarred against judgment of learned Single Judge if it is passed in exercise of (i) revisional jurisdiction, (ii) the power of superintendence and (iii) the criminal jurisdiction. Therefore, it is to be seen whether the impugned judgment passed by the learned Single Judge comes under any of these three excluded categories.

6. During the course of hearing, learned counsel for both the parties in support of their respective submissions placed reliance upon a large number of judgments of various High Courts in India. Mr. Goutam Mishra, learned amicus curiae also placed before this Court the judgments wherein conflicting views have been expressed by different High Courts. Before delving into those judgments, it is pertinent to mention here that Clause-10 of the Letters Patent Constituting the High Court of Judicature at Patna, which is applicable to Orissa High Court, is *pari materia* to the corresponding clause followed in the respective High Courts.

7. The controversy that a writ proceeding under Article 226 of the Constitution of India is a "civil proceeding" or "criminal proceeding" was considered at great length by the Constitution Bench of the apex Court in *S.A.L. Narayan Row and Another Vs. Ishwarlal Bhagwandas and Another*, . In the said case, the apex Court opined that whether the proceedings are civil or not depends upon the nature of the right violated and the appropriate relief which may be claimed and not upon the nature of the Tribunal which is invested with authority to grant relief. While so opining, the apex Court in Para-8 of the judgment observed as

follows:

"...The expression "civil proceedings" is not defined in the Constitution, nor in the General Clauses Act. The expression in our judgment covers all proceedings in which a party asserts the existence of a civil right conferred by the civil law or by statute, and claims relief for breach thereof. A criminal proceeding on the other hand is ordinarily one in which if carried to its conclusion it may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property. It also includes proceedings in which in the larger interest of the State, orders to prevent apprehended breach of the peace, orders to bind down persons who are danger to the maintenance of peace and order, or orders aimed at preventing vagrancy are contemplated to be passed...."

(Emphasis Supplied)

From the aforesaid it follows that a civil proceeding is one in which a person seeks to redress by appropriate relief the alleged infringement of his civil rights against another person or the State. A criminal proceeding is one in which the proceeding, if ultimately carried to its conclusion, may result in imposition of sentences such as death, imprisonment, fine or forfeiture of property. The term "criminal proceeding" has also been defined in Black's Law Dictionary as "one instituted and conducted for the purpose either of preventing the commission of crime, or for fixing the guilt of a crime already committed and punishing the offender; as distinguished from a "civil proceeding", which is for the redress of a private injury."

8. Referring to the above Constitution Bench judgment of the apex Court in S.A.L. Narayan Row (supra), the High Court of Judicature at Gujarat in Sanjeev Rajendrabhai Bhatt Vs. State of Gujarat and Others, came to hold as follows:

"80. In our considered opinion, in the instant case, the proceedings can be said to be criminal proceedings inasmuch as, carried to its conclusion, they may result into imprisonment, fine etc. as observed by the Supreme Court in Narayana Row.

81. From the totality of facts and circumstances, we have no hesitation in holding that the learned single Judge has passed an order in exercise of criminal jurisdiction. At the cost of repetition, we reiterate what we have already stated earlier that the proceedings were of a criminal nature. Whether a criminal Court takes cognizance of an offence or sends a complaint for investigation under Sub-section (3) of Section 156 of the Code of Criminal Procedure, 1973 does not make difference so far as the nature of proceedings is concerned. Even if cognizance is not taken, that fact would not take out the case from the purview of criminal jurisdiction.

82. In our judgment, a proceeding under Article 226 of the Constitution arising from an order passed or made by a Court in exercise or purported exercise of power under the Code of Criminal Procedure is still a "criminal proceeding" within the meaning of Clause 15 of the Letters Patent. A proceeding seeking to

avoid the consequences of a criminal proceeding initiated under the Code of Criminal Procedure will continue to remain "criminal proceeding" covered by the bracketed portion of Clause 15 of the Letters Patent.

