
(1989) 2 OLR 185

Orissa High Court

Case No: Criminal Revision No. 344 of 1989

Prithish Nandey and
Another

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision: July 15, 1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) â€” Section 154, 226, 252, 254, 296#Penal Code, 1860 (IPC) â€” Section 292

Citation: (1989) 2 OLR 185

Hon'ble Judges: K.C. Jagadeb Roy, J

Bench: Single Bench

Advocate: P. Fait, R. Mohapatra and Sanjit Mohanty, for the Appellant; Addl. Standing Counsel, for the Respondent

Final Decision: Allowed

Judgement

K.C. Jagadeb Roy, J.

This revision has been filed by the accused person in C.R. Case No. 969 of 1985 pending in the Court of the

S.D.J.M., Panposh at Uditnagar, challenging the order dated 9-6-1989 passed in the said case by the learned Sub-Divisional Judicial Magistrate

directing the accused person to tender evidence of the witnesses by affidavit on 29-6-1989 in the light of the provisions u/s 296 of the Criminal

Procedure Code.

2. This is a case where the accused persons are facing trial for the alleged offence u/s 292 of the Indian Penal Code. The evidence of the

prosecution which began on 19-1-1988 had been closed on 31-1-1959 and the case was fixed (sic) 15-2-1989 for accused statement and

defence, evidence. It is stated by the Petitioners that the case was further adjourned to 3-3-1989 for the said purpose. On 3-3-1989 the S.D.J.M.

rejected the application for adjournment of the proceedings and posted the case to 7-3-1989 for final argument. The learned S.D.J.M. by an order

dated 3-3-1989 had dispensed with the examination of the accused persons in exercise of his power u/s 313(1) of the Code of Criminal

Procedure At this stage the accused persons being aggrieved by the order dated 3-3-1989 moved this Court in Criminal Misc. Case No. 256 of

1989. The accused persons thereafter moved the Hon"ble Supreme Court in a SLP (Criminal) bearing No. 1034 of 1989 not being satisfied by

order passed by the High Court here. When the said SLP No. 1034 of 1989 was listed before to Hon"ble Vacation Judge in the Supreme Court

of India the Hon"ble Court disposed of the SLP on 16-5-1989 with the following order:

It is agreed between the parties that the statement of the Petitioners may be recorded through their counsel by the trial Court on June 9th 1983.

The trial Court will record the statements accordingly, so that the trial is not delayed. Dr. L.M. Singhvi, learned Counsel on behalf of the Petitioners

will not raise any question of prejudice if any, caused to them on account of non-examination of the Petitioners personally at any stage of the trial or

appeal or revision. SLP is disposed of as aforesaid.

2. In pursuance of the" said order of the Supreme Court dated 16-5-1989 the accused persons appeared before the S.D.J.M., Panposh at

Uditnagar on 9-6-1989 and the statements of the accused persons u/s 313, Code of Criminal Procedure were recorded through their representing

counsel.

3. On the same day, an application which has been made Annexure-1 to this Criminal Revision was filed on behalf of the accused persons praying

for a week"s time to furnish the list of the other witnesses to be produced on the side of the defence (a part list of defence witnesses having been

file tint day). The adjournment was sought for as the consent of those witnesses were not obtained by that time and in the said application it was

further stated that some time be allowed for mentioning to the Court the names of the defence witnesses, who were to be examined on

Commission. The learned. S.D.J.M. after considering the application dated 9-6-1989 of the accused persons passed the order which is impugned

in this revision. In the impugned order dated 9-6-1989 as already stated the learned trill Court ordered that the accused person might tender the

evidence of the witnesses by affidavit, in the light of the provisions u/s 296 of the Code of Criminal Procedure In this revision which was heard at

length Mr. Palit, the learned Counsel for the Petitioners urged that the order dated 9-6-1989 is without jurisdiction since the Court had no

materials before it to hold that the defence witnesses were formal witnesses so as to exercise power u/s 296 of the O.P.C. directing the defence to

tender evidence by affidavit Mr. Indrajit Ray, learned Counsel appearing for the prosecution strongly urged that such an order would cause no

prejudice to the accused persons. As such it was contended by him that in view of the fact that the proceeding was lingering for a long time the

order passed by the trial Court was justified and was intended to control the time of the proceeding by resorting to the procedure given u/s 296 of

the Code of Criminal Procedure.

