2014 (II) ILR - CUT- 1097

AMITAVA ROY, C. J. & DR. A. K. RATH, J.

O.J.C. NO.4826 OF 1996

BIGHNARAJ TRIPATHY …….. Petitioner

.Vrs.

STATE OF ORISSA & ORS. ……..Opp.Parties

DISCIPLINARY PROCEEDING – Charges are serious – Enquiry Officer exonerated the petitioner – Disciplinary authority disagreed with the findings and imposed penalty of dismissal – Departmental appeal dismissed – Writ filed – Plea advanced that the disciplinary authority failed to communicate reasons for disagreement with the findings of the Enquiry Officer – No categorical averment to that effect either in the appeal memo or in the writ petition – Such plea cannot sustain – The impugned orders finding the petitioner guilty does not call for any interference.

However, this Court in the present case considering the untold misery of the petitioner converted the penalty of dismissal to one of compulsory retirement and issued direction to compute consequential retiral benefits of the petitioner on the basis of his last pay drawn when he was dismissed from service but the same would be payable from the date of this order – He is also entitled to other incidental benefits on the basis of this adjudication.

For Petitioner - Mr. L. Pradhan, Advocate
For Opp.Parties - Mr. P.K. Muduli,
Addl. Standing Counsel.

Date of hearing : 03.09. 2014
Date of Judgment : 03.09. 2014

JUDGMENT

AMITAVA ROY, C.J.

Heard Mr. L. Pradhan, learned counsel for the petitioner and Mr.P.K. Muduli, learned Additional Standing Counsel for the opposite parties.

Challenge is to the order dated 13.1.1986 of the District Judge, Koraput, Jeypore, as disciplinary authority, dismissing the petitioner from service as a disciplinary measure and to the order dated 17.10.1995 of the Appeal Committee dismissing his appeal and sustaining his dismissal.

The relevant facts in brief are that the petitioner while working as Sherishtadar in the Office of the J.M.F.C., Umerkote was placed under suspension and disciplinary proceeding was initiated against him on the following charges.

"1) He fabricated forged summons against persons of village Gandhinagar and extorted money from them.

2) He committed theft of seventeen case records from the court of Judicial Magistrate, Umerkote.

3) He sold some of those stolen case records and collected Rs.2000/- from the concerned accused persons.

4) He remained absent from duties from 20.11.82 onwards having left the headquarters without intimation or prior permission.

5) He proceeded to village Pakhanaguda carrying the process server, Sri Gopal Behera with him by illegally using his official position and asked persons from the village to pay him money so that he would get their cases dropped and he threatened the Process Server not to divulge it.

6) He, while working as Sheristadar, Munsif-cum-S.D.J.M.'s Court, Jeypore, sent letter No.391 dated 30.3.82 without the list of valuables and the said list is found missing due to his negligence."

As required, he submitted his written explanation denying the same. His prayer for being allowed to engage a legal practitioner as defence representative was turned down. The Enquiry Officer submitted his report exonerating the petitioner and other co-delinquents. The disciplinary authority, however, disagreed with the findings and eventually by order dated 13.1.1986 imposed the penalty of dismissal on the petitioner. Prior thereto, the said authority in a detailed order dated 10.1.86 recorded exhaustive reasons to disagree with the findings of the Enquiry Officer. Being aggrieved, the petitioner preferred an appeal which was, as referred to herein above, also dismissed. He has thus approached this Court.

In the counter affidavit filed by the opposite party nos.3 and 4, it is stated, in substance, that the procedure prescribed under Rule 15 of the Orissa Civil Services (C.C.A) Rules, 1962 (for short hereinafter referred to as "the Rules") has been scrupulously adhered to and having regard to the gravity of charge, the penalty imposed on him was not disproportionate.

Mr. Pradhan has argued that as the disciplinary authority had disagreed with the findings of the Enquiry Officer, it was incumbent on him, before imposing the penalty of dismissal, to communicate to the petitioner the reasons for such disagreement and to afford him an opportunity to represent. As the same has not been done, Mr. Pradhan has argued that the order of dismissal is *per se* not sustainable in law.

Mr. P.K.Muduli has argued that the petitioner had been given an opportunity of personal hearing by the appellate authority and thus even assuming without admitting that the disciplinary authority had not communicated to him the reasons for disagreement, the same *ipso facto* would not render the order of dismissal bad in law. The learned counsel however has not admitted that the reasons for disagreement had not been communicated to the petitioner.

We have carefully considered the pleadings and the documents. Vis-à-vis the plea of omission on the part of the disciplinary authority to communicate to the petitioner the reason for his disagreement with the finding of the Enquiry Officer, no categorical statement to the effect either in the memorandum of appeal has been made before the appellate authority or in the writ petition. It is, therefore, not possible for us to sustain this contention. The charges levelled against the petitioner are very serious and having regard to the reasons recorded by the disciplinary authority to conclude that the same have been proved and that the same call for dismissal from service we are not inclined to sustain the challenge.

In that view of the matter, the decision of the disciplinary authority and sustained by the appellate authority that the petitioner was guilty of the charges does not call for any interference.

In course of the arguments, Mr. Pradhan has argued that the petitioner is presently on the wrong side of sixty and is physically infirm and is at the fag end of his life and that if he is denied his retiral benefits, he would suffer irreparable loss and prejudice apart from untold misery and sufferings.

Upon hearing learned counsel for the parties and on consideration of the facts and circumstances of the case in full, we are of the opinion that it would meet the ends of justice, if the penalty of dismissal from service is converted into one of compulsory retirement. We order accordingly.

It is further made clear that the consequential retiral benefits would be computed on the basis of his last pay drawn when he was dismissed from service but would be payable actually from the date of this order. He

would also be entitled to other incidental benefits on the basis of this adjudication. The petition is allowed to this extent.

Writ petition allowed in part.

2014 (II) ILR - CUT-1100

AMITAVA ROY, CJ & DR. B. R. SARANGI, J.

W.P.(C) NO.14999 OF 2014

TECHSUPPORT ……..Petitioner

.Vrs.

BHARAT SANCHAR NIGAM LTD. & ORS. ……..Opp.Parties

TENDER – Any bidder failing to comply Clause 3 of the NIT would be debarred from participating in the process – Petitioner failed to comply such clause – His assertion regarding payment of money towards registration fee etc. raises a disputed question of fact – Knowing fully well that the last date of submission of tender was 28.07.2014 he filed the writ petition a fortnight after i.e. on 18.08.2014 – No acceptable explanation to that effect – No material on record that the petitioner was excluded from the process due to bias or malafide on the part of the Opp.Parties – The petitioner having failed to fulfill an essential tender condition, the challenge as laid does not merit acceptance. (Paras 6,7)

For Petitioner - Mr. B.M. Patnaik, Sr. Advocate
For Opp.Parties - None

Date of hearing :12.08.2014
Date of Judgment :19.08.2014

JUDGMENT

AMITAVA ROY, C.J.

Heard Mr. B.M.Pattnaik, learned Senior Counsel for the petitioner.

2. In view of the order proposed to be passed, we do not consider it necessary to issue formal notice to the opposite party.

3. The petitioner, a partnership firm dealing with computer and electrical devices and aspiring to participate in the process initiated by the NIT No. BBSTD/Comp-6/2014/5, dated 8.7.2014 for supply of computer software, net work technical support and maintenance of computers and peripherals etc. is before this Court with the grievance that the opposite party have arbitrarily and illegally excluded it therefrom.

4. Its pleaded case in short is that in response to the tender stipulation contained in Clause 3(a) of the NIT, the intending bidders had to register themselves with M/s. I.T.I. Ltd-opposite party no.3 using the tender portal i.e. https.//www.tenderwizard. com/BSNL for obtaining user ID., Digital signature etc. by paying registration fee and processing fee for facilitating participation in the process. As per Clause 3(a) Section I of NIT, the petitioner did deposit Rs. 3933/- towards registration fee through E-payment which was acknowledged by opposite party no.3. The petitioner has averred that opposite party no.3 on receiving payment also issued user-Id (TECHSUPPORT) and password (7kn7ym) to it through E-mail on 26.7.2014 for uploading its tender documents after activating its user account. It is further pleaded that as per Clause-1 (10,11) OF Section 1 of the NIT, the petitioner deposited Rs. 30,000/- towards EMD and Rs.525/- as cost of tender form through online banking/RTGS NEFT. According to the petitioner, in spite of such compliance when the petitioner tried to upload its tender documents on 26.7.2014, the same was not accepted as the user account of the petitioner was indicated not to be activated by opposite party no.3. Thereafter, on 27.7.2014, the petitioner send an Email to opposite party no.3 with a request to activate its user account to which the opposite party no.3 on 28.7.2014 at 10.12 A.M. send an Email to the effect that its request was on progress. According to the petitioner, on 28.7.2014 at 11.11 A.M. it also forwarded another Email to opposite party no.3 along with its bank statement reflecting the payment made therein with a request to activate its user account. Opposite party no.3 responded by its email on 28.7.2014 at 12.06 P.M. as well as at 1.52 P.M. indicating that it had not received any payment and advised the petitioner to contact its bank. The petitioner thereafter approached opposite party no.2 with a representation on 28.7.2014 enclosing the copy of the bank statement and e-payment order disclosing that an amount of Rs. 3933/- had been duly credited to the account of opposite party no.3 on 26.7.2014 and requested the said opposite party to allow extension of time so as to enable it to submit its bid. However, as the

opposite party has not accepted the request, the petitioner approached this Court alleging mala fide and callous attitude of the opposite party seeking judicial intervention.

The following reliefs have prayed for:-

> " Under this circumstance, it is humbly prayed that this Hon'ble Court may be graciously pleased to admit this writ application and issue notice to the opposite parties and after hearing the parties be pleased to direct the opposite parties to allow the petitioner to submit its tender documents by extending the date from i.e. 28.7.2014 and the opening of technical bid i.e. 30.7.2014 to suitable dates.
>
> A n d
>
> In the alternative further be pleased to quash the tender bearing NIT No. BBSTD/Comp-6/2014/5, dated 8.7.2014 under Annexure-2."

5. Learned counsel for the petitioner has emphatically reiterated the above and submitted that in the facts and circumstances of the case, it is essential in the interest of justice that this Court should exercise its power of judicial review and issue an appropriate writ to the opposite party to extend the last date of submission of tender beyond 28.7.2014 and in the alternative quash the tender process. According to Mr. Pattnaik, as the petitioner has been wrongly excluded from the tender process for no fault on its part, such intervention is called for to maintain transparency and fairness in the same.

6. Upon hearing learned counsel for the petitioner and on a consideration of materials on record as available, we are left unconvinced by the pleas raised. Admittedly, as the notice inviting tender would disclose, the last date for submission of tender was 28.7.2014 and the technical bids were to be opened by 30.7.2014. Further the pleaded averments in the writ petition demonstrate the stand of the opposite party more particularly opposite party no.3 against receipt of payment as required from the petitioner in terms of Clause 3(a) of the NIT. This clause being of utmost significance is quoted herein below:-

> " Clause 3(a)- Intending bidders are requested to register themselves with M/s. ITI Limited through the website www.Tenderwizard.com/BSNL for obtaining user-Id., Digital Signature etc. by paying Vendor registration fee and processing fee for participating in the above mentioned tender."

7. It is not disputed that any bidder failing to comply with the stipulation contained in this clause, would be debarred from participating in the process.

The rival assertions vis-à-vis payment per se raises a disputed question of fact. Undisputedly, though the petitioner as a contending bidder was fully aware that the last date of submission of tender was 28.7.2014, it has instituted the present proceeding on 11.8.2014, i.e. almost a fortnight after the expiry of that date. No acceptable explanation is forthcoming in this regard. As it is apparent on the face of record, a public participatory process had been initiated by the NIT and the scheduled dates for submission of tender and subsequent stages as on date have passed. The materials on record do not demonstrate with any unimpeachable decisiveness that the exclusion of the petitioner from the process involved had been actuated by bias or mala fide on the part of opposite party. To presume any such vice would be according to us wholly inferential which is impermissible and unwarranted in the facts and circumstances of the case. The petitioner having failed to fulfil an essential tender condition, we are of the unhesitant opinion that the challenge as laid, does not merit acceptance.

8. The writ petition lacks in merit and is dismissed accordingly. No cost.

Writ petition dismissed.

2014 (II) ILR - CUT-1103

AMITAVA ROY, C.J. & DR. A. K. RATH, J.

CONTC NO.1250 OF 2013

ISWAR CH. SWAIN ……..Petitioner

.Vrs.

DILLIP KUMAR PATNAIK ……..Opp.Party

CONTEMPT OF COURTS ACT, 1971 - S.12

Contempt proceeding – No deliberate and willful violation of the interim order – Proceeding is to be closed. (Para 7)

For Petitioner - Ms. P. Jena.
For Opp.Party - None

Date of order: 04.09.2014

ORDER

Heard Ms. P. Jena, learned counsel for the petitioner.

2. The instant petition alleges deliberate non-compliance of the interim order dated 27.08.2012 passed by this Court in W.P.(C) No. 15423 of 2012.

3. It is contended that by the said interim order it was directed that the auction involved be furthered, but no confirmation thereof would be made without the leave of the Court till 12.10.2012.

4. The record of W.P.(C) No. 15423 of 2012 would reveal that by subsequent orders dated 19.10.2012 and 14.12.2012 the term of interim restraint was extended up to 30.11.2012 and 28.02.2013 respectively.

5. It is submitted on behalf of the petitioner that the opposite party had acted against the said restraint on 26.3.2013. According to the learned counsel, in view of the decision rendered by this Court in the case of Smt. Charu Patnaik Vs. Commissioner, Land Records & Settlement, Orissa, Cuttack, reported in 2007 (II) OLR 237, even if the life of the interim order was not extended, the same continued to be operative until further orders or disposal of the petition. Therefore, in the instant case, though the interim order was not extended after 28.02.2013, the same continued to be operative and thus the action taken by the opposite party on 26.03.2013 is contemptuous.

6. Upon hearing the learned counsel for the petitioner and on consideration of the pleaded averments made as well as on a perusal of the interim orders passed in W.P.(C) No. 15423 of 2012 referred to hereinabove, we are not inclined to sustain the plea of deliberate non-compliance thereof by the opposite party.

7. On a bare perusal of the decision rendered in Smt. Charu Patnaik (supra), in our opinion, it does not support the case of the petitioner. Be that as it may, it is apparent from the orders dated 27.08.2012, 19.10.2012 and 14.12.2012 that the interim restraint continued up to 28.02.2013 and thus we are of the considered opinion that in the instant case deliberate and willful violation of the interim order has not been made out. In that view of the matter, this petition is closed.

Application disposed of.

2014 (II) ILR - CUT-1105

AMITAVA ROY, CJ & DR. B. R. SARANGI, J.

W.A. NO. 86 OF 2013

INDIAN RED CROSS SOCIETY, ORISSA ……..Appellant

.Vrs.

BANKA NIDHI MISHRA ……..Respondent

A. CONSTITUTION OF INDIA, 1950 – ART. 226

Statutory entitlements cannot be curtailed by any Rules framed by the employer.

In this case the respondent, on retirement entitled to receive gratuity of Rs. 3,48,034/- under the payment of Gratuity Act, 1972 as assessed by the Controlling Authority but the appellant-society paid him Rs.50,000/- as per the 2001 Rules framed by it – Held, there is no illegality in the order passed by the learned Singh Judge, confirming the order of the Controlling Authority. (Para 18)

B. PAYMENT OF GRATUITY ACT, 1972 – S. 4

Respondent on retirement entitled to gratuity of Rs.3,48,034/- under the Act – However the appellant-society paid him Rs.50,000/- as per the Rules framed by it in 2001 – Action challenged – Held, the 2001 Rules framed by the appellant-society cannot limit the gratuity benefit of the respondent to Rs.50,000/- as he is entitled to more benefit under the relevant Act. (Para 18)

Case laws Referred to:-

1.1998 (7) SCC 221 : (Municipal Boards & Anr.-V- Salim Khan & Anr.)
2.AIR 2009 SCW 7667 : (All India Allahabad Bank Retired Employees Association)
3.110 (2010) CLT 338 : (Paradeep Port Trust-V- A Controlling Authority & Ors.)
4.2004 (1) LLJ 802 Guj. : (Indian Red-Cross Society -V- Vidyaben).
5. 2008 (II) OLR (FB)-725 : (Mahammed Saud and Ors. V. Dr. (Maj) Shaikh Mahfooz & Anr,)
6. AIR 2003 SC 3044 : (Surya Dev Rai v. Ram Chander Rai and others)
7.1991 (II) OLR-251 : (Administrator, Shree Jagannath Temple, Puri v. Jagannath Padhi and others,)

8. AIR 1984 SC 537 : (1984) 2 SCC 451 :(Ram Kumar Mishra v. State of Bihar,)

For Appellant - M/s. S.K. Sarangi, Arun Kumar Nayak, L.K. Sahoo, B.K. Behera, S.K. Sarangi.
For Respondent - Mr. Manoj Kumar Mishra, M/s. T. Mishra, P.K. Das.

Date of hearing : 25.08.2014
Date of Judgment: 04.09.2014

JUDGMENT

DR. B.R.SARANGI, J.

The writ petitioner, being the appellant, has filed the instant appeal challenging the judgment dated 15.03.2013 passed by the learned Single Judge dismissing the writ petition and confirming the order passed under Section 4 of the Payment of Gratuity Act, 1972 (hereinafter referred to as "1972 Act") by the Controlling Authority under Payment of Gratuity Act-cum-Asst. Labour Commissioner, Cuttack (in short "the Controlling Authority") in P.G. Case No. 23 of 2009 allowing the claim of the respondent-opposite party in part directing to deposit of Rs.3,00,000(Rupees Three Lakhs) in the said Court along with interest @ 10 % per annum within 30 days from the date of receipt of the order for onward disbursement as per Section 7(3) of the 1972 Act.

2. The pleaded facts on record are that the appellant-petitioner is a Society constituted by an Act of Parliament, 1920 and the respondent-opposite party was a Doctor employed in Blood Bank, who entered into service on 31.10.1997 and subsequently, appointed as Director, Central Red Cross, Blood Bank, Cuttack on 31.05.2006. On attaining the age of superannuation, he retired from service on 31.05.2006, but he was paid Rs.50,000/- towards retirement benefit, gratuity and others as per Clause 28(a) of the Indian Red Cross Society, Orissa State Branch (Recruitment and Conditions of Service) Rules, 2001 (in short, "2001 Rules"). The respondent-opposite party had claimed that his last drawn salary was Rs.21,545/- per month and considering his length of service of 28 years, he was entitled to get a sum of Rs.3,48,034/- towards gratuity. Though he submitted representation for higher gratuity, the same was not considered for which he moved the Controlling Authority in P.G. Case No.23 of 2009 under Section 4 of the 1972 Act. After the case was registered, the Controlling Authority issued notice to the appellant-petitioner calling upon it

to file show cause and on considering the materials available on record, passed the order on 29.11.2010 allowing the claim of the respondent-opposite party by granting Rs.3,48,034/- towards gratuity. Challenging the aforesaid order dated 29.11.2010 passed by the Controlling Authority in P.G. Case No.23 of 2009, the appellant-petitioner preferred the writ petition before this Court. Learned Single Judge after hearing the learned counsel for the parties, dismissed the same vide its judgment dated 15.03.2013 and confirmed the order passed by the Controlling Authority in P.G. Case No.23 of 2009. Hence, this writ appeal.

3. Amongst other grounds, the judgment of the learned Single Judge has been assailed on the ground that the respondent-opposite party does not come within the purview of 1972 Act since it is neither a factory, mine, oilfield, plantation, port and railway company as provided under Section 1(3)(a) of the 1972 Act nor it is a shop or establishment as defined under Section 1(3)(b) of the Act nor an establishments as notified by the Central Government under Section 1(3)(c) of the 1972 Act. Referring to Section 2(8) and 2(19) of the Orissa Shops and Commercial Establishments Act, 1956 (hereinafter referred as "1956 Act"), it was submitted that 'establishment' means "a shop or a commercial establishment" and 'shop' means any premises where any trade or business is carried on or where services are rendered to customers respectively. 'Employee' has been defined under Section 2(e) of the 1972 Act and "employer" has been defined in Section 2(f). The respondent-opposite party was the Director (Chief Executive under Class-1 Officer) of Central Red-Cross Society Blood Bank and does not come within the ambit of "employee" under the 1972 Act. The appellant-petitioner has already paid a sum of Rs.50,000/- towards full and final settlement of gratuity as per rule 28(a) of the Rules, 2001. Therefore, the Controlling Authority is not justified in directing to pay a sum of Rs.3, 50,000/- towards gratuity under the said Act.

4. Mr. S.K. Sarangi, learned counsel for the appellant strenuously urged that the learned Single Judge has committed a gross error by confirming the order passed by the Controlling Authority by directing to pay a maximum of Rs.3,50,000/- by applying the provisions of 1972 Act. The provisions contained under **Sub-Section (1) of 1972** Act are not applicable. Therefore, direction given for payment of maximum gratuity cannot sustain.

5. Mr.T.Mishra, learned counsel for respondent while refuting the contentions urged by learned counsel for the appellant-petitioner has raised a preliminary objection with regard to maintainability of writ appeal and also stated that the appellant-petitioner would not have preferred a writ

application when alternative remedy was available under Section 7(7) of the 1972 Act against the order of the Controlling Authority by preferring an appeal and in order to avoid limitation prescribed under the 1972 Act of 60 days, the appellant-petitioner straightaway invoked the jurisdiction of this Court under Article 226 and 227 of the Constitution of India. It is stated that the appellant-petitioner cannot challenge service proceeding having accepted the order passed by the Controlling Authority by not preferring an appeal and participating in the said proceeding, thereby, on principle of waiver, acquiescence and estoppel, he seeks for dismissal of the appeal. It is further urged that the ground for challenging the order of the Controlling Authority is that the 1972 Act has not application to the appellant-petitioner and more so, 2001 Rules provides for maximum gratuity amount of Rs.50,000/-. So far as applicability of 2001 Rules is concerned, exempting from the purview of the 1972 Act is essentially dependant upon the conditions as envisaged under Section 5 of the 1972 Act. The first requirement of Section 5 of 1972 Act is that the establishment must obtain exemption from the appropriate Government and there must be a notification to that effect and second requirement is that gratuity payable should not be less favorable than the benefit conferred under the statute. Therefore, 2001 Rules, which has been framed by the appellant-petitioner, are deficient on both the counts. It is further urged that under Section 4 of the 1972 Act, an employee is entitled to get his gratuity subject to maximum of Rs.3,50,000 and such benefit cannot be taken away by limiting the entitlement to Rs.50,000/- as no Rule can be framed and made applicable to the employee, which is less favourable in comparison to what is entitled to under the statute and statutory entitlements cannot be curtailed by any Rules framed by the employer. In support of his contention he has relied upon the judgment in **Municipal Boards and another –vrs. Salim Khan and Another,** 1998 (7) SCC 221, **All India Allahabad Bank Retired Employees Association,** AIR 2009 SCW 7667 and **Paradeep Port Trust v. A. Controlling Authority & Others,** 110 (2010) CLT 338.

Mr. T. Mishra further urged that the definition under Section 1(3)(b) and (c) of 1972 Act are wide enough to include all establishments in which more than 10 employees are employed. So much so, Section 1(3)(b) of 1972 Act includes all shops and establishments. Section 2(8) of the 1956 Act defines “establishment” as a shop or a commercial establishment. Section 2(19) of 1956 Act defines ‘shop’ to mean any premise where any trade or business is carried on or where services are rendered to customers, thereby on close reading of Section 2(8) 2(19) of 1956 Act, it includes all premises where any transaction is carried on. The respondent-opposite party is an employee within the meaning of Section 2(e) of 1972 Act. But Rule 3(b) of 2001 Rules defines ‘ employee’ as all persons employed

by the Society. The appellant carries on commercial activities by selling bloods, conducting different types of medical/pathological tests/examination where testing fees and service charges are collected from the customers. By the time the respondent-opposite party retired from service w.e.f. 2007 there were more than 40 employees working under the establishment and over Rs. 3 crores of fixed deposits was available with such establishment. To substantiate its contention he has relied upon the case in **Indian Red-Cross Society v. Vidyaben**, 2004(I) LLJ 802 Guj.

6. Being an employee of the appellant-petitioner, the respondent-opposite party is not entitled to get any pension and he earned his livelihood after retirement from service from the gratuity amount admissible to him. Therefore, at this old age, if the graguity amount would be paid in conformity with the provisions of law, it will suffice the purpose for which he has approached this Court.

7. While considering the case of the appellant-petitioner, the learned Single Judge framed as many as four issues to resolve the dispute. While answering issue nos. (i) and (ii), learned Single Judge has come to a definite conclusion that the appellant-petitioner comes within the meaning of "establishment" thereby provision of 1972 Act is applicable to it and while answering the issue no.(iii), learned Single Judge has categorically held that no Rule can be framed by the employer and made applicable to the employees, which is less favourable in comparison to what the employee gets under the 1972 Act. After coming to such conclusion, the learned Single Judge held that there is no infirmity and illegality in the impugned order passed by the Controlling Authority warranting interference of the Court and there is also no illegality in the consequential order passed by the competent authority. Accordingly he dismissed the writ petition.

8. Mr.T.Mishra, learned counsel for respondent has raised a preliminary objection with regard to the maintainability of the writ petition before this Court. It is urged that the impugned order having been passed under Article 226 of Constitution of the India, the writ appeal is not maintainable. It is stated that challenging the order passed by the Controlling Authority under the 1972 Act, the writ petition was filed before this Court in exercise of the power of superintendence under Article 227 of the Constitution of India and after due adjudication, the learned Single Judge has passed the impugned judgment and order. Therefore, once the order has been passed under Article 227 of the Constitution of India, the present writ appeal is not maintainable. To substantiate his contention, he

has relied upon the judgment of this Court in **Mahammed Saud and Ors. V. Dr. (Maj) Shaikh Mahfooz and another,** 2008 (II) OLR (FB)-725.

9. On query being made by this Court, Mr. Mishra, learned counsel for respondent-opposite party fairly admitted that while challenging the order of the Controlling authority, the appellant-petitioner has mentioned the nomenclature in the writ petition as an application under Article 226 and Article 227. Therefore, whether the Court has exercised the power under Article 226 or 227 of the Constitution of India, no conclusion can be inferred at this stage. However, similar question has been considered by the apex Court in **Surya Dev Rai v. Ram Chander Rai and others**, **AIR 2003 SC 3044.** Though the apex Court passed the judgment, but the matter has been referred to larger Bench, which is now pending for consideration. In that view of the mater, this Court should refrain from making any observation when the matter is sub judice before the apex Court regarding maintainability of the writ appeal against the order passed by the learned Single Judge under Article 226 and 227 of the Constitution of India. When this fact was confronted to Mr.T. Mishra, learned counsel for respondent, he abandoned the plea of maintainability of the writ appeal and proceeded with the matter for hearing on merit.

10. In order to dislodge the finding of the learned Single Judge Mr. S.K. Sarangi, learned counsel appearing for the appellant-petitioner brought to our notice the provisions of sub-Section (3)(a)(b)(c) of Section 1 and sub-Sections (1) and (2) of Section 4 and Sub-Sections (7) and (8) of Section 7 of the 1972 Act. He has also referred to Sections 2(8) and 2(19) of the 1956 Act, and submitted that “establishment” means “a shop or a commercial establishment” and “shop” means “any premises where any trade or business is carried on or where services are rendered to customers respectively. In addition to the same, it is urged that the appellant-petitioner has already paid a sum of Rs.50,000/- to the respondent-opposite party towards full and final settlement of gratuity under Rule 28(a) of the 2001 Rules framed by the appellant-petitioner, which has came into force w.e.f. 05.11.2001. The term ‘employee’ has been defined under Section 2(e) and (f) of the 1972 Act and it is stated that the Director (Chief Executive under Class-I Officer) of the appellant-petitioner does not come within the ambit of meaning of ‘employee’ under the 1972 Act. As the service condition of the respondent -opposite party is regulated by 2001 Rules and in consequence thereof he has been retired from service w.e.f. 31.05.2007. The 1972 Act is not applicable and any order passed by the Controlling Authority extending the benefits of gratuity is absolutely misconceived one. In that view of the matter, 1972 Act so far as the appellant-petitioner is concerned is not

applicable and as such, no exemption is required under Section 5 of the 1972 Act from the Central Government. The self contained 2001 Rules is applicable to the appellant-petitioner which prescribes the limit of gratuity.

11. On the basis of the pleaded facts mentioned above, it is admitted that the respondent -opposite party entered into the service of the appellant-petitioner as Medical Officer on 31.10.1977 and was appointed as Director on 31.05.2006 and retired from service on 31.05.2007 and he had rendered 28 years continuous service and his last drawn salary was Rs.21,545/- per month. On superannuation, he has been paid a gratuity of Rs.50,000/- as against the claim of Rs.3,48,034/-. The Controlling Authority considering the fact that the appellant-petitioner is indulged in commercial activities held that the appellant is coming within the purview of Section 1(3)(b) of 1972 Act.

12. Considering similar fact, this Court in **Administrator, Shree Jagannath Temple, Puri v. Jagannath Padhi and others,** 1991 (II) OLR-251 in paragraph-5 is held as follows:

> "Gratuity, as observed by the Supreme Court in its etymological sense, means a gift, especially for service rendered or return for favours received. (see AIR 1970 SC 919 : **Delhi Cloth and General Mills Col Ltd. v. Its Workmen).** The general principal underlying the gratuity schemes is that by their length of service, workmen are entitled to claim a certain amount as a retiral benefit. (See AIR 1960 SC 251 : **Indian Hume Pype Co. Ltd. v. Its workmen and another.)** Gratuity has to be considered to be an amount paid unconnected with any consideration and not resting upon it, and has to be considered something given freely or without recompense. It does not have foundation on any legal liability, but upon a bounty steaming from appreciation and graciousness. Long service carries with it expectation of an appreciation from the employer and a gracious financial assistance to tide over post retiral difficulties. Judged in that background, we feel that it would be unconscionable to keep temple out of the purview of the Act, more particularly when opposite party no.1, a low paid employee has served the temple for a very long span of time."

13. In view of such position, there is no dispute that the respondent -opposite party is entitled to get the gratuity but the dispute is whether the entitlement is to be determined on the basis of the 1972 Act or 2001 Rules applicable to the employees of the appellant-petitioner. On perusal of the provisions contained in Section (1)(3)(b) of 1972 Act, it is clear that it applies

to every 'shop' or 'establishment' within the meaning of any law for the time being in force in relation to 'shop' and 'establishment' in a State in which ten or more persons are employed or were employed, or on any day preceding twelve months. It is clear that 'establishment' has not been defined in 1972 Act. In absence of any definition to the word 'establishment', considering the dictionary meaning of 'establishment' as given in *Webster's International Dictionary, the apex Court* in **Central Inland Water Transport Corporation Ltd. v. Workmen,** (1975) 4 SCC 348 : 1975 SCC (L & S) 304: AIR 1975 SC 1963 observed that "establishment" means " an institution or place of business, with its fixtures and organized staff; as, large establishment, a manufacturing establishment". "Establishment" therefore means the whole trading, business or manufacturing apparatus with a separate identifiable existence.

14. In **Ram Kumar Mishra v. State of Bihar,** (1984) 2 SCC 451 : AIR 1984 SC 537, the apex Court considering Section 2(6) of Bihar Shops and Establishments Act, 1953 stated thus:

> "The word "establishment" has been defined which carries on any business, trade or profession or any work in connection with, or incidental or ancillary to, any business, trade or profession. "

15. Section 1(3)(b) of the 1972 Act applies to every shop or establishment within the meaning of any law for the time being in force in relation to shops or establishments in a State. The apex Court in **State of Punjab v. Labour Court, Jullundur ,** AIR 1979 SC 1981 in paragraph 3(c) held as follows:

> "It is urged for the appellant that the Payment of Wages Act is not an enactment contemplated by Section 1(3)(b) of the Payment of Gratuity Act. The Payment of Wages Act, it is pointed out, is a central enactment and Section 1(3)(b), it is said, refers to a law enacted by the State Legislature. We are unable to accept the contention. Section 1 (3)(b) speaks of " any law for the time being in force in relation to shops and establishments in a State". There can be no dispute that the Payment of Wages Act is in force in the State of Punjab. Then, it is submitted, the Payment of Wages Act is not a law in relation to "shops and establishments". As to that, the Payment of Wages Act is a statute which, while it may not relate to shops, relates to a class of establishments, that is to say, industrial establishments. But, it is contended, the law referred to under Section 1(3)(b) must be a law which relates to both shops and

> establishments, such as the Punjab shops & Commercial Establishment Act, 1958. It is difficult to accept that contention because there is no warrant for so limiting the meaning of the expression 'law' in Section (1)(3)(b). The expression is comprehensive in its scope, and can mean a law in relation to shops as well as, separately, a law in relation to establishments, or a law in relation to shops and commercial establishments and a law in relation to non-commercial establishments. Had Section 1(3)(b) intended to refer to a single enactment, surely the appellant would have been able to point to such a statute, that is to say, a statute relating to shops and establishments, both commercial and non-commercial. The Punjab Shops and Commercial Establishments Act does not relates to all kinds of establishments. Besides shops, it relates to commercial establishments alone. Had the intention of Parliament been, when enacting Section 1(3)(b), to refer to a law relating to commercial establishments, it would not have left the expression 'establishments' unqualified. We have carefully examined the various provisions of the Payment of Gratuity Act, and we are unable to discern any reason for giving the limited meaning to Section 1(3)(b) urged before us on behalf of the appellant. Section 1(3)(b) applied to every establishment within the meaning of any law for the time being in force in relation to establishments in a State. Such an establishment would include an industrial establishment within the meaning of Section 2(ii) (g) of the Payment of Wages Act. Accordingly, we are of opinion that the Payment of Gratuity Act applies to an establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation or the supply of water, or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on. The Hydel Upper Bari Doab Construction Project is such an establishments , and the Payment of Gratuity Act applied to it."

16. Considering the provisions contained in Section (1)(2)(b)(c) of the 1972 Act, the Gujurat High Court in **Vidyaben H. Vyas(supra)** held as follows:

> "Therefore, in light of above observation, Apex Court held that establishments having a wide meaning, it includes commercial establishments as well as non-commercial establishments and no limited meaning can be given to the word 'establishments' which has

been referred in Section 1(3)(b) of the Act, and therefore, contention raised by learned advocate Mr. Thakkar cannot be accepted and same is rejected."

17. It has been brought to the notice of the Court that the judgment passed in **Vidyaben H. Vyas (supra)** has not been challenged before the apex Court and therefore, it has reached finality.

18. In view of such proposition of law laid down by the apex Court, the appellant-petitioner is coming within the meaning of 'establishment' and as such, provisions contained in 1972 Act is applicable in letter and spirit. Therefore, 2001 Rules framed by the appellant-petitioner cannot limit gratuity benefit of the respondent-opposite party to Rs.50,000/-, which is less favourable in comparison to what an employee gets under 1972 Act.

19. In view of the facts and circumstances and law applicable to the present case, we are of the considered opinion that the learned Single Judge has not committed any illegality or irregularity by confirming the order of the Controlling Authority with regard to payment of gratuity to respondent-opposite party, warranting interference by this Court. Accordingly, the writ appeal fails and the same is dismissed.

Appeal dismissed.

2014 (II) ILR - CUT-1114

AMITAVA ROY, C. J. & DR. A. K. RATH, J.

W. P. (C) NO.4722 OF 2013

BUDHIRAM HO .....Petitioner

.Vrs.

STATE OF ORISSA & ORS. .....Opp.Parties

SERVICE LAW – Whether the petitioner being a third party can seek a direction from this Hon'ble Court to Opp.Party Nos. 1 to 3 for dismissal of Opp.Party No.4 ? – Held, the petitioner has no such locus standi in service jurisprudence. (Paras 5,6)

Case law Referred to:-

(2005) 1 SCC 590 : (Dattaraj Nathuji Thaware-V- State of Maharashtra & Ors.)

For Petitioner - Mr. M.K. Mohanty,
For Opp.Parties - Mr. S.N. Mohapatra, Standing Counsel for S & ME. Mr.A.K.Biswal.

Date of hearing : 04.9.2014
Date of judgment : 10.9.2014

JUDGMENT

DR.A.K.RATH, J.

In this writ petition under Article 226 of the Constitution of India, the petitioner has prayed, inter alia, for issuance of a writ of mandamus to the opposite parties to take immediate action for dismissal of opposite party no.4 from Government service as per Rule 18 read with Rule 13 of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962.

2. Bereft of unnecessary details, the short facts of the case of the petitioner are that Bhaskar Bej, opposite party no.4, was the Headmaster In-charge of Padmapokhari Sevashram under the Kaptipada Education District in the district of Mayurbhanj. The petitioner, who is a schedule tribe, wanted to admit his son Narendra Ho in the said Sevashram. The opposite party no.4 demanded Rs.600/- from the petitioner for admission. When the petitioner denied to pay the amount, opposite party no.4 refused to admit his son in the Sevashram and abused him in filthy language. Thereafter, the petitioner paid an amount of Rs.300/- to opposite party no.4 on 12.7.2001 and assured to pay the rest amount of Rs.300/- on 27.8.2001. Thereafter, he lodged an F.I.R. before the S.P.Vigilance, Balasore and trap was conducted by the Vigilance Department, whereafter opposite party no.4 faced the trial in T.R.No.115 of 2007 before the Special Judge (Vigilance) Balasore. Opposite party no.4 was found guilty of the offences under Section 7 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act and sentenced to undergo R.I. for one year and pay a fine of Rs.1000/-, in default, to undergo R.I. for two months. In the meantime, opposite party no.4 has been transferred and posted as Headmaster In-charge, Dewan Bahali U.G.U.P. School under Kaptipada Education District. It is further stated that the Vigilance Department vide letter No.8260 dated 28.9.2012 communicated the judgment and requested to take action against opposite party no.4 but no action has been taken.

3. Heard Mr.M.K.Mohanty, learned counsel for the petitioner, Mr.S.N.Mohapatra, learned Standing Counsel for the School and Mass Education Department and Mr.A.K.Biwal, learned counsel for opposite party no.4.

4. The sole question that hinges for our consideration is as to whether a third party has *locus standi* in service jurisprudence. The subject matter of dispute is no more *res intgra*.

5. In ***Dattaraj Nathuji Thaware Vrs. State of Maharashtra and others,*** (2005) 1 Supreme Court Cases 590, the Hon'ble apex Court came down heavily in entertaining P.I.L. in service matters. The Bench, speaking through Justice Arijit Pasayat in para-16 of the report, held as follows:-

> "A time has come to weed out the petitions, which though titled as public interest litigations are in essence something else. It is shocking to note that courts are flooded with a large number of so-called public interest litigations where even a minuscule percentage can legitimately be called as public interest litigations. Though the parameters of public interest litigation have been indicated by this Court in a large number of cases, yet unmindful of the real intentions and objectives, courts are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilized for disposal of genuine cases. Though in *Duryodhan Sahu (Dr.) v. Jitendra Kumar Mishra* this Court held that in service matters PILs should not be entertained, the inflow of so-called PILs involving service matters continues unabated in the courts and strangely are entertained. The least the High Courts could do is to throw them out on the basis of the said decision."

6. In view of the authoritative pronouncement of the Hon'ble apex Court in the decision citied supra, no mandamus can be issued to the opposite parties 1 to 3 to dismiss the opposite party no.4 from service. The writ petition is dismissed.

Writ petition dismissed.

2014 (II) ILR - CUT- 1117

PRADIP MOHANTY, J & BISWAJIT MOHANTY, J.

JCRLA NO. 63 OF 2004

MADHUSUDAN DISARI ……..Appellant

.Vrs.

STATE OF ORISSA ……. .Respondent

A. CRIMINAL PROCEDURE CODE, 1973 – S.313

Murder Case – Examination of appellant U/s. 313 Cr. P.C. – He has admitted to have assaulted the deceased on account of previous enmity – Held, admission of guilt by the appellant U/s. 313 Cr. P.C. cannot be ignored merely because he is an Adivasi. (Para 7)

B. PENAL CODE, 1860 – S.304

Eye witnesses deposed that the appellant assaulted the deceased with an axe – Appellant also admitted his guilt U/s.313 Cr. P.C. – There is no dispute that he has given two tangia blows to the deceased – No material that due to sudden provocation the appellant assaulted the deceased – The case is not coming under the purview of Section 304 I.P.C. (Para 7)

For Appellant - Mr. Samarendra Mohanty.
For Respondent- Mr. B.P. Pradhan, (Addl. G.A.)

Date of Hearing : 02.04.2014
Date of Judgment: 02.04.2014

PRADIP MOHANTY, J.

In the present Jail Criminal Appeal, the appellant has challenged the order of conviction dated 17.5.2004 passed by the learned Sessions Judge, Koraput in Criminal Trial No.48 of 2002 under Section 302, IPC and consequent sentence to undergo imprisonment for life.

2. The prosecution case in brief is that on 26.1.2202 at about 4.30 P.M., the villagers of village Desonaikguda were celebrating “Puso Pandu Jatra” near the mango grove. Suddenly at that time, P.W.1 came running to her husband, P.W.4 (son of the deceased) and informed him that his mother was murdered by the appellant by an axe blow. Hearing this, the informant

(P.W.4) immediately rushed to his house along with others and found the dead body of his mother lying at the spot with bleeding injuries on her back and near that spot one axe (M.O.I), one cap and one slipper were also lying. Thereafter, P.W.4 along with other villagers searched for the appellant but could not trace him out. Consequently, P.W.4 lodged the F.I.R. before Sadar Police Station, Koraput after the same was scribed and read over to him. Basing upon the said written report, the police registered the case under Section 302, IPC, investigated the matter and on completion of investigation, the police submitted the charge sheet against the appellant. The defence plea is one of complete denial.

3. The prosecution in order to prove charge examined as many as six witnesses including the Doctor and the Investigating Officer and exhibited 10 documents. P.Ws.1 and 2 are the eye-witnesses to the occurrence, P.W.3 is a post-occurrence witness and a co-villager, P.W.4 is the son of the deceased and informant, P.W.5 is the doctor, who conducted the autopsy and P.W.6 is the I.O. The defence examined none. On completion of trial, the Sessions Judge, Koraput convicted the appellant under Section 302, IPC basing upon the evidence of P.Ws.1 and 2, who are the eye-witnesses to the occurrence and also upon the extra-judicial confession made by the appellant before P.W.3. The appellant also admitted his guilt in the accused statement.

4. Mr. S. Mohanty, learned counsel for the appellant assailed the judgment on the following grounds;

(i) P.W.1 and P.W.2 are interested witnesses being the daughters-in-law of the deceased. Therefore, their version cannot be believed.

(ii) Since the appellant is an Adivasi, he confessed his guilt in the accused statement and admitted the fact and as such, the same cannot be utilized against him.

(iii) In the alternative, submitted that the attending circumstances in which the offence was committed, if considered, the case may be converted to one under Section 304, IPC.

5. Mr. B.P. Pradhan, learned Additional Government Advocate vehemently contends that P.W.1 and P.W.2 are the eye-witnesses and they corroborate one another with regard to the core prosecution story. Merely because they are relatives of the deceased, their clear version with regard to assault can not be disbelieved. P.W.3 is another co-villager before whom the appellant confessed his guilt and in addition to this, the appellant admitted

the facts under Section 313, Cr.P. that due to previous enmity, he assaulted the deceased. Therefore, Mr. Prdhan contends that the appellant has been rightly convicted under Section 302, IPC and in any way, this case is not coming under the purview of Section 304, IPC as the same is not covered by any of the exceptions to Section 300, IPC.

6. Perused the L.C.R. and gone through the evidence minutely.

P.W.1 is the daughter-in-law of the deceased and wife of the informant (P.W.4). In her examination-in-chief, she deposed that she and her mother-in-law (deceased) were sitting in the sun and Moti Desi Nayak (P.W.2) was also with them. At that that time, the appellant came there with a Tangia (M.O.I) in hand and assaulted the deceased with that Tangia on her back. In spite of her protest, the appellant also gave a second blow with that Tangia on the back, as a result of which she sustained severe bleeding injuries and succumbed to the same. Out of fear, P.W.1 went from the spot. The male persons were there in a nearby mango grove on account of 'Pousa Parba'. She disclosed the occurrence to her husband (P.W.4) in presence of P.W.3 and Daya Disari. Thereafter, they came to the spot and they found a cap, one Tangia as well as one piece of slipper lying near the dead body of the deceased. She identified the Tangia which was marked as M.O.I. In the cross-examination, nothing has been elicited to demolish the evidence of P.W.1. She denied the suggestion that as the deceased abused the appellant, the appellant assaulted her. She also stated that assault was made on sharp side of Tangia.