83. As Clause 15 of the Letters Patent expressly bars an appeal against the order passed by a single Judge of the High Court in exercise of criminal jurisdiction, LPAs are not maintainable and deserve to be dismissed only on that ground. We accordingly hold that the Letters Patent Appeals are not maintainable at law and they are liable to be dismissed."

9. The issue raised herein also fell for consideration before a Division Bench of Bombay High Court in *M/s. Nagpur Cable Operators' Association Vs. Commissioner of Police, Nagpur and another*, . The said Division Bench, after taking note of various cases decided by other High Courts and the apex Court, observed thus:

"21. ...Applying the tests laid down by the Apex Court in *Narayan Row's* case (*supra*), we are of the view that if the writ petition/application under Articles 226 and/or 227 of the Constitution arises out of or relates to a proceeding in which, if carried to its conclusion ultimately it may result in sentence of death or by way of imprisonment, fine or forfeiture of the property then such writ petition/application under Article 226 of the Constitution of India and/or under Article 227 of the Constitution, should be treated as a "criminal writ petition" and styled as such. For hearing and decision of such petition, it should be listed before the Division Bench allocated such business by Hon'ble the Chief Justice or if it pertains to the single Judge jurisdiction, before the Bench assigned such work. As regards petitions/applications under Article 226 of the Constitution seeking writs or orders in the nature of habeas corpus, Rule 1 of Chapter XXVIII of Appellate Side Rules, also provides only allocation of such writ petitions to the Division Bench taking criminal business of the Appellate Side of the High Court. Obviously, since the petitions/applications under Article 226 of the Constitution of India for issuance of writs of habeas corpus arise out of the unlawful detention, in its very nature, such petitions too should be styled as criminal writ petitions. Criminal writ petitions would also cover those writ petitions which arise out of the orders and the matters relating to prevention or breach of peace or maintenance of peace and order or such orders aimed at preventing vagrancy contemplated to be passed. "Criminal writ petition" shall also take in its embrace the petitions/applications under Article 226 or 227 of the Constitution of India if it arises out of or relates to investigation, enquiry or trial of the offences either under special or general statute.... However, such cases are to be distinguished from the cases where an act may be prohibited or commanded by the statute in such a manner that the person contravening the provision is liable to pecuniary penalty and such recovery is to be made a civil debt. In such type of cases the contravention would not be a crime and, therefore, petitions/applications* under Articles 226 and 227 of the Constitution of India arising therefrom would not be criminal proceeding."

(Emphasis supplied)

10. Apart from the above, in C.S. Agarwal. Vs. State and Others, , a Full Bench of the Delhi High Court, after making elaborate discussions, followed the above view of the Division Bench of the Gujarat High Court in the case of Sanjeev Rajendrabhai Bhatt (supra). It is of relevance to note, while holding writ appeals to be not maintainable, the Full Bench of the Delhi High Court in C.S. Agarwal (supra) took note of the decision of the apex Court in State of Haryana and others Vs. Ch. Bhajan Lal and others, . Subsequently, a Division Bench of the Delhi High Court in Vipul Gupta Vs. State and Others, , reiterated the view taken in C.S. Agarwal (supra). In Nitin Shantilal Bhagat and Another Vs. State of Gujarat, , the Full Bench of the Gujarat High Court relying on the Constitution Bench judgment of the apex Court in S.A.L. Narayan Row (supra) came to hold that the writ appeal was not maintainable.

11. The following are the cases, cited before this Court at the time of hearing, in which some of the High Courts have taken a divergent view on the issue which falls for consideration before this Court.

"(i) In Gangaram Kandaram Vs. Sunder Chikha Amin and others, , where the learned Single Judge while exercising extraordinary jurisdiction under Article 226 quashed the criminal proceedings, the Full Bench of the Andhra Pradesh High Court held that such exercise of powers is not in exercise of "criminal jurisdiction".