4. Section 154 of the Code of Criminal Procedure lays down the procedure for hearing of summon cases by the Magistrates. According to this

section if the Magistrate does not convict the accused u/s 252 or of the Code of Criminal Procedure on plea of guilty, he Shall proceed to hear the

prosecution and take all such evidence as has been produced in support of the prosecution and also to hear the accused and take all such evidence

as he produces in his evidence.

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5. This is the normal rule of procedure in the trial of a summon case. Section 296 of the Code of Criminal Procedure enacts a special rule of

evidence and this special rule is to apply in special Cases. In criminal case the deaminate and the way in which the witness gives his evidence has

particular significance. Therefore, the Law envisages in Section 254 of the Code of Criminal Procedure that normally the witnesses shall be

examined in the open Court, but when the Court finds that the evidence of witness which is sought to be tendered by way of an affidavits is of

formal character it may exercise its power u/s 296 of the Code of Criminal Procedure permitting the party to tender evidence of the witness by

affidavit. It is therefore, necessary before the power u/s 226 is exercised by the Court that it should be satisfied on materials on record that the

evidence that may be intended to be tendered by affidavit are of formal character. Unless there is basis for such satisfaction, the Court fills no

jurisdiction to exercise the power u/s 296 of the Code of Criminal Procedure.

6. In the present case there is no application on behalf of the accused persons that the evidence that was going to be tendered through their

witnesses are of formal character and that they be permitted to tender their evidence by affidavit. Nor it was the case of the other side that the

evidence that was intended to be tendered by the defence were of formal Character. Indeed, it is the party who intends to produce the evidence

by affidavit knows the nature of his own evidence and an make an application to the Court praying for the dispensing with the procedure of

examining the witness in Court and substitute the evidence by affidavit of the witnesses.

This was not done in this case.

The present section which corresponds to Section 510-A of the 1898 Code was introduced by Act 26/1955 with some changes in marginal

heading. The object is to accelerate the rate of disposal of cases. However, if the evidence of a person is not of a formal character, but goes to the

very root of the matter, resort cannot be had to the provision of this section. Just because the witnesses are literary persons, persons of eminence

in the literary world, journalist. dramatist novelist or film makers their status would not determine conclusively that the evidence they give in any

case would be of formal matter. Even if the Court feels that they only give their opinion in relation to a particulate publication as to whether the

impugned publications were lascivious or appealed to the orient interest or had any effect or tendency to deprive the corrupt persons, who are

likely to read, see or hear the matter contained or embodied in the publication by itself it would not make the evidence of these witnesses to be of

formal character because their evidence may go to the root of the matter for decision in the case. In the present case the Court has jumped into

conclusions that the evidence that were sought to be introduced through those witnesses could be one of parrot like. There was no basis for such

an observation;

7. It is true that the Court is competent to control the proceedings before it, to see that the process of the Court is not abused and no undue delay

is caused by tactical methods and would take steps to avoid this. But the zeal to avoid the delay in hearing of the case does not empower the,

Court to depart from the mandatory provisions of the law in matters of procedure contained in Section 254, Code of Criminal Procedure.

8. At this stage I need not go to the question as to whether this long list of witnesses was necessary for the case as the matter is sub-judice in the

trial stage. I, accordingly, quash the impugned order dated 9-6-1989 and direct that the defence witnesses be examined following the procedure

contained, in Section 254 of the Code of Criminal Procedure unless on fresh materials on record Court comes to hold that the evidence sought to

be tendered is of formal nature in which case the Court can pass such order as it may deem necessary directing tendering of evidence by affidavit

u/s 296 of the Code of Criminal Procedure.

9. In the result, the revision is allowed. The impugned order dated 9-6-1989. of the S.D.J.M. Panposh, Uditnagar is quashed and in the

circumstances of the case the parties to bear their own cost.

The stay order passed on 28th June, 1989 is vacated. The Court is to proceed with the hearing of the case as per the direction given above.

Revision allowed.