P.W.2 is another daughter-in-law of the deceased. In her examination-in-chief, she deposed that she, P.W.1 and the deceased were sitting together. At that time, the appellant came there with a Tangia (M.O.I) on his shoulder. He immediately dealt a blow with that Tangia on the back of her mother-in-law (deceased). The deceased protested. In spite of it, the appellant gave another blow on her back. After the second assault, the deceased fell down on the ground and died at the spot. Out of fear, P.W.2 and P.W.1 left the spot and disclosed this occurrence to others. P.W.2 along with others also saw one cap, one slipper and one Tangia (M.O.I) lying at the spot. By the time P.W.2 returned to the spot, the appellant had already absconded from the spot. In the cross-examination, nothing has been elicited to demolish the evidence of P.W.2. She denied the suggestion that all the villagers were drunk on that date. She also denied the suggestion that the deceased abused the accused in obscene words and as he protested, the deceased started abusing loudly and that out of anger the appellant dealt blow on the deceased.

P.W.3 is a co-villager and post-occurrence witness. He heard the incident from P.W.1. He along with the informant (P.W.4) came to the spot and found the dead body of the deceased lying there. He found a cap, one Tangia (M.O.I) and one slipper lying at the spot and those belonged to the appellant. P.W.3 along with others searched for and caught hold of the appellant and he confessed his guilt of having assaulted the deceased by means of an axe (M.O.I). Police conducted the inquest over the dead body of the deceased. P.W.3 proved the inquest report under Ext.1 and also proved the seizure list under Ext.2. He also proved the seizure of wearing apparels of the appellant under Ext.3. He also identified the material objects. In the cross-examination P.W.3 admitted that he could not say whether in every house of his village there was Tangia. In the cross-examination, nothing has been elicited to demolish his evidence. He denied a suggestion that on his interrogation the appellant has told him that as the deceased abused the appellant, he assaulted her.

P.W.4 is the son of the deceased and husband of P.W.1. In his examination-in-chief, he deposed that he was in the mango grove situated at a distance from the spot along with other villagers in connection with 'Pousa Parba'. There P.W.1 came and told that his mother had been murdered by the appellant by means of a Tangia. He along with others went to the spot and found his mother (deceased) lying dead with injuries on her back. Thereafter, he reported the matter to the police by submitting a written report, which he scribed through a Brahmin man near the police station. After writing of the said report, he affixed his L.T.I. on the said report. He proved the written report under Ext.5. In the cross-examination, he admitted that he reported the matter in the evening and the police came to the spot on the next morning. He denied the suggestion that on their interrogation, the appellant told that as the old lady (deceased) abused him, he assaulted her by means of a Tangia.

P.W.5 is the doctor, who conducted autopsy and found the following injuries;

> "Two incised wounds on the posterior aspect of the trunk on the inter scapular region. Wound No.1 being of size 4 ½" x ¾" extending from the medial border of right scapula across the mid line in the inter scapular space. No.2 being of size 3" x ½" x 2 ½" x 2" to the left of and parallel to wound no.1 in the interscapular region. Both wounds are ante mortem in nature."

P.W.5 opined that all the injuries were ante-mortem in nature and might have been caused by sharp cutting weapon. He also opined that cause of death

was due to haemorrhage from the wounds and that all the injuries were possible by axe. When confronted with axe (M.O.I), P.W.5 said that injuries could be caused by the said axe. He proved the post mortem report under Ext.6. In the cross-examination nothing material has been elicited to discredit his evidence.

P.W.6 was the O.I.C. of Koraput Sadar Police Station. In his examination-in-chief, he deposed that on the date of occurrence, P.W.4 presented the report. Basing upon the same, P.W.6 registered the case and investigated the matter. He examined the witnesses and made inquest over the dead body of the deceased. He sent the dead body of the deceased for post-mortem examination. He proved Ext.3 and seized the wearing apparels of the appellant and forwarded him to the court and sent material objects for Chemical Examination. In the cross-examination, nothing has been elicited to demolish his evidence.

7. Considering the evidence of P.Ws.1 and 2, who were eye-witnesses to the occurrence, it is crystal clear that the appellant was the author of the crime and the appellant also made extra-judicial confession before P.W.3, who is a co-villager. No doubt P.W.1 and P.W.2 are the daughters-in-law of the deceased, who described the assault given by the appellant with the axe. They specifically stated that the appellant gave two blows to the back side of the deceased and immediately P.W.1 informed P.W.4 and other villagers. We cannot ignore the clear evidence of P.Ws.1 and 2 merely because they are relatives of the deceased. There is nothing to show that they were inimically disposed towards the appellant. Further the conduct of P.W.1 informing her husband P.W.4 (informant) was natural. Thereafter, P.W.3 and others came to the spot and saw the dead body of the deceased lying there along with a Tangia (M.O.I) and slipper. On search, the appellant could not be found but subsequently, he was traced out and he confessed his guilt. The Post Mortem Examination report also corroborates the core story of prosecution and there is no dispute that the death is homicidal in nature. All the material objects were sent for Chemical Examination and the Chemical Examination report reveals that human blood was detected from the Tangia (M.O.I), wearing apparels and when the question was put to the appellant under Section 313, Cr.P.C., he admitted the above facts. He also admitted that due to previous enmity, he had assaulted the deceased on account of previous anger. Admission of guilt by the appellant under Section 313, Cr.P.C. cannot be ignored merely because he is an Adivasi, as contended by the learned counsel for the appellant. Further, there is no dispute that the appellant assaulted the deceased by means of a Tangia (M.O.I) and gave two blows and there is no material that due to sudden provocation, the

appellant assaulted the deceased. Therefore, the case is not coming under the purview of Section 304, IPC.

8. In view of the above, the judgment and order of conviction dated 17.5.2004 passed by the learned Sessions Judge, Korpaut is confirmed.The Jail Criminal Appeal is accordingly dismissed.

Appeal dismissed.

2014 (II) ILR - CUT- 1122

PRADIP MOHANTY, ACJ & BISWAJIT MOHANTY, J.

JCRLA NO.213 OF 2000

JASOBANTA SAHU ……..Appellant

.Vrs.

STATE OF ORISSA ……Respondent

PENAL CODE, 1860 – S. 300, EXCEPTION- 2

Right of private defence of person or property – Scope – Appellant has denied that he stabbed the deceased on account of land dispute – On the other hand evidence shows that on receiving notice in a proceeding U/s.107 Cr. P.C. the appellant threatened to kill the deceased which shows, killing of deceased was pre-planned – There is no material that the appellant was present in his own land and deceased as aggressor attacked the appellant which warranted his killing by the appellant in exercise of right of private defence of his person or property – Such plea was neither taken during trial nor during examination of the appellant U/s. 313 Cr. P.C. – Moreover when the appellant was confronted about the minor injuries sustained by him, his answer was that he could not say about the same, which shows that the deceased was not the author of the said injuries – Held, the appellant has failed to prove existence of facts satisfying requirement of Exception-2 to Section 300, I.P.C. in his favour – Learned Court below has rightly convicted the appellant U/s.302 I.P.C. (Paras 12,13)

For Appellant - Mrs. Usharani Padhi
For Respondent - Mr. B.P.Pradhan,
Addl. G.A.

Date of Judgment: 17.07.2014

JUDGMENT

BISWAJIT MOHANTY, J.

The present Jail Criminal Appeal has a chequred history. Sessions Trial No.2-A of 1989 from out of which the present Jail Criminal Appeal arises was initially disposed of vide judgment dated 24.8.1991 by the learned Sessions Judge, Dhenkanal, who while acquitting the appellant of the charge under Section 302, IPC, convicted the appellant under Section 304-I, IPC and sentenced him to undergo R.I. for three years.

2. According to Mrs. Padhi, learned counsel for the appellant the present appellant never preferred any appeal against the above noted judgment and sentence and rather underwent the sentence as directed. However, the informant-Hemanta Kumar Sahu (P.W.4) preferred Criminal Revision No.365 of 1991 before this Court. The said revision was disposed of on 14.1.2000 setting aside the judgment and order dated 24.8.1991 passed by the learned Sessions Judge, Dhenkanal so far as it related to acquittal of the appellant of the charge under Section 302, IPC and the matter was remitted back to the learned Sessions Judge, Dhenkanal for consideration on the point, if the offence committed by the appellant came within the purview of Section 302, IPC. This Court further directed the learned Sessions Judge to hear the prosecution and the appellant and dispose of the matter according to law by the end of April, 2000 without being influenced by any observation made by this Court in its judgment dated 14.1.2000. Accordingly, the matter was heard and impugned judgment dated 26.8.2000 was pronounced by the learned Sessions Judge, Dhenkanal holding the appellant guilty under Section 302, IPC and sentencing him to undergo imprisonment for life. The present appeal is directed against the above judgment and sentence passed by the learned Sessions Judge, Dhenkanal, Angul.

3. The prosecution story in brief is that the appellant and deceased were having strained relationship on account of property dispute. Laxminarayan Sahu (deceased), one Brajabandhu Sahu and Bhagaban Sahu (P.W.14) were brothers. The appellant is the son of Brajabandhu Sahu. There was a partition of family properties between the three brothers and their mother in which their mother was allotted Ac.1.80 decimals of land

for her maintenance. She was staying most of the times either with his son (P.W.14) or with the deceased. After her death about four years prior to the

date of occurrence, Brajabandhu Sahu, father of the appellant, wanted to divide the landed property belonging to his mother, which was objected to by the other brothers. Dispute thus arose between Brajabandhu Sahu and the appellant on one side and other two brothers on the other side. This led to litigations between the parties. On 9.10.1988, Laxminarayan Sahu (deceased) went to his land to plough, the appellant reached there at about 12.30 P.M. and stabbed Laxminarayan Sahu repeatedly by using a knife, as a result of which Laxminarayan Sahu died at the spot. Hemanta Kumar Sahu, son of P.W.14 lodged the F.I.R. (Ext.1) on the basis of which investigation was taken up. During course of investigation, the I.O. visited the spot, held inquest over the dead body of the deceased, examined the witnesses, seized the wearing apparels of the appellant as well as the deceased. The I.O. (P.W.22) also arrested the appellant on 13.10.1988 and thereafter, the appellant led to discovery of weapon of offence, i.e., knife (M.O.I). He also made query to the doctor and sent the incriminating articles for chemical examination. On completion of investigation, the I.O. submitted charge sheet against the appellant.

4. The plea of the appellant was of complete denial.

5. The prosecution in order to bring home charge, examined as many as 22 witnesses including two doctors and one I.O. The prosecution also exhibited 21 documents. It also proved seven material objects including knife (M.O.I). Three documents were admitted into evidence for defence.

6. P.Ws.1 and 2 are the eye-witnesses to the occurrence. P.W.3 is the witness, who saw the right hand of the appellant was stained with blood. P.W.4 is the informant, who saw various injuries on the neck, chest, shoulder and back of the deceased. He also stated about the previous enmity between the appellant and deceased regarding landed property. P.Ws.5 and 20 are the witnesses to leading to discovery of M.O.I. P.W.6 is a co-villager before whom the appellant confessed about commission of crime. P.Ws.7 and 8 are the seizure witnesses. P.W.9 is a seizure witness, who turned hostile. P.Ws.10,12 and 18 are the other witnesses before whom the appellant had confessed his crime but who later on turned hostile. P.W.11 is a formal witness who was commanded to take the dead body of the deceased to the Sub-Divisional Hospital, Angul for Post Mortem Examination. P.W.13 is the doctor, who conducted the Post Mortem Examination. P.W.14 is the father of P.W.4, who gave out detailed of previous litigation between the parties and the threat given out by the

appellant. P.Ws.15 and 16 are the eye-witnesses, who turned hostile. P.W.17 is the Ward Member of the village. P.W.19 is another witness to leading to discovery who later on turned hostile. P.W.21 is the doctor, who examined the appellant. P.W.22 is the Investigating Officer.

7. In the examination under Section 313, Cr.P.C., the appellant admitted that there was a dispute regarding land between his father and his other two brothers, namely, P.W.14 and the deceased. With regard to the question on his sustaining some injuries for which he was also sent for medical examination, the appellant answered that he could not say anything. Further he denied that he stabbed the deceased on account of land dispute. He took the specific stand that on account of land dispute a false case has been foisted to harass him. It appears that the appellant denied most of the questions put to him during the examination under Section 313, Cr.P.C. From the side of the defence no body was examined. But three documents were admitted into the evidence for defence. As indicated earlier vide impugned judgment dated 26.8.2000 the appellant was found guilty for commission of offence punishable under Section 302, IPC and sentenced to undergo imprisonment for life.

8. Mrs. Padhi, learned counsel for the appellant submitted that the learned court below had gone wrong in recording a finding of guilt under Section 302, IPC as the case was squarely covered under Exception-2 to Section 300, IPC and accordingly, she pleaded that the present case could come only under Section 304 Part-I, IPC not under Section 302, IPC.

9. Mr. B.P. Pradhan, learned Additional Government Advocate on the other hand defended the judgment of the court below with vehemence and contended that the present case is not covered under Exception-2 to Section 300, IPC and a scanning of evidence, would clearly show that the same comes under Section 302, IPC. In such background, Mr. Pradhan submitted that the learned court below rightly convicted the appellant under Section 302, IPC and the same warranted no interference by this Court.

10 In order to appreciate the contentions of both sides we have to scan the evidence.

P.W.1 is a co-villager. In his examination-in-chief he has stated that while he was crossing Surata nala hearing the sound “Marigali Marigali Rakhyakar”, he went to Gobardhipa and saw the appellant assaulting the deceased by a knife (M.O.I). The appellant was assaulting the deceased on his hand, back of the shoulder on the left side. Thereafter, P.W.1 narrated the incident to some of the villagers. In the cross-examination, he stated that

he had not heard any talk between the appellant and the deceased. He came to the spot and saw that the deceased was trying to get up and was falling again and again. He stayed at the place of occurrence for about 2 to 3 minutes. He had seen blood stain marks in the hands of the appellant at the time of occurrence. The knife (M.O.I) which was used by the appellant was 7 to 8 inches long. He further stated that there were some litigation between the appellant and deceased. He denied the suggestion that he had not seen the occurrence and deposed falsely being instigated by the sons of the deceased.

P.W.2 is another co-villager, who in his examination-in-chief has stated that hearing the sound "Jasobanta Mote Maripakauchhi Kie Kounthi Achha Mote Rakhya Kara", he came to the ridge of Nala and from a distance of 20 to 25 feet, he found the deceased was lying on the ground and the appellant was sitting on him and stabbing with a knife on his chest. Seeing this, out of fear he went away from the spot through another route and came to his village. In the cross-examination, he stated that he had the knowledge that the appellant and deceased were in litigating terms prior to the date of occurrence. He further stated that he had not heard any talk between the appellant and the deceased at the time of occurrence. He saw the appellant giving two stab blows to the deceased. He denied the suggestion that he had not seen the occurrence and deposed falsely being instigated by the sons of the deceased.

P.W.3 is a co-villager, who in his examination-in-chief has stated that he saw the right hand of the appellant was stained with blood. When he asked about the same to the appellant, the appellant did not give any reply. In the cross-examination, P.W.3 stated that the appellant passed by his left side and he saw blood marks on his right hand right from his shoulder upto the wrist.

P.W.4 is the cousin of the appellant and the informant. In his examination-in-chief he stated that he saw injuries on the neck, chest shoulder and back of the deceased, caused by the knife. He also stated that there was enmity between the appellant and the deceased over the landed properties. Due to absence of the deceased in the village, the appellant used to cause damage to the ridge in between their lands. So notices were served on the appellant and his parents on 6.10.1988. Further he submits that there was no good relationship between the deceased and the father of the appellant. Due to the land dispute, the appellant threatened to kill the deceased. In the cross-examination, P.W.4 stated that on receiving the notice in 107 case, the appellant spread a rumor in the village that he would kill the deceased thereafter.

P.Ws.5 and 20 are the witnesses to leading to discovery of knife M.O. I (Knife). Both identified the knife (M.O.I), In the cross-examination, both the witnesses have stood their ground.

P.W.6 is a co-villager and a witness before whom the appellant confessed his crime. In his examination-in-chief, P.W.6 has stated that when the appellant confessed his crime before him, he saw a knife in the right hand of the appellant and his wearing apparels were stained with blood. In the cross-examination, he stated that the appellant stopped for a minute, reported the fact and went away.

P.Ws7 and 8 are formal witnesses, who proved the seizure lists marked as Exts.4,6 and 7.

P.Ws.9 and 10 are declared hostile.

P.W.11 is a Head Constable who was commanded to take the dead body of the deceased to the Sub-Divisional Hospital, Angul for post mortem examination. Nothing adverse has been elicited in his cross-examination.

P.W.13 is the doctor, who conducted post mortem examination. In his examination-in-chief he has stated that on 10.10.1988 he was Surgery Specialist in the Sub-Divisional Hospital, Angul. On that day on police requisition he conducted post mortem examination on the dead body of the deceased being identified by P.W.11. During course of autopsy he found the following injuries;

"**External Injuries**;

1. One incised wound 3 cm x 1.5 cm x 5 cm deep subcutaneously over the front of chest below the right nipple.
2. Incised wound 2.5 cm x 1 cm cm x 3 cm deep over the left supra clavicular fossa.
3. Incised wound 3 cm x 1.5 cm over the left infraclavicular region penetrating into the left thoracic cavity.
4. Incised wound 2 cm x 0.5 cm over the axillary region penetrating ito the left thoracic cavity,
5. Incised wound 2 cm x 1 cm below the left infrascapular region outing through the left 7^{th} rib and penetrating into the left thoracic cavity,
6. Incised wound 3 cm x 1 cm x 6 cm deep subcutaneously over the left deltoid region,

7. Incised wound 1 cm x 0.5 cm x 0.5 cm over the ventral aspect of the pulp of left middle finger,

8. Abrasion 4 cm x 3 cm over the right calf region,

9. Abrasion 4 cm. x 4 cm over the left glutial region and abrasion 4 cm x 3 cm over the right glutial region,

10. Abrasions 5 cm x 3 cm, 4 cm x 4 cm x 3 cm over the back of chest.

Internal Injuries;

(i) There is clutted blood inside the left thoracic cavity,

(ii) Left lung shows 3 incised wounds corresponding top the positions of external injury mentioned at serial nos.3,4 and 5 above,

(iii) Heart is intact and empty of blood."

P.W.13 opined that all the above injuries were ante mortem in nature and possibly caused by means of a sharp cutting weapon. Death was caused due to haemorrhage and shock following the above mentioned injuries. These injuries were sufficient in ordinary course of nature to cause the death of a person immediately. He further stated that he examined the knife (M.O.I) on police requisition and opined that the external injuries mentioned in Sl. Nos. 1 to 7 and the internal injuries mentioned in the post mortem examination report were possible by this weapon. The injuries were sufficient to cause death of the deceased. He proved the post mortem examination report under Ext.12. In the cross-examination, P.W.13 stated that if a man stabbed with a knife (M.O.I), it was more likely to cause incised wound than punctured wound. Injury nos.8 to 10 on the deceased were possible by coming in contact with hard and rough substance or by falling during a scuffle. He further stated that injury nos.8 to 10 by themselves could not cause death of a man. Injury nos.3 to 5 individually could cause death of a man. Thus nothing adverse has been elicited to demolish the evidence of P.W.13.

P.W.14 is the brother of the deceased and father of P.W.4. In his examination-in-chief he has stated that when the father of the appellant wanted to divide the land allotted to the mother, they objected to the same as the usufructs of the land was to be adjusted towards repayment of the loan incurred by all to meet the Sudhikriya ceremony of the mother. In the year, prior to the death of the deceased, the appellant demanded to effect partition of mother's land and later he demanded a particular portion of the mother's land to the deceased. For that reason the deceased went to Jarpada Police Station to lodge information regarding the dispute over the

land. Thereafter, a proceeding under Section 145, Cr.P.C. was initiated and an attachment order was given over it. After some time, the appellant destroyed the ridge in between the lands of the appellant and the deceased. As a response to this, the deceased lodged information again at Jarpada Police Station. The police visited the spot and started a case against the appellant and his father. Thus, the appellant was creating various troubles and the deceased was filing cases against him in the Courts. On Thursday just prior to the date of occurrence, the Court Peon had been to the village to serve notice on the appellant and his father. After receiving notice, the appellant came up from his house and was threatening to kill the deceased. In the next morning when P.W.14 was sitting, the appellant passed by that way by showing a threatening mood by biting his teeth. On the date of occurrence, the deceased went towards his taila in the morning. Later he was intimated that his deceased brother had been murdered by the appellant. Accordingly, he visited the spot and found Laxminarayan Sahu lying dead. He saw several injuries on the body of his deceased brother. In the cross-examination, P.W.14 has stated that his mother was not in good terms with the father of the appellant and was also not taking any food in his house. The day when the appellant passed infront of P.W.14 by biting his teeth in an angry mood, the deceased was not present in the village. In the early morning of Sunday he told the wife of the deceased to ask him not to go to the land as the appellant was annoyed with him. He denied a suggestion that due to enmity with his brother, i.e., father of the appellant, at his instance, the witnesses have been procured to speak against the appellant and manufactured the case to see the conviction of the appellant.

P.Ws.15 and 16 are the so-called eye-witnesses, who later turned hostile.

P.W.17 is the Ward Member of the village and is a formal witness.

P.Ws.18 and 19 are also the witnesses, who turned hostile.

P.W.21 is the doctor, who examined the appellant. Though he found seven injuries on the person of the appellant, however, in examination-in-chief he clearly stated that all the injuries were simple in nature and could be caused by a knife. In the cross-examination, he stated that incised injuries 1,2 and 3 can be caused if one stabbed with a knife.

P.W.22 is the Investigating Officer, who in his examination-in-chief has stated that on 9.10.1988 he was the Sub-Inspector of Police at Jarapada Police Station. On that day he received an oral report from P.W.4 and registered the case and took up investigation. He proved the F.I.R. under Ext.1, Commanding Certificate, dead body challan, seizure lists and seven

Material Objects. He also seized the wearing apparels of the appellant as well as the deceased. He prepared the spot map under Ext.21. He seized the blood stains in presence of P.W.9 and prepared the seizure list. He also examined P.W.10 on 9.10.1988 who stated before him that the appellant told her that he had already murdered his uncle by a knife. He further stated about examination of two eye-witnesses, P.Ws.15 and 16 who later on turned hostile. He also stated about the examination of P.Ws.18 and 19 who later on turned hostile. He stated about examination of P.W.6 before whom the appellant had confessed his crime. He also stated that the appellant made statements in presence of P.Ws.5 and 20 and led to discovery of M.O.I. During his cross-examination, P.W.22 pointed out some minor contradictions in the evidence of P.Ws.1,2 and 14. He denied a suggestion that there was no eye-witnesses to the occurrence and that his investigation was perfunctory. In the re-examination, he stated about examining P.W.12, who later on turned hostile.

11. In such background, let us now examine the contentions of Mrs. Padhi, learned counsel for the appellant. Since Mrs. Padhi in her submission made it clear that the appellant did not prefer any appeal against the earlier judgment dated 24.8.1991 passed by the learned Sessions Judge, Dhenkanal in S.T. No.2-A of 1989 and since the appellant underwent the sentence as directed, one thing is clear that there is no dispute that the appellant had committed culpable homicide. However, according to Mrs. Padhi, this culpable homicide could not be described as murder as the appellant while exercising his right of private defence of person and property, in good faith, caused death of the deceased without pre-meditation. In this context, she put emphasis on the simple injuries suffered by the appellant. Therefore, she submitted that the learned court below had gone wrong in convicting the appellant under Section 302, IPC and her client could only be convicted under Section 304 Part-I as was done earlier.

12. We are unable to accept the contentions of Mrs. Padhi, learned counsel for the appellant for the following reasons;

From the evidence of P.Ws.1,2,4 and 14, it is clear that there existed land dispute between the parties. P.W.4 had made it clear in his examination-in-chief that due to this land dispute, the appellant was always threatening to kill the deceased. In cross-examination, P.W.4 has stated that after receiving notice in 107 case, the appellant spread rumor in the village that he would kill the deceased. P.W.14 in his examination-in-chief has stated that on account of land dispute, the deceased has initiated a case against the appellant and after receiving notice, the appellant threatened to kill the deceased. All these establish motive of the appellant and thus the

killing of the deceased was pre-planned. Under such facts and circumstances, it cannot be said that the deceased was killed without any pre-meditation. Further, the evidence of P.Ws.1 and 2 would show that the appellant used a knife (M.O.I) to assault the vital parts of body of the deceased. Both of them have stated that they have not heard any talk between the appellant and the deceased at that time. Their evidence is well corroborated by the evidence of P.W.13, who made it clear that the injuries suffered were sufficient in the ordinary course to cause death of a person immediately. He further stated that the deceased suffered as many as seven incised wounds out of which injuries 3,4 and 5 were sufficient individually to cause death of a man. The aforesaid injuries were found on the chest and each of the injuries penetrated into the left thoracic cavity. These injuries also correspond to the internal injury no.2, which shows 3 incised wounds in left lung. These injuries are on the chest and back side of the chest causing incised wounds on left lung. This clearly reflects that injury nos.3,4 and 5 were inflicted with sufficient force to penetrate lung. This makes the intention of the appellant clear, i.e., to murder the injured. P.W.13 has made it clear that all the external injuries and internal injuries were possible by a knife (M.O.I). This makes it clear that the appellant had given repeated knife blows to the deceased on account of which the deceased was trying to get up and he was falling again and again as stated by P.W.1.

Now coming to the question of right of private defence, one can see that such a plea was neither taken during trial nor during examination of the appellant under Section 313, Cr.P.C. nor even at the time of argument leading to the first judgment dated 24.8.1991 by the learned Sessions Judge, Dhenkanal. This plea of self-defence was not even suggested to the eye-witnesses like P.Ws.1 and 2. The version of the eye-witnesses also rules out any scope for right of private defence in favour of the appellant. Further as has been indicated earlier in answer to question no.13 during his examination under Section 313, Cr.P.C., the appellant has denied that he stabbed the deceased on account of land dispute. Thus, there exists no material whatsoever to bring the present case under Exception-2 to Section 300, IPC. In fact there is no material to show that the appellant was present in his own land and the deceased as aggressor attacked the appellant causing such injuries, which warranted his killing by the appellant in exercise of right of private defence or his person/property. Further, as per version of P.W.6 soon after the occurrence, the appellant admitted to have killed the deceased without taking any plea of right of private defence of person or property. Rather P.W.6 in the cross-examination, has made it clear that the appellant did not say for what reason he killed the deceased. All these rule out any question of killing while exercising right of private defence.

Further the injuries found on the body of the appellant as deposed by P.W.21 show that the appellant had received seven injures out of which three injuries were abrasions, one lacerated wound and rest three were incised wounds on second metacarpo phalangial joint, on the ventral surface of the left thumb and on the ventral surface of the left little finger over the middle phalanx. According to P.W.21 all the injuries are minor in nature. Assuming for a moment that the deceased was the aggressor and he inflicted these injuries, even this cannot justify right of defence to cause death of the deceased. However, we hasten to add here that there exists no evidence to show that the deceased was the author of these injuries on the person of the appellant. Interestingly, when these injuries were confronted to the appellant while he was being examined under Section 313, Cr.P.C. his answer was that he could not say about the same. This further makes it clear that the deceased cannot be said to be the author of the said injuries. Thus, for all these reasons, it can be safely said that the appellant has failed to prove existence of facts satisfying requirement of Exception-2 to Section 300, IPC in his favour.

13. In such background, we unhesitatingly hold that the court below has made correct appreciation of evidence and rightly arrived at the conclusion by convicting the appellant under Section 302, IPC. Therefore, the Jail Criminal Appeal is without any merit and the same is dismissed. Since the appellant is on bail vide order dated 24.1.2000 passed by this Court, he is directed to surrender to custody for undergoing the remaining period of sentence as imposed against him by the court below.

Appeal dismissed.

2014 (II) ILR - CUT-1132

PRADIP MOHANTY, A.C.J. & BISWANATH RATH, J.

W.A. NO. 227 OF 2014

PRAHALLAD DALEI ……. Appellant

.Vrs.

STATE OF ODISHA & ORS. ……. Respondents

ODISHA GRAMA PANCHAYAT ACT, 1964 – S.24(2)

"No confidence motion" against Sarpanch – Sub-Collector to issue notice, to the members of the Grama Panchayat fixing the date, time and place of the meeting, accompanying a copy of the requisition and the proposed resolution.

In this case notice issued by the Collector for the no confidence motion meeting did not accompany a copy of the requisition which is mandatory U/s. 24(2)(a) & (c) of the Act – Held, impugned notice is invalid and the order passed by the learned single judge being contrary to the statutory provision can not sustain, hence set aside.

(Para 12)

Case laws relied on :-

1. 2010(II) OLR-473 : Muktamanjari Sahoo -V- State of Orissa & Ors.
2. AIR 2001 Orissa 67 : Smt. Kamala Tiria -V- State of Orissa & Ors.
3. AIR 1977 SC 2145 : Cyril E.Fernandes -V- Sr. Maria Lydia & Ors.
4. 1988 (I) OLR-76 : Sarat Padhy -V- State of Orissa
5. 2005 (Suppl.) OLR-1106 : Bhagabat Sahoo -V- Collector, Angul

For Appellant - M/s. Sarat Ch. Mishra & A.K.Mishra-3.
For Respondents - Mr. B.P.Pradhan, Addl. Govt. Adv.

Date of hearing : 07.07.2014
Date of Judgment : 05.08.2014

JUDGMENT

BISWANATH RATH, J.

By filing the writ appeal the appellant has assailed the dismissal order dated 20.06.2014 passed by learned Single Judge in W.P.(C) No.11062 of 2014. The appellant has preferred to file this appeal seeking the following relief(s):-

> "It is, therefore, prayed that, this Hon'ble Court may graciously be pleased to admit the appeal, call for the records and after hearing the parties set-aside the dismissal order of the Hon'ble Single Judge Bench of this Hon'ble High Court disposed of on dtd.20.06.2014 in W.P.(C) No.1106/2014 filled against the illegal requisition of vote of no confidence against the Sarapanch, Bolagarh G.P. under Bolagarh Block under Khurda District as Annexure-2.
>
> And, to quash the notice No.-03(19) dtd.11.06.2014 as at annexure-3 issued to convene requisition meeting for note of no confidence against the appellant."

2. The case of the appellant before the learned Single Judge was that Sarapanch, Bolagarh Grama Panchayat under Bolagarh Block in Khurda district for last two years was managing the affairs of Grama Panchayat smoothly. While continuing as such, the present respondent no.3, i.e., the opposite party no.3 in the writ petition in his notice no.03(19) dated 11.06.2014 enclosed a resolution passed by nine(9) ward-members for the decision of the Panchayat in their meeting scheduled to be held on 27.06.2014 at 11.00 A.M. in the Bolagarh Grama Panchayat Office. The allegation of the petitioner in the writ petition was that the opposite party no.3 to the writ petition, i.e., present respondent no.3, has not followed the provisions contained in Section 24(2)(a) and (c) of the Orissa Grama Panchayat Act, 1964 (for short the 'Act'). The notice issued by opposite party no.3, is incomplete being violative of Section 24(2)(a) and (c) of the Orissa Grama Panchayat Act, 1964 and, therefore, sought for quashing of the same. The notice of opposite party no.3-respondent no.3 referred to is appearing at Annexure-2 of the writ petition and at Annexure-3 of the writ appeal. The aforesaid writ petition was heard on 20.06.2014 and was dismissed on the same day at the admission stage holding as follows :-

> "The petitioner has moved this Court to restrain the opposite parties from proceeding in the matter of 'no confidence motion' against the petitioner on the ground of contravention of Section 24(2) (a) and (c) of the Orissa Grama Panchayat Act. Perusal of Annexure-1 and Annexure-2 shows that the provisions of the aforesaid section has been complied with and it has been mentioned in the notice vide Annexure-2.
>
> In view of such fact, I do not find any justification to interfere in the matter.
>
> The writ petition is accordingly dismissed.
>
> **Sd/-C.R. Dash, J.**"

3. Being aggrieved by the order of learned Single Judge dated 20.06.2014, the appellant has filed the writ appeal. The appellant while quoting relevant provisions of the Act, sought for quashing of the order of learned Single Judge essentially on the following grounds:-

1. The Sub-collector, Khurda has not adopted the due procedure as contained in Section 24(2)(a) and (c) of the Act while issuing the notice for conduct of 'no confidence motion'.

2. The learned Single Judge has dismissed the writ petition without application of judicial mind and has failed to appreciate the submissions made by the appellant regarding resolution proposed to be moved in the meeting stipulated in Section 24(2)(a) and (c) of the Act on the ground that this being a legislative requirement no procedural laches can be acceptable.

4. Heard the parties during the course of the hearing on the question of admission of the writ appeal, the parties placed the citations that they relied on. The petitioner placed reliance on the decisions in the case of **Muktamanjari Sahoo v. State of Orissa & others**; 2010(II) OLR-473 and **Smt. Kamala Tiria v. State of Orissa and others**; A.I.R. 2001 Orissa 67. Similarly, the State respondents relied on the decisions in the case of **Cyril E. Fernandes v. Sr. Maria Lydia & others**; A.I.R. 1977 S.C., 2145, **Sarat Padhy v. State of Orissa**; 1988 (I) OLR-76 and **Bhagabat Sahoo v. Collector, Angul**; 2005(Suppl.) OLR-1106.

5. Before discussing on the decisions referred to by the parties, it is necessary to look into the provisions relied on by the parties. The Orissa Grama Panchayat Act, 1964 at Section 24(2)(a) and (c) reads as follows :-

"**24**.

(2) In convening a meeting under Sub-Section (1) and in the conduct of business at such meeting the procedure shall be in accordance with such rules, as may be prescribed, subject however to the following provisions, namely :

(a) no such meeting shall be convened except on a requisition signed by at least one-third of the total membership of the Grama Panchayat along with a copy of the resolution proposed to be moved at the meeting;

xx xx xx xx

(c) the Sub-Divisional Officer on receipt of such requisition shall fix the date, hour and place of such meeting and give notice of the same to all the members holding office on the date of such notice along with a copy of the requisition and of the proposed resolution, at least fifteen clear days before the date so fixed."

6. The submission of the appellant is that while issuing a notice of 'no confidence motion' following provisions under Section 24(2)(a) of the Act no meeting can be convened except on a requisition signed by at least one-third of the total membership of the Grama Pachayat along with a copy of the

resolution proposed to be moved at the meeting. Similarly, under Section 24(2) (c) the requirement of the statute is that a Sub-Divisional Officer on receipt of such requisition shall fix the date, hour and place of such meeting and give notice of the same to all the members holding office on the date of such notice along with a copy of the requisition and copy of the proposed resolution, at least fifteen clear days before the date so fixed.

7. The appellant, even though assails the action of the Sub-Collector for not following the provisions contained in Section 24(2)(h) but, we feel that the same has no relevance to the present case. Before proceeding to deal with the validity of the notice under Annexure-3, it is necessary to look into the contents in Annexure-3. Annexure-3, i.e., the notice no.03 dated 11.06.2014 clearly speaks that while fixing the date and time of the meeting, the Sub-collector, Khurda has only enclosed the resolution adopted by the Panchayat on 28.05.2014. If the resolution dated 28.05.2014 is looked into, the said resolution in item no.5 resolved to intimate Sub-Collector, Khurda to bring a 'no confidence motion' against the Sarapanch. Following the above resolution dated 28.05.2014, the Panchayat also by letter dated 30.05.2014 intimated the Sub-Collector, Khurda that they have already resolved to bring a 'no confidence motion' against the Saranpach.

8. From the above, it is amply clear that the members of the Panchayat have resolved to move the 'no confidence motion' against the Sarapanch by their meeting dated 28.05.2014 and the Sub-collector, Khurda in his notice dated 11.06.2014 issued under Section 24 of the Act accompanied the resolution of the members of the Panchayat dated 28.05.2014. The mandate of the provisions contained in Section 24(2)(a) and (c) are two fold. As per Section 24(2)(a), the requirement is that no meeting shall be convened except on a requisition signed by one-third of the total membership of the Grama Panchayat along with a copy of the resolution proposed to be moved and the second requirement is that the Sub-Divisional Officer on receipt of such requisition shall fix the date, hour and place of such meeting and give notice of the same to all the members holding office **on the date of such notice along with a copy of the requisition and of the proposed resolution, at least fifteen clear days before the date so fixed.**

9. The documents filed along with writ petition as well as the writ appeal clearly establish that the meeting was convened on 28.05.2014 in which the members of the Grama Panchayat proposed / decided to bring 'no confidence motion' against the Sarpanch and on 30.05.2014 the members of the Grama Panchayat submitted a requisition to the Sub Divisional Officer for bringing a 'no confidence motion' against the Sarpanch, which was sent

along with a copy of the resolution dated 28.05.2014 proposed to be moved. But, the Sub-Collector upon receipt of the proposed resolution fixed the date, hour and place of the meeting by issuing a notice dated 11.06.2014 and while fixing the date, hour and place of such meeting giving notice to all the members had only accompanied the resolution of the members of the Grama Panchayat dated 28.05.2014 as clearly reflected in the documents vide Annexure-3 to the writ appeal.

10. We have heard the respective parties and gone through the materials produced before us as well as the provisions relied on by the parties. Provision of Section 24(2)(c) of the Act makes it amply clear that though the Sub-collector, Khurda was required under the statute to issue notice of 'no confidence motion' accompanying therein a copy of the requisition and the proposed resolution, we find the notice of 'no confidence motion' did not accompany the requisition. Thus notice vide Annexure-3 also suffers being not in consonance with the statutory requirement vide Section 24(2)(c) of the Act.

11. In view of the above strong factual position, this Court does not feel it necessary to deal with the citations relied upon at the Bar, which are irrelevant for the purpose.

12. In this view of the matter, the impugned notice vide Annexure-3 to the writ appeal as well as Annexure-2 to the writ petition is contrary to the provisions contained in Section 24(2)(a) and (c) of the Grama Panchayat Act, 1964, as it did not contain the copy of the requisition, which is a mandatory requirement. As such, the notice as appearing at Annexure-3 is held to be invalid in the eye of law. Accordingly, the order of the learned Single Judge impugned at Annexure-1, being contrary to the materials available on record as well as the statutory provision vide Section 24(2)(c) of Act is not sustainable in the eye of law, which we set-aside accordingly. The writ appeal is thus allowed. However, there is no order as to costs.

Writ appeal allowed.

2014 (II) ILR - CUT-1138

M. M. DAS, J.

FAO NOS. 109/2007 & 30/2008

BIDULATA MOHANTY …..….Appellant

.Vrs.

SANGRAM KESARI NAYAK ……Respondent

A. SUCCESSION ACT, 1925 – S. 281

Probate petition – Petition shall be verified by at least one of the witnesses to the will, if procurable – D.W.1 in her Cross-examination admitted that her petition for probate does not contain verification of any witness, though they were available and procurable – Non-compliance of the provision U/s.281 of the Act – No explanation by the propounder for such non-compliance – Held, application being incomplete, probate of Ext-A is liable to be refused. (Paras 18,20)

B. SUCCESSION ACT, 1925 – S.63

Will – It required to be attested compulsorily by at least two or more witnesses – Ext-A was attested by D.W.2 only – Absence of second attesting witness – The will under Ext-A is invalid in law for non-compliance of Section 63 of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872 – Held, learned trial Court is correct that Ext-1 is the genuine will and the Will Under Ext-A is shrouded by suspicion. (Paras 17 to 21)

For Appellant - M/s. P.K.Nayak-1, P.K.Mohanty, M. Das.
For Respondent - M/s. A.P.Bose, R.K. Nayak, F.R.Mohapatra.
M/s. S.K.Mandal & M.Mohapatra.

Date of Judgment: 31.01.2014

JUDGMENT

M.M. DAS, J.

Both the appeals have been filed by the appellant against the common judgment and order dated 19.2.2005 passed in Original Suit No. 9 of 2003 (Probate Misc. Case No. 19 of 1996) and Original Suit No. 10 of

2003 (Probate Misc. Case No. 1 of 1997) by the learned Civil Judge (Senior Division), First Court, Cuttack.

2. O.S. No. 9 of 2003 was filed by the present respondent under Sections 276 and 278 of the Indian Succession Act for grant of probate of the Will dated 6.11.1995 and O.S. No. 10 of 2003 was filed by the present appellant for grant of probate of the Will dated 26.1.1995. Both the Wills were executed by the testatrix, namely, Major Miss. Sybil Holmes, daughter of late Alfred Joseph Holmes. The appellant was the defendant in O.S. No. 9 of 2003, where the respondent was the plaintiff and it was vice-versa in O.S. No. 10 of 2003.

3. It appears from the facts of the case that under Ext. 1, the Will allegedly executed in favour of the respondent by the testatrix on 6.11.1995 has been drafted in English. The entire movable and immoveable properties of the testatrix have been bequeathed to the propounder (respondent) to be utilized for the purpose of running an orphanage for the orphans and destitute children. The properties so bequeathed is placed under three schedules i.e. A, B and C. In Schedule-A, the furniture, fixtures, utensils, sewing machines and telephone etc. are bequeathed. In Schedule-B, the bank accounts of different banks and in Schedule-C, the immoveable properties consisting of one pucca building with vacant land of Ac. 0.76 decimals and an English Medium School at Kesharpur in the name and style of “Major Holmes School” started in the year, 1974 are bequeathed to the beneficiary. Therefore, Ext. 1 contains a complete list of the total moveable and immoveable left behind by the deceased testatrix. The peculiarity of the bequeath made in Ext. 1 is that the executor has been restrained and directed not to sell or mortgage the Schedule-C properties in any manner. As such, the intention behind the disposition is that the executor is to act more or less as a manager of the proposed orphanage and not to alienate the same for his personal benefit or gain.

4. Ext. A, the Will allegedly executed on 26.1.1995 in favour of the present appellant is drafted in Oriya. In Ext. A, only a part of immoveable property out of the property mentioned under Ext. 1 has been bequeathed in favour of the present appellant. The said Ext. A is silent about the rest part of the building, vacant portion of the land, bank accounts, moveable properties like furniture and fixtures and other articles. There is no mention in Ext. A with regard to management of the institution established by the testatrix i.e. English Medium School named as “Major Holmes School” at Kesharpur, Cuttack.

5. As stated above, the testatrix in both the Wills is the same person, who appears to be a pious Christian lady and was leading a retired life from nursing service in defence. The facts further reveal that she had a deep concern for the orphans and her only desire was to save and take care of the life of such orphans and destitute children, because she herself was an orphan and prior to death, she served the orphans for many years. These facts can be considered to be admitted by both the parties from the materials on record.

6. With regard to the past career of the testatrix, it appears that her mother tongue was English. She was studying outside the country and was a foreigner. She was making all correspondences in English and was not able to read and write Oriya, but, however, she was able to speak Oriya to some extent.

7. Upon the pleadings being completed and the documents produced by the parties being marked as Exts. as well as the oral evidence being recorded, the trial court framed the issues to be answered which are follows:

> (i) Whether the testatrix had a disposing mind, if 'yes', in what manner?
>
> (ii) Whether the two 'Wills' have been properly executed and attested?
>
> (iii) Whether there is suspicious and vicious circumstances existing in any of the Wills?
>
> (iv) Which of the two Wills is the last Will and is to be probated?

8. Probate of a Will cannot be allowed, if the court comes to the conclusion that such Will is shrouded by suspicious circumstances or the same is created fraudulently. The trial court on Issue Nos. 2 and 3, which are vital issues, after discussing the evidence adduced by the parties, found that there is no dispute with regard to identity of the testatrix in both the Wills and the fact that the properties bequeathed in both the Wills belong to the testatrix. Further, it is an admitted case that under the Will (Ext. A), a part of the properties as mentioned in the Will (Ext. 1) is covered.

9. Considering the surrounding circumstances and the nature of the evidence adduced, the trial court found that the Will (Ext. A) dated 26.1.1995 allegedly executed in favour of the appellant has not been executed by the testatrix, late Major Miss Sybil Holmes and it is not proved to be the outcome of free Will and volition of the testatrix and it is also not duly proved. On the other hand, the Will dated 6.11.1995 under Ext. 1 executed by the testatrix in

favour of the present respondent, who was the plaintiff in O.S. No. 9 of 2003, is duly attested and it is the outcome of free Will and volition of late Major Miss Sybil Holmes. With regard to Issue No. 4, in view of its findings on the above two issues, the trial court recorded that Ext. 1 is the last Will of the testatrix, which is free from all suspicions and the same is genuine being an outcome of the free Will and volition of the testatrix. On Issue No. 1, the trial court found that the respondent, who was the plaintiff in O.S. No. 9 of 2003, is the propounder of Ext. 1 and has got cause of action to file the suit. Lastly, the trial court found that in view of its findings on the foregoing issues, the plaintiff in O.S. No. 9 of 2003 (respondent herein) is entitled to the prayer for grant of probate of the Will dated 6.11.1995 under Ext. 1. Accordingly, the trial court dismissed the suit filed by the appellant i.e. O.S. No. 10 of 2003 on contest and decreed the suit (O.S. No. 9 of 2003) filed by the respondent, on contest. Consequently the trial court directed grant of letters of administration in favour of the present respondent, who was the plaintiff in O.S. No. 9 of 2003 with a copy of the Will under Ext. 1 in respect of the property as mentioned in the schedule of the said Will. The appellant being aggrieved has preferred both the aforesaid appeals against the common judgment.

