

STATE OF ORISSA

v.

PRASANNA KUMAR MOHANTY
(Criminal Appeal No. 704 of 2009)

APRIL 9, 2009

[S.B. SINHA AND DR. MUKUNDAKAM SHARMA, JJ.]

EVIDENCE ACT, 1872:

s. 33 – Relevance of examination-in-chief of a witness if he was not available for cross-examination – HELD: Despite the fact that two opportunities were granted to defence to cross-examine the witness, he was recalled for cross-examination – Further, for a long period he did not make himself available for his cross-examination – Therefore, s.33 is not applicable to facts of the case – However, if the said witness is not capable of giving evidence by appearing in court, prosecution may file an application for his cross-examination through a Commissioner who would consider as to whether the witness is capable of deposing before him – Order is passed in exercise of jurisdiction under Article 142 of the Constitution, as such, it will not be construed as a precedent – Constitution of India, 1950 – Article 142.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 704 of 2009.

From the Judgment & Order dated 20.4.2007 of the High Court of Orissa at Cutack in Criminal Misc. No. 552 of 2007.

Radha Shaym Jena and Siddharth Panda for the Appellant.

Shibashish Misra for the Respondents.

The following Order of the Court was delivered:

A ORDER

Delay condoned.

Leave granted.

B We have heard learned counsel for the parties.

C The prosecution against the respondent herein was initiated in the year 1987. The Investigating Officer Bipin Behari Mahapatra was examination-in-Chief on 1.9.1999. Unfortunately, on that date he could not be cross examined as respondent herein had filed two Criminal Miscellaneous Applications before the High Court although the learned Special Judge proceeded on the basis that the cross examination would be treated to have been declined. He was also present in Court on 15.1.2003 and 7.8.2003. By an Order dated 7.8.2003, however, on an application filed by the defence, the said Bipin Behari Mahapatra was recalled for cross examination. The matter was adjourned to 12.9.2003 on which date he was directed to remain present.

D It, however, appears that although the matter for further hearing was fixed from 12.9.2003 till 18.8.2006 no prosecution witness including the said investigating officer was present in the Court. The learned Special Judge went on issuing summons for his appearance so that he could be cross examined by the defence. Only on 18.8.2006, the learned Court's attention was drawn on an endorsement to the summons that he would not be able to attend the Court due to his illness. On and about 8.1.2007, an application was filed by the special Public Prosecutor to exonerate Mr. Mohapatra from cross examination on the ground of his illness. By reason of his order dated 24.3.2007 the learned Special Judge, however, directed as under :-

E "From the aforesaid circumstances, it is thus seen that the defence did not take steps for cross-examination of P.W.9 on

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closure of this evidence in Chief on 10.9.1999. Vigilance took adjournment to procure attendance of P.W.9 on the ground of his illness and ultimately report is received that P.W.9 being aged 75 years due to prolong illness is not in a position to move and understand things having lost memory. No doubt it is necessary to cross examine the witness to assess his veracity and without cross examine the defence loses his valuable rights. But in the present case when P.W.9 due to old age and prolonged illness has lost his memory and unable to understand things no fruitful purpose would be served to insist for his attendance or to depute commission for his cross-examination in a case of this nature. Hence it is needless to insist upon the attendance of P.W.9 for his cross examination. However, the veracity of his evidence in chief shall be assessed with reference to other materials on record during final argument of the case. Accordingly, the petition filed on behalf of Special P.P. Vigilance is disposed of." A B C D

The respondent filed an application under Section 482 of the Criminal Procedure Code there against before the High Court. The High Court, while relying upon a decision of this Court in *Gopal Saran vs. Satyanarayan* reported in 1989 (3) SCC 56 held as under :- E

"In view of what has been decided in the above reported cases, it is clear that when a witness does not make himself available for being cross-examined after his examination-in-Chief, it will be difficult on the part of a Court to rely on his evidence in examination-in-Chief. The purpose of cross-examination of a witness is to test the veracity of the statement made by a witness in his examination-in-Chief and where a witness is not cross examined, for his non availability it will be unsafe to rely on examination in chief of such a witness." F G

Mr. Radha Shyam Jena, learned counsel appearing on behalf of the appellant-State submits that keeping in view the fact that P.W.9 was available for cross examination and the defence had been given ample opportunity to cross examine H

A him, Section 33 of the Indian Evidence Act, 1872 will be applicable. It was urged that the decision of this Court in *Gopal Saran* (supra) is not applicable to the facts and circumstances of this case as this Court was dealing therewith a civil matter.

B Mr. Shibashish Misra, learned counsel appearing on behalf of the respondent, however, supported the impugned judgment.

Section 33 of the Indian Evidence Act, 1872 reads as under :-

C "33.Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.- Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

E Provided -

that the proceeding was between the same parties or their representatives in interest;

F that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding."

G The said provision therefore, will be applicable *inter alia* in a case where either the witness who has been examined in chief is incapable of giving evidence or is absent without any amount of delay or expense which the Court considers unreasonable.

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The Criminal trial or inquiry shall be deemed to be a proceeding in terms of the explanation appended to Section 33 between the prosecutor and the accused. However, in this case, despite the fact that two opportunities were granted to the defence for cross examining the said investigating officer but he was, as noticed hereinbefore, was recalled for cross examination. Furthermore, since 2003 to 2006 he did not make himself available for his cross examination. In that view of the matter, we are of the opinion that Section 33 of the Evidence Act is not applicable to the facts of the present case.

However, if the said witness is not capable in giving evidence by appearing in Court we are of the opinion that the prosecution may file an application for his cross examination through a Commissioner which may be allowed by the learned Trial Judge. It would be for the learned Commissioner to consider as to whether he is capable of deposing before him or not.

We are passing this order in exercise of our jurisdiction under Article 142 of the Constitution of India and it may not be construed as a precedent.

The appeal is accordingly, disposed of.

R.P.

Appeal disposed of.