(ii) In the case of Adishwar Jain Vs. Union of India (UOI) and Another, , the High Court of Judicature at Punjab and Haryana while dealing with the question of maintainability held that an appeal under the Letters Patent is maintainable against the judgment of a learned Single Judge in the petition under Article 226 of the Constitution praying for issuance of Habeas Corpus.

(iii) This Court in the case of Bholanath Rout v. State of Orissa & others reported in , 2013 (I) OLR 341 , while entertaining a writ appeal (Letters Patent Appeal) filed against the judgment of the learned Single Judge refusing to direct investigation by an independent agency, set aside the judgment and directed that the case should be re-investigated by an independent agency like the Crime Branch."

On careful perusal of these judgments, this Court finds that the view taken by the Full Bench of the Andhra Pradesh High Court in Gangaram Kandaram (supra) is not acceptable inasmuch, as the same is not in consonance with the ratio laid down in the case of S.A.L. Narayan Row (supra). Similarly, since in the case of Bholanath Rout (supra) the question of maintainability was not raised and in the case of Adishwar Jain (supra) dealt with habeas corpus petition, those judgments are not relevant for the purpose of the present reference.

12. From the above analysis of the decisions of the apex Court and other High Courts, this Court arrives at the conclusion that the question, whether an order

passed by learned Single Judge in a writ petition under Article 226 of the Constitution of India is a proceeding under civil jurisdiction or criminal jurisdiction, can be determined by taking into consideration the nature of proceeding. That means, if the relief asked for in a writ petition is against exercise of power under criminal law or the proceeding would be a criminal proceeding, or the proceeding if carried to its conclusion ultimately may result in sentence of death or imprisonment or fine or forfeiture of property, such writ petition should be treated as filed against a proceeding under criminal jurisdiction. In such a case, the Letters Patent Appeal/Writ Appeal is not maintainable.

13. In view of the above settled position of law, it is to be seen whether the writ petition, from which this appeal arises, was filed invoking the "criminal jurisdiction" of this Court and/or the impugned order was passed "in exercise of criminal jurisdiction". As it appears from the records produced before this Court, the appellant being the informant filed a writ petition {W.P.(Crl.) No. 1066 of 2013} challenging the action of the I.I.C., Khaira Police Station, Balasore. His grievance was that he lodged an FIR, which was registered as Khaira P.S. Case No. 61 of 2011 under Sections 498-A , 302 , 304-B and 34 , I.P.C. read with Section 4 of the Dowry Prohibition Act. But, the I.I.C. filed charge-sheet deliberately omitting three other accused persons named in the FIR. Therefore, alleging that the investigation conducted by the IIC was not fair and proper, the appellant in the aforesaid writ application prayed for further investigation. The learned Single Judge ultimately found that there was no serious irregularity or mala fides in the investigation and was pleased to dismiss the writ petition vide order dated 06.03.2014. Aggrieved by the said order, the appellant has filed this appeal. If this appeal is allowed and relief sought for in the writ petition is acceded to, it would amount to directing further investigation to Khaira P.S. Case No. 61 of 2011. In such event, it may lead to filing of charge-sheet by the Investigating Officer, framing of charge and can result in conviction and order of sentence. Therefore, in terms of the ratio laid down in S.A.L. Narayan Row (supra), it can be safely held that in the instant case the writ petition was filed invoking "criminal jurisdiction" of the learned Single Judge and the learned Single Judge has passed the impugned order "in exercise of criminal jurisdiction". As such, the instant writ appeal clearly comes under the third excluded category of Clause-10 of the Letters Patent which bars filing of a writ appeal.

14. For the foregoing discussions, the reference is answered in negative and the writ appeal is required to be dismissed as not maintainable.

15. Before parting with the case, this Court deems it proper to place on record its appreciation for the assistance rendered by learned amicus curiae Mr. Goutam Mishra in deciding the reference.

The matter may be placed before the Bench concerned for appropriate final orders.

D.H. Waghela, C.J.

I agree.

Raghubir Dash, J.

I agree.