10. The above findings, when juxtaposed with the evidence on record, it would be found that D.W. 1 examined on behalf of the appellant made the statement that Major Miss Sybil Holmes was very much concerned about the orphans and destitute children. She was paying the money and Sangram Sir (P.W. 1) was looking after the management and the testatrix was thinking to dispose of her property in favour of orphans and Sangram Sir was assisting the testatrix in this regard.

11. D.W. 4 in his cross-examination has stated that it is clear that testatrix had the intention to dispose of all her movable and immovable properties in favour of orphanage only and not for any other purpose. D.W. 1 in his cross-examination has stated that each year the respondent was hosting the National Flag where the orphans used to come. He further stated that Sybil was suffering from paralysis. Sangram Sir was bringing medicine for her and bringing vegetables etc. We were taking salaries from Sangram Babu. She was paying the money and Sangram Sir was looking after the management. Sangram Sir was assisting the testatrix in this regard.

12. The appellant in her deposition has stated that her qualification is matric fail. She was reading in Ravenshaw Girls' High School. She had taken training for dresser in Cuttack City Hospital but has not filed the training certificate. She was not reading in Nursing School or College. She is not a trained nurse. However, in the Will under Ext. A, though the appellant

who was the allegedly propounder/legatee was described as a professional and trained nurse in her plaint but during her examination as witness, she deposed to be a 'Dresser' by profession and not to be a nurse. She has further stated in her cross-examination that she joined with the testatrix in the year, 1985 and was attending the testatrix to look after her ailing health as paid employee at Rs. 400/- per month as salary.

13. The respondent produced Ext. 2 dated 19.7.1985, which is also a registered Will in favour of the respondent and two others, and was cancelled by the testatrix by executing a fresh Will (Ext. 1). Exts. 3 to 20 are documents, which indicate about the past service and position of the testatrix and also proves that after her death, an orphanage with the name and style of "Sybel Memorial Children's Home" is running over the bequeathed property being managed by the present respondent. The appellant only filed one document i.e. the alleged Will under Ext. A.

14. D.W. 4 Bina Behera, in her evidence during cross-examination has stated that Ext. 2 is a registered document and has remained unchallenged. In para-3 and 4 of Ext. 2, the intention of the testatrix is disclosed. The testatrix has stated that all her properties shall belong to orphans and destitute children's Home, which she wished, should be started after her in the name and style of 'Sybil Memorial Children's Home'. To build such an institution was her long cherished hope as she has given her life and blood for orphans and also she was deeply concerned about the future of such orphans of this vast country. It was her desire that this children's home should live and grow and take care of the orphans.

15. Ext. 1 is in conformity to Ext. 2 which discloses her intention. It is stated in Ext. 1 that all her properties mentioned in Schedule-A, B & C of the Will, Sri Sangram Keshari Nayak is to start one orphanage for the orphans and destitute children in the name and style of 'Sybil Memorial Children's Home' in the house of the testatrix more fully described in Schedule-C which is her life's desire and she has given her life and blood to the orphans and she is deeply concerned about their future. She has further stated that all her properties will go to Sri Sangram Keshari Nayak who will run 'Sybil Memorial Children's Home' and this will be managed by her executor Sri Sangram Keshari Nayak to the best of his ability.

To avoid mis-utilization of her property in other manner, she has given a protective warning that her executor (Sangram Keshari Nayak) shall not sale or mortgage the property in any other manner.

16. From a bare reading of the contents of Exts. 1 and 2 and disposition of D.W. 4, it is clear that the testatrix had a mind to dispose of all her properties for the purpose of running an orphanage under the management of Sri Sangram Keshari Nayak for the orphans and destitute children of the country and not for any other purpose. To bequeath her property for personal use and benefit and gain was contrary to her last wish and desire.

17. **Due Execution and attestation of the Will**.

To prove due execution and attestation of a 'Will', the relevant provision is laid down under Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act.

Section 68 of the Evidence Act provides that a 'Will' compulsorily is to be attested. Section 63 of the Indian Succession Act further provides that the 'Will' is compulsorily to be attested by at least two or more witnesses. These provisions/requirements must be satisfactorily proved by the party who claims probate. For execution and attestation, the propounder of the 'will' has to prove that there are two witnesses who saw the testatrix sign in the Will and the attesting witnesses have signed the 'Will' in presence of the testatrix.

When we examine Ext. 1 in the aforesaid pari materia, it is seen that the testatrix as well as the two attesting witnesses have signed in presence of each other. In page-4 of Ext. 1, the executant/testatrix has certified that she has executed her last 'Will' and testament in presence of attesters Rashmi Ranjan Sahu and Sridhar Das, who have seen her executing the 'Will' and have signed in her presence. The two attesters have also certified that they have witnessed the execution of the Will by Miss. Sybil Holmes and signed in her presence.

18. This aspect has also been clearly proved from the depositions of P.Ws.1 and 3 being stated in their cross-examination in the following manner:

P.W. 2 has stated that at the time of execution of Ext.1, P.W. 1, Sridhar Das, Bina Behera, Advocate A.K. Rao and Typist R.K. Barik were there. The testatrix signed the Will first and then P.W. 2 Sridhar Das and Bina Behera signed thereon. The testatrix signed first and then the attesting witnesses signed.

From the affidavit and the aforesaid evidence of P.Ws. 2 and 3, it can safely be concluded that Ext. 1 has been duly executed, attested and fulfilled all the conditions required by law. On the other hand, Ext. A does not

disclose the names of the attesting witnesses from out of all those witnesses who signed it.

Daitari Mohapatra, who has been examined as D.W. 2, claims to be the only attesting witness in Ext. A. His evidence is full of doubtful circumstances. He is an interested witness since he was the home tutor of the son of Bidulata Mohanty. He has not stated nor it is known as to who is the other attesting witness in Ext. A. None of the other witnesses of Ext. A has come forward to depose that he is the second attesting witness. In absence of another attesting witness neither known nor examined, the requirement of Section 63 of the Indian Succession Act is not complied. The Will attested by only one attesting witness is invalid and inoperative in the eye of law. Probate cannot be granted in such a case and prayer is bound to fail. So, it can safely be concluded that Ext. A has not been duly executed, attested or proved. Probate of Ext. A is liable to be refused on this score alone.

19. **Vicious and suspicious circumstances of the Will**

Suspicious circumstances in a Will are the questions of fact and cannot be accurately defined. The court is to scan the documents and come to the conclusion whether the suspicious circumstance is of such nature that it would be sufficient to refuse probate of the Will. Ext. 1 is free from any doubtful circumstance of any manner. The hostile evidence of D.W. 4, Bina Behera, cannot be coloured to be suspicious circumstance. It is not unusual that during evidence, many witnesses turn hostile and depose falsehood in evidence. Bina Behera is no exception to this. The evidence of Bina Behera (D.W.4) goes to show that she is a liar out and out, though she has stated that she is illiterate and do not know reading and writing in her cross-examination, she has stated “I was born in April, 1934. Now I am not able to read Bible since last 17 to 18 years as I am not able to see properly”.

From her aforesaid statements, it can safely be inferred that D.W. 4 is a literate lady who is able to read Bible 17 to 18 years back, admitted that her signature which she was unable to see and tell her date of birth according to English calendar. Her intention of turning hostile and deposing falsehood is clear from her statement, where she admitted that she has not understood the contents of the affidavit and could not say who prepared that and on whose instance or instruction, the affidavit is prepared. She further told that she came to the court as a witness to get a piece of land situated towards the backside of the case land and further deposed that the asbestos room should be given to her. The hostility of such interested witness cannot make the Will inoperative. The court is not powerless in such a case. The court can look to the whole circumstances of the case and come to the

conclusion that the formalities/provisions of law have been complied and in such event, the court can allow the probate of Will basing upon the evidence of witnesses and documents.

20. On the other hand, Ext. A is surrounded with suspicious circumstances inherent in it and the propounder has not explained those vicious circumstances to the satisfaction of the court. Some of the suspicious circumstances in Ext. A are as follows:

Language of the Will

When it is the admitted case that the testatrix had no knowledge of Oriya, was reading in foreign country, making correspondence in English and could be able to only speak Oriya to some extent, her intention to scribe the Will in Oriya by an unqualified Advocate's Clerk of Bidulata Mohanty is a grave suspicious circumstance, not explained by the propounder. It is certified below Ext. A by the scribe that the testatrix herself read Ext. A drafted in Oriya which is impossible and can never be correct.

Absence of a second attesting witness

Section 63 of the Indian Succession Act provides for two attesting witnesses to sign the document and to be examined as witnesses. This requirement of law is not fulfilled. Surprisingly in Ext. A, it is not specifically mentioned nor in evidence adduced, any of the D.Ws. deposed as to who is the second attesting witness of the Will.

Bidulata has examined three witnesses out of which she herself is not a signatory to the Will. D.W. 3 is the scribe who admitted that he is not an attesting witness. In such circumstances, D.W. 2 if accepted as attesting witness, there is absence of a second attesting witness. The prayer to probate Ext. A is bound to fail since the provision of law has not been complied with for absence of a second attesting witness.

Section 281 of the Indian Succession Act has not been complied as the provision prescribes that where the application is for probate, the petition shall be verified by at least one of the witnesses.

D.W. 1 in para-34 in her cross-examination has admitted that her plaint (petition for probate in O.S. No. 10 of 2003) does not contain the attestation/verification of any witness though they know about the filing of the case. From her statement, it reveals that the witnesses of Ext. A are available and procurable. In absence of compliance of the provisions laid down in Section 281, the application is incomplete and cannot be probated. The propounder has no explanation to such non-compliance.

21. From the above discussion, it is clear that the trial court has rightly appreciated the evidence adduced before it both oral and documentary to come to the conclusion that Ext. 1 is a genuine Will executed in favour of the respondent and the Will under Ext. A is shrouded by suspicion. Hence, the conclusion of the trial court cannot be faulted with in these appeals.

22. In the result, therefore, both the FAOs, accordingly, stand dismissed, but in the circumstances, parties shall bear their own cost.

Appeals dismissed.

2014 (II) ILR - CUT-1146

VINOD PRASAD, J & S.K. SAHOO, J.

G. A. NO. 19 OF 2002

STATE OF ORISSA ……...Appellant

.Vrs.

SK. HIMAT & ORS. …….Respondents

CRIMINAL TRIAL – Murder case – Prosecution version is different both in the F.I.R. & complaint petition – Although the Post-mortem report indicates that it was a homicidal death and the cause of death is for rupture of liver due to external injury on the abdomen and chest but in the absence of any specific material against any of the respondents, it can not be definitely said that the prosecution has established its case beyond all reasonable doubt – Held, the impugned judgment and order of acquittal passed by the trial Court is confirmed.

(Paras 10, 11)

Case laws Referred to:-

1.AIR 1983 SC 308 : (Babu & Ors.-V- State of Uttar Pradesh)
2.(2014) 2 SCC (Cri) 497 : (Basappa-V- State of Karnataka)
3.(2012) 3 SCC (Cri) 287 : (Rohtash-V- State of Haryana)

ForAppellant - Mr. Sk. Zafarulla, Addl. Standing Counsel.
For Respondents - Mr. M.A. Alli, Mr.B.K.Ragada.

Date of hearing : 15.09. 2014
Date of Judgment : 22.09.2014

JUDGMENT

S.K.SAHOO, J.

The respondents Sk. Himat, Taslima Bibi, Noorjan Bibi, Sk. Das Mahammad and Sk. Roj Mahammad faced trial under section 498(A)/34 I.P.C. and section 302/34 I.P.C. in the court of learned Additional Sessions Judge, Bhadrak in Sessions Trial No.23/80 of 1996 on the charge of subjecting Tara Bibi (hereafter "the deceased") to cruelty and also committing her murder in furtherance of their common intention. The learned trial Court vide judgment and order dated 29.4.1998 acquitted all the respondents of all the charges. Hence this Government Appeal.

2. The prosecution case, in short, is that the respondent no.5 Sk. Roj Mahammad married the deceased about ten years prior to the date of occurrence and they were blessed with four children, out of whom two were alive and two died. The respondent no.3 Noorjan Bibi is the mother-in-law of the deceased. Respondent no.3 had married to one Sk. Arju Hossain, who is the natural father of respondent no.5. After death of Sk. Arju Hossain, respondent no.3 married to respondent no.1 Sk. Himat. Respondent no.2 Taslima Bibi is the married sister-in-law and respondent no.4 Sk. Das Mahammad is the brother-in-law of the deceased.

It is the further prosecution case that while the deceased was staying in her in-laws' house, she was subjected to physical and mental torture in connection with demand of dowry and there was attempt for settlement of the dispute between the parties. On 21.9.1990 P.W.6 Sk. Rajak, brother of the deceased received information from P.W.3 Atta Khan that the respondents were assaulting the deceased. Hearing such fact, P.W.6 along with his brother Sk. Rasid (P.W.5) proceeded to the house of the respondents situated in village Bishnupur Bindha under Bhadrak (Rural) Police Station and found the entrance door of the house of the respondents half opened. Both P.W.5 and P.W.6 noticed that the deceased was crying and there was bleeding from her nose. The respondents drove out P.W.5 and P.W.6 from their house and closed the door from inside. P.W.5 and P.W.6 remained outside and heard the shout of the deceased. They called Grama Rakhi Sk. Safee who came to the house of the respondents but found the deceased lying dead and accordingly intimated it to P.W.5 and P.W.6.

On 22.9.1990 on the written report of the Grama Rakhi Sk. Safee, Bhadrak (Rural) P.S. U.D. Case No.39 of 1990 was registered by P.W.8 Jayant Kumar Tripathy, who was by then attached to Bhadrak (Rural) Police station as Officer-in-Charge. It was reported by the Grama Rakhi that on 21.9.1990 at about 10.30 p.m. the deceased had committed suicide probably by consuming poison. After registering the U.D. case, P.W.8 directed A.S.I. Sri U.N. Pani to enquire into the case. Sri Pani conducted inquest over the dead body of the deceased on 22.9.1990 at 5.00 p.m. on the verandah of the house of respondent no.5 vide Ext.1. He also sent the dead body for Post-mortem examination to the District Headquarters Hospital, Bhadrak. P.W.7 Dr. Satyabhama Behera who was the Assistant Surgeon attached to the said hospital conducted the Post-mortem examination on 23.9.1990 and she noticed a lacerated injury on the left lower lip, a contusion over left anterior left chest wall, contusion over epigastrium and right hypochondrium and opined all the injuries to be ante mortem in nature. She further found the liver of the deceased was lacerated on the interior surface and opined the cause of death due to shock and haemorrhage on account of rupture of liver due to external injury on the abdomen and chest. The Post-mortem report was marked as Ext.5. Sri Pani sent the viscera of the deceased to S.F.L., Rasulgarh for chemical analysis and the viscera report (Ext.9) indicates that no common insecticidal, alkaloidal and metallic poison could be detected in the viscera. Sri Pani also seized the wearing apparels of the deceased vide seizure list (Ext.2). Sri Pani made a query from the Department of F.M.T., S.C.B. Medical College and Hospital, Cuttack regarding final opinion as to cause of death of the deceased and perusing the copy of the inquest report, dead body challan and Post-mortem report, it was opined by the Professor and Head of the Department of F.M.T. that due to direct assault on the deceased, there was rupture of liver and the death was homicidal. The opinion of the Professor and Head of Department, F.M.T. has been marked as Ext.10.

On receipt of the opinion vide Ext.10 on 12.01.1991 P.W.8 registered Bhadrak (Rural) P.S. Cased No.7 of 1991 on his own information under section 302 I.P.C. against unknown persons. The F.I.R. has been marked as Ext.12. P.W.8 visited the spot and prepared the spot map (Ext.11). He examined the witnesses and on 1.5.1991 he handed over the charge of investigation to S.I. Sri Dilip Kumar Das of Bhadrak (Rural) Police Station. P.W.9 Prafulla Kumar Mohanty took the charge of investigation from Sri Dillip Kumar Das and ultimately on completion of investigation submitted Final Report in the case indicating “the case as true but no clue” as per the order of the Superintendent of Police, Bhadrak.

P.W.6 Sk. Rajak who is the brother of the deceased filed a complaint petition in the court of S.D.J.M., Bhadrak on 18.12.1990 as the police did not take any proper action in the case and the said case was registered as 1 C.C. No.401 of 1990. The S.D.J.M. sent the complaint petition to the O.I.C., Bhadrak (Rural) Police Station for investigation under section 156 (3) Cr.P.C. Since the I.O. had registered Bhadrak (Rural) P.S. Case No.7 of 1991 on 12.1.1991 on his own information by the time of receipt of the complaint petition through court, he returned the complaint petition to the court of S.D.J.M., Bhadrak which was tagged with G.R. Case No.50 of 1991 arising out of Bhadrak (Rural) P.S. Case No.7 of 1991.

When Final Report was submitted by the I.O. in Bhadrak (Rural) P.S. Case No.7 of 1991, a protest petition was filed by P.W.6 Sk. Rajak on receipt of the notice from the court of S.D.J.M., Bhadrak. The S.D.J.M. examined some more witnesses and recorded their statements under section 164 Cr.P.C. and ultimately vide order dated 24.9.1994 took cognizance of offences under sections 302/498(A)/34 I.P.C. and issued process against the respondents.

3. During course of trial, the prosecution examined nine witnesses. P.W.1 Sk. Nasim was a co-villager of the respondents who saw the dead body of the deceased lying in the house of respondent no.5. P.W.2 Sk. Ramjan is a witness to the inquest vide Ext.1 and also to the seizure of the wearing apparels of the deceased vide Ext.2. P.W.3 Atta Khan stated to have seen the respondent no.5 and his other family members assaulting the deceased by fist blows and slaps and accordingly he intimated the same to P.W.6. P.W.4 Naba Kishore Rana did not support the prosecution case and he was declared hostile. P.W.5 and his cousin brother P.W.6 stated to have proceeded to the village of the respondents on receipt of information from P.W.3 and stated in detail as to what happened after their arrival in the house of the respondents. P.W.7 Dr. Satyabhama Behera conducted the Post-mortem examination and proved her report (Ext.5). P.W.8 and P.W.9 are the Investigating Officers.

The defence plea was one of denial and it was pleaded by respondent no.1 that his house situates at a distance of one mile away from the house of respondent no.5 and he has been falsely entangled in the case. From the side of the respondents, one witness namely Subash Chandra Mallik, who was an Advocate's Clerk in Bhadrak Court was examined as D.W.1 and he stated to have scribed the complaint petition on the instruction of P.W.6 and proved the complaint petition as Ext.A.

4. The learned trial Court analyzed the evidence adduced by both the sides and came to hold that the prosecution has put forth two different

stories. Though from the evidence of P.W.1 and P.W.4 it was established that the deceased died by taking poison in the house of the respondents, the evidence of P.W.3 coupled with the evidence of P.W.5 and P.W.6 indicated that there was assault on the deceased, for which she died. The prosecution case as advanced during trial was not reflected in the complaint petition vide Ext.A. The learned trial Court further held that while the complaint petition (Ext.A) indicates that the deceased died in the house of respondent no.5, P.W.3, P.W.5 and P.W.6 while deposing in court posed themselves as witnesses to the occurrence of assault on the deceased by the respondents. The learned trial Court further held that the prosecution has not examined the material witnesses like Grama Rakhi Sk. Safee or any independent witnesses to corroborate the evidence of P.W.5 and P.W.6. The inquest report (Ext.1) does not mention about any foul play on the death of the deceased. The learned trial Court finally held that though the deceased met with a homicidal death but the culpability of the respondents has not been established beyond reasonable doubt.

5. Learned counsel for the State Mr. Sk. Zafarulla, Addl. Standing Counsel vehemently argued that the conclusions arrived at by the learned trial Court are not reasonably possible and the findings are quite unreasonable which are contrary to the evidence on record. The learned counsel contended that when there was no dispute that the deceased was staying in the house of respondent no.5 at the time of her death and the doctor conducting Post-mortem examination not only found external injuries on the person of the deceased, but also opined her cause of death to be homicidal and due to shock and haemorrhage resulting in rupture of liver and the respondents having failed to discharge their burden of proof as required under section 106 of the Evidence Act to show as to how the deceased died, the order of acquittal should be set aside. The learned counsel for the State further submitted that the evidence of the eye witnesses P.W.3, P.W.5 and P.W.6 are very convincing which is corroborated by the post-mortem report (Ext.5) and merely because there was improper investigation in the case, the learned trial Court was not justified in acquitting all the respondents, particularly when there was clinching evidence against respondent no.5.

The learned counsels for respondent nos. 1 and 3 Mr. B.K. Ragada and respondent nos. 2, 4 and 5 Mr. M.A. Alli supported the impugned judgment and contended that the prosecution has changed its version from time to time and the story projected during trial is a concocted one and in view of the nature of evidence, it cannot be said that the view taken by the learned trial Court is perverse or that the conclusions are not possible. The learned counsels further submitted that it would not be proper to interfere

with the order of acquittal passed in the year 1998 when the appellants faced the rigor of the proceedings for a long time.

6. It is the settled principle of law as held in the case of **Babu and others v. State of Uttar Pradesh reported in AIR 1983 SC 308** that in appeal against acquittal, even if two views are possible, the appellate court should not interfere with the conclusion arrived at by the trial Court unless the conclusions are not possible. If the finding reached by the trial Judge cannot be said to be unreasonable, the Appellate Court should not disturb it even if it were possible to reach a different conclusion on the basis of the material on the record because the trial Judge has the advantage of seeing and hearing the witnesses and initial presumption of innocence in favour of the accused is not weakened by his acquittal. The Appellate Court, therefore, should be slow in disturbing the finding of fact of the trial Court and if two views are reasonably possible on the evidences on the record, it is not expected to interfere simply because it feels that it would have taken a different view if the case had been tried by it. In the case of **Basappa v. State of Karnataka reported in (2014) 2 SCC (Cri) 497**, it is held that the exercise of the power under section 378 Cr.P.C. by the court is to prevent failure of justice or miscarriage of justice. There is miscarriage of justice if an innocent person is convicted and if the guilty let scot-free. If the judgment of the trial Court is based on no material and it suffers from any legal infirmity in the sense that there was non-consideration or mis-appreciation of the evidence on record, only in such circumstances, reversal of acquittal by the High Court would be justified. In the case of **Rohtash v. State of Haryana reported in (2012) 3 SCC (Cri) 287**, it is held that only in exceptional cases where there are compelling circumstances and the judgment is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's conclusion bolsters the presumption of innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference. Keeping the ratio laid down by the Hon'ble Supreme Court, let us analyze the evidence on record to find out as to whether the conclusions drawn by the trial Court is perverse and against weight of evidence or not, whether the view taken is reasonable and plausible or not, whether the findings of the trial Court is palpably wrong, manifestly erroneous or not. We are quite conscious of the fact that there is no limitation on the part of an appellate court to review the entire evidence upon which the order of acquittal has been passed and to come to its own conclusion and review the trial Court's conclusion on both facts as well as law, but unless we are satisfied that there has been flagrant miscarriage of justice by pronouncing the order of acquittal

substantially and compelling reasons are there to interfere with the conclusions arrived at by the trial Court, the finding of the acquittal should not be disturbed, we are not going to interfere with the same.

Change of prosecution version

7. The prosecution case at the first instance was that the deceased committed suicide by consuming poison. Grama Rakhi Sk. Safee reported the matter before the O.I.C., Bhadrak (Rural) Police Station suspecting that the deceased had committed suicide by consuming poison. On the basis of such report, Bhadrak (Rural) P.S. U.D. Case No.39 of 1990 was instituted and inquest was conducted. At the time of inquest also, it was indicated in the column no.9 that the cause of death is not known. The doctor conducting the post-mortem examination also reserved the final opinion regarding the cause of death awaiting report of chemical examination of viscera. P.W.6 who filed the complaint case against the respondents in the Court of S.D.J.M., Bhadrak, for the first time mentioned in the complaint petition that the deceased was suspected to have been assaulted to death. Only after receipt of the viscera report and final opinion regarding cause of death from the Professor and Head of Department, F.M.T., S.C.B. Medical College, Cuttack, the F.I.R. was registered after inordinate delay and witnesses came up during trial with a story that the respondents assaulted the deceased for which she died. This change of version is like the change of color of a caterpillar casts a serious reflection on the truthfulness of the prosecution case.

Pre-varicating Statements/Non-examination of material witnesses

8. P.W.3 posed himself as a witness to the assault on the deceased and he has stated that he saw respondent no.5 and his other family members were assaulting the deceased by fist blows and slaps. He admits in the cross-examination that he cannot say who is Taslima Bibi (respondent no.2), Noorjan Bibi (respondent no.3), Sk.Himat (respondent no.1) and Das Mahammad (respondent no.4). He stated to have intimated about the occurrence only to P.W.6. He states that for the first time he visited the house of respondent no.5 on the date of occurrence after hearing shout but he has never entered inside the house of respondent no.5. P.W.6 though stated that he heard about the assault on the deceased from P.W.3 but in the complaint petition filed by him vide Ext.A, there is no whisper that either he heard about the occurrence from P.W.3 or that he and P.W.5 had been to the village of the respondents thereafter. P.W.3 has not implicated respondent nos.1 to 4 in the assault on the deceased.

P.W. 5 and P.W.6 have not seen the assault on the deceased by any of the respondents, but they have stated that they heard the sound of assault on the deceased as well as her crying sound and accordingly intimated the Grama Rakhi. Admittedly the Grama Rakhi has not been examined in this case. Though P.W.5 and P.W.6 have stated that the accused persons did not allow them to enter inside the house but the presence of all the respondents at the time of occurrence is a doubtful feature. P.W.1 has stated that respondent nos.4 and 5 are separate for last 14 years and staying in separate mess and separate houses but they were living in one "Khanja". He has further stated that the house of respondent no.1 situates at a distance of half a kilometer away from the house of respondent no.5 and the respondent no.1 was staying with his family in his house and he has no relationship with respondent no.5. P.W.1 has further stated that respondent no.2 who is the sister of respondent no.5 was married at village Sankarpur which is 15 Kms. away from the house of the respondent no.5 and she was staying at her husband's place. P.W.1 has further stated that after the incident he had been to the house of respondent no.5 to see the deceased but he had not seen the respondent nos.1 to 4. In view of such evidence of P.W.1, the statements of P.W.5 and P.W.6 that all the respondents were present in the in-laws house of the deceased when they visited it on the date of occurrence cannot be accepted. P.W.3 is also silent about the presence of respondent nos.1 to 4.

The doctor (P.W.7) conducting post-mortem examination noticed only three injuries on the person of the deceased out of which one is a lacerated wound and the rests are contusions. P.W.6 says that at about 11.00 p.m. they received information from P.W.3 about the assault on their sister at village Bishnupur and they proceeded to Bishnupur by foot. It is the prosecution case that the assault on the deceased had already started when P.W.3 was present in village Bishnupur. P.W.3 stated that seeing the incident of assault on the deceased, he returned to his village Saidabad and after meeting his family members, he proceeded to village Nanghamahal and informed the matter to P.W.6. In view of the number of injuries sustained by the deceased, it is difficult to accept that the deceased was further assaulted after the arrival of P.W.5 and P.W.6 from their village in the village of the respondents at Bishnupur.

The evidence on record indicates that village Bishnupur is a thickly populated village and there are houses near the spot. P.W.3 who belongs to a different village has stated that about 50 persons gathered near the house of respondent no.5 at the time of assault and there are 25 to 30 houses in between the house of Sk. Raj Mahammad and his sister's house in village Bishnupur. No other persons from village Bishnupur has been examined to

corroborate the evidence of P.W.3 regarding the assault on the deceased. Thus the prevaricated statements of the witnesses coupled with the non-examination of material witnesses create doubt about the authenticity of the prosecution case.

Belated Disclosure

9. P.W.6 has stated that he reported the matter not only to the police but also to the higher police officials. No documentary evidence has been proved in that respect. P.Ws.3, 5 and 6 kept mum practically from the date of occurrence i.e., 21.09.1990 till the F.I.R. was lodged. The explanation which they have furnished for their belated disclosure is neither convincing nor acceptable and as such the possibility of concocting a case at a later stage cannot be ruled out.

Sum Up

10. Thus, when the presence of respondent nos.1 to 4 at the spot is doubtful, when the evidence of P.W.3, P.W.5 and P.W.6 are not acceptable because of their delayed disclosure of the occurrence and when the prosecution has resorted to falsehood by first posing the death of the deceased to be a case of poisoning and subsequently changed its version to be a case of assault after receipt of the final opinion from the medical expert, it can be said that the prosecution case is very suspicious. The nature of evidence adduced by the prosecution is not sufficient to come to an irresistible conclusion that the respondents are the authors of the crime. Even though the post-mortem report indicates that it was a homicidal death and the cause of death is due to rupture of liver due to external injury on the abdomen and chest, but in absence of any specific material against any of the respondents, it cannot be definitely said that the prosecution has established its case beyond all reasonable doubt.

The view taken by the learned trial Court appears to be reasonable and based on proper analysis of the evidence on record and the conclusions arrived at by the learned trial Court cannot be said to be perverse and in that view of the matter, it would not be proper to interfere with the order of acquittal which was passed in the year 1998 after a long gap of more than 16 years.

11. In view of the discussions made above, we hold that the impugned judgment and order of acquittal passed by the trial Court does not suffer from any infirmity or illegality. The conclusions drawn by the trial court is neither perverse nor against weight of evidence. The view taken by the trial

court is reasonable and plausible and accordingly the impugned judgment and order of acquittal is upheld. The Government Appeal stands dismissed.

It appears from record that in view of the warrant of arrest issued by this Court on 27.6.2014, the respondent no.1 was arrested and produced in the Court of learned District and Sessions Judge, Bhadrak on 27.7.2014 and remanded to jail custody and he is in custody since that day. The respondent no.1 is hereby directed to be released forthwith from jail custody if he is not required in any other case.

It further appears that the respondent no.2 Taslima Bibi, respondent no.4 Sk. Das Mahammad and respondent no.5 Sk. Roj Mahammad have been released on bail by this Court vide order dated 28.7.2014. They are discharged from the liability of their bail bonds. Their personal bonds and the surety bonds stand cancelled.

The non-bailable warrant of arrest issued by this Court on 27.6.2014 against respondent no.3 Noorjan Bibi is hereby recalled.

Appeal dismissed.

2014 (II) ILR - CUT-1155

INDRAJIT MAHANTY, J.

CRLMC. NO.3724 OF 2009

AJAYA KUMAR SAMANTARAY .....Petitioner

.Vrs.

RANJITA DAS .....Opp.Party

CRIMINAL PROCEDURE CODE, 1973 - S. 482

Earlier application U/s. 482 Cr. P.C. dismissed – Orders challenged in the said application cannot be challenged once again by invoking jurisdiction U/s. 482 Cr. P.C.

In this case petitioner filed CRLMC No.394/02 U/s. 482 Cr. P.C. challenging the confirming orders U/s. 125 Cr. P.C. allowing maintenance in favour of the O.P.-wife which was dismissed by order Dt.21.11.2001 – After lapse of seven years the self same orders were

challenged in the present petition – Held, petition U/s. 482 Cr. P.C. is dismissed - Direction issued to communicate the order to the trial Court to ensure that the benefit of the order passed by the learned J.M.F.C., Khurda reached the O.P. at the earliest. (Para 4)

For Petitioner -M/s. S.Ray & C.R. Nandy
For Opp.Party -Mr.G.Rath, Sr. Advocate.

Date of judgment: 03.07.2014

JUDGMENT

I. MAHANTY, J.

The present application under Section 482 Cr.P.C. has come to be filed by the petitioner-Ajaya Kumar Samantaray seeking to challenge an order dated 12.08.2002 passed in Criminal Revision No.50 of 2001 by the learned Additional Sessions Judge, Khurdha confirming the order dated 12.09.2001 passed by the learned J.M.F.C., Khurdha in Criminal Misc. Case No.138 of 1999/T.R. No.203 of 2000.

2. Shorn of any unnecessary details, it is suffice to note that a proceeding under Section 125 Cr.P.C. was initiated by the opposite party-wife seeking maintenance from the petitioner-husband. The said petition came to be allowed by order dated 12.09.2001 whereby the petitioner was directed to pay a sum of Rs.500/- per month as maintenance to the opposite party from the date of filing of the case i.e. 12.08.1999. That order was challenged by the petitioner in Criminal Revision No.50 of 2001 before the court of the Additional Sessions Judge, Khurdha. The said revision came to be dismissed by order dated 12.08.2002 affirming the order passed by the learned J.M.F.C., Khurdha. It appears that both the aforesaid orders earlier challenged by the present petitioner before this Court in a proceeding under Section 482 Cr.P.C. numbered as CRLMC No.394 of 2002 and by order dated 21.11.2002, the following order was passed:

> "The learned counsel for the petitioner does not want to press this application and accordingly this application under Section 482 Cr.P.C. is dismissed as not pressed".

3. Once again the petitioner after lapse of seven years, for which no explanation at all exists, has come and filed the present petition under Section 482 Cr.P.C. seeking to challenge the selfsame orders which were subject matter of challenge in the earlier CRLMC. Law on this subject is very

well settled that once an earlier petition under Section 482 is dismissed, no challenge to the same is permissible once again seeking to invoke jurisdiction under Section 482 Cr.P.C and is barred by the principles of res judicata. Apart from the above, it appears that this attempt by the petitioner is with the sole purpose of delay and does not appear to be bona fide.

4. In view of the above, this Court is of the considered view that this is a fit case where its inherent jurisdiction under Section 482 Cr.P.C. should not be exercised in favour of the petitioner and direct dismissal of the same. The Registry is directed to communicate this order to the trial court in order to ensure that the benefit of the order passed by the learned J.M.F.C., Khurdha reached the opposite party at the earliest.

Application dismissed.

2014 (II) ILR - CUT-1157

INDRAJIT MAHANTY, J.

CRLMC. NO.502 OF 2010

NURI SAHAJI & ORS. .....Petitioners

.*Vrs.*

STATE OF ORISSA & ORS. .....Opp.Parties

CRIMINAL PROCEDURE CODE, 1973 – S. 482

Quashing of Criminal Proceeding – Pursuant to the order of this Court, the statement of the alleged victim was recorded by the learned J.M.F.C., Bhadrak U/s.164 Cr. P.C. – Statement shows that both the petitioners and O.P.3 (victim) are living with good relationship – Held, continuance of the above criminal proceeding any further would not serve any fruitful purpose since there is very little chance of conviction in the said case – Impugned criminal proceeding in G.R. Case No.1079/08 arising out of Dhusuri P.S. Case No.89/08 pending in the Court of learned S.D.J.M., Bhadrak is quashed. (Para 2)

Case law Referred to:-

(2003) 25 OCR (SC) 99 : (B.S. Joshi & Ors.-V- State of Haryana & Anr.)

For Petitioners - M/s. S.K. Sahoo, G. Sahoo & Miss A.Mohanty.

For Opp.Party No.1 - Addl. Standing Counsel.
For Opp.Party No.2 - Mr. D.Samal
For Opp.Party No.3 - M/s M.K. Mallick, B.P. Mohanty & D.P. Pattnaik.

Date of judgment: 03.07.2014

JUDGMENT

I. MAHANTY, J.

The present application under Section 482 Cr.P.C. has come to be filed by the petitioners seeking to quash the criminal proceeding in G.R. Case No.1079 of 2008 arising out of Dhusuri P.S. Case No.89 of 2008, pending before the learned S.D.J.M., Bhadrak.

2. Pursuant to the order of this Court dated 23.02.2011, the statement of the alleged victim (opposite party No.3) has been recorded by the learned J.M.S.C., Bhadrak under Section 164 Cr.P.C., translation of which reads as follows:

> "In the year 2008, I went to Keonjhar with Nuri Saji and we were staying at Ghatagaon for a period of two years. I had gone with Nuri Saji on my own volition. Thereafter, we went to our village Jagannath Sahi. Our staying at Ghatagaon, a daughter has taken birth. My husband and my in-laws have showing good behaviour to me. Presently, I have in happy. Without my father's permission, I went away with Nuri Saji."

It appears that both the petitioners and opposite party No.3 (victim) are living with good cordial relationship. Therefore, continuance of the aforesaid criminal proceeding any further would serve no fruitful purpose since there is very little chance of any conviction in the said case.

In view of the above and keeping in view the decision of the Hon'ble Supreme Court in the case of B**.S. Joshi and others V. State of Haryana and another,** (2003) 25 OCR (SC) 99, the CRLMC is allowed and the criminal proceeding in G.R. Case No.1079 of 2008 arising out of Dhusuri P.S. Case No.89 of 2008, pending before the learned S.D.J.M., Bhadrak is quashed

Application allowed.

2014 (II) ILR - CUT-1159

I. MAHANTY, J & B.N. MAHAPATRA, J.

W.P.(C) NO. 23863 OF 2013

HRUSIKESH PANDA ……Petitioner

Vrs.

STATE OF ODISHA & ORS. ……Opp.Parties

ADMISSION – M.B.B.S. Course, 2013-14 – Whether petitioner is entitled to get admission after the cut off date i.e. 30.09.2013 ? – Held, cut off date cannot be used as a technical tool to deny admission to a meritorious student who has been deprived of admission for no fault of him but for the lapses on the part of the authorities.

In this case the petitioner was deprived of taking admission in MBBS Course against the vacant seat to which he was entitled to before the cut off date as the authorities failed to hold Counselling – Held, in the interest of Justice the petitioner deserves admission in MBBS Course for the academic year 2013-14 – Direction issued to the authorities, to give admission to the petitioner against the available vacant seat in MBBS Course at SCB Medical College and Hospital, Cuttack– However, the petitioner's right to appear in the examination shall be in accordance with the Examination Rules/Regulations and if the petitioner does not meet the attendance requirement, he shall be permitted to repeat the academic year. (Paras 10 & 13)

Case law Relied on:-

AIR 2012 SC 3396 : (Asha -V- Ot. B.D. Sharma, University of Health Sciences & Ors.)

Case laws Referred to:-

1.(2005) 2 SCC 65 : (Mridul Dhal (Minor) & Anr.-V- Union of India & Ors.)
2.(2010) 1 SCC 173 : (Medical Council of India-V- Manas Ranjan Behera & Ors.)

For Petitioner - Mr. S.K. Pradhan
For Opp.Parties - Mr. M. S. Sahoo
Addl. Standing Counsel
M/s. S.Palit, A.K. Mahana,
A.Mishra, Miss. R.Tripathy,
A. Parija, Mr. R.C.Mohanty.

Date of Judgment: 14.05.2014

JUDGMENT

B.N. MAHAPATRA, J.

This writ petition has been filed by the petitioner for a direction to the opposite parties to allot him a seat in MBBS Course on the basis of his rank in the State at the earliest.

2. Petitioner's case in a nutshell is that he appeared in the National Eligibility-cum-Entrance Test-UG 2013 (for short, "NEET") and qualified in the said examination securing 10362 rank in the NEET All India Rank and 513 rank in the State (Odisha). Considering his rank, the petitioner was allotted the branch of BDS course in S.C.B. Medical College and Hospital, Cuttack on 23.07.2013. The final vacancy round counseling for MBBS/BDS candidates was held on 25.09.2013 and 26.09.2013. As per the NEET All India Rank of the petitioner, he appeared on 25.09.2013 in the final vacancy round counseling after depositing counseling fee of Rs.450/- towards document verification. One candidate, namely, Manisha Mohanty, Rank No.GE4477 in NEET All India Rank was allotted MBBS and her name appeared in the final consolidated seat allotment for medical (MBBS/BDS) as on 26.09.2013. Manisha Mohanty took spot admission in MBBS, 2013 course at AIIMS, Bhubaneswar on the very same day, i.e., 26.09.2013 thereby vacating the MBBS seat in S.C.B. Medical College and Hospital, Cuttack. Further, one Swayam Prakash Dash whose NEET All India Rank is 10353 and Odisha Rank is 512, i.e., just one above rank as compared to the petitioner (513) was allotted MBBS course in VSS Medical College, Burla. Thus, the petitioner securing 513 rank in Odisha is the next eligible candidate to get allotment in MBBS as one seat has fallen vacant on 26.09.2013 after said Manisha Mohanty joined in AIIMS, Bhubaneswar. The petitioner reliably learnt that one more seat in MBBS in M.K.C.G. Medical College, Berhampur has fallen vacant on 10.10.2013 as one of the students has resigned and discontinued the course. Therefore, at present, two seats in MBBS-2013 are available to be filled up.

3. The petitioner appeared in person and submitted that as per the final schedule for All India Quota (NEET) UG Counseling, 2013, the last date up to which the students can be admitted against the vacancies arising due to any reason was on 30.09.2013. Therefore, the petitioner approached in person to opposite party No.2-OJEE-2013 on each day starting from 26.09.2013 to 30.09.2013 for allotting a vacant MBBS seat to him but in vain. The action of opposite party No.2 in not allotting one vacant MBBS seat to

the petitioner, which had fallen vacant on 26.09.2013 itself, is absolutely illegal, arbitrary, and opposed to Articles 14 and 16 of the Constitution of India. No valid and cogent reason has been assigned by opposite party No.2 in not allotting the vacant MBBS seat to the petitioner.

It was submitted that in the 1st year theory classes of both MBBS and BDS are same. The difference is only in the practical classes. So far as the practical classes are concerned, it is more for MBBS course in comparison to BDS Course.

Concluding his argument, learned counsel for the petitioner submitted that the petitioner should not have been made to suffer for no fault of his own.

4. Mr. M.S. Sahoo, learned Additional Standing Counsel for the State-opposite party No.4 submitted that no MBBS admission can be made beyond 30th September of any year. Ms. Manisha Mohanty was admitted into MBBS Course on 27.07.2013 and she was issued with College Leaving Certificate (CLC) on 26.09.2013 on her request to study elsewhere. After the CLC was issued to Manisha Mohanty, the same was communicated to the Chairman, OJEE through FAX and post vide letter No.6979 dated 28.09.2013. In course of hearing, an affidavit was filed by the Dean and Principal of S.C.B., Medical College-Prof. (Dr.) Prakash Chandra Mohapatra, wherein it has been stated that on 03.05.2014 a meeting was conducted among the Professors and Heads of the Departments of Anatomy, Physiology & Biochemistry to discuss regarding the possibility of transfer of a student from BDS course to MBBS course. In the proceeding of the meeting held on 03.05.2014, it has been stated that the syllabus of MBBS and BDS are different. In BDS syllabus, Physiology and Biochemistry constitute one paper whereas in MBBS there are separate papers. The teaching hours and depth of knowledge imparted to a BDS student is much less than a MBBS student. As per their syllabus, BDS students don't study the anatomy of extremities. They are not taught in detail regarding other systems except head and neck, as per their requirement. It would not be possible to organize extra classes for one BDS student to make up the course in a short period of time as the first professional MBBS examination will start in 1st week of July.

5. Mr. Palit, learned counsel appearing for opposite party No.2-OJEE submitted that due to short time, OJEE could not be held in respect of one seat about which the opposite party No.4 communicated to the Chairman, OJEE on 28.09.2013 through FAX.

6. Mr. R.C. Mohanty, learned counsel for the Medical Council of India submitted that no admission can be made to MBBS course after the cut-off date, i.e., 30th September, 2013. In support of his contention, he relied upon the decision of the Hon'ble Supreme Court in the case of *Mridul Dhar (Minor) and another vs. Union of India and others, (2005) 2 SCC 65.* Placing reliance upon the judgment of the Hon'ble Supreme Court dated 30th August, 2013 in the case of *Aneesh D. Lawande & Others vs. The State of Goa and others (Writ Petition (C) No.598 of 2013),* Mr.Mohanty submitted that a seat cannot be carried forward to the next year.

7. On the rival contentions of the parties, the only question that arises for consideration by this Court is whether the petitioner is entitled to get admission in MBBS Course for the academic year 2013-14 after the cut-off date, i.e., 30th September, 2013.

8. On the rival contentions of the parties, the only question arises for consideration by this Court is whether the petitioner is entitled to take admission in MBBS course for the academic year 2013-14 after the cut-off date of the admission, i.e., 30th September, 2013.

9. At this juncture, it would be appropriate to refer to the judgment of the Hon'ble Supreme Court in the case of ***Asha vs. Pt. B.D. Sharma, University of Health Sciences and others***, AIR 2012 SC 3396 The Hon'ble Supreme Court in the case of Asha (supra) after taking note of its earlier judgment in the case of ***Mriduldhar (minor and another) (supra)*** held as under:

> "31. There is no doubt that 30th September is the cut-off date. The authorities cannot grant admission beyond the cut-off date which is specifically postulated. But where no fault is attributable to a candidate and she is denied admission for arbitrary reasons, should the cut-off date be permitted to operate as a bar to admission to such students particularly when it would result in complete ruining of the professional career of a meritorious candidate, is the question we have to answer. Having recorded that the appellant is not at fault and she pursued her rights and remedies as expeditiously as possible. We are of the considered view that the cut-off date cannot be used as a technical instrument or tool to deny admission to a meritorious students. The rule of merit stands completely defeated in the facts of the present case. The appellant was a candidate placed higher in the merit list. It cannot be disputed that candidates having merit much lower to her have already been given admission in the MBBS course. The appellant had attained 832 marks while the students

who had attained 821, 792, 752, 740 and 731 marks have already been given admission in the ESM category in the MBBS course. It is not only unfortunate but apparently unfair that the appellant be denied admission. Though there can be rarest of rare cases or exceptional circumstances where the courts may have to mould the relief and make exception to the cut-off date of 30th September, but in those cases, the Court must first return a finding that no fault is attributable to the candidate, the candidate has pursued her rights and legal remedies expeditiously without any delay and that there is fault on the part of the authorities and apparent breach of some rules, regulations and principles in the process of selection and grant of admission. Where denial of admission violates the right to equality and equal treatment of the candidate, it would be completely unjust and unfair to deny such exceptional relief to the candidate. "

"36. Now, we shall proceed to answer the questions posed by us in the opening part of this judgment.

ANSWERS

(a) The rule of merit for preference of courses and colleges admits no exception. It is an absolute rule and all stakeholders and concerned authorities are required to follow this rule strictly and without demur.

(b) 30th September is undoubtedly the last date by which the admitted students should report to their respective colleges without fail. In the normal course, the admissions must close by holding of second counseling by 15th September of the relevant academic year (in terms of the decision of this Court in Priya Gupta (supra). Thereafter, only in very rare and exceptional cases of unequivocal discrimination or arbitrariness or pressing emergency, admission may be permissible but such power may preferably be exercised by the courts. Further, it will be in the rarest of rare cases and where the ends of justice would be subverted or the process of law would stand frustrated that the courts would exercise their extraordinary jurisdiction of admitting candidates to the courses after the deadline of 30th September of the current academic year. This, however, can only be done if the conditions stated by this Court in the case of Priya Gupta (supra) and this judgment are found to be unexceptionally satisfied and the reasons therefor are recorded by the court of competent jurisdiction.

(c) & (d) Wherever the court finds that action of the authorities has been arbitrary, contrary to the judgments of this Court and violative of the Rules, regulations and conditions of the prospectus, causing prejudice to the rights of the students, the Court shall award compensation to such students as well as direct initiation of disciplinary action against the erring officers/officials. The court shall also ensure that the proceedings under the Contempt of Courts Act, 1971 are initiated against the erring authorities irrespective of their stature and empowerment.

Where the admissions given by the concerned authorities are found by the courts to be legally unsustainable and where there is no reason to permit the students to continue with the course, the mere fact that such students have put in a year or so into the academic course is not by itself a ground to permit them to continue with the course." (*Underlined for emphasis*)

10. In the present case, the petitioner has not committed any fault. He was deprived of taking admission in MBBS Course against the vacant seat available for the academic year 2013-14 to which he was entitled to before the cut-off date due to laches on the part of opposite party-authorities in not holding the counselling for one vacant seat, which fell vacant in S.C.B. Medical College and Hospital, Cuttack on 26.9.2013, as one candidate, namely, Manisha Mohanty, took spot admission in MBBS Course at AIIMS, Bhubaneswar. One Swayam Prakash Dash, whose NEET All India Rank is 10353 and Odisha Rank is 512 i.e. just one rank above to the petitioner (Rank No. 513), was allotted MBBS Course in V.S.S. Medical College, Burla. Thus, the petitioner securing 513 rank in Odisha is the next eligible candidate to get allotment in MBBS as one seat has fallen vacant on 26.09.2013 after Manisha Mohanty took admission in AIIMS, Bhubaneswar. Thus, the petitioner has become the victim of the circumstances which was beyond his control. Had the opposite parties, more particularly opposite party No. 2-OJEE, 2013 and opposite party No. 4-Dean and Principal, S.C.B. Medical College & Hospital, Cuttack acted with promptitude in filling up the vacant seat before the cut-off date, the petitioner would have certainly got admission in MBBS Course during the academic year, 2013-14 before the cut-off date, i.e., 30.09.2013. Knowing pretty well that a seat in MBBS course is very valuable, opposite party No.4 has not taken prompt action in communicating the Chairman, OJEE about vacancy of one seat in MBBS course after the CLC was issued to Manisha Mohanty on 26.09.2013, which fact intimated to the OJEE, 2013 on 28.09.2013, i.e., two days after the seat fell vacant. Similarly, OJEE, 2013 has not taken any step for holding the

counselling before the cut-off date in respect of such vacant seat about which it was intimated on 28.09.2013. Further, the assertion of the petitioner that he approached the opposite party no. 2-OJEE, 2013 in person on each date for counselling starting from 26.09.2013 to 30.09.2013 for allotting a vacant seat to him was not denied by opposite party no. 2. When the petitioner failed to take admission in MBBS course against the vacant seat which arose before the cut-off date to which he is entitled to, he has filed the present writ petition on 23.10.2013 seeking appropriate relief. Thus, the petitioner is not at fault and he is diligent in pursuing his rights and legal remedy.

11. The Hon'ble Supreme Court in the case of ***Medical Council of India Vs. Manas Ranjan Behera and others***, (2010) 1 SCC 173 noticing that 12 students who were eligible and because of unprecedented situation they could not secure admission within the prescribed time limit condoned the delay in giving admission to them as one time measure.

12. It may be noted that a meritorious student if not given admission in a medical course to which he is entitled to for no fault of his and the seat remains vacant, it is a national waste as it will not only result in complete ruining the professional career of a meritorious student but also make the country to lose a qualified doctor. Needless to say that medical education is a national wealth and the country is in bare need of Doctors.

13. For the reasons stated above, we are of the considered view that the petitioner is entitled to get the relief as prayed for in view of the judgment of the Hon'ble Supreme Court in the case of ***Asha*** (supra). Therefore, in the peculiar and extra-ordinary facts of the case, we feel in the interest of justice the petitioner deserves admission in MBBS course for the academic year 2013-14. Accordingly, we direct opposite party-authorities, more particularly opposite party Nos. 2 and 4 to give admission to the petitioner against the available vacant seat in MBBS course at S.C.B. Medical College and Hospital, Cuttack. However, the petitioner's right to appear in the examination shall be in accordance with the Examination Rules/Regulations and if the petitioner does not meet the attendance requirement, he shall be permitted to repeat the academic year. This order is being passed taking into consideration the peculiar facts and circumstances of the case.

14. The principle decided by the Hon'ble Supreme Court in the case of ***Mriduldhar (minor and another) (supra)*** has no application to the facts of the present case in view of the latter judgment of the Hon'ble Supreme Court in the case of ***Asha*** (supra). Similarly, the judgment of the Hon'ble Supreme Court dated August 30, 2013 in the case of ***Aneesh D. Lawande and others –v- The State of Goa and others*** (W.P. (Civil) No. 598 of 2013)

relied upon by Mr.R.C. Mohanty, learned counsel appearing for the Medical Council of India-opposite party No. 3 is of no assistance since in the present case, no seat is carried forward to the next year and our above direction would not affect the other meritorious candidates who would be aspirants to get admission next year, i.e., 2014-15.

15. In the result, the writ petition is allowed with the aforesaid observations and directions, but without any order as to costs.

Urgent certified copy of this judgment be granted on proper application in course of the day and free copies thereof be handed over to learned counsel for opposite parties for necessary compliance.

Writ petition allowed.

2014 (II) ILR - CUT-1166

I. MAHANTY, J & B. N. MAHAPATRA, J.

W.P.(C) NO. 6245 OF 2014

DEO ISPAT ALLOYS LTD.
SUNDARGARH ..... Petitioner

.Vrs.

COMMISSIONER OF
COMMERCIAL TAXES,
ORISSA, BANIJYAKAR
BHAWAN&ORS, ...Opp.Parties

ORISSA VAT ACT, 2004 – S. 43

Escaped assessment – Dealer is entitled to be supplied with the materials intended to be used against him in the assessment proceeding for rebuttal and the dealer's explanation with regard to those materials is bound to be considered by the assessing officer in the assessment order either accepting or rejecting the same.

In this case materials utilized in the assessment have not been confronted to the dealer for rebuttal – No opportunity of hearing afforded to the petitioner before passing the impugned order of assessment – Violation of principles of natural justice – Impugned order of assessment is quashed and the matter is remitted back to the Assessing Officer for assessment afresh after confronting the adverse materials to be utilized against the petitioner.

Case laws Referred to:-

1.(1962) 45 ITR 206 : (C. Vasantlal & Co.-V- Commissioner of Income-tax, Bombay City)
2.(1977) 39 STC 478 : (State of Kerala-V- K.T. Shaduli Yusuff)
3.(1980) 125 ITR 713 : (Kishinchand Chellaram-V- Commissioner of Income-tax,Bombay City II)
4.(1991) Supp-1 SCC 600 : (Delhi Transport Corporation-V- D.T.C. Mazdoor Congress)
5.(1998) 8 SCC 194 : (Basudeo Tiwary-V- Sido Kanhu University)
6.(1998) 109 STC 16 : (J.S. Refineries Ltd.)
7.(2009) 21 VST 280 (Orissa) : (Lakhiram Jain & Sons-V- Sales Tax Officer, Rayagada Circle, Rayagada & Anr.).

For Petitioner - M/s. Damodar Pati
For Opp.Parties - M/s. R.P. Kar, S.C. (Commercial Taxes Deptt.)

Date of Order : 26.09.2014

ORDER

B.N. MAHAPATRA, J.

This writ petition has been filed with a prayer to quash the order of assessment dated 26.11.2013 passed by the Sales Tax Officer, Rourkela Circle, Panposh under Section 43 of the Orissa Value Added Tax Act, 2014 (for short, 'the OVAT Act') for the period from 01.04.2009 to 06.09.2012 on the ground that the said order is illegal, arbitrary and violative of principles of natural justice.

2. Petitioner's case in a nutshell is that it is a limited Company carrying on business in manufacturing of Silico Manganese and its manufacturing unit is located at Bhawanipur, Kirei in the district of Sundargarh. It is registered under the provisions of the Orissa Value Added Tax Act, 2004 (for short, 'OVAT Act'), the Central Sales Tax Act, 1956 (for short, 'CST Act') and the

Orissa Entry Tax Act, 1999 (for short, 'OET Act'). It had submitted the return for the tax period from 01.04.2009 to 06.09.2012 disclosing true and correct turnover and paid the tax as per the return filed. It maintains required books of account for its business activities for compliance of the OVAT Act. Pursuant to the notice issued by opposite party No.2-STO, Rourkela II Circle, Panposh, Rourkela to the petitioner under Section 43 of the OVAT Act, it appeared before opposite party No.2 on 21.10.2013 and 12.11.2013 along with purchase register, purchase bills, sales registers and sale bills for verification. Petitioner on the said dates prayed opposite party No.2 to provide the report for submission of reply on the allegation made against it. On 26.11.2013, the petitioner submitted a written note praying opposite party No.2 to provide a copy of the report. Opposite party No.2 without providing a copy of the report completed the impugned assessment under Annexure-1 raising demand of Rs.8,34,77,727/- towards tax, interest and penalty. Hence, the present writ petition.

3. Mr.D.Pati, learned counsel for the petitioner submitted that the allegations on the basis of which the impugned assessment order has been passed are false and fabricated. The main plank of argument of Mr.Pati is that before completing the assessment under Section 43 on the basis of the adverse materials contained in the report, the same was not confronted to the petitioner. No reasonable opportunity of hearing was afforded to the petitioner for submission of its explanation against the allegations raised in the report. Therefore, it was submitted that the impugned order of assessment is not sustainable in law.

4. Mr.R.P.Kar, learned Standing Counsel for the Revenue submitted that there is no infirmity and illegality in the order of assessment impugned in the present writ petition. On the date of visit, no books of account was produced at the place of business. Many incriminating documents and records revealing some of the business transactions were recovered from the business premises of the dealer and seized under Section 73(6) of the OVAT Act. Seized incriminating materials and documents revealed that the dealer-Company was involved in clandestine business transactions and evaded the legitimate tax due from it. The dealer-Company did not appear for offering any statement on confrontation of adverse material after availing number of opportunities. Concluding his argument, Mr.Kar submitted that considering the volume of suppression, volume of purchase and sale transactions, extra tax raised in the impugned assessment order is neither arbitrary nor excessive.

5. On the rival contentions of the parties, the following questions fall for consideration by this Court:-

(i) Whether any reasonable opportunity of hearing has been afforded to the petitioner before passing the impugned order?

(ii) Whether copy of the incriminating material intended to be used against the petitioner has been supplied to the petitioner?

(iii) Whether a dealer is entitled to be supplied with the materials intended to be used against him in the assessment proceeding for his rebuttal?

6. Question Nos.(i), (ii) and (iii) being interlinked, they are dealt with together.

7. Perusal of the impugned assessment order does not reveal that various allegations on the basis of which the impugned order of assessment was passed had been confronted to the petitioner. In the penultimate paragraph of the order of assessment impugned, the Assessing Officer observed as follows:

> "I have gone through the fraud case report 01.04.2009 to 06.09.2012 vis-à-vis with written compliance of the Ld. Advocate. The detail reaons of reopening of the case was supplied to the dealer. But the dealers neither submitted any satisfactory explanation nor produced any documentary evidence in order to nullify the allegation made in the tax evasion report submitted by the Enforcement Wing. Thus, it is proved beyond my doubt that the dealer is engaged clandestine business activities and knowingly avoiding to submit the written compliance for his defence. Considering the allegation contained in the tax evasion report submitted by the Deputy Commissioner of Commercial Enforcement, Sambalpur true and correct, the re-assessment order is decided as per fraud case report basing on the information and materials available in the record on merit."

8. Perused the assessment records produced by Mr.Kar from which it reveals that pursuant to the notice issued for assessment of escaped turnover, the petitioner appeared from time to time before the Assessing Officer with books of account and the case was partly heard. Order sheet does not reveal that the materials utilized against the dealer-petitioner in the assessment order were confronted to him and his explanation against each of the allegation was recorded by the Assessing Officer. Statement of the petitioner recorded on 12.11.2013 in course of assessment proceeding is available at page 23 of the assessment record. It would be relevant to extract here the contents of said statement dated 12.11.2013.

> "Today, i.e., on 12.11.2013 (Tuesday) at about 11 am, I appeared before the Sales Tax Officer, Rourkela II Circle, Panposh regarding production of books of account for escaped assessment under OVAT, CST & OET Act. On being asked by the STO, I had produced the books of accounts, i.e., return photo copies without certified, purchase register, sale register, purchase & sale bill from the period from 01.04.2006 to 06.09.2012. But I could not produce the documents for the period from 01.04.2008 to 06.09.2012 and committed an assurance before the STO that I will produce the above said documents on 19.11.2013. At last the fraud case report was confronted by the STO to me.
>
> The above statement given by me is true and correct to the best of my knowledge and belief."

9. We are shocked to notice how very casually an order of escaped assessment under Section 43 of the OVAT Act has been passed raising huge demand of Rs.8,34,77,727/- utilizing various allegations against the dealer without confronting the same to the dealer. So far as the confrontation of fraud case report is concerned, only one line is recorded in the statement dated 12.11.2013, i.e., "at last fraud case was confronted by the STO to me". Neither the order sheet entry nor the statement recorded from the dealer on 12.11.2013 reveal that the incriminating materials in the fraud case report, which the Assessing Officer utilized in the assessment, were confronted to the petitioner and his explanations were considered before passing of the impugned order of assessment. This is a glaring example, how assessment order is passed without observing the principles of natural justice and huge demand is raised, which ultimately adversely affects the interest of the dealer as well as the Revenue. It causes hardship to the dealer when he was compelled to pay a portion of the substantial demand during pendency of appeal/revision in order to carry on his business. It adversely affects the interest of Revenue when such order does not stand to the judicial scrutiny and in many cases, finally the Revenue Department is required to refund the amount collected during pendency of the appeal and revision along with interest as provided under the statute.

10. The Hon'ble Supreme Court in ***C. Vasantlal and Co. v. Commissioner of Income-tax, Bombay City*** [1962] 45 ITR 206 observed as follows:

> "The Income-tax Officer is not bound by any technical rules of the law of evidence. It is open to him to collect materials to facilitate assessment even by private enquiry. But if he desires to use the

> material so collected, the assessee must be informed of the material and must be given an adequate opportunity of explaining it."

11. The Hon'ble Supreme Court in ***State of Kerala v. K. T. Shaduli Yusuff*** *[1977] 39 STC 478* held as under:

> "... The tax proceedings are no doubt quasi-judicial proceedings and the sales tax authorities are not bound strictly by the rules of evidence, nevertheless the authorities must base their order on materials which are known to the assessee and after he is given a chance to rebut the same. ..."

12. In ***Kishinchand Chellaram v. Commissioner of Income-tax, Bombay City II*** *[1980] 125 ITR 713*, the Hon'ble Supreme Court held that it was true that proceedings under the income-tax law were not governed by the strict rules of evidence, and, therefore, it might be said that even without calling the manager of the bank in evidence to prove the letter dated February 18, 1955, it could be taken into account as evidence. But before the Income-tax authorities could rely upon it, they were bound to produce it before the assessee so that the assessee could controvert the statements contained in it by asking for an opportunity to cross-examine the manager of the bank with reference to the statements made by him.

13. In ***Delhi Transport Corporation v. D.T.C. Mazdoor Congress*** *[1991] Supp 1 SCC 600*, the Hon'ble Supreme Court held as follows:

> "... It is now well-settled that the 'audi alteram partem' rule which in essence, enforces the equality clause in article 14 of the Constitution is applicable not only to quasi-judicial orders but to administrative orders affecting prejudicially the party-in-question unless the application of the rule has been expressly excluded by the Act or regulation or rule which is not the case here. Rules of natural justice do not supplant but supplement the Rules and Regulations. Moreover, the rule of law which permeates our Constitution demands that it has to be observed both substantially and procedurally. ..."

14. In ***Basudeo Tiwary v. Sido Kanhu University*** [1998] 8 SCC 194, the Hon'ble Supreme Court held that in order to impose procedural safeguards, this court has read the requirement of natural justice in many situations when the statute is silent on this point. The approach of this Court in this regard is that omission to impose the hearing requirement in the statute under which the impugned action is being taken does not exclude hearing - it may be implied from the nature of the power - particularly when

the right of a party is affected adversely. The justification for reading such a requirement is that the Court merely supplies omission of the Legislature.

15. This court in ***J.S. Refineries Ltd.*** *[1998] 109 STC 16* held that any material sought to be utilized against the dealer has to be brought to his notice.

16. This Court in the case of ***Lakhiram Jain and Sons Vs. Sales Tax Officer, Rayagada Circle, Rayagada and another***, [2009] 21 VST 280 (Orissa)] has held as under:

> "Law is well-settled that if any person is likely to be affected by the use of any material against him those are to be brought to his notice for rebuttal. This is the requirement of the natural justice. The principles of natural justice are based on two basic pillars, i.e., (i) nobody shall be condemned unheard (audi alteram partem), and (ii) nobody shall be judge of his own cause (nemo debet esse judex in propria sua causa)."

17. Needless to say that an assessing authority is entitled to collect the materials behind the back of the assessee. It is not necessary that all the materials so collected by the assessing authority need be confronted to the assessee. Only those materials which the assessing authority intends to utilize against the assessee during assessment are bound to be disclosed to the assessee.

18. Considering the facts and circumstances of the case as well as the decisions of the Hon'ble Supreme Court and this Court, we are of the considered opinion that a dealer is entitled to be supplied with the materials intended to be used against him in the assessment proceeding for rebuttal and the dealer's explanation with regard to those materials is bound to be considered by the assessing officer in the assessment order either accepting or rejecting the same.

19. The next question relates to the stage at which the copy of the seized documents should be supplied to the petitioner - dealer. Should it be supplied before or after production of books of account for verification by the assessing officer? We should keep in mind that in order to plug the leakage of revenue, the fiscal statutes provide various measures to be taken by the departmental officers including surprise visit to the place of business, audit visit, establishment of check-post, inspection of goods in transit, etc. Pursuant to such provisions, very often departmental officers used to pay surprise visit to the business premises of the dealer to find out whether all

the transactions effected by a dealer in his day-to-day business are recorded in his regular books of account maintained for the purpose of paying tax. It is not uncommon that unscrupulous businessmen who effect purchase and sale outside, the regular books of account keep note of the same in some slips/chits or secret account for the purpose of their own reference. The inspecting officers while conducting inspection at the place of business of the dealer, invariably try to trace out such duplicate accounts. If any such account comes to their possession, they cross-verify the same with regular books of account maintained by the dealer and submit their verification report to the assessing officer alleging suppression of purchase and/or sale, if any, found on such verification. In such event, the assessing officer is not bound to accept the view of the inspecting officer in respect of the allegations raised against the dealer in the report in entirety. He may not accept the report at all. He may accept the report in part. Therefore, part of the report containing allegation against the dealer and the materials on the basis of which such allegation has been made must have to be disclosed to the dealer for his rebuttal, if the assessing officer wants to utilize the same against the dealer.

20. In view of the above, we have no hesitation to hold that no opportunity of hearing has been afforded to the petitioner before passing the impugned order of assessment. We further hold that the incriminating materials utilized against the petitioner in the assessment order have not been supplied to the petitioner to which the petitioner is entitled to.

21. In the fact situation, we quash the order of assessment dated 26.11.2013 passed under Section 43 of the OVAT Act for the period from 01.04.2009 to 06.09.2012 and remand the matter to the Assessing Officer to make the assessment afresh after confronting the adverse materials he intends to utilize against the petitioner and considering the petitioner's explanation against such allegation(s). The entire exercise shall be completed within a period of eight weeks from today.

22. In the result, the Writ petition is allowed to the extent indicated above. No costs.

Writ petition allowed.

2014 (II) ILR - CUT-1174

S. PANDA, J.

W.P.(C) NO.24359 OF 2013

PRAFULLA KUMAR SAHOO ……..Petitioner

.Vrs.

SUDAM CHARAN SAHOO & ORS. ……..Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O-9, R-5

Summons returned un served against defendant No.1 to 3 – Suit dismissed against them in the year 2009 for not taking fresh steps by plaintiff within the time prescribed – Plaintiff filed petition under Order 9, Rule 5 read with Section 151 C.P.C. to set aside the order of dismissal in the year 2013 – Trial Court without issuing notice set aside the order of dismissal – Hence this writ petition at the instance of defendant No.3 – Delay of more than 4 years – On dismissal of the suit against defendant Nos.1 to 3 a valuable right accrued in their favour which was not considered by the Court below – As the right accrued in favour of those defendants was affected by setting aside the order of dismissal, without hearing them, the said order need be interfered with and it is open for the petitioner to challenge the said order on his appearance in the trial Court – In case the petitioner files an application, the same may be considered by the Court below in the light of the decision reported in AIR 1987 SC 1353 after giving an opportunity of hearing to the Parties. (Paras 5,6,7)

Case law Referred to:-

AIR 1987 SC 1353 : (Collector, Land Acquisition, Anantnag & Anr.-V- Mst. Katiji & Ors.)

For Petitioner - M/s. P.K. Rath, R.N. Parija, A.K. Rout, S.K. Pattanayak, A. Behera.

For Opp.Parties -M/s. M.K. Mishra, T. Mishra, M.K. Raiguru, M/s. G.B. Jena, A.K. Sahu.

Date of Judgment : 30.09.2014

JUDGMENT

S.PANDA, J.

Petitioner in this petition has challenged the order dated 21.9.2013 passed by learned Civil Judge (Sr.Divn.), Kendrapara in C.M.A. No. 351 of 2013 arising out of C.S. No. 350 of 2004 allowing an application under Order, 9 Rule, 5 read with Section 151 of the Code of Civil Procedure filed by the opposite party No.1 to set aside the order dated 2.3.2009 passed by the court below in the aforesaid suit.

2. The facts leading to the aforesaid suit as reveals from the record that opposite party No.1 as plaintiff filed the suit impleading the present petitioner as defendant No.3 for declaration that Regd. Sale Deed No. 2052 dated 23.5.2002 is illegal, fraudulent and void and for permanent injunction and other consequential relief. In the plaint plaintiff has given a genealogy which reveals that plaintiff and defendant Nos. 3 to 10 are sons and daughters of Dhruba Sahoo and defendant Nos. 1 and 2 are son and wife of defendant No.3. The plaintiff inter alia alleged that the property was purchased by Dhruba in the name of his wife. However after death of Dhruba his wife Radhamani alienated the property in the name of defendant No.1 in the year 2002. He further alleged that said Radhamani was not in a proper state of mind to execute the sale deed hence the suit. As the plaintiff is residing in the said house plaintiff and defendant Nos. 3 to 10 were in the joint mess and property, defendant Nos. 1 and 2 threatened him to dispossess from the said property. It is averred by the petitioner in the petition that the opposite party No.1 suppressing the material facts and misleading the Excise Authorities falsely disclosing the suit property as his recorded property has got a Excise License to operate “On Shop” over the suit property. An objection was filed by the petitioner before the authority regarding the license issued in favour of opposite party No.1. After considering the objection filed by the petitioner the Collector, Kendrapara has issued a show cause notice dated 19.8.2013 to the opposite party No.1 for cancellation of license of I.M.F.L. “On Shop”. Thereafter, on 21.8.2013 the license has been cancelled by the Excise Authorities. In the suit notice was issued to the defendants on 8.10.2004 in both ways. On 25.1.2005 defendant Nos. 4 & 6 to 10 entered appearance through their counsel and prays for some time to file written statement. From the order dated 21.6.2007 it appears that service returns from defendant Nos. 1 to 3 back and service returns from defendant No.5 not back. Thereafter the matter was posted to prove service against defendant Nos. 1 to 3 by plaintiff. Hence the plaintiff did not prove the service against defendant Nos. 1 to 3 on 6.1.2009 the court below has directed the plaintiff to take fresh step against defendant Nos. 1 to 3 and S.R. of defendant No.5 awaited till then. Fresh step as against defendant Nos. 1 to 3 has not been taken by the plaintiff and the court below on 2.3.2009 dismissed the suit against defendant Nos. 1 to 3. After dismissal of

the suit against defendant Nos. 1 to 3, plaintiff has filed an application under Order, 9 Rule, 5 read with Section 151 of the Code of Civil Procedure before the trial court which was registered as C.M.A. No. 351 of 2013 to restore the suit seeking recalling the order of dismissal. The learned trial court without issuing any notice and without giving any opportunity of hearing to the defendants in the impugned order has allowed the application and set aside the order dated 2.3.2009. The court below has directed issue summons against the defendant Nos. 1 to 3 and restoring C.S. No. 350 of 2004 to its file. The court below in the impugned order also observed that opportunity should be given to the plaintiff to issue summons to the defendants to say about their case and allow the suit to dispose of in present of all the parties on merit. After recalling of the order by the trial court the plaintiff has filed an application for injunction which was registered as Interim Application No. 419 of 2013.

3. Learned counsel for the petitioner submitted that from the order sheet of the trial court it reveals that the plaintiff filed an application under Order, 9 Rule, 5 of the Code of Civil Procedure to set aside the order dated 2.3.2009 and for restoration of the suit to its original record and to allow the plaintiff to take fresh step against the defendant Nos. 1 to 3. The plaintiff has to take step for issuance of notice to defendant Nos. 1 to 3 as such step has not been taken the suit was dismissed against them. The court below set aside such dismissal order without issuing notice to the defendant Nos. 1 to 3 against whom the suit was dismissed. As the right accrued in favour of those defendants was affected by setting aside the order of dismissal by impugned order therefore, the said order need be interfered with. The court below condoned more than four years delay and restored the suit to its original form. The court below allowed the plaintiff to take fresh step and condoned the delay even though the said application was filed beyond the period of limitation.

4. Learned counsel appearing for opposite party No.1-plaintiff submitted that the plaintiff has taken a plea of illness which has accepted by the trial court and allowed the plaintiff to take fresh step by setting aside the order of dismissal. As substantial justice has been done the order need not be interfered with.

5. Considering the above fact and circumstances as described hereinabove and the rival submission of the parties there is no doubt that the suit was dismissed against defendant Nos. 1 to 3 for not taking fresh step by the plaintiff in the year 2009. The plaintiff has filed an application to set aside the said order in the year 2013. On dismissal of the suit against the defendant Nos. 1 to 3 a valuable right accrued in favour of those defendants

which was not considered by the court below without issuing notice in the application for restoration of the suit, the trial court has set aside the order of dismissal considering an application under Order, 9 Rule, 5 read with Section 151 of the Code of Civil Procedure.

6. There was delay of more than four years in filing such application by the plaintiff for restoration of the suit against defendant Nos. 1 to 3. The present petitioner who is defendant No.3 knew about all the above facts after he received notice. A right accrued in favour of the petitioner on dismissal of the suit against him. Hence it is open to the petitioner to challenge the said order on his appearance as a valuable right accrued to him and there is delay in filing such application.

7. In view of the discussion made in the aforesaid paragraph this Court disposes of the writ petition with an observation that in case the petitioner files an application in such event the court below shall consider the same in the light of decision rendered by the Apex Court in the case ***Collector, Land Acquisition, Anantnag and another Vs. Mst. Katiji and others*** reported in ***AIR 1987 SC 1353*** after giving an opportunity of hearing to the parties. With the aforesaid observation the writ petition is disposed of.

Writ petition disposed of.

2014 (II) ILR - CUT-1177

S.PANDA, J.

W.P.(C) 26429 OF 2013

MURALIDHAR PRADHAN ..... Petitioner

Vrs.

HAREKRUSHNA SETH .....Opp. Party

CIVIL PROCEDURE CODE,1908 – O-6, R-17

Amendment of written statement – Evidence from the side of the plaintiff closed – Withdrawal of earlier admission in written statement – Amendment would change the nature and character of the suit – Held,

earlier admissions of the defendant can not be allowed to be withdrawn by way of such amendment.

In this case, the defendant in his written statement admitted that the suit property was gifted to his father by Dura @ Draupadi Beherani and now by way of amendment he wants to withdraw such admission with the plea that the said property was gifted to his parents – Held, the Court below rightly rejected his application for amendment

(Paras 5,6)

Case laws Referred to:-

1.2007 (II) OLR (SC) 169 : (Usha Balashaheb Swaim & Ors.-V- Kiran Appaso Swaim & Ors.)
2.AIR 2006 SC 2832 : (Baldev Singh & Ors.-V- Manohar Singh & Anr.)
3.2009 (II) OLR (SC) 815 : (Revajeetu Builders & Developers -V- Narayana -swamy & Sons & Ors.)
4.(1998) 1 SCC 278 : (Heeralal –V- Kalyan Mal)

For Petitioner - M/s. G.P. Dutta, K. Ghosh, S.K. Mohanty, B. K. Sahoo, S. Patro
For Opp.Party - M/s. K.R. Mohapatra, S. Ghosh, A.R. Panigrahi, S.K. Dash.

Date of Judgment: 29.10.2014

JUDGMENT

S.PANDA, J.

This Writ Petition has been filed by the petitioner challenging the order dated 07.8.2013 passed by the learned Civil Judge (Senior Division), Sambalpur in C.S No.33 of 2012 rejecting the application filed under Order 6, Rule 17 of C.P.C for amendment of the written statement.

2. The facts leading to the present case are that the opposite party as plaintiff filed C.S No.33 of 2012 before the learned Civil Judge (Senior Division), Sambalpur for declaration of right, title and interest and for permanent injunction. The plaintiff in the plaint *inter alia* stated that one Dura @ Draupadi Beherani, W/o late Nabi Behera was the original owner of the suit Schedule-A property. The said Dura @ Draupadi Beherani gifted the Schedule-A property to one Nanku Pradhan, who did not deliver possession and both of them were in possession of the suit land. Thereafter Dura @ Draupadi Beherani and Nanku Pradhan executed Registered Sale Deed No.934 dated 06.3.1964 in favour of the father of the plaintiff and since the date of execution, his father was in peaceful possession of the suit land.

Dura @ Draupadi Beherani died in the year 1969 having no issue whereas Nanku Pradhan died in the year 1983 living his widow Kairi Pradhan and the present petitioner. Kairi Pradhan died in the year 2000 living the present petitioner as the sole legal heir. The father of the plaintiff died in the year 1994 living the plaintiff as sole legal heir to succeed his property. After execution of Registered Sale Deed dated 06.3.1964, the father of the plaintiff filed Rent Case No.28 of 2012 before the Settlement Authority to record his purchased land and in the said case the vendors namely Dura @ Draupadi Beherani and Nanku Pradhan were made as opposite parties. After conducting an enquiry, the Settlement Authority by order dated 29.1.1968 rejected the prayer of the father of the plaintiff on the ground that the vendor belongs to Scheduled Tribe Community and permission was not taken from the appropriate Revenue Authority at the time of execution of the Sale Deed. However, the Asst. Settlement Officer directed to prepare the Records of Right in the name of Draupadi Behera with illegal possession of the father of the plaintiff. On the basis of the aforesaid order, the Major Settlement Records of Right in respect of the purchased land of the father of the plaintiff was published in the name of Draupadi Behera with possession note of Banamali Seth (the father of the plaintiff), through illegal Sale Deed dated 06.3.1964. The plaintiff has taken a stand that he has absolute right, title, interest and possession over the suit land after death of his father and the defendant claiming himself the only surviving legal heir of the vendors trying forcibly to dispossess the plaintiff over the suit land.

2.1 After receiving notice, the petitioner, who is defendant appeared in the suit and filed his written statement traversing the allegations made by the plaintiff. He has taken a specific stand that Draupadi Beherani kept Nanku Pradhan as her son to look after her during his old age and Nanku Pradhan remained in the house of late Draupadi Beherani by cultivating all her land. Later on Draupadi gifted all her properties including the suit lands in favour of Nanku Pradhan by executing Gift Deed on 15.12.1947, which was accepted by Nanku Pradhan.

2.2 While matter stood thus, the Registered Gift Deed dated 15.12.1947 which was in the custody of the father of the petitioner was misplaced. Subsequently, the petitioner recovered the said Gift Deed which reveals that Draupadi had gifted away all her properties including the suit lands by executing Registered Deed of Gift in favour of his parents Nanku Pradhan and Purnamasi Pradhan. Thereafter, the petitioner filed an application under Order 6, Rule 17 of C.P.C for amendment of the written statement. The plaintiff filed his objection to the said application stating that the application is not maintainable as it the same was filed at a belated stage. The court

below after hearing the parties by the impugned order rejected the said application on the ground that it is not understandable as to why defendant kept mum regarding the said fact during filing of the written statement and the defendant remained silent over the matter for such a long time.

3. Learned counsel appearing for the petitioner submitted that the proposed amendment of the written statement is necessary for effective adjudication of the dispute and to avoid multiplicity of litigation, as such the impugned order need be interfered with. He further submitted that the petitioner by way of amendment of the written statement wants to correct some names and the same will not change the nature and character of the suit.

4. Learned counsel appearing for the opposite party submitted that the proposed amendment will change the nature and character of the suit. He further submitted that the petitioner has failed to explain that in spite of due diligence he could not able to file the application for amendment before commencement of trial, as such the court below has rightly rejected the application. Hence the impugned order need not be interfered with.

5. Admittedly the suit is of the year 2012. The evidence on the side of the plaintiff has already been closed. The defendant had cross-examined P.Ws, 1, 2 and 3. The petitioner at the time of filing of the written statement could have brought the facts. The petitioner has also failed to explain that in spite of due diligence he could not able to file the application for amendment before commencement of trial. Law is well settled that while considering the application for amendment the court has to see whether the amendment is necessary to decide the real controversy, whether no prejudice or injustice caused to other party and whether the application for amendment is bona fide or mala fide. As general rule the court should decline amendment if admission made in the pleadings particularly in the plaint sought to be omitted or get rid off as held by the Apex Court in the case of **Usha Balashaheb Swami and others Vs. Kiran Appaso Swami and others** reported in **2007 (II) OLR (SC) 169**. The Apex Court further held that a prayer for amendment of the plaint and prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counter part in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.

5.1 The Apex Court in the case of **Baldev Singh and others Vs. Manohar Singh and another** reported in **AIR 2006 SC 2832** held that amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. It is true that some general principles are certainly common to both, but the rules that the plaintiff cannot be allowed to amend his pleadings so as to alter materially or substitute his cause of action or the nature of his claim has necessarily no counterpart in the law relating to amendment of the written statement. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new cause of action. Accordingly, in the case of amendment of written statement, the Courts are inclined to be more liberal in allowing amendment of the written statement than of plaint and question of prejudice is less likely to operate with same rigour in the former than in the latter case.

5.2 The Apex Court in the case of **Revajeetu Builders and Developers Vs. Narayanaswamy and sons and others** reported in **2009 (II) OLR (SC) 815** held that the Courts have very wide discretion in the matter of amendment of pleadings but Court's powers must be exercised judiciously and with great care. The decision on an application made under Order 6, Rule 17 of C.P.C is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. While deciding applications for amendments the Courts must not refuse *bona fid*e, legitimate, honest and necessary amendments and should never permit *mala fide*, worthless and/or dishonest amendments. The first condition which must be satisfied before the amendment can be allowed by the court is whether such amendment is necessary for the determination of the real question in controversy. If that condition is not satisfied, the amendment cannot be allowed. This is the basic test which should govern the Court's discretion in grant or refusal of the amendment.

5.3 The Apex Court in the case of **Heeralal Vs.Kalyan Mal** reported in **(1998) 1 SCC 278** held that the earlier admissions of the defendant cannot be allowed to be withdrawn by way of amendment.

In the present case, the defendant earlier in its written statement has admitted the facts regarding the property gifted to his father by Dura @ Draupadi Beherani and now by way of amendment he wants to withdraw such admission advancing the plea that the property was gifted to his parents.

6. In view of the aforesaid settled position of law, the admission earlier made by a party cannot not be allowed to be withdrawn and considering the

application for amendment also in another angle as per the facts and circumstances of the present case as stated in the above paragraphs, the amendment is necessary for effective adjudication of the dispute between the parties. Hence, the court below rightly rejected the application. As there is no error apparent on the face of the record, this Court is not inclined to interfere with the impugned order dated 07.8.2013 passed by the learned Civil Judge (Senior Division), Sambalpur in C.S No.33 of 2012 in exercise of the jurisdiction under Article 227 of the Constitution of India. Accordingly, this Writ Petition is dismissed.

Writ Petition dismissed.

2014 (II) ILR - CUT-1182

B. P. RAY, J.

F.A. NO. 223 OF 1997

FOOD CORPORATION OF INDIA ……..Appellant

.Vrs.

RAGHUNATH MOHAPRABHU LABOUR CONTRACT SOCIETY LTD. & ORS. ……Respondents

ODISHA CO-OPERATIVE SOCIETIES ACT, 1962 – S. 121 (2) (PRIOR TO AMENDMENT)

Money suit against Defendant No.1-Society – Suit is of the year 1984 – Society liquidated during pendency of the suit – Application by society to add the liquidator a party on 06.03.1992 with a copy to the plaintiff – Plaintiff being aware did not take steps to obtain leave of the Registrar as required U/s. 121 (2) of the Act which was substituted w.e.f. 01.05.1993 i.e. much after commencement of the liquidation proceeding i.e. on 06.03.1992 – Held, the suit is hit by the mischief of Section 121 (2) as it stood prior to amendment – Suit is rightly dismissed by the learned trial Court. (Para 17)

For Appellant - M/s. S.K. Nayak (I), Sr. Advocate,
Debasis Nayak, R.K. Kar, A.K. Baral,
K. Ray, Sumanta Ku. Nayak.
For Respondents – Addl. Standing Counsel.

Date of Judgment: 01.09.2014

JUDGMENT

B.P.RAY, J.

This appeal has been preferred under Section 96 of Civil Procedure Code by the appellant challenging the judgment and decree dated 13.05.1997 passed by the learned Civil Judge, (Senior Division), Berhampur dismissing the Money Suit No.65 of 1984 against the respondent Nos.2 and 3 and ex parte against respondent No.1 without cost.

2. The appellant, who was the plaintiff in the Court below, had filed a money suit claiming an amount of Rs.2,38,084.03/- as compensation for breach of contract. The appellant's case, in short, is that it had entered into an agreement with respondent No.1-Society (defendant No.1) for transporting food grains from railway and road heads to the former's go downs, retail shops and warehouses in the districts of Ganjam and Phulbani. The contract was for a period of two years with effect from 19.08.1980.

3. As per the terms of the contract, respondent No.1 had deposited 50% of the earnest money amounting to Rs.31,500/- and the balance 50% of the earnest money was agreed to be adjusted by deducting 5% out of the bills submitted by respondent No.1 from time to time during execution of the work. Things continued as per the terms of the contract till 21.11.81, after which the respondent No.1 failed to carry out the work as per the terms of the contract despite allotment order being issued and received by him regularly, leading to breach of contract.

4. Seeing no other alternative, the appellant had to carry out the work by engaging ad hoc handling and transport contractors on payment of rates higher than what used to be paid to the respondent No.1. After closure of the contract, the appellant demanded from the respondent No.1 the amount spent in excess by engagement of ad hoc contractors for the work to be done by the respondent No.1. When the respondent No.1 did not respond, the appellant-plaintiff filed the suit against the respondent-defendant No.1 originally, claiming an amount of Rs.1,90,630.03/- together with the interest at the rate of 12% per annum from 11.10.82 till the date of filing of the suit with prayer for a money decree with interest pendent elite and future interest.

5. It is to be noted that during pendency of the suit, respondent No.1 Society was liquidated. Subsequently, the liquidator, i.e., Assistant Registrar of Co-operative Societies (in short A.R.C.S.), Berhampur was arraigned as a party, being respondent No.3. After appearance, respondent No.3 intimated the court that the appellant-Society comes within the jurisdiction of the A.R.C.S., Chatrapur. So, the appellant had also made the A.R.C.S., Chatrapur a party, being respondent No.2 herein (defendant No.2 in the court below).

6. During course of trial, although the respondent No.1 had originally filed his written statement, it subsequently chose not to contest the suit and was set ex parte. Respondent No.2 filed written statement pleading that defendant No.1 (respondent No.1) is not coming within his jurisdiction. The defendant No.3 (respondent No.3) in his written statement pleaded, inter alia, that the learned trial court has no jurisdiction to entertain the suit as only the liquidator has the power to settle any claim against a liquidated society. The defendants, with the pleadings as mentioned above, prayed for dismissal of the suit.

7. The learned trial court, after considering the pleadings, framed as many as three issues, which are as follows :-

(1) Whether the plaintiff is entitled to the suit claim ?

(2) Whether this court has got jurisdiction to entertain the suit ?

(3) To what relief ?

8. After considering the pleadings, materials on record and evidence adduced, the learned court below has settled Issue No.1 in favour of the plaintiff-appellant, holding that he is entitled to Rs.1,83,254.96, being the difference shown in the statement of account of the appellant. The finding of the learned trial court as regards this issue is not in challenge by the appellant.

9. As regards issue No.2, it is clear from the records that the respondent No.1 Society was liquidated vide order No.3969 dated 29.06.93 and the A.R.C.S. Berhampur, respondent No.3 was appointed as liquidator. This is also made clear by the affidavit dated 11.08.2014 filed by the Inspector of Co-operative Societies, Berhampur, pursuant to an order of this court vide its order dated 25.07.2014.

10. The learned trial court, while deciding on issue No.2, has taken into consideration Section 121 (2) of the Orissa Co-operative Societies Act, 1962, the wordings of which are as follows:

121. **"Bar of jurisdiction of courts":-**

(1) Save as provided in this Act no Civil or Revenue Court shall have any jurisdiction in respect of –

(a) to (d) xxx xxx xxx

(2) While a society is being wound up, no suit or other legal proceedings relating to business of such society shall be proceeded with, or instituted against, the liquidator as such or against the society or any member thereof, except by leave of the Registrar and subject to such terms as he may impose".

(3) xxx xxx xxx"

11. The learned trial court has observed that the appellant having already made the liquidator a co-defendant by amending the plaint and the liquidator having contested the suit, it was incumbent upon the appellant to take prior permission of the Registrar for proceeding with the suit as envisaged under Section 121 (2) of the Orissa Co-operative Societies Act, 1962. This having not been done, the suit is liable to be dismissed.

12. Mr. Nayak, learned counsel for the appellant, submits that the said Section 121 of the Orissa Co-operative Societies Act, 1962 was substituted with effect from 1.5.1993 by Orissa Act No.28 of 1991, the wordings of which are as follows:-

"121. **Bar of Jurisdiction of Courts** – Save as provided under this Act, no Civil or Revenue Court shall have any jurisdiction on any ground whatsoever in respect of any proceeding under this Act or Rules or any order, decision, determination or award, by whatever expression called, made or given there under."

13. Mr. Nayak, learned counsel for the appellant, firmly contended that since the society was liquidated after the date of substitution of the said Section 121, i.e. on 29.6.1993, the later Section 121 would govern the suit and not the already substituted Section 121. Therefore, the learned trial court was wrong in applying a non-existent provision to dismiss the suit for want of jurisdiction. He further contended that since there was no requirement for obtaining leave of the Registrar under the present Section 121, the suit could not have been dismissed for want of jurisdiction.

14. The learned counsel for the State, on the other hand, contends that since the suit was filed in the year 1984 before the date of substitution of the said Section 121, the learned trial court was correct in its application of the older Section 121 (2) and the suit, therefore, was rightly dismissed.

15. I am of the view that the most important aspect in determining whether the new Section 121 would apply or the earlier Section 121 would apply is the date on which the liquidation proceedings in respect of the respondent No.1 were initiated and not the date on which it was liquidated. This date, i.e. , the date on which the liquidation proceedings were initiated is not forthcoming from the pleadings of the parties, the evidence adduced or the affidavit dated 11.8.2014 of the Inspector of Co-operative Societies.

16. Mr. Nayak, learned counsel of the appellant submits that a petition under Order 1 Rules 10 of the Civil Procedure Code was filed on 24.7.1993 by the plaintiff to add defendant No.3 (Liquidator) as a party to the suit which was allowed by the learned trial court on 4.12.1993. The said order 1 Rule 10 application being after the date of substitution of Section 121, he strenuously contended that the suit should not have been dismissed since there was no requirement for leave of the Registrar under the present Section 121.

17. On close scrutiny of the records of the learned court below and the order sheet, I find that the defendant No.1 (the Society) had filed a petition under Order 1 Rule 10 of the Code of Civil Procedure to add A.R.C.S., Berhampur (Liquidator and Respondent No.3) as a party on 6.3.1992 with a copy being served to the plaintiff (appellant). This petition was allowed by the learned court below on 28.04.1992 and the plaintiff was ordered to take necessary steps by 25.6.1992. This being the factual position, it becomes obvious that liquidation proceedings with respect to the respondent No.1 Society must already have commenced by 6.3.1992, much before the date of the substitution of Section 121 coming into effect on 1.5.1993. Therefore, I am not inclined to agree with Mr. Nayak, learned counsel for the appellant. I am of the opinion that the suit is hit by the mischief of Section 121 (2) before the said Section was substituted. It was, thus, imperative upon the plaintiff-appellant to have obtained leave of the Registrar as envisaged under the said Section 121 (2) when he was made aware of it, during pendency of the suit or any time thereafter. This not being done, the suit had no legs to stand and was rightly dismissed by the learned trial court.

18. In view of the aforesaid observations, I find no merit in this appeal, which is accordingly dismissed.

Appeal dismissed.

2014 (II) ILR - CUT-1187

S. C. PARIJA, J.

ARBA NO.26 OF 2013

STATE OF ODISHA & ORS. ……Appellants

.Vrs.

PRATIMA KANUNGO & ORS. ……..Respondents

A. ARBITRATION & CONCILIATION ACT, 1996 – S. 34 (2)

Arbitral award – Setting aside of – Scope of interference – An award can be set aside only on the grounds mentioned U/s. 34 (2) of the Act.

In the present case no ground is made out to show that the award is opposed to public policy or is patently illegal so as to come within the ambit of section 34 (2) of the Act – Held, no interference is warranted in the merits of the award. (Para 33)

B. ARBITRATION & CONCILIATION ACT, 1996 – S. 31 (7)

Interest – For pre-award period and post award period – Power of the Arbitrator – For pre-award period interest has to be awarded as specified in the contract and in the absence of contract as per the discretion of the Arbitrator – With regard to post-award period interest is payable as per the discretion of the Arbitrator but in the absence of exercise of such discretion at the statutory rate of 18% per annum – Held, the award of interest at the rate of 15% P.A. by the learned Arbitrator for the pre-award period and post-award period cannot be said to be unjustified so as to warrant any interference.

(Para 35,36)

C. ARBITRATION & CONCILIATION ACT, 1996 – S. 31 (7)

Future interest – Award of future interest @ 15% P.A. from the date of award till the date of payment – In the absence of any provision for future interest or interest upon interest in the contract the Arbitrator cannot award interest upon interest or compound interest either from the pre-award period or post-award period – Held, award of future interest by the learned Arbitrator on the aggregate of the principal sum and interest up to the date of award cannot be sustained and the same is set aside. (Paras 37,38,39)

Case laws Referred to:-

1.2004 (I) OLR 298 : (State of Orissa & Anr.-V- Sri Durga Charan Routaraya)
2.AIR 2003 SC 2629 : (Oil & Natural Gas Corporation Ltd.-V- Saw Pipes Ltd.)
3.(2009) 12 SCC 1 : (State of Rajasthan & Anr.-V- Ferro Concrete Construction Pvt. Ltd.)
4.2001 (45) A.L.R. 4 (SC) : (Om Prakash Gita Devi & Co. & Ors. –V- Food Corporation of India)
5.AIR 1999 SC 2102 : (Olympus Superstructures Pvt. Ltd.-V- Meena Vijay Khetan & Ors.)
6.AIR 1999 SC 3804 : (M/s. Arosan Enterprises Ltd.-V- Union of India & Anr.)
7.(2006) 7 SCC 700 : (Rajasthan State Road Transport Corporation -V- Indag Rubber Ltd.)
8.AIR 2012 SC 2829 : (Rashtriya Ispat Nigam Ltd.-V- Dewan Chand Ram Saran)
9.(2009) 12 SCC 26 : (Sayeed Ahmed & Company-V- State of U.P. & Ors.)
10.2012 (4) SCC 505 : (Himachal Pradesh Housing & Urban Development Authority & Anr.-V- Ranjit Singh Rana)
11.AIR 1995 SC 2189 : (Hindustan Construction Co.Ltd.-V- Governor of Orissa)
12.AIR 1997 SC 1324 : (B.V. Radha Krishna-V- Sponge Iron India Ltd.)
13.(1994) 6 SCC 485 : (State of Rajasthan-V- Puri Construction Co. Ltd. & Anr.)
14.AIR 2010 SC 1511 : (State of Haryana & Ors.-V- S.L. Arora & Company)

For Appellant - Addl. Govt. Advocate
For Respondent - M/s. R.K. Rath, Sr. Advocate, M.Verma, D.Pradhan, Y.S.P. Babu, S.K. Mishra.

Date of Judgment : 26.09.2014

JUDGMENT

S.C.PARIJA, J.

This appeal is directed against the order dated 06.04.2013, passed by the learned District Judge, Sundargarh, in ARBP No.5 of 2010, rejecting the application of the appellants filed under Section 34 of the Arbitration and Conciliation Act, 1996, for setting aside the award dated 25.01.2010, passed by the learned Arbitrator.

2. The brief facts of the case, which give rise to the present appeal is that the State of Orissa through its functionaries entered into a contract with the original Contractor (father of the present respondents) for execution of the work of "Construction of Spill Way (excluding gates)" vide agreement dated 21.11.1980, bearing No.16-F2 of 1980-81. As per the agreement, the work was scheduled to be completed by 20.03.1982. The Contractor submitted work programme on 21.11.1980 to complete the work within 20.03.1982 but did not make sufficient arrangement and take effective steps to complete the work within the stipulated time. As the Contractor could not complete the work within the stipulated time, which was the essence of the contract, the contract was closed as per the relevant clause of the agreement, giving due notice to the Contractor to show cause on 25.07.1981. Subsequently, a modified order for closer of the contract was issued to the Contractor on 17.08.1985.

3. During course of the execution of the contract work, the Contractor had been paid 7 running bills. The final measurement of the work executed by the Contractor was recorded on 20.09.1981 and the 8th and final bill was paid to the Contractor on 20.05.1983, which he received without any objection. However, after a long lapse of about three years, the Contractor vide letter dated 10.03.1986, requested the appellants to take final measurement of the contract work executed by him. No action having been taken by the appellants, the Contractor challenged the illegal closure of the contract and not recording the final measurement of the work by filing Suit No.52 of 1988 before the learned Subordinate Judge, Bhubaneswar, under Section 20 of the Arbitration Act, 1940, for referral of the dispute to arbitration. Accordingly, learned Court below referred the dispute to the Special Arbitration Tribunal comprising of Shri Justice B.K.Behera, former Judge of this Court. Subsequently, as the Special Arbitration Act was repealed and the Special Arbitration Tribunal was abolished, the matter was transferred to the Orissa Arbitration Tribunal, who passed an ex parte award under the Arbitration Act, 1940.

4. The Contractor filed an application before the learned Subordinate Judge, Bhubaneswar, which was registered as Misc.Case No.421 of 1992 (arising out of O.S.No.144 of 1992), praying for setting aside the ex parte award. The learned Subordinate Judge, Bhubaneswar, set aside the ex parte award passed by the Orissa Arbitration Tribunal and remitted the matter back to the Tribunal for passing the award afresh, after giving an opportunity of hearing to the parties. The Contractor had also filed O.S.No.52 of 1988 before the learned Subordinate Judge, Bhubaneswar, in which Misc.Case No.54 of 1990 was filed under Section 5 of the Arbitration Act, 1940, for appointment of a Special Arbitration Tribunal, instead of

referring the matter to the Orissa Arbitration Tribunal. This prayer of the Contractor was rejected by the learned Civil Judge (Senior Division), Bhubaneswar, in the selfsame order dated 4.9.2000, by which the dispute was remitted back to the Orissa Arbitration Tribunal for fresh disposal.

5. Being aggrieved by the refusal of the prayer of the Contractor for referring the matter to the Special Arbitration Tribunal, the Contractor preferred Civil Revision No.341 of 2000 before this Court. In the meanwhile, the Arbitration and Conciliation Act, 1996 ("the Act" for short) having come into force when the Civil Revision was being heard by this Court, a prayer was made by the Contractor in the said Civil Revision, to refer the matter to a named Arbitrator with the consent of the State, in terms of Section 85 of the Act. Accordingly, by order dated 16.11.2001, this Court disposed of the Civil Revision No.341 of 2000, appointing Shri Justice P.C.Mishra, a former Judge of this Court, as the sole Arbitrator, with the consent of the parties.

6. Subsequently, the State filed Misc.Case No.441 of 2002 in Civil Revision No.341 of 2000, for recalling the order dated 16.11.2001 appointing Shri Justice P.C. Mishra, as the Arbitrator, on the ground that the dispute has already been decided by the Orissa Aribitration Tribunal and therefore, the appointment of another Arbitrator is not necessary. The said application (Misc.Case No.441 of 2002) was disposed of by order dated 25.07.2002, refusing to recall the order dated 16.11.2001, by which Shri Justice P.C.Mishra had been appointed as the Arbitrator, giving liberty to the State to raise such objection before the Arbitrator indicating inter alia, that the dispute has already been decided by the Orissa Arbitration Tribunal and in the event such objection is raised, learned Arbitrator will consider the same by passing an appropriate order.

7. Consequent to the order of this Court dated 25.07.2002, passed in Misc.Case No.441 of 2002, arising out of Civil Revision No.341 of 2000, the State filed a preliminary objection/counter statement before the learned Arbitrator raising the question of maintainability of the proceeding. Learned Arbitrator vide order dated 28.12.2002, rejected the objection raised by the State with regard to the maintainability of the proceeding before the Arbitrator.

8. Being aggrieved by the said order of the learned Arbitrator, dated 28.12.2002, the present appellants moved this Court in W.P.(C) No.741 of 2003 and a Division Bench of this Court by order dated 09.01.2007, dismissed the writ petition, holding that the Arbitrator had been appointed by this Court with the consent of the parties as per Section 85 (2)(a) of the Act and therefore no interference is warranted.

9. Subsequently, the appellants appeared before the learned Arbitrator, filed their defence statement and participated in the proceeding.

10. On the pleadings of the parties, learned Arbitrator framed the following issues:-

"(1) Whether there exists any arbitral dispute?

(2) Whether the reference to Arbitrator is valid in view of Clause 23(f) of the contract read with Clause-38 (f) of the Detailed Tender Call Notice?

(3) Has any final bill ever been measured and prepared for payment to the Claimant for the works executed by him arising out of and relating to the Contract No.16-F2 of 1980-81 after Government passed the order on 16.2.1985?

(4) Is the order dated 15.07.1981 of the Executive Engineer, Respondent no.3 closing the contract valid and legal?

(5) Are the various deductions from the Claimant's bill valid and legally sustained?

(6) Whether the Claimant is entitled to any of the claims made?

(7) Whether the interest is payable as claimed?"

11. After considering the pleadings of the parties and the evidence on record, both oral and documentary, and upon hearing both sides, learned Arbitrator passed the award dated 25.01.2010 in favour of the Contractor.

12. Being aggrieved by the award passed by the learned Arbitrator, dated 25.01.2010, the appellants moved the learned District Judge, Sundargarh, in Arbitration Petition No.05 of 2010, under Section 34 of the Act for setting aside the award. Learned District Judge, after considering the materials on record and examining the findings recorded by the learned Arbitrator, has come to hold that there is no infirmity or illegality in the impugned award so as to warrant any interference and has accordingly rejected the prayer of the appellants for setting aside the award under Section 34 of the Act, which is now under challenge in the present appeal.

13. Learned counsel for the appellants submits that after recording of the final measurement and payment of the 8th and final bill, which was received by the Contractor without any objection, the subsequent claim raised by the Contractor at a belated stage, on the basis of manufactured and fabricated documents could not have been accepted by the learned Arbitrator. In this

regard, it is submitted that on payment of the 8th and final bill, as the agreement came to an end along with its arbitration clause, the dispute raised by the Contractor was not arbitrable and therefore the claims raised by the Contractor was not sustainable in law. A reference in this regard has been made to a decision of this Court in ***State of Orissa and another v. Sri Durga Charan Routaraya***, 2004(1) OLR 298.

14. Learned counsel for the appellants further submits that as the award has been passed by the learned Arbitrator in gross violation of the terms of the contract, the award is opposed to "public policy" and is therefore liable to be set aside. In this regard, learned counsel for the appellants has relied upon a decision of the apex Court in ***Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd,*** AIR 2003 SC 2629, wherein the Hon'ble Court has held that if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered with under Section 34 of the Act. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such an award is opposed to "public policy" and is required to be adjudged void.

15. Learned counsel for the appellants further submits that as the award passed by the learned Arbitrator is not based on any evidence and/or insufficient evidence, the same cannot be sustained. In this regard, learned counsel for the appellants relied upon a decision of the apex Court in ***State of Rajasthan and Another v. Ferro Concrete Construction Private Limited***, (2009) 12 SCC 1, wherein the Hon'ble Court has held that while the quantum of evidence required to accept a claim may be a matter within the exclusive jurisdiction of the Arbitrator to decide, if there was no evidence at all and if the Arbitrator makes an award of the amount claimed in the claim statement, merely on the basis of the claim statement without anything more, it has to be held that the award on that account would be invalid.

16. Learned counsel for the appellants further submits that the award of interest by the learned Arbitrator @ 15% per annum for the pre-award and post-award periods is not proper and justified. In this regard, it is submitted that the award of interest @ 15% per annum is very high and not commensurate with the bank rate of interest prevalent at the time of passing of the award. In this regard, learned counsel for the appellants has relied upon a decision of the apex Court in ***Om Prakash Gita Devi & Co. and others v. Food Corporation of India,*** 2001 (45) Arbitration Law Reporter 4 (SC), in support of his plea for reduction in the rate of interest awarded.

17. In response, learned counsel for the respondents submits that as the award passed by the learned Arbitrator is based on evidence on record, both oral and documentary and detailed findings have been recorded in respect of each items of claim, the same cannot be interfered with by the Court, unless the challenge comes within the ambit of Section 34(2) of the Act. In this regard, it is submitted that as the contentions raised by the appellants are all issues of fact, which the learned Arbitrator has decided on the basis of the evidence on record, the Courts have no right or authority to interdict an award on factual issues. In this regard, learned counsel for the respondents has relied upon the decisions of the apex Court in ***Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan and others,*** AIR 1999 S.C. 2102 and ***M/s Arosan Enterprises Ltd. v. Union of India and another,*** AIR 1999 S.C.3804.

18. Learned counsel for the respondents further submits that as this Court does not sit in appeal over the award of the learned Arbitrator by re-assessing or re-appreciating the evidence, no interference is warranted, especially when no grounds have been made out to show that the challenge to the award falls within the ambit of Section 34(2) of the Act. In this regard, learned counsel for the respondents has relied upon three decisions of the apex Court in ***Rajasthan State Road Transport Corporation v. Indag Rubber Ltd.,*** (2006) 7 SCC 700; ***Kwality Manufacturing Corporation v. Central Warehousing Corporation,*** 2009 (5) SCC 142 and ***Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran,*** AIR 2012 SC 2829.

19. Coming to the plea of the appellants regarding award of interest by the learned Arbitrator @ 15% per annum for the pre-award and post-award periods, learned counsel for the respondents has relied upon a decision of the apex Court in ***Sayeed Ahmed and Company v. State of Uttar Pradesh and others,*** (2009) 12 SCC 26, wherein the Hon'ble Court has held that unless the award of interest by the Arbitrator is contrary to Section 31(7) (a) and (b) of the Act, or the same is found to be unwarranted for the reasons to be recorded, the Court should not alter the rate of interest awarded by the Arbitrator. In this regard, learned counsel for the respondents has also relied upon the decision of the apex Court in ***Himachal Pradesh Housing and Urban Development Authority and Anr. v. Ranjit Singh Rana,*** 2012 (4) SCC 505, wherein the Hon'ble Court has reiterated that the rate of interest awarded by the Arbitrator cannot be interfered with by the Court unless the same is in contravention of Section 31(7) (a) and (b) of the Act.

20. It is accordingly submitted that as the award of the learned Arbitrator is based on elaborate reasonings in respect of each issues, supported by evidence on record, the same is not liable to be interfered with, as this Court

does not sit in appeal over the findings of the learned Arbitrator. Further, as no grounds have been made out by the appellants for setting aside the award, as provided under Section 34(2) of the Act, no interference is warranted in the present appeal.

21. On a perusal of the award, it is seen that the learned Arbitrator has framed 7 issues, as already detailed above. With regard to the plea of the appellants that the Contractor had been paid the 8th running account bill as the final bill, learned Arbitrator under issue nos.3 and 4 has taken into consideration various documents produced by the parties and the oral evidence adduced by them and has come to hold as under:-

> "xxxx xxxx My conclusion therefore is that the final measurement had never been taken, nor the final bill was ever prepared for the works executed by the claimant pursuant to contract No.16-F/2 of 1980-81. It is also clear from the discussions made above that the alleged order dated 25.7.1981, Ext.R-5 was preplanned and was accomplished in haste. At the cost of repetition I feel necessary to mention that news-paper publication (Ext.C-4) is dated 16.7.81; whereas in Ext.C-11, the Chief Engineer wrote to the F.A.-cum-Deputy Secretary to the Government that the Tender call notice was sent for news-paper publication on 18.8.81. If the closure of the contact of the Claimant was necessary for completion of the uncompleted work urgently, why and under what circumstance the Tender of Bhesoj Patel was approved by the Government on 8.6.82, that is a year after. One more aspect in connection with the approval of the Tender in favour of Bhesoj Patel need to be mentioned as was contended emphatically by the learned counsel for the Claimant that the department was bent upon to favour Bhesoj Patel for obvious reasons. From the facts stated above it abundantly clear that the order dated 25.7.81 of the Executive Engineer for closing the contract was not valid and therefore illegal."

22. Learned Arbitrator has dealt with all the issues in detail and has recorded elaborate findings in respect of each issues and every item of claim, based on the pleadings of the parties and evidence available on record.

23. The law is well settled that an award can be set aside only if the same comes within the ambit of Section 34(2) of the Act. In *Oil & Natural Gas Corporation Ltd.* (supra), the Hon'ble Court has observed that the award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or
(b) the interest of India; or
(c) justice or morality; or
(d) if it is patently illegal.

24. In ***Steel Authority of India Limited v. Gupta Brother Steel Tubes Limited***, (2009) 10 SCC 63, Hon'ble Court has referred to its earlier decisions where it has been held that where an Arbitrator travels beyond a contract, the award would be without jurisdiction and the same would amount to misconduct and such award would become amenable for being set aside by a Court. However, an error by the Arbitrator relatable to interpretation of the contract is not amenable to correction by Courts.

25. Hon'ble Court while taking note of its decisions with regard to scope of interference in an award of the Arbitrator, has held as under:

> "18. It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the decisions of this Court can be summerised thus:

(i) In a case where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a court.

(ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by courts as such error is not an error on the face of the award.

(iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.

(iv) An award contrary to substantive provisions of law or against the terms of contract would be patently illegal.

(v) Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.

(vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.

(vii) It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings."

26. Hon'ble Court has proceeded to observe that the legal position is no more res integra that the Arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that Arbitrator has reached at a wrong conclusion. The Courts do not interfere with the conclusion of the Arbitrator even with regard to construction of a contract, if it is a possible view of the matter.

27. The aforesaid position of law with regard to scope of interference with an award of the Arbitrator has been affirmed and reiterated by the apex Court in *Rashtriya Ispat Nigam Limited* (supra).

28. It is now well settled that the Court while considering the question whether an award passed by the Arbitrator should be set aside or not, does not examine the question as an appellate Court. While exercising the said power, the Court cannot re-appreciate the materials on the record for the purpose of recording a finding whether in the facts and circumstances of a particular case, the award in question could have been made. (See- ***Hindustan Construction Co. Ltd. v. Governor of Orissa,*** AIR 1995 SC 2189.)

29. A similar view has been expressed by the apex Court in ***B.V.Radha Krishna v. Sponge Iron India Ltd.,*** AIR 1997 SC 1324, wherein it was observed:

> "Bearing in mind the principles laid down by this Court in the above said cases, if we look into disposal of the matter by the High Court, it would be evident that the High Court has substituted its own view in place of the arbitrator's view as if it was dealing with an appeal. That is exactly what is forbidden by the decisions of this Court. Therefore, we have no hesitation to set aside the judgment of the High Court on this issue."

30. An error of law on the face of the award means that you can find in the award some legal proposition which is the basis of the award and which you can then say is erroneous. The Court has no jurisdiction to investigate into the merits of the case and to examine the documentary and oral evidence on the record for the purpose of finding out, whether or not the Arbitrator has committed an error of law. The Court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the

Arbitrator had acted contrary to the bargain between the parties. If the view of the Arbitrator is a possible view, the award or the reasoning contained therein cannot be examined.

31. In this context, reference may be made to a decision of the apex Court in ***State of Rajasthan v. Puri Construction Co.Ltd. and another,*** (1994) 6 SCC 485, where the Hon'ble Court has observed as under:

> "A Court of competent jurisdiction has both right and duty to decide the lis presented before it for adjudication according to the best understanding of law and facts involved in the lis by the judge presiding over the Court. Such decision even if erroneous either in factual determination or application of law correctly, is a valid one and binding inter parties. It does not, therefore, stand to reason that the arbitrator's award will be per se invalid and inoperative for the simple reason that the arbitrator has failed to appreciate the facts and has committed error in appreciating correct legal principle in basing the award. An erroneous decision of a Court of law is open to judicial review by way of appeal or revision in accordance with the provisions of law. Similarly, an award rendered by an arbitrator is open to challenge within the parameters of several provisions of the Arbitration Act. Since the arbitrator is a judge by choice of the parties and more often than not a person with little or no legal background, the adjudication of disputes by an arbitration by way of an award can be challenged only within the limited scope of several provisions of the Arbitration Act and the legislature in its wisdom has limited the scope and ambit of challenge to an award in the Arbitration Act. Over the decades, judicial decisions have indicated the parameters of such challenge consistent with the provisions of the Arbitration Act. By and large the Courts have disfavoured interference with arbitration award on account of error of law and fact on the score of misappreciation and misreading of the materials on record and have shown definite inclination to preserve the award as far as possible. As reference to arbitration of disputes in commercial and other transactions involving substantial amount has increased in recent times, the Courts were impelled to have fresh look on the ambit of challenge to an award by the arbitrator so that the award does not get undesirable immunity. In recent times, error in law and fact in basing an award has not been given the wide immunity as enjoyed earlier, by expanding the import and implication of "legal misconduct" of an arbitrator so that award by the arbitrator does not perpetrate gross miscarriage of justice and the same is not reduced to mockery of a fair decision of the lis between the parties to

arbitration. Precisely for the aforesaid reasons, the erroneous application of law constituting the very basis of the award and improper and incorrect findings of fact, which without closer and intrinsic scrutiny, are demonstrable on the face of the materials on record, have been held, very rightly, as legal misconduct rendering the award as invalid. It is necessary, however, to put a note of caution that in the anxiety to render justice to the party to arbitration, the Court should not reappraise the evidences intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the arbitrator is, according to the understanding of the Court, erroneous. Such exercise of power which can be exercised by an appellate Court with power to reverse the finding of fact, is alien to the scope and ambit of challenge of an award under the Arbitration Act. Where the error of finding of facts having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints, the interference with award based on erroneous finding of fact is permissible. Similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator. In ultimate analysis it is a question of delicate balancing between the permissible limit of error of law and fact and patently erroneous finding easily demonstrable from the materials on record and application of principle of law forming the basis of the award which is patently erroneous. It may be indicated here that however objectively the problem may be viewed, the subjective element inherent in the judge deciding the problem, is bound to creep in and influence the decision. By long training in the art of dispassionate analysis, such subjective element is however, reduced to minimum. Keeping the aforesaid principle in mind, the challenge to the validity of the impugned award is to be considered with reference to judicial decisions on the subject."

32. The apex Court in ***P.R.Shah Shares & Stock Broker (P) Ltd. v. M/s B.H.H. Securities (P) Ltd. and Ors***, AIR 2012 SC 1866, has reiterated the legal position that a Court does not sit in appeal over the award of an Arbitrator by re-assessing or re-appreciating the evidence. An award can be challenged only on the grounds mentioned in Section 34(2) of the Act and in absence of any such ground, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.

33. Keeping in view the position of law with regard to the scope of interference with an award of the Arbitrator, it is seen that in the present case, no material has been produced before this Court and no ground has been made out to show as to how the award is opposed to public policy or is patently illegal, so as to come within the ambit of Section 34 (2) of the Act. The award reveals that the learned Arbitrator has recorded elaborate reasons in support of each of its findings, which are based on materials available on record. Moreover, it is not a case where the award is based on no evidence and therefore, the sufficiency of the evidence to accept a claim being within the exclusive jurisdiction of the Arbitrator to decide, no interference is warranted with regard to the merits of the award.

34. Coming to the question of reducing the rate of interest of 15% per annum, awarded by the learned Arbitrator for the pre-award and post-award periods, the apex Court in *Sayeed Ahmed and Company* (supra), while referring to the power of the Arbitrator to award interest under Section 31 (7) (a) and (b) of the Act, has observed that unless the award of interest is found to be unwarranted for reasons to be recorded, the Court should not alter the rate of interest awarded by the Arbitrator.

35. The apex Court in ***State of Haryana and Ors. v. S.L.Arora and Company***, AIR 2010 SC 1511, while dealing with the power of the Arbitrator to award interest under Section 31(7)(a) and (b) of the Act, has observed as under:

> "(i) Clause (a) relates to pre-award period and clause (b) relates to post-award period. The contract binds and prevails in regard to interest during the pre-award period. The contract has no application in regard to interest during the post-award period.
>
> (ii) Clause (a) gives discretion to the arbitral tribunal in regard to the rate, the period, the quantum (principal which is to be subjected to interest) when awarding interest. But such discretion is always subject to the contract between the parties. Clause (b) also gives discretion to the arbitral tribunal to award interest for the post-award period but that discretion is not subject to any contract; and if that discretion is not exercised by the arbitral tribunal, then the statute steps in and mandates payment of interest, at the specified rate of 18% per annum for the post-award period."

In short, with regard to pre-award period, interest has to be awarded as specified in the contract and in the absence of contract as per discretion of the Arbitrator. On the other hand, in regard to the post-award period, interest is payable as per the discretion of the Arbitrator and in the absence

of exercise of such discretion, at a mandatory statutory rate of 18% per annum.

36. In the light of the discussions made above, the award of rate of interest of 15% per annum by the learned Arbitrator for the pre-award and post-award periods cannot be said to be unwarranted and/or unjustified, so as to warrant any interference.

37. Though there is no challenge by the appellants to the award of compound interest for the post-award period, either in their application under Section 34 of the Act before the learned District Judge or before this Court in the present appeal, from the award it is seen that the learned Arbitrator has awarded principal amount of Rs.48,82,058/- towards different items of claim. Further, the learned Arbitrator has awarded interest @ 15% per annum on the principal sum, from the date of closure of the contract, i.e. 17.08.1985, till the date of award and has proceeded to club the interest with the principal amount and thereby making the principal amount to be Rs.2,27,80,903/-, on which the learned Arbitrator has awarded future interest @ 15% per annum from the date of award till the date of payment. This approach of the learned Arbitrator in awarding interest on interest from the date of award is erroneous and misconceived.

38. In *S.L.Arora* (supra), similar questions arose for consideration: (a) whether Section 31(7) of the Act authorizes and enables the arbitral tribunal to award interest on interest from the date of award and (b) whether the arbitral tribunal granted future interest from the date of the award, only on the principal amount found due or on the aggregate of the principal and interest up to the date of award. The Supreme Court, considering the provisions of Section 31 of the Act, held as follows:-

> "14.Section 31(7) makes no reference to payment of compound interest or payment of interest upon interest. Nor does it require the interest which accrues till the date of the award, to be treated as part of the principal from the date of award for calculating the post-award interest. The use of the words "*where and insofar as an arbitral award is for the payment of money*" and use of the words "*the arbitral tribunal may include in the sum for which the award is made, interest ….. On the whole or any part of the money*" in clause (a) and use of the words " *a sum directed to be paid by an arbitral award shall…. Carry interest*", in clause (b) of sub-section (7) of Section 31 clearly indicates that the section contemplates award of only simple interest and not compound interest or interest upon interest. '*A sum directed to be paid by an arbitral award*' refers to the award of sums

on the substantive claims and does not refer to interest awarded on the '*sum directed to be paid by the award'*. In the absence of any provision for interest upon interest in the contract, the arbitral tribunals do not have the power to award interest upon interest, or compound interest, either for the pre-award period or for the post-award period.

15. There is a tendency among contractors to elevate the claims for interest and costs to the level of substantive disputes by describing them as separate and independent heads of claim. The long pendency of arbitration matters either due to prolonged arbitration proceedings or due to litigations (both intervening and post-arbitral), has the unfortunate effect of swelling the interest payable on the amount awarded and costs to very substantial amounts. In many arbitral awards for money, the interest awarded often exceeds the amount awarded, by several times. Leisurely arbitrations, avoidable judicial interventions and indecisiveness on the part of decision makers in government and statutory bodies in accepting and settling genuine claims either at the stage when the claim is made or at least at the stage when the award is made have resulted in undue emphasis and importance being bestowed upon interest and costs. However, substantial their quantum may be in a given case, interest, in particular interest from the date of the award, and costs are ancillary issues and are not substantive disputes.

xxxx xxxx xxxx

The provision for interest in the Act is contained in Section 31 dealing with the form and contents of arbitral ward. It employs two significant expressions "where the arbitral award is for payment of money" and "the arbitral tribunal may include in the sum for which the award is made, interest….. On the whole or any part of the money". The legislature has thus made it clear that award of interest under sub-section (7) of Section 31 (any award of costs under sub-section (8) of Section 31 of the Act) are ancillary matters to be provided for by the award, when the arbitral tribunal decides the substantive disputes between the parties. The words 'sum for which the award is made' and 'a sum directed to be paid by an arbitral award' contextually refer to award on the substantive claims and not ancillary or consequential directions relating to interest and costs."

39. Applying the principles of law as detailed above to the facts of the present case, the conclusion is irresistible that the award of future interest by

the learned Arbitrator on the aggregate of the principal sum and interest up to the date of award cannot be sustained and the same is accordingly set aside.

40. Accordingly, the respondents are entitled to simple interest @ 15% per annum only on the principal awarded amount of Rs.48,82,058/- both for the pre-award and post-award periods, till the date of payment.The award is modified to the said extent only. The appeal is accordingly disposed of. No costs.

Appeal allowed in part.

2014 (II) ILR - CUT-1202

B. K. PATEL, J.

W.P.(C) NO. 28024 OF 2013

EXECUTIVE ENGINEER, ROURKELA ELECTRICAL DIVISION, WESCO ……..Petitioner

.Vrs.

GRIEVANCE REDRESSAL FORUM, ROURKELA & ANR. ……Opp.Parties

A. OERC Retail Supply Tariff order - 2013-14 – Paragraph-196 – "Reliability Surcharge" – This surcharge can only be levied if the consumer gets power supply through a dedicated feeder – "Dedicated feeder" means a feeder provided for the exclusive use of a consumer – In this case since the feeder through which O.P.2 is getting power supply is used for power supply to other industries, O.P.2 cannot be said to receive power supply through a dedicated feeder – Held, the G.R.F. has rightly passed the impugned order that the petitioner is not entitled to claim "reliability surcharge" from O.P.2.

(Para 15)

B. ELECTRICITY – Reliability surcharge – The surcharge can only be levied if the consumer gets power supply through a dedicated feeder

– Dedicated feeder means a feeder provided for the exclusive use of a consumer, even the licensee cannot extend electric supply to any other consumer from the dedicated feeder – In the present case since the feeder through which O.P.2 is getting power supply is used for power supply to other industries, O.P.2 cannot be said to have received power supply through a dedicated feeder and the G.R.F. has rightly held that the petitioner is not entitled to claim, reliability surcharge from O.P.2.

(Para 15)

Case law Referred to:-

AIR 2013 M.P. 167 : (K.S. Oils Ltd.-V- Madhya Pradesh Kschetra Vidut Vitran Company Ltd., Bhopal & Ors.)

For Petitioner - M/s. B.K. Nayak-1 & D.K. Mohanty.
For Opp.Parties - M/s. Sreejit Mohanty, Debraj Mohanty, A.K. Nath.

Date of Hearing : 01.07.2014
Date of Judgment : 26.09.2014

JUDGMENT

B.K. PATEL,J.

In this writ petition, the petitioner representing distribution licensee WESCO, has assailed the legality of order dated 11.11.2013 passed by Grievance Redressal Forum, Rourkela (for short 'the GRF') in Case No.57 of 2013 in which it was held that claim of the petitioner of reliability surcharge in the energy bills for the months of May and June, 2013 from opposite party no.2 was unjust and the petitioner was directed to revise the energy bills of opposite party no.2 for the months of May and June, 2013 waiving out the reliability surcharge from the bills.

2. Opposite party no. 2, situated at Kalunga Industrial Estate, is a mini steel plant, having contract demand of 2600 KVA, availing power supply from the industrial feeder which emanates from 132/33 KV grid substation on the strength of agreement dated 20.6.2012 at Annexure-1 entered into with WESCO. Clauses-6 and 7 of the agreement at Annexure-1 read as follows:

> "(6) **Charges to be paid by the Consumer**: The Consumer shall pay to the Engineer for power demanded and electrical energy supplied under this agreement minimum monthly charges, 'demand charges', 'energy charges' and 'other charges' in accordance with the provisions of OERC Distribution (Conditions of Supply) Code, 2004 and as notified in the Tariff Notifications from time to time:

In Large Industry category.

Provided that annual sum payable by any individual consumer under the provision to Section 45 of the Indian Electricity Act, 2003, shall not be deemed to be part of the minimum monthly charges or demand charges, if any, payable by the consumer or the particular class of consumers under Regulations 84 and 85 of the OERC Distribution (Conditions of Supply) Code, 2004.

Provided further that the consumer shall pay electricity duty or such other levy, tax or duty as may be prescribed under any other law in addition to the charges, fuel surcharge and transformer loss payable under the OERC Distribution (Conditions of Supply) Code, 2004.

(7) The tariff and conditions of supply mentioned in this Agreement shall be subject to any revision that may be made by the Licensee from time to time."

Thus, Clause-6 of the agreement specifically provides that opposite party no.2 is liable to pay, apart from minimum monthly charges, demand charges and energy charges, 'other charges' in accordance with provisions of the Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2004 (for short 'the OERC Code) and as notified in the Tariff Notifications from time to time in Large Industry category. Orissa Electricity Regulatory Commission (for short 'the OERC) Tariff Orders or Notifications did not provide for 'reliability surcharge' earlier. However, reliability surcharge was made leviable on high end consumers under certain conditions as provided under paragraph 196 in the OERC Tariff Order for the financial year 2013-14 (for short 'the Tariff Order') which came into effect from 1.4.2013. Paragraph 196 of the Tariff Order read as follows:

"196. **Reliability Surcharge**

Many concerns, basically HT/ EHT Industries brought to the notice of the Commission regarding uninterrupted quality power supply to their units. Many process industries particularly connected with the dedicated feeders from the Grid of OPTCL and Primary sub-station of DISCOMs objected to the restrictions being imposed on their units by the DISCOMs in case of exigency with or without the express intimation of SLDC. While there is a need to supply uninterrupted power to high end HT/EHT consumers this has to be viewed in the overall perspective of a situation of system unavailability / power deficit where a large number of ordinary consumers suffer power cut

during peak hours and also sometimes during the summer months. The Commission is, therefore, of the view that for getting uninterrupted power supply in this adverse scenario the high end consumer must compensate the DISCOMs who may otherwise would have imposed power cuts on those consumers. Therefore, we introduce a concept of reliability surcharge in this tariff order for FY 2013-14. The reliability surcharge shall be payable to start with such HT and EHT consumers who get power supply through dedicated feeders from OPTCL Grid sub-station or from the primary 33/11 KV sub-station of DISCOMs. The reliability surcharge shall be 20 paise per unit for all the units consumed by such HT and EHT consumers in the billing month. This surcharge is leviable over and above the bill amount based on normal tariff for that category of consumers after the rebate and penalty if any. The reliability surcharge is leviable provided following two conditions are satisfied.

(a) If Reliability Index formula which is given below is at or more than 99 % in a month.

Reliability Index for dedicated feeder for the month

$$\frac{[1\text{SAIDI for the dedicated Feeder }] \times 100}{24 \times 60 \times \text{nos. of days in the month}}$$

and

(b) The voltage variation at the consumer premises is as per Section 2.1 (Schedule 1) of OERC (Standard of Performance) Regulation, 2004. (underline supplied)

DISCOMs shall also attach the reliability index calculation and voltage variation report with the bill in case of levy of reliability surcharge. They are not required to pay any charges for this report to be attached with the bill. We also direct M/s. OPTCL to co-operate for ensuring uninterrupted power supply without restriction to such consumers." (underline supplied)

3. In purported exercise of authority to impose reliability surcharge under paragraph 196 of the Tariff Order, WESCO levied reliability surcharge on opposite party no.2 in its energy bills for the months of May and June, 2013. Opposite party no.2 filed complaint bearing Case No.57 of 2013 challenging imposition of reliability surcharge on the ground that pre-conditions for levy of reliability surcharge as provided at paragraph 196 of the Tariff Order do not exist inasmuch as opposite party no.2 does not get power supply through dedicated feeder from OPTCL grid sub-station or from the primary 33/11 KV sub-station of the WESCO. WESCO filed objection

against the complaint. On consideration of rival contentions and materials on record the GRF passed the order impugned in this writ petition on the basis of following findings:

> "Tariff order of OERC for the FY 2013-14 at **Para-196** speaks about reliability surcharge for HT and EHT consumer. **Para-196** speculates that, the reliability surcharge shall be payable to start with such HT and EHT consumer who get power supply through dedicated feeder from OPTCL Grid substation or from the primary 33/11 KV substation of DISCOMs. The reliability surcharge shall be 20 paisa per unit for all the units consumed by such HT and EHT consumers in the billing month. This such as is leviable or all above the bill amount based on normal tariff for that category of consumers after the rebate and penalty if any.
>
> **From the above tariff order this forum understands that, getting power supply through dedicated feeder is a prerequisite for the purpose of claiming reliability surcharge**. In the instant case the petitioner is getting power supply from 33 KV, Kalunga feeder emanating from 132/33 KV Grid substation, Rourkela which is not a dedicated feeder from OPTCL Grid to the petitioner's industry. Around 15 Large Industries consumers are also getting power supply from the said feeder as per the documents submitted by the Distribution Licensee."

Thus, the GRF recorded the finding that opposite party no.2 is getting power supply from 33 KV, Kalunga feeder emanating from 132/33 KV grid substation which is not a dedicated feeder from OPTCL grid to the petitioner's industry inasmuch as around 15 Large Industries consumers are also getting power supply from the said feeder as per the documents submitted by the WESCO. In such circumstances, opposite party no.2 does not satisfy the first prerequisite under paragraph 196 of the Tariff Order for getting power supply through dedicated feeder so as to be liable for payment of reliability surcharge.

4. It is not disputed that opposite party no.2 is getting power supply through feeder emanating from 132/33 KV grid substation, Rourkela through which feeder other Large Industries consumers are also getting power supply. Opposite party no.2 does not dispute that reliability index was more than 99 per cent and voltage variation was as per Section 2.1 (Schedule I) of the OERC (Standard of Performance) Regulation, 2004 (for short 'the OERC Regulation') during the months of May and June, 2013.

5. It was contended by the learned counsel for the petitioner that the GRF has committed illegality in holding that opposite party no.2 does not get power supply through dedicated feeder. Placing reliance on the decision of the Madhya Pradesh High Court in **K.S. Oils Ltd. –vrs.- Madhya Pradesh Kschetra Vidut Vitran Company Ltd., Bhopal & others**: AIR 2013 Madhya Pradesh 167 it was argued that a dedicated feeder does not mean that it can be used only by a single consumer to run its unit. It was further argued that in the present case power supply has been given through the same feeder to the opposite party no.2 and other similar industrial units only. No supply of power is given through the feeder to any general consumer. There being no dispute that power supply to opposite party no.2 industry fulfills the criteria of reliability index as well as the standard of voltage variation as provided under sub-paragraphs (a) and (b) of paragraph 196 of the Tariff Order, reliability surcharge was rightly levied.

6. *Per contra*, it was contended by the learned counsel for opposite party no.2 that the first and foremost prerequisite for levy of reliability surcharge is supply of power through a dedicated feeder as is evident from paragraph 196 of the Tariff Order. The provision for levy of tariff is essentially a fiscal provision for which it is to be construed strictly. Paragraph 196 of the Tariff Order presupposes fulfillment of three conditions for levy of reliability surcharge. The very first condition is that reliability surcharge shall be payable by such HT and EHT consumers who get power supply through dedicated feeder from OPTCL grid substation or from the primary 33/11 KV substation of DISCOMs. Secondly, the reliability index must be more than 99 per cent. Third condition is that the voltage variation on the consumers' premises must be as per Section 2.1 (Schedule I) of the OERC Regulation. Distribution licensee cannot levy reliability surcharge in the absence of any of the three conditions. It was submitted that the term 'dedicated feeder' has not been defined either in the Electricity Act, 2003, or any of the Rules, Regulations or Code applicable to Odisha including the OERC Code. In the Tariff Order also the term 'dedicated feeder' has not been defined. In ordinary parlance 'dedicated feeder' means a feeder which is connected to a single consumer. Even the OERC Code envisages supply of electricity through a feeder to a single consumer. Regulation 27 of the OERC Code provides for arrangement agreed to in writing for providing service line for exclusive use of a consumer. Admittedly, the feeder through which opposite party no.2 gets electricity supply has not been agreed upon to be used exclusively by opposite party no.2. It was further submitted that Regulation 2(f) of the Andhra Pradesh Electricity Regulatory Commission provides that 'dedicated feeder' means feeder emanating from substation where transformation to the required voltage takes place and feeds power to a single consumer having contracted capacity of minimum fifty percent of line

capacity or more. Similarly, Regulation 5.3 of the Meghalaya State Electricity Regulatory Commission provides that the licensee shall not extend electric supply to any other consumer from the dedicated feeder. Clause 24 of Kerala Electricity Supply Code, 2014 provides that the service line and other equipment of a consumer with a dedicated feeder shall not be used to supply power to another consumer. Referring to paragraphs-6 and 11 of the judgment of the Appellate Tribunal For Electricity, New Delhi passed in Appeal No.109 of 2011 in the case of **Maharashtra State Electricity Distribution Co. Ltd. –vrs.- Maharashtra Electricity Regulatory Commission and R.L. Steels Ltd.** (MANU/ET/0132/2011) it was argued that dedicated feeder has been specifically referred to by the Appellate Tribunal for Electricity to be a feeder where only one consumer is connected. It was further argued that all licensees under the Electricity Act are obliged to ensure uninterrupted quality power supply without voltage fluctuation or variation to the consumers. The consumer is not liable to pay any surcharge for availing services which licensees are obliged to provide. Reliability surcharge is envisaged by the OERC to be levied only on such HT and EHT consumers who get such quality supply through dedicated feeders. It cannot be levied on a consumer whenever in a particular month reliability index and voltage variation are in accordance with the standard prescribed in sub-paragraphs (a) and (b) of paragraph 196 of the Tariff Order, irrespective of the manner of use of the feeder.

7. From the admitted facts as well as averments and rival contentions made by the parties, it is evident that the petitioner distribution licensee also does not dispute that supply of electricity through a dedicated feeder is an essential prerequisite for levy of reliability surcharge. However, in spite of the fact that as many as about fifteen other Large Industries consumers are getting power supply through the same feeder, learned counsel for the petitioner contended that such feeder is a dedicated feeder. On the other hand, case of opposite party no.2 is that electricity supply is not given through a dedicated feeder. Therefore, the only issue which requires to be decided in this case is as to whether the feeder through which opposite party no.2 is getting electricity supply is a dedicated feeder or not.

8. None of the statutory provisions or Rules and Regulations applicable to the State of Odisha including the OERC Code provide for the definition of the term ‘dedicated feeder’. As has been stated at paragraph 196 of the Tariff Order, the fiscal concept of levy of reliability surcharge was introduced to start with such HT/EHT consumers who get power supply through dedicated feeders from OPTCL grid substation or from the primary 33/11 KV substation of DISCOMs. Learned counsel for the petitione r vehemently

argued that the term 'dedicated feeder' has to be assigned the meaning as assigned by the Madhya Pradesh High Court in **K.S. Oils Ltd. –vrs.- Madhya Pradesh Kschetra Vidut Vitran Company Ltd., Bhopal & others** (supra) in which the sole question before the Court was as to whether distribution licensee can be allowed to provide power supply to any other consumer from the dedicated feeder provided to the appellant at appellant's cost. Upon reference to Clause 5.3 and placing reliance upon clause 4.9 of the M.P. Electricity Supply Code, 2004 (for short 'the M.P. Code'), the question was answered in the affirmative. Clause 5.3 of the M.P. Code reads as follows:

> "5.3 Consumers desirous of getting power supply from dedicated feeders may request for such facility to the licensee. The dedicated feeder shall be extended from the Power Sub-station to the consumer's point of supply. In such cases the consumers shall be liable to pay the cost of Bay and all protection Switchgears and its accessories provided at the power sub-station for this feeder in addition to the cost of the feeder. On receipt of such request, the licensee will check the feasibility based on merits of providing a dedicated feeder to the consumer's premises. It found feasible, the consumer will be provided with a dedicated feeder and the consumer will be liable to pay additional charges as indicated in the Schedule of Miscellaneous Charges."

Thus, it is evident that Clause 5.3 of the M.P. Code simply provides for modalities for providing dedicated feeder to a consumer. It is not a fiscal provision. Clause 4.9 of the M.P. Code reads as follows:

> "4.9 The service connection/extension of distribution mains, notwithstanding that it has been paid for by the consumer, shall be the property of the licensee. The licensee shall maintain it at its cost and shall also have the right to use the same service connection/ extension for supply of energy to any other person but such extension or service connection should not adversely affect the supply to the consumer who paid for the extension of the distribution supply network."

Thus, Clause 4.9 of the M.P. Code explicitly provides that service connection/ extension, cost of which has been paid by the consumer, can be permitted by the licensee to be used for supply of energy to any other person. In such circumstances, it was held that the licensee may provide connection to any other consumer from the feeder installed in accordance with Clause 5.3 of the M.P. Code.

9. In absence of any definition, the term 'dedicated feeder', understood in ordinary parlance, means a feeder provided for the exclusive use of a consumer. In the present case, admittedly, the feeder through which opposite party no.2 is getting power supply is used for power supply to other industries also. Provision for levy of reliability surcharge introduced for the first time during the financial year 2013-14 is a fiscal provision intended to levy the surcharge as one of the 'other charges' in terms of Clauses 6 and 7 of the agreement dated 20.6.2012 at Annexure-1 entered into between the parties. Therefore, the term 'dedicated feeder' has to be given a strict interpretation.

10. Learned counsel for opposite party no.2 has brought to the notice of the Court definition of the term 'dedicated feeder' assigned by the Electricity Regulatory Commissions of some other States.

11. Regulation 2(f) of the Andhra Pradesh Electricity Regulatory Commission provides as follows:

> (f) "**Dedicated Feeder**" means feeder emanating from substation where transformation to the required voltage takes place and feeds power to a single consumer having contracted capacity of minimum fifty percent of line capacity or more. The Consumer shall bear the full line cost, including take off arrangements at Substation end of the Licensee. In such cases the billing meter shall be provided at the Licensee's sub-station." (underline supplied)

12. Regulation 5.3 of the Meghalaya State Electricity Regulatory Commission provides as follows:

> "5.3 **Dedicated Feeder**
>
> Consumers other than 3 MVA & above including steel and other similar industries desirous of getting power supply from dedicated feeder may make a request for such facility to the licensee. The dedicated feeder shall be extended from the power substation to the consumer's point of supply. In such cases the consumers shall be liable to pay the cost of Bay and all protection switchgears and its accessories provided at the power substation for this feeder in addition to the cost of the feeder. On receipt of such request, the licensee will check the feasibility, based on merit, of providing a dedicated feeder to the consumer's premises. If found feasible, the consumer will be provided with a dedicated feeder and the consumer will be liable to pay additional charges such as supervision charges, etc. as approved by the Commission from time to time. The Licensee

shall not extend electric supply to any other consumer from the dedicated feeder." (underline supplied)

13. Similarly, Clause 24 of the Kerala Electricity Supply Code, 2014 provides as follows:

"24. **The service line, meter and associated equipment deemed to be the property of the licensee**.- (1) The whole of service line, meter and other associated equipment shall be deemed to be the property of the licensee and shall remain under his control so long as they are connected to the distribution system of the licensee.

(2) The licensee may use the service line and other apparatus to give supply to other consumers, if the supply to the consumer who has paid for such line and apparatus is not affected adversely:

Provided that the service line and other equipment of a consumer with a dedicated feeder shall not be used to supply power to another consumer.

(3) Even if the supply to the consumer who has paid for the line or equipment is disconnected, for whatsoever reason, the consumer shall permit the licensee, continued access to the service line and other equipment if they are required to give supply to other consumers, until alternate arrangements are made by the licensee:

Provided that no payment shall be due to the consumer for such access or facility.

(4) The licensee shall make all possible efforts to provide alternate arrangement or mutually acceptable arrangement for continuation of the installation at the existing place, as early as possible." (underline supplied)

14. Appellate Tribunal for Electricity, New Delhi, constituted under Section 110 of the Electricity Act, 2003 at paragraphs 6 and 11 of the order passed in **Maharashtra State Electricity Distribution Co. Ltd. –vrs.- Maharashtra Electricity Regulatory Commission and R.L. Steels Ltd.** (supra) has observed as follows:

"6. On 13.11.2009, the Appellant submitted a petition being Case No.71 of 2009 before State Commission praying for allowing the Appellant to levy of low voltage surcharge to consumers

connected on non-express feeders (more than one connection on the said feeder) at voltages lower than that specified in Standard of Performance Regulations. The Appellant also prayed that in case of dedicated feeders (where only one consumer is connected), the Appellant may be allowed to charge on the basis of consumption recorded by meters installed at sending end and receiving end whichever is higher.

Xx	xx	xx	xx	xx
Xx	xx	xx	xx	xx

11. The State Commission disposed of this petition in Case No.52 of 2010 through a Clarificatory order dated 9.11.2010. In this order, the State Commission clarified that under its Order dated 5.3.2010 the levy of 2 % extra units cannot be made if the power supplied was connected on dedicated feeder (only one connection on the said feeder). Levy of 2 % extra units was applicable only if consumer is connected on non-dedicated feeder (more than one connection on the said feeder)." (underline supplied)

Thus, the Appellate Tribunal For Electricity has clearly assigned the meaning of 'dedicated feeder' to be a feeder to which only one consumer is connected.

15. It is not disputed that the feeder through which opposite party no.2 gets power supply has never been agreed upon by the parties either in the agreement at Annexure-1 or in any subsequent instrument to be used exclusively by opposite party no.2. That goes to indicate that it was never meant to be a dedicated feeder. A close reading of paragraph 196 of the Tariff Order would reveal that the concept of reliability surcharge was introduced in view of objection raised by industries particularly connected with "dedicated feeders" from the Grid of OPTCL substation and primary substation of DISCOMs. Considering objections and the scenario of the system of availability/power deficit the OERC introduced the concept of levy of reliability surcharge to be payable, to start with, such HT and EHT consumers who get power supply through dedicated feeders. Thus, reliability surcharge was levied on the basis of objections raised by a class of consumers availing power supply through dedicated feeders to be payable by such HT and EHT consumers who get power supply through dedicated feeders. The expression "dedicated feeders" occurs twice in paragraph 196 of the Tariff Order. In the absence of any definition of the expression "dedicated feeder" provided under the Statues, Rules, Regulations or the

OERC Code, the OERC ought to have provided for a precise definition or meaning of the term "dedicated feeder" in the Tariff Order itself. That having not been done, no fault can be found with the meaning of the expression "dedicated feeder' assigned by the GRF in the impugned order, such meaning being in consonance with the meaning and definition of "dedicated feeder" assigned by Electricity Regulation Commissions of other States as well as the Appellate Tribunal for Electricity which are essentially expert technical bodies. The meaning sought to be assigned by the petitioner to the term "dedicated feeders" would render the use of expression "dedicated feeders" by the OERC in paragraph 196 of the Tariff Order redundant. In the facts and circumstances of the case, the GRF has rightly held that the petitioner is not entitled to claim reliability surcharge from the opposite party no.2.

16. In view of the above, there is no merit in the writ petition. Accordingly, the writ petition is dismissed.

Writ petition dismissed.

2014 (II) ILR - CUT-1213

B. K. NAYAK, J.

W.P.(C) NO.7935 OF 2013

BAIRAGI MOHARANA & ANR. ……Petitioners

.Vrs.

THE COLLECTOR, KHURDA & ORS. …….Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O-18, R-17

Court may recall and examine witness – Discretion of the Court – It should be used in appropriate cases to enable the Court to clarify any doubt with regard to the evidence led by the parties but the said power should not be used to fill up omission in the evidence of a witness who has already been examined.

In this case there is no mention in the impugned order as to what ambiguities are there in the evidence of P.W.10 necessitating clarification and to recall the said witness for further Cross-examination – Held, the impugned order allowing the petition of the defendants to recall P.W.10 for further Cross-examination is set aside.

(Paras 5,6)

Case laws Referred to:-

1.(2011) 11 SCC 275 : (K.K. Velusamy-V- N. Palanisamy)
2.2013 (I) OLR (SC) 1070 : (M/s. Bagai Construction Thr. Its Proprietor Mr. Lalit Bagai-V- M/s. Gupta Building Material Store.)

For Petitioners - M/s. R.C.Mohanty, G. Nayak, S.Mohanty.
For Opp.Parties - Learned State Counsel.

Date of hearing : 31.07.2014
Date of judgment: 25.08.2014

JUDGMENT

B.K.NAYAK, J.

Order dated 16.03.2013 passed by the learned Civil Judge (Senior Division) First Court, Cuttack in Title Suit No.160 of 2002/Title Suit No.117 of 1994 allowing the petition filed by the defendants to recall P.W.10 (plaintiff) for further cross-examination, has been assailed in this writ application.

2. The petitioners have filed the suit for declaration of right, title and interest over the suit land, against the State. After closure of evidence, while arguments in the suit were being heard, the Government pleader representing the defendants-State filed an application under Order 18 Rule 17 of the C.P.C. with a prayer to recall P.W.10 (plaintiff) for his further cross-examination on the ground that the previous G.P. having expired during the pendency of the suit, P.W.10 could not be effectively cross-examined by the A.G.P. and that after he was engaged to conduct the suit, while going through the evidence he found that P.W.10 has not been effectively cross-examined. Along with the application, a list of questions necessary to be put to the witness during further cross-examination was attached. The petition was opposed to by the plaintiff by filing objection stating that P.W.10 was cross-examined at length and discharged and that at the belated stage the petition has been filed to recall the witness only to fill up the lacuna which should not be allowed.

3. By the impugned order, the learned trial court allowed the petition holding that the questions appended to the recall petition appear to be genuine and required for just and proper adjudication of the matter in controversy and to clarify the ambiguities in the evidence of P.W.10 and that since P.w.10 is the plaintiff himself no prejudice will be caused to him for further cross-examination on the questions appended to the petition.

4. With regard to the scope of Order 18 Rule 17 of the Civil Procedure Code, the Hon'ble Supreme Court in the case of ***K.K. Velusamy v. N. Palanisamy: (2011) 11 SCC 275*** held as follows :

> "**9.** Order 18 Rule 17 of the Code enables the court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness under Order 18 Rule 17 can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said power. The power is discretionary and should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. (Vide *Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate.)*
>
> **10.** Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to *clarify any issue or doubt,* by recalling any witness either suo motu, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.
>
> **11.** There is no specific provision in the Code enabling the parties to reopen the evidence for the purpose of further examination-in-chief or cross-examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the absence of any provision providing for reopening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under Section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to reopen the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected

by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put such question to elicit any clarifications.

12. The respondent contended that Section 151 cannot be used for reopening evidence or for recalling witnesses. We are not able to accept the said submission as an absolute proposition. We however agree that Section 151 of the Code cannot be routinely invoked for reopening evidence or recalling witnesses. The scope of Section 151 has been explained by this Court in several decisions [*see Padam Sen v. State of U.P., Manohar Lal Chopra v. Seth Hiralal, Arjun Singh v. Mohindra Kumar, Ram Chand and Sons Sugar Mills (P) Ltd. v. Kanhayalal Bhargave, Nain Singh v. Koonwarjee, Newabganj Sugar Mills Co. Ltd. v. Union of India, Jaipur Mineral Development Syndicate v. CIT, National Institute of Mental Health & Neuro Sciences v. C. Parameshwara* and *Vinod Seth v. Devinder Bajaj].* We may summarise them as follows :

(a) Section 151 is not a substantive provision which *creates* or confers any power or jurisdiction on courts. It merely recognizes the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is "right" and undo what is "wrong", that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, Section 151 recognizes and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is coextensive with the need to exercise such power on the facts and circumstances.

(c) A court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or by necessary implication exhaust the scope of the power of the court or the jurisdiction that may be exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or in a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the code.

(d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the legislature.

(e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and in the facts and circumstances of the case. The absence of an express provision in the Code and the recognition and saving of the inherent power of a court, should not however be treated as a *carte blanche* to grant any relief.

(f) The power under Section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court."

5. It is clear from the aforesaid decision of the apex Court that power of the Court under Order 18 Rule 17 of the C.P.C. is a discretionary power which should be used sparingly in appropriate cases to enable the court to clarify any doubt it may have in regard to the evidence led by the parties and not intended to be used to fill up omissions in the evidence of a witness, who has already been examined. Order 18 Rule 17 of the Code is also not intended to enable the parties to recall any witnesses for further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced at the time of recording of evidence. After deletion of Order 18 Rule 17-A, the court may in appropriate cases in exercise of its inherent power under Section 151 of the Code may permit cross-examination of a witness, but this inherent power cannot be routinely invoked or exercised for reopening evidence or recalling witnesses.

The principles laid down in ***K.K. Velusamy*** *(supra)* have been followed in a subsequent decision of the apex Court reported in ***2013(I) OLR (SC) 1070: M/s. Bagai Construction Thr. Its Proprietor Mr. Lalit Bagai v. M/s. Gupta Building Material Store.***

6. In the impugned order except stating that the questions appended to the recall petition appear to be genuine and required for just and proper adjudication of the matter in controversy and to clarify the ambiguities in the evidence of P.W.10, the learned Civil Judge (Senior Division) has not considered the petition in the light of the principles laid down by the apex Court in the decision referred to above. There is also no mention in the impugned order as to what ambiguities are there in the evidence of P.W.10 which need clarification. The impugned order allowing the prayer for recall of P.W.10 for further cross-examination does not indicate whether the Court below exercised power under Section 151 of the C.P.C., since within the scope of Order 18 Rule 17 of the C.P.C., it is not permissible to allow a party for further examination-in-chief of his own witness or for further cross-examination of a witness of adversary on recall.

7. In the aforesaid circumstances, I allow the writ petition and set aside the impugned order and remit the matter back to the court below to reconsider the defendants' petition for recall of P.W.10 for further cross-examination in the light of the principles governing the field. No costs.

Writ petition allowed.

2014 (II) ILR - CUT-1218

S. K. MISHRA, J.

MISC CASE No. 809 OF 2014
(ARISING OUT OF CRLA NO. 287 OF 2014)

ASHOK KUMAR PANDA ……..Appellant

.Vrs.

REPUBLIC OF INDIA ……Respondent

CRIMINAL PROCEDURE CODE, 1973 – S. 389

Suspension of conviction – Appellant convicted Under sections 7, 13 (2) read with Section 13 (1) (d) of the P.C. Act, 1988 – Sentence in a case involving corruption – Corruption is not only a punishable offence but also undermines human rights, indirectly violating them,

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and systematic corruption is a human rights violation in itself as it leads to systematic economic crimes – Held, no exceptional ground, is made out to suspend the conviction of the appellant. (para-9)

Case laws Referred to:-

1.(1995) 2 SCC 513 : (Rama Narang-V- Ramesh Narang & Ors.)
2.AIR 1996 SC 2449 : (State of Tamil Nadu-V- A. Jaganathan).
3(2001) 6 SCC 584 : (K.C.Sareen-V- Central Bureau of Investigation, Chandigarh)

For Appellant - M/s. H.K. Mund
For Respondent - Mr. V.Narasingh

Date of order- 03.7.2014

ORDER

Misc.Case No. 809 of 2014

Heard learned counsel for the appellant and the learned Standing Counsel for the Republic of India.

2. This is an application under Section 389 of the Code of Criminal Procedure, 1973, hereinafter referred to as the 'Code' for brevity, for staying of order of conviction of the appellant. The learned Special Judge (C.B.I.), Court No.III, Bhubaneswar in T.R. Case No.5/7 of 2013/2012 has convicted the accused person for the offence under Sections 7 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988, hereinafter referred to as the 'Act' for brevity, for demanding and accepting bribe of Rs.5,000/- for sanctioning the agricultural loan in favour of the complainant.

3. In course of hearing, learned counsel for the appellant painstakingly argued that this is an exceptional case where the conviction of the appellant is patently illegal on the face of the impugned judgment. It is contended by the learned counsel for the appellant that the loan application has been seized by the C.B.I. after seven days of the trap. Hence, it is argued that there is no consideration for payment of illegal gratification by the complainant. Secondly, it is submitted that at the time of trap, a number of persons were gathered there and the accused absconded from the place of trap. However, though an F.I.R. has been lodged against such an incident, no charge has been leveled against the appellant for concealing or causing disappearance of evidence punishable under Section 201 of the I.P.C. Thirdly, it is submitted that currency notes were not recovered from the appellant-petitioner right after the trap. However, the C.B.I. has established

that on the next date, the appellant was apprehended and on appropriate chemical test, trace of phenolphthalein powder was found from the pant pocket of the appellant. On this score, learned counsel for the appellant submits that there is ample scope for staying the conviction of the appellant as on the face of record he is entitled to be acquitted. However, in course of argument, learned counsel for the appellant relying upon the reported decision in the case of ***State of Maharashtra v. Gajanan and another*****,** AIR 2004 SC 1188 : (2003) 12 SCC 432 has conceded that conviction should be stayed only in very exceptional cases.

4. Learned Standing Counsel for the C.B.I., on the other hand, argued that the ground that was urged by the learned counsel for the appellant-petitioner may be good grounds for the appeal to succeed, but these are not exceptional circumstances, for which conviction of the appellant should be stayed. It is further contended by the learned counsel for the C.B.I. that in the case of ***State of Maharasthra*** T***hrough CBI Anti Corruption Branch, Mumbai v. Balakrishna Dattatrya Kumbhar,*** in Criminal Appeal No. 1648 of 2012, Hon'ble Justice Dr. B.S.Chauhan, after taking into consideration several judgments of the Supreme Court, has held that relief of staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done.

5. On examination of the impugned judgment, it appears that the learned Special Judge, (C.B.I.) has taken into consideration all the materials available on record and has come to the conclusion that the C.B.I. has proved its case beyond all reasonable doubt and, therefore, he proceeded to convict the appellant for the offence described above.

6. In ***Rama Narang v. Ramesh Narang and others***, (1995) 2 SCC 513, the Supreme Court dealt with the said issue elaborately and held that if, in a befitting case, the High Court feels satisfied that the order of conviction needs to be suspended, or stayed, so that the convicted person does not have to suffer from a certain disqualification, provided for by some other statute, it may exercise its power in this regard because otherwise, the damage done cannot be undone. However, while granting such stay of conviction, the court must examine all the pros and cons and then, only if it feels satisfied that a case has in fact been made out for grant of such an order, it may proceed to do so and even while doing so, it may, if it so considers it appropriate, impose such conditions as are deemed appropriate, to protect the interests of the other parties. Further, it is the duty of the applicant to specifically invite the attention of the appellate court as regards the consequences, which are likely to follow, upon grant of such stay, so as

to enable it to apply its mind fully to the issue, since under Section 389(I) Cr.P.C., the court is under an obligation to support its order in a manner provided therein, the same being, "for the reasons to be recorded by it in writing".

7. In the case of ***State of Tamil Nadu v. A.Jaganathan,*** AIR 1996 SC 2449, the Supreme Court held that the order of the High Court, by which the order of conviction has been stayed for the sole reason that, in absence of such a stay, the accused was likely to lose his job. The Supreme Court has reversed the impugned order therein observing:

> "… … the High Court, though made an observation but did not consider at all the moral conduct of the respondent… who was the Police Inspector…had been convicted under sections 392, 218 and 466 I.P.C. while the other respondents, who are also public servants, have been convicted under the provisions of the Prevention of Corruption Act. In such a case, the discretionary power to suspend the conviction either under section 389 or under Section 482 Cr.P.C. should not have been exercised. The order impugned, thus, cannot be sustained."

8. In the case of **K.C.Sareen v. Central Bureau of Investigation, Chandigarh** (2001) 6 SCC 584, the Supreme Court has held as follows:

> "The legal position, therefore, is this : though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code, its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal in challenge of the conviction the Court should not suspend the operation of the order of conviction. The Court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance. It is in the light of the above legal position that we have to examine the question as to what should be the position when a public servant is convicted of an offence under the P.C. Act. No doubt when the appellate court admits the appeal filed in challenge of the conviction and sentence for the offence under the P.C. Act, the superior court should normally suspend the sentence of imprisonment until disposal of the appeal, because refusal thereof would render the very appeal otiose unless such appeal could be heard soon after the filing of the appeal. But suspension of conviction of the offence under the P.C. Act, dehors the sentence of imprisonment as a sequel thereto, is a different matter."

9. In the case of ***State of Maharasthra T**hrough CBI Anti Corruption Branch, Mumbai v. Balakrishna Dattatrya Kumbhar** (supra),* the Supreme Court has held that corruption is not only a punishable offence but also undermines human rights, indirectly violating them, and systematic corruption, is a human rights' violation in itself, as it leads to systematic economic crimes. The Supreme Court further held that in the aforesaid backdrop, the High Court should not have passed the said order of suspension of sentence in a case involving corruption. It was certainly not the case where damage if done, could not be undone as the employee/ respondent if ultimately succeeds, could claim all consequential benefits.

10. Applying these principles to the case in hand, the Court comes to the conclusion that though the learned counsel for the appellant has made out certain points which may be good grounds for appeal to succeed, it does not justify, not being exceptional in character to the suspension of conviction of the appellant.

11. In that view of the matter, this Court is of the opinion that the petition of the petitioner to suspend the conviction of the appellant is devoid of any merit and, therefore, is dismissed. The Misc. Case is accordingly disposed of.

Application disposed of.

2014 (II) ILR - CUT-1222

C. R. DASH, J

W.P.(C) NOS.18405, 18406 OF 2013

SUSAMA DAS .....Petitioner

.Vrs.

KUMARI KABITA BEHERA & ORS. .....Opp.Parties

A. EVIDENCE ACT, 1872 – S.35

School admission register – Government U.P. School – Public register – Entry of date of birth of the third child of the petitioner – Entry made by the Headmaster of the concerned school in due discharge of his official duty – Petitioner's husband has signed the

register (Ext-1) at the time of admission – Ext.1 carried the correct date of birth of the petitioner's third child and such child having taken birth after the cut off date, i.e. 21.04.1995, the petitioner is held to be disqualified. (Para 15)

B. ODISHA PANCHAYAT SAMITI ACT, 1959 - S. 45 (1) (v)

Election of Panchayat Samiti member – Petitioner's election challenged as her third child born after the cut off date i.e. 21.04.1995 – Election Tribunal dismissed the petition – Lower appellate Court found the date of birth of the third child recorded as 31.05.1996 vide Ext-1 and the entry made on the information given by the husband of the petitioner – Evidence adduced by the petitioner and her husband is suspicious but evidence of O.P.1 is more probable – Lower appellate Court has followed well established norms while reassessing the evidence – This Court finds no infirmity by the learned Lower appellate Court – Writ petition having no merit, is dismissed.

(Paras 21,22,23)

Case law Relied on :-

AIR 1988 SC 1796 : (Biratmal Singhvi-V- Anand Purohit)

Case laws Referred to:-

1.2004 (Supp.) OLR 335 : (Chandrakanti Jena-V- Banalata Jea & Ors.)
2.111 (2011) CLT 709 : (Ch. Sudhakar Reddy-V- T.Kesab Reddy & Ors.).
3.AIR 1965 SC 282 : (Brij Mohan Singh-V- Priya Brat Narain Sinha & Ors.)

For Petitioner - M/s. Deepali Mohapatra, S. Parida.
For Opp.Parties - M/s. Tanmay Mishra, S. Senapati (Caveator).

Date of Judgment : 18.09.2014

JUDGMENT

C.R. DASH, J.

As both the writ applications involve common facts and questions of law, they are taken up together for disposal by this common order.

2. Susma Das is the petitioner in both the writ applications. She was elected as Panchayat Samiti Member (Samiti Sabhya) of Chikalakhandi Grama Panchayat in the election held on 17.02.2012 defeating Kumari Kabita Behera (opposite party No.1 in W.P.(C) No.18405 of 2013) the only contesting candidate. On being so elected, she subsequently contested for

the post of Chairman of Chhatrapur Panchayat Samiti. She was declared elected as Chairman of Chhatrapur Panchayat Samiti defeating Prativa Behera (opposite party No.1 in W.P.(C) No.18406 of 2013). Both Prativa Behera and Kumari Kabita Behera moved the Election Tribunal, i.e., Civil Judge (Senior Division), Chhatrapur vide Election Petition No.1 of 2012 and Election Petition No.2 of 2012 respectively challenging the election of Susma Das as Chairman of Chhatrapur Panchayat Samiti and Panchayat Samiti Member of Chikalakhandi Grama Panchayat on the ground that she (Susma Das) had given birth to her third child named Chinmaya Das after the cutoff date, i.e., 21.04.1995.

3. Learned Election Tribunal, after hearing, dismissed the aforesaid election petitions obliging Kumari Kabita Behera and Prativa Behera to move the learned District Judge, Ganjam in Election Appeal No.6 of 2012 and Election Appeal No.7 of 2012 respectively for redressal of their grievances regarding alleged illegal election of the present petitioner-Susma Das. Learned District Judge, Ganjam, after hearing, allowed Election Appeal No.6 of 2012 and declared Kumari Kabita Behera (opposite party No.1 in W.P.(C) No.18405 of 2013) to have been elected, as she had polled second highest vote in the election for the post of Samiti Sabhya of Chikalakhandi Grama Panchayat and she was the only other candidate, who had contested. Election Appeal No.7 of 2012 filed by Prativa Behera (opposite party No.1 in W.P.(C) No.18406 of 2013) was, however, allowed in part and the prayer of said Prativa Behera to the effect that she be declared elected as Chairman of Chhatrapur Panchayat Samiti was negatived.

4. The findings in the Election Appeal No.6 of 2013 in favour of Kumari Kabita Behera has been impugned by the present petitioner-Susma Das in W.P.(C) No.18405 of 2013 and findings in Election Appeal No.7 of 2013 filed by Prativa Behera has been impugned by said Susma Das in W.P.(C) No.18406 of 2013. In both the writ applications, the issue involved is, whether the third child of Susama Das was born before the cutoff date (21.04.1995) or after the cutoff date.

5. It is the case of opposite party No.1 in both the writ applications (as election petitioners) that the third child of the petitioner-Susama Das was born after the cutoff date, i.e., 21.04.1995. It was averred by them in the election petitions that the first child of the petitioner-Susama Das was born on 19.04.1989, second child was born on 26.07.1990 and the third child was born on 31.05.1996. They relied on the information provided by the Headmaster of Upper Primary School, Rikapalli, Chhatrapur NAC, Ganjam and claimed that the petitioner is disqualified to contest the election as per Section- 45 (1) (v) of the Orissa Panchayat Samiti Act, 1959.

6. The petitioner, upon notice, filed her written statement stating therein that her third child was not born on 31.05.1996 and the correct date of his birth is 28.05.1994, which is before the cutoff date, i.e., 21.04.1995. It was specifically averred that initially her (petitioner's) third child was admitted in the Government U.P. School Kumarbegapalli on 05.07.1999 and the School Admission Register shows that the date of his birth is "28.05.1994". Subsequently, he was admitted in Rikapalli U.P. School and the School authority, having failed to record his correct date of birth, wrongly entered the date of birth as "31.05.1996", which remained uncorrected. The petitioner, from her side relied on the original record of birth maintained in Community Health Centre (II) Municipentha, the Birth Certificate issued by the Medical Officer, which indicates that the third child of the petitioner was born on 28.05.1994, and the School admission register of Kumarbegapalli U.P. School among other documents.

7. Learned Election Tribunal, on assessment of the evidence and on going through the records and hearing the parties, accepted the contention of the petitioner so far as the date of birth of her third child on "28.05.1994" is concerned and dismissed both the election petitions.

8. Opposite party No.1 in both the writ applications preferred appeals before the learned District Judge, Ganjam. Learned District Judge, Ganjam also on thorough scrutiny of the evidence on record and after hearing the parties, set aside the findings of learned Election Tribunal and held that the date of birth of the third child of the petitioner to be "28.05.1994" is not free from suspicion and the date of birth as entered in the Rikapalli School in presence of the husband of the petitioner, which is "31.05.1996" is the correct date of birth. 31.05.1996, being a date after the cutoff date, i.e., 21.04.1995, learned District Judge, Ganjam answered the issue in affirmative so far as the election dispute is concerned and allowed the appeals.

9. Both parties before the Election Tribunal adduced oral and documentary evidence. So far as the age of third child of the present petitioner-Susama Das is concerned, the issue revolves round basically the documentary evidence adduced by the parties. While the opposite party No.1 in both the writ applications, namely, Kumari Kabita Behera and Prativa Behera (petitioners in the election petition) tried to prove that the third child of the present petitioner- Susama Das (opposite party No.1 in the election petition) was born on "31.05.1996", the petitioner's attempt was to prove that her third child was born on "28.05.1994". The oral testimony on either side is basically explanatory and justification of the documentary evidence adduced. I have to find out as to how far the present opposite

party No.1 in both the writ applications, namely, Kumari Kabita Behera and Prativa Behera (petitioners before the Election Tribunal) have been successful in proving the date of birth of third child of the present petitioner-Susama Das to be "31.05.1996".

10. As in both the election petitions same set of evidence have been produced by both the election petitioners to prove the age of third child of the present petitioner-Susama Das, said documentary evidence are described, as they are exhibited in Election Petition No.2 of 2012. Ext.1 is the Admission Register of Rikapalli U.P. School commencing from 1998 - 1999. Ext.1/a is the Admission Sl. No. 1911 dated 02.07.2001 relating to the admission of third child of Susama Das. Ext.2 is the Certificate issued by the Board of Secondary Education Odisha in respect of third child of Susama Das. Ext.3 is the letter dated 01.05.2012 issued by the Office of the Registrar of Birth and Death-cum-Medical Officer in-charge, Community Health Centre-II, Muncipentho, District- Ganjam showing that no birth registration had been made in favour of Chinmaya Das (third child of petitioner-Susama Das) for the year 1994 to 1996 as per the office record. We are not concerned with Exts. 4 and 5, as those are the documents relating to birth of first child and second child of the petitioner-Susama Das. Ext.7 is the affidavit sworn by Pradip Kumar Das, husband of petitioner Susama Das on 30.03.2012 showing the statement of Pradip Kumar Das regarding change of date of birth of his third child from "31.05.1996" to "28.05.1994". This Court is however, concerned with Ext.1, Ext.1/a and Ext.2 so far as proving the factum of age of the third child of the petitioner-Susama Das is concerned.

11. Ext.1 has been proved by the Headmaster of U.P. School, Rikapalli (P.W.1) so also Ext.1/a. According to P.W.1, Ext.1 is the Admission Register of Rikapalli U.P. School commencing from the educational year 1998 - 1999 and the same is maintained in the official capacity. Ext.1/a is the admission Sl. No. 1911 dated 02.07.2001 relating to admission of third child of Susama Das and as per the record, Pradip Kumar Das had admitted Chinmaya Das. At that time, one Panchanan Achary was the Headmaster. As per Ext.1/a, the date of birth of third child of Susama Das is "31.05.1996". P.W.1 has further stated that the date of birth of a student is entered in the admission register as per the version of the parents. This evidence of P.W.1 gets corroboration from the evidence of present petitioner Susama Das (D.W.1) on the point that her husband Pradip Kumar Das had admitted her third child in Class-I of Rikapalli U.P. School. Pradip Kumar Das, who was examined as D.W.4 in paragraph- 17 of his evidence, has testified that he admitted his third child in Rikapalli School without obtaining the Transfer Certificate from Kumarbegapalli School and also he signed in the School Admission

Register. Thorough scrutiny of Ext.1 also shows that one Pradip Kumar Das has signed in the admission register in the column meant for parents and he has put his signature in English.

12. No objection is raised or could have been raised by Miss Deepali Mohapatra, learned counsel for the petitioner as regards the admissibility of Ext.1 on the ground that the same is not an official record or a public register inasmuch as it is an admitted fact that such an entry regarding date of birth, of third child, i.e., 31.05.1996 in that register, i.e., Ext.1 is explained to be wrongly made under certain compulsions by the petitioner's husband himself, though such explanation is prevaricating. It is, however, argued by Miss Deepali Mohapatra, learned counsel for the petitioner that once such wrong entry regarding date of birth was made in the admission register vide Ext.1. It was necessarily carried forward to the Matriculation Certificate vide Ext.2 and steps have been taken by the petitioner's husband to get the date of birth corrected by applying to the Board of Secondary Education, Odisha through proper channel, which is assailed by the counsel for the opposite party No.1 to be an action to obviate the disqualification attached to the petitioner-Susama Das under Section 45 (1) (v) of the Orissa Panchayat Samiti Act.

13. Mr. Manoj Kumar Mishra, learned senior counsel appearing for the opposite parties in both the writ applications relies on some decisions of this Court and submits that the Matriculation Certificate is a more authentic and more reliable document. (see Chandrakanti Jena v. Banalata Jena and others, ***2004 (Supp) OLR 335***, Ch. Sudhakar Reddy v. T. Kesab Reddy and others, ***111 (2011) CLT 709***.

14. Ext.1 is a document admissible under Section 35 of the Evidence Act. To render a document admissible under Section 35 of the Evidence Act, three conditions must be satisfied, firstly, entry, that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact, and thirdly, it must have been made by public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. Hon'ble Supreme Court in the case of Biratmal Singhvi v. Anand Purohit, ***A.I.R. 1988 SC 1796*** in paragraph-14 of the judgment has held that, if the entry in the Scholars' Register regarding the date of birth is made on the basis of information given by parents, the entry would have evidentiary value, but, if it is given by a stranger or by someone else, who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value.

15. So far as Ext.1 is concerned, the same is a public register and Ext.1/a is an entry in a public register or record, i.e., School Admission Register of a Government U.P. School. Secondly, the entry in question throws light on the fact in issue, i.e., date of birth of the third child of petitioner-Susama Das. Thirdly, the entry has been made by the Headmaster of the concerned School in due discharge of his official duty. All the three ingredients of Section- 35 of the Evidence Act having been satisfied, Ext.1 and Ext.1/a are held to be admissible in evidence. Learned lower appellate court, on thorough discussion of the materials on record, has rightly held that the date of birth recorded in the said documents vide Ext.1 has evidentiary value inasmuch as the entry regarding the date of birth of the petitioner's third child in Ext.1 has been made on the basis of the information given by the present petitioner's husband Pradip Kumar Das, who himself has admitted such fact in his evidence and there is further material to show that Pradip Kumar Das has signed the register vide Ext.1 in English at the time of admission of his third child. Taking into consideration all the aspects, it was held by the learned lower appellate court that the date of birth entered in the School admission register of Rikapalli U.P. School vide Ext.1 and carried forward to the Matriculation Certificate vide Ext.2 is the correct date of birth of the petitioner's third child, and such third child having taken birth after the cutoff date, i.e., 21.04.1995, the petitioner (respondent before the lower appellate court) is disqualified.

16. Miss Deepali Mohapatra, learned counsel for the petitioner submits that the learned lower appellate court, being a Judge of fact could not have ignored the general tendency of people to lower the age of the boy or a girl at the time of his/her admission so that later in life he or she would have an advantage while seeking public service etc. She relies on the case of Brij Mohan Singh v. Priya Brat Narain Sinha and others, ***A.I.R. 1965 SC 282*** to substantiate her contention.

17. In the aforesaid case, question of age of the appellant was the issue. The appellant had asserted that he was born on October, 15, 1935, whereas the respondents had asserted that he was born on October, 15, 1937. After discussing oral evidence, and documentary evidence including the reasoning of the High Court on the issue of age, Hon'ble Supreme Court proceeded to discuss Ext.2, Ext.8 and Ext.18 adduced in that case, which are admission register of Aurangabad Town School, where the appellant had taken his admission as a student, the application made by the appellant for the post of Sub Inspector showing his date of birth and the Certificate issued by the Bihar School Examination Board for his passing the Matriculation examination respectively. Hon'ble Supreme Court ruled in favour of admissibility of the School admission register under Section- 35 of

the Evidence Act, but refused to accept the date of birth mentioned in the School admission register and the certificate issued by Board of Secondary Examination as correct date of birth, as it was suggested that incorrect statement was made at the request of the person regarding the date of birth of the appellant, who had admitted him to the School. The request was also made, it is suggested, to make him appear two years younger than what he really was, so that later in life he would have an advantage while seeking public service for which a minimum age of eligibility is prescribed.

18. Taking into consideration all the aforesaid aspects, Hon'ble Supreme Court in paragraph- 20 of the judgment held thus :-

> "…… The appellant's case is that once this wrong entry was made in the admission register it was necessarily carried forward to the Matriculation Certificate and was also adhered to in the application for the post of Sub Inspector of Police. This explanation was accepted by the Election Tribunal but was rejected by the High Court as untrustworthy. However much one may condemn such an act of making a false statement of age with a view to secure advantage in getting public service, a judge of facts cannot ignore the position that in actual life this happens not infrequently. We find it impossible to say that the Election Tribunal was wrong in accepting the appellant's explanation. Taking all the circumstances into consideration we are of opinion that the explanation may very well be true and so it will not be proper for the court to base any conclusion about the appellant's age on the entry in these three documents vide Ext.2, Ext.8 and Ext.18".

19. The fact in the present case can however be distinguished. The aforesaid presumption regarding the popular tendency cannot be drawn in the present case inasmuch as the admission in Rikapalli U.P. School was made entering the date of birth of third child of the present petitioner as "31.05.1996" in presence of the child's father Pradip Kumar Das and such a fact is an admitted one, though the date of birth is stated to be incorrectly reflected and explanation has been given for such incorrect reflection of the date of birth. The case of Biratmal Singhvi (supra) applies squarely to the facts of the present case, as the date of birth of the third child of the petitioner has been entered in Ext.1 as per version of the child's father and not a stranger.

20. Both the parties have adduced positive evidence. The election petitioners (present opposite party No.1 in both the writ applications) have adduced positive evidence to show that actual date of birth of the third child of the petitioner Susama Das is "31.05.1996". The petitioner – Susama Das,

on the other hand, by adducing positive evidence, has tried to prove that the date of birth of her third child is "28.05.1994". There being positive evidence from both the sides, there is evidence of competing probabilities on record. The learned Election Tribunal, without attaching much importance to the evidence adduced by the election petitioners, accepted the date of birth of third child of the petitioner as "28.05.1994" on the basis of entry made in Ext.A, as that was the first School. Learned lower appellate court, however, has painstakingly scanned evidence from both the sides and has come to the finding that there are many suspicious features so far the evidence adduced by the petitioner-Susama Das to show the date of birth of her third child as "28.05.1994" is concerned. Let me find out whether the evidence adduced by the petitioner is more probable to displace the evidence adduced by the election petitioners (present opposite party No.1 in both the writ applications).

21. Ext.A is the Transfer Certificate issued by the Headmaster, U.P. School, Kumarbegapalli on 20.03.2012. Said certificate has been obtained for the purpose of Census report. At the time of leaving the School, the petitioner is shown to be reading in Class-IV and the date of his leaving the School is mentioned as "01.01.2003". On the other hand, Ext.1, the admission register of Rikapalli U.P. School shows that third child of the petitioner Susama Das was admitted in Rikapalli U.P. School on 02.07.2001. According to Pradip Kumar Das (husband of the present petitioner Susama Das), his third child was admitted in Rikapalli U.P. School in Class- I without any Transfer Certificate. It is suspicious as to how a student continued in two Schools from 02.07.2001 up to 01.01.2003, the date of leaving Kumarbegapalli U.P. School. Further, the Transfer Certificate has been obtained on 20.03.2012 for the purpose of Census, though by that time, the Census was already over. On 01.01.2003, third child of the petitioner Susama Das was reading in Class- IV, but on 02.07.2001, he was admitted in Class – I in Rikapalli U.P. School as per Ext.1. Such a fact would also go to show that the assertion of the petitioner and her husband that their third child was transferred and admitted in Rikapalli U.P. School, when he was reading in Class- II is not correct. This certificate vide Ext.A shows that the third child of petitioner-Susama Das is shown to have read in two Schools at a time and the document vide Ext.A has been obtained on 20.03.2012 to obviate the disqualification attached to her (petitioner) under Section 45 (1) (v) of the Panchayat Samiti Act. Ext.B, the Birth Certificate issued by the Registrar of Birth and Death-cum-Medical Officer in-charge, CHC-II, Muncipentho, Ganjam was issued on 26.07.2006. According to Pradip Kumar Das D.W.4, as he was contesting for the post of Sarpanch of Podapadar Grama Panchayat in 2007, the said certificate was obtained at

that time. This document cannot be said to have any probability to displace the evidence vide Ext.1 and Ext.2. The other document, i.e., admission register of Kumarbegapalli U.P. School vide Ext.C has been proved by the Headmistress in-charge of Government U.P. School, Kumarbegapalli- (D.W.2). In cross-examination, D.W.2 has testified that Ext.C does not contain any seal and signature of the Headmaster, S.I. of Schools on the front page so also no certificate is appended on this Ext.C and the same does not carry any page-mark. She has further testified that the first page of Ext.C has been corrected without any initial and there is no year written in Ext.C after the year 2002. In paragraph- 5 of her cross-examination, D.W. 2 has testified that as per the rule, in every year, a new admission register is being made. Ext. C shows that the front page of the register has been corrected without any initial. There is no page-mark. 24 numbers of old sheets are there in the register and 22 sheets are new papers stitched subsequently and there is no seal and signature of D.I. of Schools in Ext.C in any page. All the aforesaid features make Ext.C a suspicious document. Besides, the aforesaid features and facts, the learned lower appellate court has disbelieved the explanations of the petitioner- Susama Das and her husband so far as the reason of admission of their third child at Rikapalli U.P. School showing her date of birth as “31.05.1996” is concerned. In the counter affidavit, it is asserted by the petitioner – Susama Das that the School authority of Rikapalli U.P. School failed to record the correct date of birth of her third child and the date of birth was wrongly entered as “31.05.1996” which remains uncorrected by oversight and want of proper information. In her evidence, however, she has testified that her husband Pradip Kumar Das readmitted her third child in Rikapalli Government U.P. School on 02.07.2001 and the Headmaster of the School advised that the child should be admitted in Class- I and he put his date of birth as “31.05.1996” in the Rikapalli U.P. School register, as her third child was found over-aged to be admitted in Class – I. Such prevaricating explanation has been taken note of by the learned lower appellate court to add to the suspicion so far as the date of birth entered in Kumarbegapalli U.P. School as “28.05.1994” is concerned. In view of such suspicious features in the evidence adduced by the petitioner, the same cannot be held to be more probable than the evidence adduced by opposite party No.1 in both the writ applications.

22. Learned counsel for the petitioner submits that the learned lower appellate court in the present case, has illegally taken into consideration the weaknesses in the evidence of the returned candidate, i.e., the present petitioner to hold that the case of the adversary, i.e., election petitioners has been proved. And such an approach by the learned lower appellate court is against the established principle of law.

Perusal of the lower appellate court judgments in both the appeals show that learned court below has not at all approached the evidence in the manner as alleged by the counsel for the petitioner. He has discussed evidence adduced by both the parties and while assessing the evidence of the election petitioners, he has taken into consideration those pieces of present petitioner's evidence, which support the election petitioners. For example, the election petitioners have asserted that husband of petitioner Susama Das got his third child admitted in Rikapalli U.P. School. Such fact has been admitted by Susama Das (D.W.1) and her husband (D.W.4) in their evidence. Learned lower appellate court has taken into consideration such evidence adduced by the present petitioners, which in fact support the election petitioners. The approach by the learned lower appellate court in reassessing the evidence cannot therefore be found to be faulty, as he has followed the well established norms of appreciation of evidence.

23. Taking into consideration all the aforesaid facts and discussions and especially a thorough discussion of the materials available on record by the learned lower appellate court, I do not find any infirmity or patent error in the findings arrived at by the learned lower appellate court.

24. Accordingly, the writ applications are found to be devoid of any merit and the same are dismissed.

Writ petitions dismissed.

2014 (II) ILR - CUT-1232

RAGHUBIR DASH, J.

FAO NO. 43 OF 2012

RAJANIBALA SAHOO ……..Appellant

.Vrs.

MANU BISWAL & ORS. ……Respondents

A. CIVIL PROCEDURE CODE, 1908 – O-39, R-1 & 2

Temporary injunction – Appellant being a stranger purchaser of one of the suit plots was restrained from raising any construction on the ground that the suit land was a dwelling house of an un-devided

family – No pleadings that the suit plot is a part of the dwelling house of the joint family – Other outsiders purchased suit plots have already raised construction – No challenge made to such transfers – Plaintiffs suppressed material facts – Not entitled to the equitable relief of injunction in their favour – Held, impugned order restraining the appellant from making any construction over the suit plot is set aside. (Paras 7, 8)

B. CIVIL PROCEDURE CODE, 1908 – O-43, R-1(r)

Appeal against order of temporary injunction – Appellant a stranger purchaser – Sale of Ac.0.04 only out of Ac.0.75 – Though suit land is homestead, there is no pleadings that it is part of the dwelling house of the joint family – Transfers in favour of other outsiders have not been challenged – Lower Court failed to consider essential ingredients – In the result the appeal is allowed and the appellant is permitted to go ahead with the construction work over the suit land subject to the condition that she would not claim any equity on the event the final result of the suit goes against her. (Paras 6,7,8)

Case law Referred to:-

AIR 1971 Orissa 198 : (Bhim Singh-V- Ratnakar Singh)

For Appellant - M/s. Susanta Kumar Dash, Surya Kanta Dash, H.K. Maharana, & B. P. Dhal.

For Respondents - M/s. A.K.Tripathy, P.K. Nayak, & P. Kar.

Date of hearing :16. 07.2014
Date of judgment : 30.07.2014

JUDGMENT

R. DASH, J.

Being aggrieved by the order dated 10.01.2012 passed by learned Civil Judge (Senior Division), Jajpur in I.A. No.297 of 2011 arising out of C.S.No.510 of 2011 allowing the I.A., the appellant, who is the sole opposite party in the I.A. and defendant No.6 in the suit, has preferred this appeal to have the impugned order restraining her from making any construction or changing the nature and character of the suit land till disposal of the suit set aside.

2. Respondent Nos.1 to 6 are the plaintiffs-petitioners before the lower Court. They have filed the suit claiming that the plaint Schedule 'B' land measuring Ac0.75 decimals is the undivided ancestral homestead property of their family and though there has been severance of joint status of the family, there has been no partition of the suit land as yet. It is contended by them that on 12.08.2002 an unregistered deed of partition was created by some members of the joint family showing the suit property to have been partitioned amongst the co-sharers and then, on the same day, one of the co-sharers late Jairam Biswal executed a sale deed alienating a specific portion of the suit land measuring Ac0.06 decimals of land in favour of another co-sharer, Laxmidhar Biswal (Defendant No.2). On the same day Jairam executed another sale deed alienating Ac0.11.03 decimals out of the suit land in favour of defendant Nos.8 and 9 who are strangers to the family. Out of his purchased land defendant No.2 sold Ac0.04 decimals to defendant No.7, a stranger to the family, by executing a Registered Sale Deed on 11.04.2011. Defendant No.7, in turn, sold his purchased land to the present appellant under Registered Sale Deed dated 14.09.2011. On the strength of that sale deed the appellant, it is alleged, is trying to intrude upon the suit land to raise construction of a house. It is the specific case of respondents-plaintiffs that the unregistered deed of partition is a fraudulent one. No one representing respondent-plaintiff Nos.1 to 5 is a signatory to the deed of partition. No part of the suit land has been allotted to the share of plaintiff-respondent Nos.1 to 5. So far plaintiff-respondent No.6 is concerned, it is contended that her signature on the unregistered partition deed was fraudulently obtained. Taking different grounds on the validity of the impugned partition deed dated 12.08.2002, the suit has been failed to declare the same to be void and inoperative and the sale deed executed by Jairam to Laxmidhar (Defendant No.2) and subsequent sale deeds executed by defendant No.2 in favour of defendant No.7 and by defendant No.7 in favour of the Appellant may also be declared illegal and void.

3. The appellant in her counter has contended that having purchased Ac.0.04 decimals of land on payment of Rs.2,02,000/- she has got delivery of possession of her purchased land. She claims that the entire joint family properties were already partitioned amicably amongst the different branches of the joint family prior to 12.08.2002. The unregistered deed dated 12.08.2002 signed by different branches of the joint family is a deed of acknowledgement of the earlier partition. The partition has been acted upon and the plaintiffs have never objected to it. Basing on the partition Jairam executed one sale deed on 12.08.2002 in favour of defendant No.2 and on the same day he executed another sale deed in favour of defendant No.8 and defendant No.9 who are strangers to the joint family. After such sale

transactions the strangers have constructed separate building over their respective purchased land. Not only Jairam but also plaintiff-respondent No.6, who is a signatory to the impugned deed of partition, has sold Ac.0.07 decimals of land to one Annapurna Mohapatra vide Registered Sale Deed No.626 dated 20.04.2005 who has already constructed a building on her purchased land. It is the further case of the appellant that the plaintiffs-respondents were well aware of the fact that there was a partition amongst the family members, but in order to score personal gain they have filed the suit challenging the sale deed executed in her favour while not challenging the sale transactions made in favour of defendant Nos.8 and 9 and, suppressing the fact that plaintiff-respondent No.6, out of her share, has sold a portion to one Annapurna Mohapatra who is not arrayed as a party to the suit. The appellant asserts that plaintiff-respondent No.6 has clearly admitted in the sale deed executed by her that there was previous partition of the suit land. It is also the appellant's case that the branch which plaintiff-respondent Nos.1 to 5 belong to was represented by defendant No.4 who is the mother-in-law of plaintiff-respondent No.1 and paternal grand-mother of plaintiff-respondent Nos.2 to 4.

4. Learned trial Court heard argument and considering the respective stand taken by the parties allowed the application for temporary injunction solely on the ground that the appellant being a stranger to the family and the suit land being house and homestead property of the joint family, she is not entitled for joint possession and if injunction is refused and the appellant constructs a house over her purchased land the petitioner would suffer irreparable loss which could not be compensated in terms of money.

5. Learned counsel for the appellant challenges the impugned order arguing that the learned court below has mechanically rendered a finding that the suit land is house and homestead of a joint family to which the appellant is a stranger and that the three cardinal principles that require consideration before granting temporary injunction have not at all been considered by the learned lower court. It is also submitted that the plaintiffs-respondents having not approached the civil court with clean hands, the equitable remedy ought not to have been extended to them. Learned counsel for the respondents on the other hand supports the impugned order and urges this Court not to interfere with the order.

6. There is no dispute that the plaint Schedule 'B' property consists of several plots, all of them recorded as Gharabari in kisam. It measures A0.75 in area. But there is no pleading that there is a dwelling house of an undivided family and all the plots constituting the suit property are used for beneficial enjoyment of the house. Section 44 of the Transfer of Property

Act prevents intrusion of strangers into such family residence which is to be enjoyed by members of the family alone in spite of transfer of share therein to strangers (*Bhim Singh V. Ratnakar Singh; AIR 1971 Orissa 198).*

In the case at hand, it is not disputed that much before the appellant purchased a piece of land from out of one of the suit plots, one of the plaintiffs-respondents (R-6) had sold a piece of land from out of the plaint Schedule 'Kha' to one Annapurna Mohapatra and it is claimed that she has already constructed a house thereon. That apart, the appellant's assertion that D.8 and 9, who are strangers to the family, after purchasing portions from out of the suit plots, constructed their own house over their respective purchased land. Plaintiffs admit that such sale transactions have taken place but they have not challenged those sale transactions. If these strangers are not sought to be injuncted from making construction of houses over portions of the suit land as well as occupying and enjoying the houses they have already constructed, the appellant in the absence of any special reason cannot be prevented from raising construction over her purchased land merely on the ground that she being a stranger to the family is not entitled to possess and enjoy the portion of the suit land she has purchased.

7. So far the ingredient of prima facie case is concerned, it cannot be said that the plaintiff-respondents have failed to raise a substantial question which needs investigation and decision on merit. But the plaintiffs have no explanation as to why the four decimals of land sold to the plaintiffs out of the 75 decimals of the suit land should be preserved in its present actual condition until the questions raised by the plaintiffs in challenging the impugned deeds are decided. Some other strangers have not been persecuted to check them from raising constructions over portions of the suit land. One of the plaintiffs has made alienation of a piece of land from out of the suit land in favour of a stranger but that sale transaction has not been challenged in the suit. She is Plaintiff-respondent No.6. In the sale deed that Plaintiff-respondent No.6 has executed, she has admitted that there was an earlier partition. She does not challenge the validity of that sale deed. But while challenging the sale deed executed in favour of the appellant she has pleaded that there was no previous partition and that the unregistered partition deed is void. When she has joined hands with other plaintiffs-respondents to seek an equitable relief, she ought to have come to the Court with a clean hand. She cannot be said to have come with a clean hand because while challenging the alienation made in favour of the appellant she has not challenged the validity of the sale deed that she has executed in favour of one Annapurna Mohapatra. Under the aforestated circumstances, the equitable relief sought for could not have been extended to the respondents.

8. Now, let it be examined if the respondents have made out that they would suffer either any injury or any inconvenience if the prayer for interim injunction is refused. The suit property is homestead in nature. It is not shown that the entire of the suit land is a dwelling house of an undivided family. Some of the purchasers have already raised constructions within the area of the suit land. It is not pleaded precisely as to what area out of the suit land has already been alienated to outsiders by different co-sharers and whether any co-sharers, while making such alienation, has exceeded the limit and extent of his share in the suit property. It is also not pleaded that a piece of land sold to the appellant is situated at such a strategic position that the co-sharers, including the plaintiffs-respondents, would experience any inconvenience for the enjoyment of their dwelling houses or any other part of the suit land. From the plaint it can be asserted that late Jairam has alienated 18 decimals of land and plaintiff-respondent No.6 has sold six decimals of land from out of the suit land. If the plaintiff-respondents apprehend that their co-sharers are likely to alienate the land in excess of their respective share then the proper remedy would be to seek temporary injunction against the co-sharers restraining them from making any further alienation till disposal of the suit because, it is the case of the respondent-plaintiffs that in the unregistered deed of partition no portion of the suit land has been allotted to the share of plaintiff-respondent Nos.1 to 5. Under such circumstances, it cannot be said that the balance of convenience tilts in favour of the respondents and that they would suffer irreparable injury if the appellant is not restrained from making any construction over her purchased land. In the result, the impugned order restraining the appellant from making any construction over the suit land as well as changing the nature and character of the same till disposal of the suit is liable to be set aside. However, it is made clear that for the construction she might raise on her purchased land she would not claim any equity on the event the final result of the suit goes against her.

9. In the result, the appeal is allowed. The I.A. is dismissed and the impugned order is set aside.

Appeal allowed.

2014 (II) ILR - CUT-1238

DR. B. R. SARANGI, J.

OJC. NO.11949 OF 1999 (With Batch)

TEACHER'S ASSOCIATION OF BERHAMPUR UNIVERSITY & ORS. .....Petitioners

.Vrs.

STATE OF ORISSA & ORS. .....Opp.Parties

SERVICE LAW – Claim of pensionary benefit taking in to account the length of service up to the age of 60 years but not 58 years – Orissa University First Statute, 1990 – Amendment of statute 291 by Amendment Act, 2012 – Benefit to be computed retrospectively computing superannuation age up to 60 years – Held, direction issued to Opp.Parties to recompute the pension payable to the petitioners taking in to consideration their entire length of service up to the age of 60 years. (Para 26)

Case laws Referred to:-

1.AIR 2004 SC 5100 : (Zile Singh-V- State of Haryana & Ors.)
2.(2005) 7 SCC 396 : (Government of India & Ors.-V- Indian Tobacco Assocation)
3.(2001) 4 SCC 236 : (Ramkanali Colliery of BCCL-V-Workmen).

For Petitioner - Mr. H.M. Dhal
For Petitioners - Mr. Prasant Ku. Jena
For Opp.Parties- Mr. B.S. Mishra-2,
Mr. Sangram Das,
Addl. Govt. Advocate.

Date of hearing : 13.03.2014
Date of judgment: 27.03.2014

JUDGMENT

DR. B.R.SARANGI, J.

The Teachers Association of Berhampur University, petitioner no.1 and its members, petitioner nos.2 to 51, have filed O.J.C. No. 11949 of 1999 challenging the action of the opposite parties in not determining and paying the pensionary benefit by taking the entire length of service up to age of 60

years into consideration and also challenging the vires of Statute 291 of the Orissa University First Statute, 1990 on the ground that the same is violative of Articles 14 and 16 of the Constitution of India.

O.J.C.No.3421 of 2000 has been filed by some of the retired employees of Berhampur University seeking similar relief like that in O.J.C. No. 11949 of 1999.

In W.P.(C) No.129 of 2007 the Berhampur University Teachers' Association, represented through its Secretary, is also claiming the same benefit.

2. Since common question of law as to whether the petitioners are entitled to get the pensionary benefits on attaining the age of 60 years or 58 years in consonance with the provisions contained in Statute 291 of Orissa University First Statute, 1990 is involved in all these writ petitions, they were heard together and are disposed of by this common judgment.

3. Berhampur University was established under Section 22 of the Berhampur University Act, 1966, Berhampur University Statute 1966 was framed, which provides the manner of recruitment of various teachers and employees of the University and their conditions of services. Under Rule 237-A (1) of Berhampur University Statute, the date of retirement of an employee was mentioned to be at the age of 60 years. On superannuation, the entitlement of an employee was provided under Rule 237(AAA), which is as follows :

> "Every employee of the University other than Vice-Chancellor, shall be entitled either to the benefit of the contributory Provident Fund Scheme provided under the chapter (herein after referred to as the C.P.F. Scheme) or to the benefit of the pension scheme applicable to the State Govt. servant from time to time as he may opt under this chapter."

4. The above Rule, inter alia, provides that rate of pension under the pension scheme shall be same as provided in Orissa Pension Rules, 1977 as amended from time to time with temporary increase. The Orissa Pension Rules, 1977 has been replaced by Orissa Civil Services (Pension) Rules, 1992, which has come into force with effect from 9.3.1992.

5. While the conditions of services of employees of different Universities were governed under their respective Universities Act and Statute, the Orissa University Act, 1989 came into force and all such Universities including Berhampur University were deemed to have been established under Section 3 of the Orissa University Act, 1989. Under

Section 24(3) of the Orissa University Act, 1989, the Orissa Universities First Statute, 1990 was enacted by the State Government. Under Section 33 of the said Act, Berhampur University Act, 1966 and the Act made for the other Universities were repealed, but at the same time under Section 33(2)(a), it was made clear that "notwithstanding such repeal, the authorities constituted, officers, teachers and other employees appointed, notifications issued including the notification for appointment of administrator, orders made, action taken, things done or contracts entered into under the said Act or the Ordinance, shall be deemed to have been constituted, appointed, issued, made, taken, done or entered into under this Act. Clause (d) of Section 33 provides that Statute and Regulations made under the said Act or ordinance shall in so far as they are not in consistent with this Act, be deemed to have been made under this Act and shall continue in force until new provisions are made under this Act.

6. Consequent upon enactment of Orissa University Act, 1989, under Section 24(3) of the said Act, Orissa Universities First Statute, 1990 came into force with effect from 1.1.1990, which was made applicable to the employees of all the Universities established within Orissa and on coming into force of this Statute, Berhampur University Statute, 1966 was repealed. Statute 268 of Orissa Universities First Statutes, 1990 provides that the date of retirement of an University employee is the date on which the employee attained the age of 60 years. Under Rule 237-A(1) of the Berhampur University Statute, 1966, the date of retirement was similarly mentioned to be at the age of 60 years. Therefore, so far as the date of retirement of an employee of Berhampur University is concerned, there is no ambiguity or inconsistency between Berhampur University Statute, 1966 (repealed) vis-à-vis Orissa Universities First Statutes, 1990.

7. The employees of Berhampur University including the teaching staff get superannuated at the age of 60 years but their pensionary and other retiral benefits are not computed taking into consideration the entire length of service up to 60 years. But the same is done taking into consideration the period up to the age of 58 years, meaning thereby the period of service from 58 years to 60 years has been ignored for the purpose of computation of pensionary and retiral benefits though effectively they are rendering service till they attain the age of 60 years.

8. Statute 290 of Orissa Universities First Statute, 1990, prescribes the modalities for payment of pension and gratuity of the employees of the University, which is as follows:

> **"**290(1) Subject to Sub-Statute (3) infra, the employees of the University who opt for pension Scheme shall be entitled to the pensionary benefits including family pension as provided under Orissa Pension Rules, if any, as admissible from time to time.
>
> (2) Subject to Sub-Statute (30 infra, the employees shall also be entitled to gratuity including Death Gratuity of the same rates and subject to the same terms and conditions as applicable from time to time to the State Govt. employees.
>
> (3) In the case of existing employee opting or deemed to have opted for the pension scheme the amount contributed by the University to their contributory Provident Fund together with interest accrued thereon till the date of their exercising option shall be credited to the pension fund of the University.
>
> (4) The employees under the Pension Scheme shall subscribe to the General Provident Fund Account which shall be opened and operated in accordance with the provisions contained in the Provident Fund Act and the Orissa General Provident Fund Rules."

Rule 291 of the First Statute also reads as follows :

> "Notwithstanding the age of superannuation, the period of qualifying service of employees other than the Class IV employees upto the time when they complete 58 years of age shall be taken into consideration to determine the quantum of their pension. Family pension and Gratuity. In the case of Class IV employees the period of service up to the age of superannuation shall be reckoned for the purpose."

9. It appears from Statute 291 of the Orissa Universities First Statutes, 1990 that the pension and gratuity of the employees of the Universities other than Class-IV employees are calculated by taking into consideration 58 years of age as the period of qualifying service although the age of superannuation is fixed at the age of 60 years. By application of this provision, the teaching staff of Berhampur University comes under the other category of employees. Therefore, their pensionary benefits are to be calculated taking into consideration 58 years of age as the period of qualifying service although their age of superannuation is fixed at the age of 60 years. The petitioners state that there cannot be two dates one for retirement and the other for calculating the retirement benefits. It is stated that ignoring two years of service, i.e. from 58 years to 60 years for the

purpose of pension and other benefits is unconstitutional and ultra vires Articles 14 and 16 of the Constitution of India. The petitioner asserts that by operation of Statute 291 of Orissa Universities First Statutes, 1990, the rights and privileges of the teaching staff of the University to get their pension and other retiral benefits in terms of actual period of service rendered by them cannot be taken away. Further, Statute 343 of the Orissa Universities First Statutes, 1990 protects such interest of the employees of the University, which provides as follows:

> "Nothing in this statute shall operate either to deprive any person of any right or privilege to which he is entitled to or under any law or by the terms of any contract or Agreement subsisting between such persons and the University and to confer on him any right or privilege in respect of any matter for which specific provision is made by terms of any contract or agreement between himself and the University."

As it appears from the above mentioned provision, the benefit conferred by the said Statute for determining pension by taking into consideration actual length of service, cannot be curtailed by operation of Rule 291 as well as Rule 293(1) and (3) of Orissa Universities First Statutes, 1990. The Berhampur University Statute, 1966, which was governing the field till 01.01.1990 confers a right to get pensionary and other benefits by computing the actual length of qualifying service. Such rights which have already been accrued in favour of the employees cannot be curtailed by enactment of Orissa Universities First Statutes, 1990. If so, it would amount to arbitrary and unreasonable exercise of power by the authorities and violate Articles 14 and 16 of the Constitution of India.

10. The Berhampur University passed a resolution bearing No. 80 dated 28.3.1998 requesting the Government regarding payment of the terminal benefits/ pensionary benefits for the entire length of service up to the age of 60 years. Though the resolution of the syndicate dated 28.3.1998 and the representation of the teaching staff dated 18.2.1999 were transmitted to opposite party no.1, no action has been taken and in the meantime many of the teaching staffs of the University got retired and they have been deprived of their legitimate claim of pensionary/ retirement benefits admissible to them in conformity with their terms of appointment as per Berhampur University Statute, 1966. Since an accrued right of the teaching staff of Berhampur University has been taken away by virtue of the enactment of Statute 291 for extending the pension and other retirement benefits, grievance was made to the opposite parties to compute the actual length of service for extension of such benefits on 18.2.1999. At this point of time, the

petitioners filed the writ applications assailing the vires of the provisions contained in Statute 291 of the Orissa Universities First Statute, 1990.

11. When the matter was pending for consideration, in exercise of the powers conferred by sub-section (6) of Section 24 of the Orissa Universities Act, 1989 and in consultation with the State Government, the Chancellor has been pleased to allow the amendment to be made in the Orissa Universities First Statute, 1990 called "Odisha Universities (Amendment) Statutes, 2012". Clause 26 of the said Amendment Statute reads thus:

> "26. In the said statutes, for statute 291, the following shall be substituted, namely:
>
> "The period of qualifying service of employees reckoned up to the age of their superannuation shall be taken into consideration to determine the quantum of their pension, family pension and gratuity."

12. By virtue of the aforesaid amending provision, the period of qualifying service of the employees is to be reckoned up to the age of their superannuation, i.e., 60 years, which shall be taken into consideration to determine the quantum of their family pension and gratuity. Therefore, the anomaly which was created by the previous Statute 291 has been mitigated by virtue of the amended provision of Statute 291 and now there shall be one date of superannuation, i.e., at the age of 60 years and the same should be taken into consideration for determination of quantum of family pension and gratuity.

13. Mr.H.M.Dhal, learned counsel for the petitioners in OJC Nos. 11949 of 1999 and 3421 of 2000 and Mr.P.K.Jena, learned counsel appearing for the petitioner in W.P.(C) No.129 of 2007 state that by virtue of the amended provision of Statute 291, they are not pressing for consideration of vires of the erstwhile provision of Statute 291 or the amended provision of Statute 291 and confining their prayer that since by virtue of the amendment of Statute 291, the relief sought for has already been granted, this Court has to take into consideration whether such benefit can be granted from retrospective effect or what should be the effect of the substituted provision of the Amendment Act. To substantiate their contention, they have relied upon the judgments of the apex Court in **Zile Singh v. State of Haryana and others,** AIR 2004 SC 5100 and **Government of India and others v. Indian Tobacco Association, (**2005)7 SCC 396.

14. Mr.B.S.Mishra, learned counsel appearing for Berhampur University with reference to the counter affidavit though has admitted that Berhampur

University was constituted under the Berhampur University Act, 1966 and the service conditions of the petitioners were regulated under the Berhampur University Statute, 1966, which came into force with effect from 1.1.1967 and 2.1.1967 respectively, granting pensionary benefits on attaining the age of superannuation at the age of 60 years, but by virtue of enactment of Statute 291, pensionary benefit has been computed on attaining the age of 60 years though the employees were to be superannuated on attaining the age of 58 years. It is admitted that the University has also passed a resolution on 28.3.1998 requesting either to repeal or amend Statute 291 suitably for counting the period of service till the date of superannuation of each employee of the University as qualifying service till. It is stated that consequent upon implementation of Orissa Universities First Statute, 1990 and the provisions contained therein like Statutes 268, 290 and 291, which determine the age of superannuation and terminal benefits of the employees of Berhampur University repealing the earlier provisions as laid down in the Act, 1966 and 1989. Section 24(2) of the Orissa University Act, 1989 provides that in relation to matters not provided for in the statute the corresponding Rules if any of the State Government may mutatis mutandis apply to the University. It is stated that the age of retirement required under Statute 268 is one aspect and determination of pensionary benefits and terminal pension of an employee is a different aspect, which were governed under the provisions stipulated in Statute 291. Therefore, extending such benefits up to the age of 60 years as claimed by the petitioners would be sustained unless otherwise the said provision is amended by the competent authority.

15. No counter affidavit has been filed on behalf of the State but on the other hand learned Addl. Govt. Advocate supports the stand taken by the University.

16. The aforesaid being the pleadings available on record, now it is to be considered whether the amendment of Statute 291 by virtue of Amendment Act, 2012 which has been substituted has got its prospective or retrospective application.

17. As it appears, by virtue of the amendment to Orissa Universities (Amendment) Act, 2012, under clause 26, Statute 291 has been amended by substituting that the period of qualifying service of employees reckoned up to the age of their superannuation shall be taken into consideration to determine the quantum of their pension, family pension and gratuity. The earlier Statute 291 of the Orissa Universities First Statutes, 1990 has been “substituted” by virtue of Orissa Universities (Amendment) Act, 2012.

18. The apex Court while considering the case of **Zile Singh (supra)** has taken into account the Haryana Municipal Act, 1973 (hereinafter, "the Principal Act", for short) which is a State enactment dealing with local self-government through the municipalities. Chapter III of the said Act deals with composition of municipalities. The Haryana Municipal (Amendment) Act, 1994 (Act No.3 of 1994) inserted Section 13A in Chapter III of the Principal Act mentioning disqualification for membership, which states that a person shall be disqualified for being chosen as and for being a member of a municipality if he has more than two living children provided that a person having more than two children on or after the expiry of one year of the commencement of this Act, shall not be deemed to be disqualified. The said amendment Act was under challenge before the apex Court on the ground that whether the provision so amended has got retrospective operation and if not, whether the provision as amended by the Second Amendment applies. Considering such contention, the apex Court in paragraphs 13,14, 15, 16 and 17 states as follows :

> **"**13 It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statue is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only 'nova constitution futuris formam imponere debet non praeteritis'- a new law ought to regulate what is to follow, not the past. (See: Principles of Statutory Interpretation by Justice G.P. Singh, Ninth Edition, 2004 at p. 438). It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity my be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole (ibid,p.440).
>
> 14. The presumption against retrospective operation is not applicable to declaratory statutes. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law

retrospective operation is generally intended. An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect (ibid, pp.468).

15. Though retrospectivity is not be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, Seventh Edition), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the Courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the Courts may be called upon to construe the provisions and answer the question whether the legislature had sufficient expressed that intention giving the Statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated (p.388). The rule against retrospectivity does not extend to protect from the effect of a repeal a privilege which did not amount to accrued right (p.392).

16. Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to explain a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The rule against retrospectivity is inapplicable to such legislations as are explanatory and declaratory in nature. The classic illustration is the case of Att. Gen. v. Pougett ([1816] 2 Price 381, 392). By a Customs Act of 1873 (53 Geo. 3, c.33) a duty was imposed upon hides of 9s . 4d., but the Act omitted to state that it was to be 9s. 4d. per cwt., and to remedy this omission another Customs Act (53 Geo. 3, c. 105) was passed later in the same year. Between the passing of these two Acts some hides were exported, and it was contended that they were not liable to pay the duty of 9s. 4d. per cwt., but Thomson C.B., in giving judgment for the Attorney General, said" "The duty in this instance was in fact imposed by the first Act, but the gross mistake of the omission of the weight for which the sum expressed was to have been payable occasioned the amendment made by the subsequent Act, but that had reference to the former statute as soon as it passed, and they must be taken together as if they were one and the same Act." (p.395).

17. Maxwell states in his work on Interpretation of Statutes, (Twelfth Edition) that the rule against retrospective operation is a presumption only, and as such it "may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it" (p.225). If the dominant intention of the legislature can be clearly and doubtlessly spelt out, the inhibition contained in the rule against perpetuity becomes of doubtful applicability as the "inhibition of the rule" is a matter of degree which would "vary secundum materiam" (p.226). Sometimes, where the sense of the statute demands it or where there has been an obvious mistake in drafting a Court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act (p.231)."

19. The apex Court in the said judgment in paragraphs 23 to 25 held as follows :

"23**.** The text of Section 2 of the Second Amendment Act provides for the word "upto" being substituted for the word "after". What is the meaning and effect of the expression employed therein – "shall be substituted".

"24. The substitution of one text for the other pre-existing text is one of the known and well-recognised practices employed in legislative drafting. 'Substitution has to be distinguished from 'supersession' or a mere repeal of an existing provision.

"25. Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision (See Principles of Statutory Interpretation, ibid, p. 565). If any authority is needed in support of the proposition, it is to be found in West U.P. Sugar Mills Assn. and Ors. v. State of U.P. and Ors., (2002) 2 SCC 645, State of Rajasthan vs. Mangilal Pindwal, (1996) 5 SCC 60, Koteswar Vittal Kamath v. K. Rangappa Baliga and Co., (1969) 1 SCC 255 and A.L.V.R.S.T. Veerappa Chettiar v. S. Michael and ors., AIR 1963 SC 933. In West U.P. Sugar Mills Association and Ors. s case (supra) a three Judge Bench of this Court held that the State Government by substituting the new rule in place of the old one never intended to keep alive the old rule. Having regard to the totality of the circumstances centering around the issue the Court held that the substitution had the effect of just deleting the old rule and making the new rule operative. In Mangilal Pindwal's case (supra) this Court upheld the legislative practice of an amendment by substitution

being incorporated in the text of a statute which had ceased to exist and held that the substitution would have the effect of amending the operation of law during the period in which it was in force. In Koteswar's case (supra) a three Judge Bench of this Court emphasized the distinction between 'supersession' of a rule and 'substitution' of a rule and held that the process of substitution consists of two steps: first, the old rule is made to cease to exist and, next, the new rule is brought into existence in its place."

20. In **Indian Tobacco Association (supra**), the apex Court has considered the meaning of "substitute" in paragraphs 15, 23 & 25, which is as follows:

"15. The word "substitute" ordinarily would mean "to put (one) in place of another"; or "to replace". In Black's Law Dictionary, 5th Edn., at p.1281, the word "substitute" has been defined to mean "to put in the place of another person or thing", or "to exchange". In Collins English Dictionary, the word "substitute" has been defined to mean "to serve or cause to serve in place of (another atom or group)" or "a person or thing that serves in place of another, such as a prayer in a game who takes the place of an injured colleague.

23. If the Central Government intended to extend the benefit to the members of the respondent Association only with prospective effect, it could have said so explicitly. Such a benefit could also have been extended by taking recourse to the proviso appended to sub-clause (iv) of clause (2) of the notification dated 7.4.1997. It may, therefore, be safely concluded that by reason of the amended notification, the Central government only intended to rectify a mistake and, thus, the same will have retrospective effect and retroactive operation.

25. Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision (see Principles of Statutory Interpretation, ibid., p.565). If any authority is needed in support of the proposition, it is to be found in West U.P.Sugar Mills Assn. v. State of U.P6, State of Rajasthan v. Mangilal Pindwal7, Koteswar Vittal Kamath v. K. Rangappa Baliga and Co8 and A.L.V.R.S.T. Veerappa Chettiar v. S. Michael9. In West U.P. Sugar Mills Assn. case6 a three-Judge Bench of this Court held that the State Government by substituting the new rule in place of the old one never intended to keep alive the old rule. Having regard to the totality of the circumstances centring around the issue the Court held that the substitution had the effect of just deleting the old rule and

> making the new rule operative. In Mangilal Pindwal case7 this Court upheld the legislative practice of an amendment by substitution being incorporated in the text of a statute which had ceased to exist and held that the substitution would have the effect of amending the operation of law during the period in which it was in force. In Koteswar case8 a three Judge Bench of this Court emphasised the distinction between supersession' of a rule and 'substitution' of a rule and held that the process of substitution consists of two steps: first, the old rule is made to cease to exist and, next, the new rule is brought into existence in its place.

21. The effect of substituted provision has also been considered by the apex Court in **Ramkanali Colliery of BCCL v. Workmen**, (2001) 4 SCC 236, as follows :

> "What we are concerned with in the present case is the effect of the expression 'substituted" used in the context of deletion of sub-sections of Section 14, as was originally enacted. In *Bhagat Ram Sharma v. Union of India,* 1988 Supp SCC 30: 1988 SCC (L&C) 404 the Supreme Court stated that it is a matter of legislative practice to provide while enacting an amending law, that an existing provision shall be deleted and a new provision substituted. If there is both repeal and introduction of another provision in place thereof by a single exercise, the expression "substituted" is used. Such deletion has the effect of the repeal of the existing provision and also provides for introduction of a new provision. In our view there is thus no real distinction between repeal and amendment or substitution in such cases. If that aspect is borne in mind, we have to apply the usual principles of finding out the rights of the parties flowing from an amendment of a provision. If there is a vested right and that right is to be taken away, necessarily the law will have to be retrospective in effect and if such a law retrospectively takes away such a right, it can no longer be contended that the right should be enforced."

22. By virtue of amendment of Statute 291 by Amendment Act, 2012, the mistake which has been crept in in the earlier Statute has been rectified. Therefore, the effect of the present amendment of Statute 291 has to be retrospective and the benefit has to be computed retrospectively computing the age of superannuation at the age of 60 years.

23. Considering the fact from other angle, the employees of Orissa University of Agriculture and Technology had made identical grievance in

O.J.C. No. 9211 of 1993 disposed of on 28.3.1997 (Krupasindhu Rout v. Orissa University of Agriculture and Technology) and this Court has held as follows :

> "We, therefore, dispose of the application with a direction to opposite party to notionally add two more years to his qualifying service and calculate his pension on the basis that he/ she superannuated on attaining the age of 60 years and taking into account the pay he would have got had he continued till completion of 60 years of age. The opposite party is directed to pass appropriate orders and extend the benefits in terms of the direction given above within three months from the date of receipt of this order."

24. This Court has also considered similar questions in Damodar Rath v. Utkal University, OJC No. 1512 of 1990 disposed of on 31.3.1993 as well as in Basanta Kumar Ray v. Vice Chancellor, Utkal University, OJC No. 6815 of 1994 disposed of on 12.5.1990 and taking into consideration various provisions of the then Utkal University Act and Rules, and the subsequent provisions of the Orissa University Act, directed the authorities to revise and recompute the pension payable to the petitioners of those cases by taking their entire length of service up to the age of 60 years into consideration.

25. Considering the above proposition of law and applying the same to the present facts of the case, this Court is of the opinion that there is no justification on the part of the opposite parties to deprive the petitioners of getting their pension on the basis of the entire length of service rendered up to the age of 60 years.

26. In the result, the writ applications succeed and the opposite parties are directed to revise and recompute the pension payable to the petitioners taking their entire length of service up to the age of 60 years into consideration within a period of four months from the date of receipt of writ. The arrears of the petitioners will also be paid by the opposite parties within the same period. No cost.

Writ petitions allowed.

2014 (II) ILR - CUT-1251

DR. B. R. SARANGI, J.

O.J.C. NO. 3954 OF 2001

NITYANANDA DAS ……..Petitioner

.Vrs.

OSRTC & ANR. ……Opp.Parties

SERVICE LAW – Disciplinary Authority awarded punishment to the petitioner treating his unauthorized period of absence from 13.03.1966 till 07. 02. 2000 as leave without pay which amounts to giving continuity in service – Authorities concerned are not correct to exclude that period and said that petitioner had not competed 10 years of qualifying service for retirement under Voluntary Retirement Scheme – Held, the impugned order rejecting the petitioner's application for retirement under V.R.S. is quashed – Direction issued for reconsideration of his application. (Paras 17,18)

Case laws Referred to:-

1. 2011 (Supp.1) 2 OLR 1075 : (Ganeswar Biswal-V- State of Odisha & Ors.)
2. (2004) 9 SCC 461 : (Reserve Bank of India & Anr.-V- Cecio Dennis Solomon & Anr.)
3. (2004) 4 SCC 522,528 : (Jaipal Singh-V- Sumitra Mohajan)
4. 2006(6) SCC 704=(2006) SC 2876 : (Ashok Kumar Sahoo-V- Union of India & Ors.)
5. AIR 1985 SC 69(74): (1985) 1 SCC 134 : (Hans Raj-V- State of Punjab)
6. (2009) 8 SCC 605 (615) : (United Bank of India-V- Pijush Kanti Nandy)
7. AIR 1978 SC 851 : (Mohinder Singh Gill & Anr.-V- The Chief Election Commissioner, New Delhi & Ors.)

For Petitioners - M/s. B. Dash, C. Mohata, J. Tewari
For Opp.Parties - Mr. U.C. Mohanty.

Date of hearing : 04.08.2014
Date of Judgment: 02.09.2014

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who was working as a Conductor in Orissa State Road Transport Corporation, Bhubaneswar (in short OSRTC) has filed this application challenging the order dated 18.05.2001 Annexure-5(A) rejecting his application under Voluntary Retirement Scheme on the ground that he got below 10 years of qualifying service and therefore, the same was not being acceptable.

2. The petitioner appointed as a Conductor on 13.08.1987, vide Annexure-1, having remained unauthorizedly absent w.e.f. 12.03.1996. A departmental proceeding was initiated against him for that on 17.01.1997 on the charge of misconduct. In view of the provisions contained under Regulation-110(3) of the OSRTC Employees (Classification, Recruitment and Condition of Service) Regulation, 1978, in short "1978 Regulation" no employee, shall proceed on leave without obtaining permission to avail himself leave pending sanction of leave applied for by him from the immediate superior or competent authority, as the case may be. When the matter stood thus, the Government of Orissa in Department of Public Enterprises issued a Resolution on dated 06.06.1998 introducing a Model Voluntary Retirement Scheme for the employees of State Public Sector Undertakings, which was accepted by the OSRTC in its Resolution dated 06.06.1998. As per such scheme, the petitioner submitted his application for Voluntary Retirement, which had been forwarded to the General Manager (Administration), OSRTC vide Annexure-3(A).

3. In the disciplinary proceeding, the DTM(A), OSRTC, Cuttack issued office order dated 08.02.2000 suggesting that the period of unauthorized absence of the petitioner from duty from 13.3.1996 to 7.2.2000 might be treaded as leave without pay with imposition of ancillary punishments. Vide Annexure-5 dated 08.3.2001, the DTM (A), OSRTC, Cuttack issued an office order pursuant to the order of the CMD, OSRTC allowing 52 persons to retire from service as per the Voluntary Scheme w.e.f 8.3.2001 but in the case of the petitioner, it was stated that since he had not completed 10 years of qualifying service, his application for retirement under VRS was rejected. Hence this writ application.

4. Mr. B. Dash, learned counsel for the petitioner, strenuously urged that rejection of the application of the petitioner filed under VRS vide Annexure-5(A), was an outcome of non-application of mind of the opposite party-authorities inasmuch as petitioner having rendered 10 years of qualifying service the order passed by the Disciplinary Authority dated 08.02.2000 treating the unauthorized leave availed by the petitioner i.e. from 13.03.1996 to 07.02.2000 as leave without pay was an error of record. If

such period would have been counted as service period, the petitioner having got the minimum qualifying service of 10 years, his application under VRS should have been accepted by the authorities and he should have been extended the benefits admissible under the said scheme.

5. Mr. U.C. Mohanty, learned counsel for opposite party no.2, referring to the counter affidavit filed on behalf of the opposite party nos. 2 and 3 stated that the petitioner joined the service on 13.08.1987. He having remained on unauthorized for the period from 12.03.1996 to 07.2.2000 and from 09.02.2000 to 28.05.2002, he had not completed 10 years of service by the date of submission of application under VRS as per Clause 2.2 of Annexure-2. The application for retirement under VRS having been considered on 08.02.2000 followed by a disciplinary proceeding, the petitioner was awarded a punishment treating the period of his absence from 13.03.1996 till date i.e. 07.02.2000 as leave without pay, vide Annexure-7. The period of absence from 13.3.1996 to 07.2.2000 should not be taken into consideration for computation of 10 years of qualifying service. Therefore, rightly, the authorities rejected the application vide Annexure-5/A.

6. In order to substantiate his contention, Mr. Mohanty relied upon a judgment of this Court in **Ganeswar Biswal v. state of Odisha & others,** 2011 (Suppl.) 2 OLR 1075.

7. With the aforesaid factual backdrop of the case in hand, it is admitted that the petitioner had joined the service on 13.08.1987. He had remained unauthorizedly absent from 12.03.1996 to 07.02.2000 for which he faced a disciplinary proceeding and finally punishment was awarded treating the said period as leave without pay, vide Annexure-2. The OSRTC while accepting the Resolution dated 06.06.1998 of the Government of Odisha in P.E Department communicated the same for information of employees inviting options from the eligible employees in which specific eligibility criteria had been mentioned in Clause-2.0 of Annexure-B/1 of Annexure-2 to the writ petition.

8. While going to the scheme, it appears that the meaning of “Voluntary Retirement” under Voluntary Retirement scheme came up for consideration before the Supreme Court in ***Reserve Bank of India & Another v. Cecil Dennis Solomon and another,*** *(2004) 9 SCC 461* wherein the expressions “superannuation”, “voluntary retirement”, “compulsory retirement” and “resignation” was taken into consideration. In paragraphs-10 & 11 of the said judgment it was held as follows :-

10. In service jurisprudence, the expressions "superannuation", "voluntary retirement", "compulsory retirement" and "resignation" convey different connotations. Voluntary retirement and resignation involve voluntary acts on the part of the employee to leave service. Though both involve voluntary acts, they operate differently. One of the basic distinctions is that in case of resignation it can be tendered at any time, but in the case of voluntary retirement, it can only be sought for after rendering prescribed period of qualifying service. Other fundamental distinction is that in case of the former, normally retiral benefits are denied but in case of the latter, the same is not denied. In case of the former, permission or notice is not mandated, while in case of the latter, permission of the employer concerned is a requisite condition. Though resignation is a bilateral concept, and becomes effective on acceptance by the competent authority, yet the general rule can be displaced by express provisions to the contrary. In *Punjab National Bank* v. *P.K. Mittal, 1989 Supp (2) 175: air 1989 SC 1083* on interpretation of Regulation 20(2) of the Punjab National Bank Regulations, it was held that resignation would automatically take effect from the date specified in the notice as there was no provision for any acceptance or rejection of the resignation by the employer. In *Union of India* v. *Gopal Chandra Misra*, *(1978) 2 SCC 301* it was held in the case of a judge of the High Court having regard to Article 217 of the Constitution that he has a unilateral right or privilege to resign his office and his resignation becomes effective from the date which he, of his own volition, chooses. But where there is a provision empowering the employer not to accept the resignation, on certain circumstances e.g. pendency of disciplinary proceedings, the employer can exercise the power.

11. On the contrary, as noted by this Court in *Dinesh Chandra Sangma* v. *State of Assam*, *AIR 1978 SC 17* while the Government reserves its right to compulsorily retire a government servant, even against his wish, there is a corresponding right of the government servant to voluntarily retire from service. Voluntary retirement is a condition of service created by statutory provision whereas resignation is an implied term of any employer-employee relationship."

9. In view of the aforesaid law laid down by the Apex Court the inevitable conclusion is that the 'voluntary retirement' and 'resignation' involve voluntary acts on the part of an employee to leave service. One of the basic distinctions between the two is that in case of resignation, it can be

tendered at any time but in the case of voluntary retirement, it can only be sought after rendering a prescribed period of qualifying service. Further, in the case of resignation a prior permission is not mandatory while in the case of voluntary retirement, permission of the employer concerned is a pre-requisite condition. Under Rule 16, an employee who seeks voluntary retirement has to give three months notice to enable the employer to complete the designated mode of acceptance. Resignation may be unilateral whereas voluntary retirement is bilateral. In the case of resignation the relationship of employer and employee terminates on acceptance of resignation. Whereas in the case of retirement, voluntary or superannuation, the relationship continues for the purposes of payment of retiral benefits. The above view is fortified by the Apex Court in ***Jaipal Singh v. Sumitra Mahajan,*** *(2004) 4 SCC 522, 528* and in ***UCO Bank v. Sanwar Mal,*** (2004) 4 SCC 412.

10. In ***Ashok Kumar Sahoo v. Union of India & Others***, 2006 (6) SCC 704= AIR (2006) SC 2876, the Apex Court held as follows;

> "28. Cases of voluntary retirement can broadly be divided into the following three categories:
>
> (i) Where voluntary retirement is automatic and comes into force on the expiry of notice period;
>
> (ii) When it comes into force; unless an order is passed within the notice period withholding permission to retire, and
>
> (iii) When voluntary retirement does not come into force unless permission to this effect is specifically granted by the Controlling Authority.

11. Such fact was considered by this Court in ***Chandrakanta Tripathy V. State of Odisha & Others***, in W.P.(C) No. 9647 of 2008 disposed of on 24.7.2014. Keeping the above parameters in view and applying the same to the present context, it appears that in the model Voluntary Retirement Scheme, Annexure-B/1 to Annexure-2 of the writ petition, Clause 2.0 states about eligibility, Clause 3.0 states about procedure whereas Clause 4.0 states about voluntary retirement benefits, Clause 5.0 states about competent authority and Clause 6.0 states about miscellaneous. Clause 6.5 of the scheme states that the Scheme does not confer any right on an employee to have his request for voluntary retirement accepted by the Management. Clauses 2, 3, 4 and 6 of the Scheme is quoted below.

"2.0 Eligibility.

2.1 It will be applicable for all regular Employees of the State Public Enterprises.

2.2 The employees must have been in regular service of the PSU continuously for not less than ten(10) years.

2.3 No charge(s)/charge sheet(s) for misconduct or misbehavior should be pending against the employee.

2.4 The employee due to retire on superannuation under normal course within a year of the date of the application for Voluntary Retirement shall not be covered under this Scheme.

3.0 Procedure

3.1 The eligibility employee who desires to seek Voluntary Retirement may apply to the competent Authority through his/her Head of the Deptt. in the prescribed format.

3.2 The decision of the competent Authority regarding the acceptance/rejection of the VR application shall be communicated to the concerned employee within thirty (30) days of submission of the application.

4.0 Voluntary Retirement Benefits.

4.1 An employee who is allowed to retire voluntarily by the competent authority shall be entitled to the following benefits.

Ex-gratia payment at the rate of twenty one(21) days salary (Pay, DA, IR) last drawn for every completed year of service. This compensation will be in addition to Gratuity and other statutory dues as admissible on the date of retirement. For computing completed year of service, any period exceeding three (3) months in a year will be counted as one(1) year.

6.0 Miscellaneous.

6.1 Application for Voluntary Retirement can not be withdrawn after the sanction order has been communicated to the concerned employee.

6.2 The vacancy caused by Voluntary Retirement Scheme shall stand abolished.

6.3 The clearance of all dues under the Scheme shall be paid to the employee within thirty (30) days of sanction of the Voluntary

> Retirement subject to Clearance of all dues payable to the Corporation by the employees concerned.
>
> 6.4 An employee availing Voluntary Retirement under this scheme shall not be eligible for re-appointment in any Govt. (Central or State), Semi-Govt. organizations or Central/State Public Sector Undertakings in future.
>
> 6.5 Not withstanding any of the aforesaid provisions the scheme does not confer any right on an employee to have his request for Voluntary Retirement accepted by the Management. The competent Authority has the right/discretion either to accept or reject the request of any employee for Voluntary Retirement, keeping in view the service record of the employee, the organizational requirement and any other relevant factors in this regard."

In view of the Clause 2.2, an employee must have been in regular service of the PSU continuously for not less than 10 years and as per Clause 2.3, no charge (s)/charge sheet (s) for misconduct or misbehavior should not be pending against the employee. The application of the petitioner for his retirement under VRS, was rejected on the ground that he had got below 10 years of qualifying service vide Annnexure-5/A.

12. In **Hans Raj v. State of Punjab,** AIR 1985 SC 69(74): (1985) 1 SCC 134 while considering Rule 2(3) of Punjab Civil Service (Pre-mature Retirement) Rules, 1975, the apex Court held "qualifying service" under the rules means "service qualifying for pension. In **Union of India v. S. Dharmalingam,** AIR 1994 SC 592: (1994) 1 SCC 179, the apex Court held "qualifying service" means service rendered while on duty or otherwise which shall be taken into account for the purpose of pensions and gratuities admissible. While considering Regulations 29(5), 29(1) and 2(w) of United Bank of India (Employers) Pension Regulation, 1995, the apex Court in **United Bank of India v. Pijush Kanti Nandy,** (2009) 8 SCC 605 (615) in paragraph 24 and 26 held as follows:

> "Thus the construction of "qualifying service" must ordinarily be kept confined to the service rendered while on duty. A person may be in service even otherwise although not rendering any duty. Those exigencies of situation are covered by the other types of cases which would come within the purview thereof. A person who is not in service cannot be said to be entitled to the benefit thereof. The term "otherwise" should be read ejusden genris. The term "otherwise" in the context of "the Regulations" should be construed so that it can

> become a meaningful one. For the said purpose, the employee concerned was required to be in service. It is not possible to hold in absence of any express words that the eligibility criteria laid down in the Regulations for obtaining the benefit of pension i.e. the qualifying service should be construed in such a manner that a person even not in service would be deemed to be in service. The statute does not raise a legal fiction. A strict construction of the term "qualifying service" therefore, would not be appropriate. It, is however, trite that even a beneficial legislation should not be extended to such an extent whereby it would take into within its fold a situation which was not contemplated under the statute."

13. By following a disciplinary proceeding the authorities had given continuity in service with eyes wide open by allowing the unauthorized absence period to be treated as leave without pay. Therefore, the period from 13.3.1996 to 07.02.2000 during which the petitioner remained unauthorizedly absent if treated as regular service, taking into account his initial date of joining in service from 13.08.1987 till 7.2.2000, petitioner should have been found to have completed 10 years of qualifying service. Therefore, the authority could not have denied the benefits of VRS scheme to the petitioner by accepting the VRS submitted by him in accordance with law.

14. The contention raised by Mr. U.C. Mohanty, learned counsel for opposite party no.2 that as per the provisions at Clause-5.0, the competent authority to sanction Voluntary Retirement was the Chairman-cum-Managing Director/Chairman, OSRTC and Clause-6.5 does not confer any right on an employee to have his request for Voluntary Retirement accepted by the Management. Therefore the discretion lay with the competent authority either to accept or reject the request keeping in view the service record of the employee concerned etc. To such contention of the opposite party, it can be safely concluded that the authority cannot exercise his discretion at his caprice and whims and by arbitrary exercise of power. Such exercise of power must have got reasonable conclusion with a nexus to achieve the object to be sought, otherwise there will be no meaning in inviting applications from the employees seeking voluntary retirement. When the employees exercise their option for voluntary retirement, the same cannot be denied by the employer in an arbitrary and unreasonable manner. If such exercise of power could be there with the authority then it will amount to violation of Article 14 of Constitution of India.

15. As per the Clause-3 of the Voluntary Retirement Scheme, only eligible employees who seek Voluntary Retirement may apply to the competent Authority through their Heads of the Departments in the prescribed format. The competent authority can accept the application for voluntary retirement within 30 days of submission thereof. It is stated by the learned counsel for the opposite parties that if an employee submitted his application VRS, the discretion is only left to the employer to accept the same within a period of 30 days of such submission. If the same has not been accepted, no legal right for acceptance of the same can be exercised by the employee.

16. Much reliance has been placed in ***Ganeswar Biswal v. State of Orissa and others,*** *2011 (Supp.-II) OLR 1075,* but the same judgment is not applicable in the present context in view of paragraphs 8 and 9 of the judgment which state as follows:

> " It is an admitted that in the present case that the offer has been communicated to the petitioner and he has already received all the financial benefits admissible under the V.R.S. Hon'ble Supreme Court in the case of **HEC Voluntary Retd. Emps. Welfare Soc. and another v. Heavy Engineering Corporation Ltd. and others.,** A.I.R. 2006 S.C. 1420, has held thus :-
>
> "The voluntary retirement scheme speaks of a package. One either takes it or rejects it. While offering to opt for the same, presumably the employee takes into consideration the further implications also."
>
> Proceeding further, it has further been held by Hon'ble the Supreme Court that:-
>
> "It is not in dispute that the effect of such voluntary retirement scheme is cessation of jural relationship between the employer and the employee. Once an employee opts to retire voluntary, in terms of the contract he cannot raise a claim……."
>
> 9. In view of the settled law on the point, the offer of voluntary retirement by the petitioner having been accepted by the O.P.G.C.(opp.party) and the petitioner having received all the financial benefits under the V.R.S., this Court cannot go into the question as to whether the petitioner had any interest to take voluntary retirement or not. It is to be only seen whether the last paragraph of the notice vide Annexure-3 constitutes a coercion as contended by the petitioner."

In the above case the application for VRS submitted by the employee had been accepted and final benefits as admissible under VRS had been extended and after acceptance of the VRS benefits there was no question whether the petitioner had any interest for voluntary retirement or not. But in the case in hand, the question is whether the unauthorized absence could be taken into consideration while computation of 10 years of qualifying service for acceptance of VRS or not. If the authority by following due procedure treated the unauthorized absence period from 13.03.1996 to 07.02.2000 as leave without pay, that ipso facto amounts to giving continuity of service. If that period is taken into consideration, the petitioner had completed 10 years of qualifying service and therefore, the authority could not have rejected the voluntary retirement application on a flimsy ground that he has not completed 10 years of qualifying service by the time he submitted his application under VRS and could not have denied the benefit admissible to him in accordance with the scheme.

17. In course of hearing, reliance has been placed on subsequent conduct of the petitioner stating that the petitioner again remained unauthorizedly absent from 09.02.2000 to 28.05.2002 for which he had been placed in another disciplinary proceeding and for that he was dismissed from service on 28.05.2002 vide Annexure-3 to the OJC No. 5997 of 2002. Stating so, Mr. U.C. Mohanty, learned counsel for opposite party no.2, contended that the authority rightly rejected the voluntary retirement application of the petitioner. Under the Voluntary Retirement Scheme, the subsequent conduct was also to be taken into consideration by the authority and the reasons for rejection of the Voluntary Retirement application are that the petitioner had not 10 years' qualifying service. Constitution Bench of the Apex Court in ***Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others,*** *AIR 1978 SC 851* in paragraph-8 upon the judgment of Gordhandas Bhanji (AIR 1952 SC 160) has held as follows

> "Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself".
>
> Orders are not like old wine becoming better as they grow older."

18. Therefore, any subsequent explanation by way of affidavit disentitling the petitioner with regard to acceptance of his application under VRS by reason of imposition of a punishment by the disciplinary authority cannot be taken into consideration, rather on the basis of the factum that the period of unauthorized absence from 13.03.1996 to 07.02.2000 having been treated as leave without pay, this should have been added to the period of his qualifying service accepting the date of joining the service as 01.08.1987. The order of rejection of petitioner's application as per Annexure-5 is therefore, quashed and the opposite parties are directed to reconsider the application submitted by the petitioner for retirement under VRS taking into account the fact that he had got 10 years of qualifying service by the time he submitted his application computing the unauthorized period of absence from 13.03.1996 to 07.03.2000 giving continuity of service with effect from the date of joining, i.e., 01.08.1987. Accordingly, the writ petition is allowed. No order as to cost.

Writ petition allowed.

2014 (II) ILR - CUT-1261

D. DASH, J.

CRLA NO.307 OF 1991

SAMAKURTI KAMESWAR RAO .....Appellant

.Vrs.

STATE OF ORISSA .....Respondent

ESSENTIAL COMMODITIES ACT, 1955 – S. 7 (1) (a) (ii)

Seizure of 19 quintals and 91 kgs of rice from the shop of the appellant – Conviction U/s. 7 (1) (a) (ii) of the Act for contravention of Clause 3 of the Orissa Rice and Paddy Control Order, 1965 – Defence case was entire stock did not belong to the appellant – D.W.1 claims to be the owner of 13 quintals out of the seized rice and due to some difficulty he had kept the same with the appellant and moved the

authority to release the rice in his favour – No evidence by the prosecution to counter the same – No reason to doubt the version of D.W.1 – Defence case being acceptable the rest quantity of seized rice falls below the quantity attracting contravention of Clause 3 of the Control Order – Held, impugned judgment of conviction and sentence is set aside. (Para 13)

For Appellant - M/s. M.Mishra, U.C. Patnaik, P.K. Das, B. Mishra, D.S. Mohanty.
For Respondent - Mr. R.R. Mohanty, Addl. Standing Counsel.

Date of hearing : 21.03.2014
Date of judgment: 26.03.2014

JUDGMENT

D. DASH, J.

The appellant in this appeal has called in question the conviction passed by the learned Special Judge Koraput in T.R. Case No.9 of 1991 convicting the appellant for offence under Section 7(1)(a)(ii) of the Essential Commodities Act, 1955 for contravention of Clause-3 of the Orissa Rice and Paddy Control Order 1965 (in short, the Control Order) and the sentence imposed on him to undergo rigorous imprisonment for a period of three months and to pay a fine of Rs.500/- (five hundred) with default stipulation of undergoing rigorous imprisonment for three months.

2. Prosecution case is that on 02.06.1988, the Inspector of Supplies with his staff went to the shop of the appellant situated at daily market at Jeypore. On inspection; he found 19 quintals and 91 kgs. of rice to have been kept in 22 bags in his shop. The appellant could not produce any authority or licence for storage of such quantity of rice in his shop for which the stock was seized. On completion of enquiry, prosecution report was submitted against the appellant for contravention of the Clause (3) of the Control Order.

The case of the defence is that the entire seized stock did not belong to him and it has been specifically stated to have been also belonging to one Raghunath Behera of village Phampuni.The appellant has also taken the plea that he has never admitted his guilt before any authority at any point of time by stating the seized stock of rice to have been owned and possessed by him.

3. Prosecution in the case has examined three witnesses out of whom P.W.1 is the Inspector of Supplies, P.W. 2 is another Inspector of Supplies. One independent witness has been examined as P.W 3.

Defence has examined one witness namely Raghunath Behera who has claimed the seized rice of 13 quintals to be his own.

5. Besides the above, from the side of the prosecution the weighment chat has been admitted in evidence and marked as Ext.1, seizure list has been marked as Ext. 2 and a statement said to have been made by the appellant has been admitted in evidence and marked as Ext. 3.

6. Learned Special Judge upon analysis of evidence of prosecution and also the evidence adduced from the side of the defence has found that these 19 quintals and 91 kgs. of rice found in the shop of the appellant had been stored by the appellant without any authority and as such having found the appellant to have contravened the provision of Clause-3 of the Control Order, he has been held guilty for commission of offence punishable under Section 7(1)(a)(11) of the Act. This order of conviction and sentence is now under challenge before this Court.

It is the settled position of law that a person acting in contravention of any of the Control Order promulgated by virtue of power conferred under Section 3 of the Act is liable to be punished under the provision of Section 7 of the Essential Commodities Act.

7. The sole point for consideration in the case is as to whether the appellant can be said to have contravened the provision of Clause-3 of the Control Order.

For the said reason the factual finding is required to be given on the basis of the evidence that the appellant had stored this 19 quintals and 91 kgs. of rice without any authority and as such is a 'dealer' coming within the ambit of the definition as provided in clause 2(b) read with Clause – 3(2) of Control Order.

8. Learned counsel for the appellant submits that accepting the factum of seizure of 19 quintals and 91 kgs of rice from the shop of the appellant for a moment, it has been established by the defence to have not been belonging to appellant in its entirety. The evidence adduced on that score is quite satisfactory and the person claiming to the owner the rice in part has been examined as D.W. 1 and there remains no material to discard the said evidence. So, according to him the learned Special Judge has not considered the defence evidence at all much less to say that the same has been discarded. It is submitted that on proper appreciation of the said

evidence, it can be said that the defence has dislodged the presumption as contained in Clause 3(2) of the Control Order, as regards the said storage being in contravention of the Control Order. Therefore, he submits that the conviction and sentence is untenable.

Learned counsel for the State in support of the findings rendered by the learned Special Judge has gone to place the evidence adduced from the side of prosecution. It is his submission that the defence evidence cannot outweigh the evidence let in by the prosecution, establishing the storage of the said rice by the appellant. It is also his submission that the defence case has to be taken as an afterthought as to have been projected only with a view to wriggle out of the net of the present case.

9. On above rival submission, now it has to be decided as to whether the appellant on the basis of the evidence adduced from his side can be said to have not been in possession of said quantity of rice and as such is not a dealer within the ambit of definition as provided in the Control Order.

10. Clause-3 of the Control Order lays down that no person shall act as dealer except under and in accordance with a licence issued in that behalf by the Licensing Authority Sub-clause 2 of that clause further lays down that for the purpose, any person who stores rice or paddy or rice and paddy taken together in quantity exceeding 10 quintals inside the State of Orissa shall unless contrary is proved be deemed to act as a dealer. The definition of the dealer in Clause 2-(b) covers a person engaged in business of purchase or sale of rice or paddy or rice and paddy taken together in quantities exceeding 5 quintals or storage for sale of rice or paddy or rice and paddy taken together in quantities exceeding 10 quintals any time but it does not include a cultivator or land-lord in respect of rice or paddy being the produce of the land cultivated or owned by him.

11. Now keeping the above provisions of law in mind and also the rival contentions the evidence is required to be scanned, so as to say whether this presumption as available in the case which is a rebuttable one, has been dislodged. In other words, whether the appellant has been able to prove to the contrary that he was not the person who can be attributed with this storage of said quantity of rice in his shop.

12. It is this settled position of law that when prosecution it to prove its case beyond reasonable doubt, the defence can establish its case by preponderance of probability. So, here in view of the submission made by the learned counsel for the appellant, let us accept for a moment that the prosecution has proved the factum of physical possession of said quantity of rice by the appellant at the relevant time. This now takes me to straight way

go to the evidence let in by the defence to examine as to whether by preponderance of probability, it can be said the rice seized in entirety did not belong to the appellant.

13. D.W. 1 is the person who claims to be the owner of 13 quintals out of the said seized rice. It is the evidence of D.W. 1 that he has got his landed property about 10 acres at village Phampuni and he personally cultivates his lands. As per his evidence he had brought 25 bags of paddy to Jeypore for milling and intended to sell the rice and after getting the same milled he received 13 quintals of rice. The mill owner issued necessary receipt to him for the purpose. This has been proved by the witnesses as Ext. B. It is also his evidence that another receipt was issued by the mill owner showing delivery of 13 quintals of rice which he has proved as Ext. C. He has further stated that on 01.06.1988 he brought the rice to the market but could not succeed in selling. So he wanted to keep the rice in the shop of the appellant with whom he had earlier acquaintance and with much persuasion, ultimately the appellant agreed to keep the same in his shop on his behalf. He has further stated that when he came after a day, the appellant told him that the said rice had already been seized. So he filed a petition before the authority for the release of the said rice, the copy of the said petition has been marked as Ext. D and the A.D. showing the factum of receipt of the same has been marked as Ext. D/1. The witness has been cross-examined at length from the side of the prosecution. He has stated that on that occasion, he had brought the paddy to sell it but the mill owner refused to purchase the paddy at the price with which he intended to sell and for that reason he had to go for milling to finally sell the end product and being not able to sell during then, he had to approach the appellant to keep the said rice in his custody. The prosecution has remained satisfied by simply suggesting to this witnesses that the documents such as Exts. A and B are all manufactured for the purpose of this case. No evidence to counter the same is forth coming.

On going through the evidence of the D.W. 1, I do not find any cogent reason to discard the same by entertaining any doubt in his version. The evidence of is witness is further getting of corroboration from the documentary evidence that is Ext. A and B and also most importantly Ext. D & D/1 concerning his claim at an earlier point of time. The claim petition has been proved and marked Ext-D which shows that shortly after the seizure for the purpose of getting the rice seized in connection with the case released in his favour, he had moved the authority. Thus the defence case cannot as it is be said to be an after thought. This being the evidence let in by the defence, in my considered view, the presumption stands well rebutted that the said seized rice did not belong to the appellant in entirety. So, the case

of the defence is acceptable on the score that D.W.1 had kept his rice which he had obtained after the milling of paddy grown by him by cultivating his own land. The rest quantity of this seized rice falls below the quantity as prescribed in the Control Order for the purpose of attraction of contravention of clause (3) of the Control Order.

In that view of the matter, the finding of guilt of the appellant in respect of contravention of Clause-3 of the Control Order by the appellant is indefensible and consequently, the judgment of conviction and sentence passed by the learned Special Judge, Koraput is found unsustainable in the eye of law.

14. In the result the judgment of conviction and sentence impugned in this appeal is set aside and the criminal appeal stands allowed.

Appeal allowed.

2014 (II) ILR - CUT- 1266

D. DASH, J.

CRLA NO.45/1996 & JCRLA NO.20/1997

NITYANANDA SETHI ……...Appellant

.Vrs.

STATE OF ORISSA ……Respondent

A. PENAL CODE, 1860 – S.376

Rape – Victim is a physically and psychologically vulnerable girl – Aged about 20 years – She was threatened to maintain silence – She disclosed the incident when she was found to be pregnant – A village meeting was convened where appellant Surya confessed the crime being instigated by appellant Nityananda – When meeting did not yield any result F.I.R. lodged five months after the incident – Defence took the plea of consensual inter course – When the victim is vulnerable, absence of consent stands as the initial presumption – Testimony of the victim found to be reliable and inspires confidence – Impugned judgment of conviction and sentence are confirmed.

(Paras 10,14)

B. PENAL CODE, 1860 – S. 376

Rape – Conviction challenged – Prayer for reduction of sentence – Imposition of inadequate sentence is injustice to the victim of the crime in particular and the society in general – Courts to impose appropriate punishment so as to respond to the society's cry for justice – Similarly an offender should not be shown leniency on the ground of discretion rested in a Court and real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors – Held, in this case appellants do not deserve reduction of sentence. (Paras 11 to 14)

Case laws Referred to:-

1.AIR 1992 SC 2004 : (State of Rajasthan-V- Narayan)
2.2004 SC 1497 : (Aman Kumar & Anr.-V- State Haryana)
3.AIR 1990 SC 658 : (State of Maharashtra-V- Chandraparaksh Kewalchand Jain)
4.AIR 2006 SC 381 : (Himachal Pradesh-V- Asharam)
5.(2013) 7 SC 545 : (Gopal Singh-V- State of Uttarakhand)
6.1995(6) SCC 230 : (State of Andhra Pradesh-V- Bodem Sundara Rao)
7.1996 (2) SCC 384 : (State of Punjab-V- Gurmit Singh)
8.2012 (6) SCC 297 : (Surendra Singh-V- State of U.P.)

For Appellant - Mr. J.K. Panda
For Respondent - Mr. K.K. Nayak, Addl. Standing Counsel
For Appellants - M/s.R.K. Panda, C.R.Swain, B. Mohanty, A.K.Mohanty, Harihar Panigrahi.
Mr.J.K. Panda-Amicus Curie

Date of hearing : 04.07.2014
Date of judgment: 06.08.2014

JUDGMENT

D. DASH, J.

The above noted appeals arise out of two judgments passed in Sessions Case No. 07 of 1993 and 09 of 1993. It may be stated here that both the appellants were arraigned together in G.R. Case No. 240 of 1991 on the file of J.M.F.C., Khaollikote initiated for offence under Section 376/34 IPC. The case having been committed to the Court of Session finally came to be tried by the learned Asst. Sessions, Judge, Chatrapur. Both the appellants together faced the charge and the trial thus commenced. During trial, at the stage of recording of their statements after closure of prosecution

evidence, the appellant Surya absconded for which the case was split up against him at that stage of trial and it got concluded in respect of appellant Nityananda. After conclusion of the trial as against appellant Nityananda, he having been convicted for offence under Section 376 IPC and sentenced to rigorous imprisonment for 10 years and to pay fine of Rs. 1000/- in default to undergo rigorous imprisonment for six months, has preferred the appeal No. 45 of 1996.

In the meantime, the appellant Surya was apprehended and the trial continued and concluded against him. He has also been convicted for the above offence and sentenced as it was imposed upon appellant Nityananda. So appellant Surya has preferred the appeal No. 20 of 1997 from inside the jail.

2. The factual matrix of the case is as under;

The victim here is a differently able girl being lame, with left hand remaining non-functional, being affected by polio and fingers with rickettee features being as that of a child. Father of the victim used to work as a labourer remaining outside in order to earn his livelihood in maintaining the family members who were remaining there in the village. The victim with her other sister and mother used to permanently stay in the village.

3. On 09.07.1991, the victim during early morning hours had gone to answer the call of nature. On the way, appellant Nityananda came and suddenly chucked a lump of sands on her eyes resulting her immediate fall being blurred of vision resultanting pain. He then gagged her immediately; threatened whereafter committed sexual intercourse upon her against her will. At this time, appellant Surya who was at a little distance came near and the allegations stand that he also committed rape upon the victim. After this incident, the victim remained tight lipped for quite sometime and only when she fell ill, it came to light that she was by then having a child of five months in her womb. On query, she divulged the shocking incident to her parents. So a meeting in the village was convened wherein appellant Surya appeared and confessed to have committed rape upon her after appellant Nityananda. However, said meeting finally turned as an exercise in futility.

Therefore, the F.I.R. being lodged, necessary case was registered and the investigation commenced. The investigating officer recorded the statement of the victim, her father and other villagers, got the victim as well as the appellants medically examined. Thereafter the investigation being completed, the charge-sheet against the appellants was submitted putting them to trial in the court of law. Pursuant to the same, the appellants faced the trial which culminated as afore-stated.

4. Prosecution during trial has examined in total seven witnesses, when the defence examined none. The victim has been examined as P.W. 1. Her father has also come to the witness box as P.W. 3. The medical officer who had examined the victim as well as the appellants is P.W. 6 and P.W. 7 is the investigating officer. Besides the above, other witnesses have been examined from the side of the prosecution as regards the happenings in the meeting convened in the village prior to the lodging of the F.I.R.

5. The trial court upon analysis of evidence of the victim, P.W. 1, her father as also the evidence of other witnesses and viewing the facts and circumstances of this case as those emanate from the evidence of the prosecution witnesses, has found the appellants guilty for commission of offence under Section 376 IPC and they have been accordingly sentenced as stated above.

6. Learned counsel (amicus curie) appearing on behalf of the appellants submits that the finding of the trial court placing implicit reliance on the evidence of P.W. 1 is untenable in the eye of law. According to him in the present case in view of the delayed disclosure of the incident which is after about five months of the incident, the evidence of P.W. 1 ought to have been held to be untrustworthy and it ought to have held that the same do not inspire confidence. He submits that such long silence maintained by the victim and her speaking out only on being asked about the pregnancy clearly reveal that it is a case of consent, that too when no other option was left for the victim, she had to colour the consensual sexual intercourse to be one with force and without consent. Learned counsel for the appellants further submits that here the evidence of P.W. 1 also suffers from infirmities that she has developed the story during trial and those are concerning the material aspect of the case, just as a measure to impress the court for not raising any doubt with regard to her version of the incident. Therefore, he submits that the trial court has erred in law by holding that the prosecution has proved its case beyond reasonable doubt against the appellants that they committed rape upon the victim. In view of the above, he urges with vehemence that the judgment of conviction and order of sentence recorded against the appellant are liable to be set aside. Alternatively, it is submitted that in the facts and circumstances of the case and in view of the fact that these appellants, one of whom is now aged about 85 years and another of 43 years of age must be living with family and all those members would suffer like anything in the event, the appellants are sentence to undergo rigorous imprisonment for long period that too after having enjoyed liberty for such a long period and they will be ruined in that case. So, he urges for leniency being shown in the matter of imposition of sentence.

7. Learned counsel for the State counters the above submission as above by placing the evidence of the victim (P.W.1) in great detail. It is his contention that in the facts and circumstances of the case and considering the evidence of P.W. 1, the conviction cannot be said to be a flawed one. According to him, the victim has deposed in the Court in a natural manner without slightest exaggeration, and the only ground to discard her evidence is her delayed disclosure of the incident which in the facts and circumstances of the case is of no significance and that too just viewing the back ground from which the victim hails, the condition of the victim both mental and physical and also other factors such as she being the burden to her family. According to him here is a case where the persons on whom she had faith and confidence being responsible members of the society have abused their position as such shattering and affecting her frame of mind and under the circumstance to muster the courage for a girl with all these disabilities at the cost of facing humiliation, inviting social stigma, hatredness and putting further burden upon all concerned, the delayed disclosure is immaterial. It is also his submission that it is a fit case for recording the conviction against the appellants for offence under section 376 IPC and the trial court did commit no mistake in finally finding them guilty of the said offence and imposing just and appropriate sentence in consonance with legal command. Therefore, he contends that the appeals are devoid of merit.

8. It is the settled position of law that the prosecutrix is not an accomplice. She stands at higher pedestal than an injured witness. If the court of facts finds it difficult to accept the version of prosecutrix on its face value, it may search for evidence direct or circumstantial which could lend assurance to her testimony. Assurance short of corroboration is understood in the context of an accomplice would suffice (Refer:- ***State of Rajasthan v. Narayan;*** AIR 1992 SC 2004 and ***Aman Kumar and Another vs. state of Haryana*** 2004 SC 1497). The same view has also been expressed in ***State of Maharashtra v. Chandraparaksh Kewalchand Jain,*** AIR 1990 SC 658. In ***Narayan Sahu v. State of Tripura*** AIR 2005 SC 1452, Hon'ble Supreme Court have held that if the prosecutrix is an adult and having full understanding, the Court is entitled to base conviction on the evidence unless the same is shown to be infirm and not trustworthy, if the totality of the circumstances appearing on the record of the case discloses that the prosecution does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.

9. Again in case of ***Himachal Pradeesh V. Asharam;*** AIR 2006 SC 381, it has been held as under.-

"The evidence of prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital unless there are compelling reasons which necessiate looking for corroboration of the statement. The court should find no difficulty in acting on the testimony of the victim of sexual assault alone to convict the appellant where her testimony inspires confidence and it is found reliable". The Apex Court has also held that in case of a rape, corroboration is not a matter of law but guide of prudence and that corroboration is not always necessary. The testimony of the victim is vital unless there are compelling reasons which necessiate looking for corroboration. Court can act on the evidence of victim alone where the evidence inspires confidence. The rule of corroboration must be present in the mind of the court and the court must give reasons for dispensing with necessity of corroboration. The victim of rape is not an accomplice and her evidence can be acted upon without corroboration, She stands at a higher pedestal then an injured witness. If the court finds it difficult to accept her version, it may seek for some evidence which lends assurance to her evidence. Assurance short of corroboration as understood in the context of an accomplice would suffice.

Rape leaves permanent scar and has a serious psychological impact on the victim and her family members and therefore, none would normally concoct the story of rape and falsely implicate a person. The victim's evidence can be acted upon, particularly if her version is credible and there is not even an iota of evidence to show that she has reason to falsely implicate the accused.

10. In the avail of aforesaid principles, now the rival submissions are required to be tested to find out the pregnability of the finding of the trial court. So at first the evidence of P.W. 1 requires evaluation to say as to if the same inspires confidence and is trustworthy or not. P.W. 1, the victim being aged about 20 years at that point of time is a physically and psychologically vulnerable girl. It is her evidence that when she was going to the village bandh to attend the call of nature, she could notice somebody to be following her. No sooner did she notice the same, appellant Nityananda appeared before her and chucked a lump of sand on her face which led to her immediate fall. It is next stated that taking advantage of her helplessness at that time and as nobody were there nearby, the appellant Nityananda raped her. In order to stop her from raising any hullah, she was gagged by appellant Nityananda by putting cloth into her mouth. She has further stated that this appellant Nityananda had then threatened to press her neck in case she makes any resistance for the said forcible sexual intercourse. She has next stated that after appellant Nityananda enjoyed her sexually with penetration and fulfilled his sexual lust. The appellant Surya who was then a

little distance in threshing floor came and being instigated by appellant Nityananda also went on to rape her. Her further testimony is to the effect that being seriously threatened by the appellants, she maintained silence without disclosing about this to her parents and later when she became pregnant and when it was detected that she was by then carrying a child of five months in her womb, she with much difficulty had no other option but to open out the incident to her parents. As it usually happens in rural areas, the parents then convened a meeting in the village where the appellant Surya at the end confessed to have committed rape being instigated by appellant Nityananda. However, since the meeting did yield no fruitful result, as advised by the village gentries, F.I.R. was lodged by the father of the victim at Kodala Police Station. Only ground to discard her evidence as urged is that of delayed unfurling of the incident when only her pregnancy was detected which is projected as a strong circumstance favouring consensual sexual intercourse. However, it must be kept in mind that in case of sexual intercourse of such vulnerable victim, absence of consent stands as the initial presumption and the court has to proceed accordingly. One cannot be drifted away from the ground of reality that here is a case that the victim due to her physical condition, a dependent for whole of her life upon parents and all others. She hails from rural area when all the family members are dependant upon the wage of the father who in order to maintain the family, used to go outside to work while the family consisting of mother with remaining members reside in the village. Naturally, under such the circumstances, the victim as well as her family heavily depend upon the neighbours and other co-villagers. Particularly for the victim with her physic, condition of health and her state of mind, has all the reason to accept the villagers with imposition of utmost faith and confidence so as to come to her rescue in case of difficulty. By the time the incident took place she was already a heavy burden not only for the family but also to all others associated with her and under the circumstance, when she was ravished not by one but simultaneously by another, her remaining silent is not at all an unnatural or unusual conduct or a conduct against that of ordinary person with her status physic and her mental state althrough. The mental state of a girl with such infirmity would normally impel her to remain in a quandary for long whether to open out and if so, when, how and before whom at first. A girl of this age being placed like a sack loaded with goad on the shoulder of the parents and that too heavily worrying them is but normally under that situation, to think for a moment not to give further prick with nails upon the body of the parents causing further pain simultaneously inviting the social stigma for all, thinking for a while as to what disastrous reaction, it may carry in the community where they live and also the consequences which may befall on all of them. So, such delayed disclosure in the present case in my

considered view, is of no significance and cannot be taken as a circumstance to discard altogether the plain and simple version of P.W. 1 during the trial spoken in a natural manner. That itself cannot make her evidence untrustworthy when upon detail analysis, the same is found to be inspiring confidence being free from any such basic infirmity. Moreover, father of the victim has gone state about the disclosure made before him by his daughter P.W. 1 and that he had convened the meeting when appellant Surya had gone and confessed the crime at the instigation of respondent Nityananda who had not attended the meeting. It is also the evidence of P.W. 2 that P.W. 1 in sobbing state had narrated the incident before all the villagers present in that meeting. Of course unfortunately in the case, the villagers present have not come to support the case of the prosecution by stating in so many words about the happenings in the said meeting. But that has nothing to do in placing any negative impact in doubting the testimony of P.W. 1 which otherwise inspires confidence. In view of above, the finding of the trial court with regard to the guilt of the appellant for commission of offence under Section 376 IPC is found to be absolutely impregnable and thus wholly defensible.

11. Coming to the justification of the sentence and consideration of submission regarding reduction, it is to be borne in mind that sentencing for any offence has a social goal. Its no doubt true that on certain occasions, chances may be granted to the convict for reforming himself but its equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. It's a complex exercise and the Court is obligated to see the impact of offence on the society as a whole, its ramifications on the immediate collective as well as its repercussions on the victim.

In ***Gopal Singh-vrs.-State of Uttarakhand***; (2013) 7 SC 545, the Apex Court have expressed that just punishment would be dependent on the facts of the case and rationalized judicial discretion. Neither the personal perception of a judge nor self adhered moralistic vision nor should hypothetical apprehensions be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion rested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors.

12. The above authoritative expression deals with sentencing a general. In the case at hand, the matter concerns with the justification of rigorous imprisonment for ten years in case of a rape committed on a physically and psychologically vulnerable girl in her teens. Crimes against women are on

rise and such crimes are affront to the human dignity of the society and, therefore, imposition of inadequate sentence is injustice to the victim of the crime in particular and the society in general. The courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the court's verdict in the measure of punishment.

The rights of the victim of crime and society at large, while considering imposition of appropriate punishment (***State of Andhra Pradesh vrs. Bodem Sundara Rao***; 1995(6) SCC 230). The Apex Court have stated with anguish that crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection of the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault- it is often destructive of the whole personality of the victim, a rapist degrades the very soul of the helpless female in ***State of Punjab vrs. Gurmit Singh;*** 1996 (2) SCC 384.

As regards the gravity of the crime of rape, it has been expressed thus:-

Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere. (In ***Surendra Singh vrs. State of U.P.***; 2012(6)SCC 297)

13. In view of the above enunciation of law, the obtaining factual matrix, the brutality reflected in commission of crime, particularly in view of the vulnerability of victim, the response expected from courts by the society and the rampant uninhibited exposure of the bestial nature of pervert minds, this Court is required to address whether rigorous imprisonment of ten years deserves modification. The grounds urged are all in seeking leniency on the base of mitigating factors. The physically disabled girl was dealt with animal passion by those who are supposed to be the repository of her faith and confidence, her dignity and purity of life and mind has been shattered. The plight is well visualized. She would pass her time with traumatic experience and unforgettable shame being not in a position to assert her honour as such for no fault of hers. It demands just punishment within legal parameters. It has to be in consonance with the legislative command and the discretion vested being rationally exercised. In the instant case besides the victim, the

family is burdened with further sufferings in such a manner that the society as a whole is compelled to suffer as it has created an incurable dent in the social fabric.

14. The mitigating factors projected in course of hearing are on the score that the appellants need be visited with mercy. But this Court unhesitantly think that the fact situation of the case cannot allow the mercy to have a march over and thus there remains no room for reduction of the sentence of rigorous imprisonment for a period of ten years.

The judgment of conviction and the order of sentence passed by trial court are hereby confirmed.

15. Resultantly, the appeals being sans merit stand dismissed.

Appeals dismissed.

2014 (II) ILR - CUT-1275

PRAMATH PATNAIK, J.

W.P.(C) NO. 27083 OF 2013

VIJAYA LAXMI BEHURA .....Petitioner

.*Vrs.*

STATE OF ORISSA & ORS. .....Opp.Parties

A. SIKHYA SAHAYAK – Regularization as primary school teacher – Eligibility – Satisfaction of village Education Committee – Candidate must have completed six years continuous satisfactory engagement as Sikhya Sahayak as per Clause 12.2 of the Guidelines of the Government, department of school and Mass Education Dt.10.01.2008.

In this case petitioner was appointed as Sikhya Sahayak on 05.01.2005 on annual contract basis but remained absent from 09.01.2005 to 08.07.2007 – However, she was allowed to join work w.e.f. 30.11.2009 on execution of a fresh agreement – Her engagement from 05.01.2005 to 30.11.2009 cannot be counted towards continuity of service – Held, there is no infirmity in the impugned order rejecting

petitioner's representation to regularize her service as Primary school teacher. (Paras 11,12,13)

B. SERVICE LAW – Sikhya Sahayak – Regularization as primary school teacher – Eligibility – Satisfaction of the village Education Committee – Candidate must have completed six years continuous satisfactory engagement as per Clause 12.2 of the Guidelines of the Government, Department of School and Mass Education Dt.10.01.2008.
(Paras 10,11,12)

For Petitioner - M/s. B. Mohanty, S. Pattnaik,
R.P. Roy, A.C. Boxipatra.
For Opp.Parties - Standing Counsel,
(School & Mass Education Department).

Date of hearing : 15.10.2014
Date of judgment : 22.10.2014

JUDGMENT

P. PATNAIK, J.

The petitioner challenges the legality and propriety of the order dated 07.02.2013 passed by opposite party no.1 and rejecting her representations by not considering regularization of her service.

2. The facts as delineated in the writ petition is that the petitioner is a Bachelor of Arts with Certified Teacher training applied for the post of Sikhya Sahayak in the district of Jagatsinghpur in pursuant to advertisement. After selection was made, the name of the petitioner was found place in the merit list. Pursuant to the merit list, the opposite parties had issued appointment order in the name of the petitioner and she was directed to join on or before 01.01.2005 in Brajasena U.P. School under Jagatsinghpur Block. Copy of the said appointment order dated 01.01.2005 is annexed as Annexure-1.

3. Pursuant to the aforesaid appointment order, the petitioner joined in the said school on 05.01.2005 and her joining report has been accepted by the Headmaster, Brajasena U.P. School vide Anexure-2.

4. The petitioner while continuing as Shikhya Sahayak, she suffered from Collities and was under treatment in the District Headquarters Hospital, Jagatsinghpur from 09.01.2005 to 26.04.2005. She applied for leave to the Headmaster and it was forwarded to the concerned authority for sanction of

leave. Since she was advised to take rest from 27.04.2005 to 08.07.2007, while the petitioner was treated at Bhubaneswar, she sent leave application to the Headmaster for sanction of leave. Copy of the medical certificates issued by Capital Hospital, Bhubaneswar is annexed as Annexure-3 series. After recovery, the petitioner submitted her joining report before the Headmaster of the school but the Headmaster refused to accept the same. But finally on 27.11.2009, opposite party no.4 allowed the petitioner to join her duty before the same school with a condition that the period of absence in the school till the date of joining shall be treated as no work no pay and no remuneration for the period shall be paid. Copy of the said order dated 27.11.2009 is annexed as Annexure-4 to the writ petition.

5. That in pursuant to the order dated 27.11.2009 under Annexure-4 the petitioner joined in the school and has been continuing till date without any interruption. Since similarly situated candidates like of petitioner who joined in the year 2005 have been regularized in the service and appointed as Primary School Teacher, the petitioner filed a representation on 17.02.2011 before opposite party no.1 to consider her representation and regularize her service in the post of Primary School Teacher. Copy of the said representation dated 17.02.2011 is annexed as Annexure-5 to the writ petition. Due to non-consideration of representation, the petitioner approached this Court in W.P.(C) No.16831 of 2012 which was disposed of on 19.12.2012, inter alia, directing opposite party no.2 to dispose of the representation of the petitioner as early as possible preferably within a period of three months from the date of receipt of the certified copy of this order. In deference to the direction of this Court, opposite party no.4 vide letter dated 02.03.2013 has communicated the rejection order of the representation of the petitioner vide order dated 07.02.2013 of opposite party no.1 which is impugned in this writ petition (under Annexure-6).

6. Heard learned counsel for the petitioner and learned Standing Counsel for School and Mass Education Department.

7. Opposite party nos.1 to 4 filed counter affidavit justifying the order of opposite party no.1 under Annexure-6 to the writ petition. In the counter affidavit, opposite parties have taken the stand that the petitioner was engaged as Sikshya Sahayak at Bajrasena U.P. School under Jagatsinghpur Block vide office order dated 01.01.2005 of the Collector-cum-Chief Executive Officer, Zilla Parishad, Jagatsinghpur. Pursuant to the engagement, the petitioner continued as Sikshya Sahayak from 05.01.2005 to 08.01.2005. Thereafter the petitioner went on leave from 09.01.2005 to 08.07.2007 by submitting bunch of leave applications to the concerned Headmaster of Bajrasena U.P. School. As such the petitioner has not served

for a continuous period from the date of her joining on the other hand she remained absent from her duty for more than two years which is not permissible under the contract of service.

9. It is further stated in the counter affidavit that under Annexure A/4 to the counter vide letter dated 10.11.2009 the petitioner has been asked by the D.P.C., SSA, Jagatsinghpur for execution of fresh agreement for engagement as Sikshya Sahayak and the petitioner executed a fresh agreement on 13.11.2009 vide Annexure-B/4 to the counter.

10. Learned Standing Counsel for School and Mass Education Department in course of hearing has referred to the guidelines of the Government of Odisha, Department of School and Mass Education dated 10.01.2008 under Annexure-7 and the Clauses 4.4, 9 and 12.2 of the said resolution are quoted herein below :-

> "4.4 Orders of engagement shall be issued by the Zilla Parishad through its Chief Executive Officer-cum-Collector of the District. The engagement will be on an annual contract basis. Contract will be renewed in subsequent years depending on the performance of the candidate. While renewing the contract of the Sikshya Sahayaks (SSs), the Zilla Parishad/ Collector-cum-CEO, Zilla Parishad must see that the Village Education Committee of the concerned school has given positive certificate in his/her favour about regular attendance and satisfactory teaching. The Sikshya Sahayak (SS) can be removed from engagement with 30 days prior notice, if she/he violates the conditions of the contract or is considered unsuitable later on by the authorities or on the basis of adverse report of the Village Education Committee."

> "9. **ASSIGNMENT**

(i) Teaching in the schools shall be the main duty of the Sikshya Sahayaks(SS).

(ii) They must ensure minimum level of learning (MLL) for the students as prescribed by the Competent Authority (School & Mass Education Department).

(iii) They must ensure at least 90% attendance of the children in respective schools in all classes.

(iv) They shall reduce the dropout of the children in school below 10%.

(v) She/He shall motivate the parents/guardians of the village in which Primary Schools is situated for enrolment of children within the age group of 6 to 14 years. It shall be his/her duty to contact parents/guardians in case children fail to attend classes regularly and get back such children to the classes.

(vi) They shall perform all such other duties as assigned to them by the competent authority as and when required."

"12.2 Notwithstanding anything to the contrary in Para-12.1, a Sikhya Sahayak after completion of 6 years of continuous satisfactory engagement as Sikhya Sahayak and Junior Teacher, taken together, as on 1st April, 2008, shall be eligible for appointment as Regular Primary School Teacher."

11. In the counter affidavit filed by opposite parties 1 and 4, it has also been stated that the petitioner executed a fresh agreement on 13.11.2009 and pursuant to execution of the said agreement the petitioner was allowed for her engagement on 30.11.2009. Hence the period from 05.01.2005 to 30.11.2009 cannot be counted towards continuity of service of the petitioner for the purpose of treating her as Zilla Parishad Teacher.

12. Having heard learned counsel for both the parties at length and on perusal of the writ petition as well as the counter affidavit, I am of the considered view that there is no infirmity or illegality in the impugned order under Annexure-6 of the writ petition. For all practical purposes her service is to be treated as fresh service after execution of the agreement i.e., on 30.11.2009. Since the engagement of the petitioner as Sikshya Sahayak is by virtue of execution of an annual agreement, the petitioner shall be eligible for appointment as regular Primary School Teacher only after completion of six years of continuous satisfactory engagement as Sikshya Sahayak and Junior Teacher taken together as per the Clause 12.2 of the said resolution. (supra)

13. Having heard learned counsel for both the parties and on perusal of the writ petition and counter affidavit, I am of the considered view that there is no infirmity or illegality in the impugned order vide Annexure-6 which warrants any interference by this Court.

Accordingly, the writ petition being devoid of merits is dismissed. No order as to cost.

Writ petition dismissed.