2014 (I) ILR - CUT- 1015

SUPREME COURT OF INDIA

H.L. DATTU, J & CHANDRAMAULI KR. PRASAD, J

CRIMINAL APPEAL NO. 1439 OF 2012
(@S.L.P. (CRL) NO. 4235 OF 2011)

PUSHPANJALI SAHU ……Appellant

.Vrs.

STATE OF ORISSA & ANR. ……Respondents

PENAL CODE, 1860 – S.376

Rape – Court can award imprisonment not less than 7 years which may extend for life – However for reduction of sentence Court ought to give appropriate reasons.

In this case, trial court convicted the accused for rape and sentenced him to undergo imprisonment for a period of seven years which was confirmed in the appeal but in revision this Court reduced the sentence from 7 years to the period already undergone by the accused, i.e., about a year. Apex Court was not convinced with the reasons assigned by the High Court for reducing the sentence – Held, order passed by the High Court reducing the period of sentence is set aside and order passed by the trial court is restored.

(Paras 12 & 14)

Case Law Referred to:-

1. (2008) 16 SCC 758 : State of Madhya Pradesh -V- Pappu
2. (2003) 8 SCC 13 : State of M.P. -V- Ghanshyam Singh
3. (2005) 5 SCC 413 : State of M.P. -V- Babbu Barkare
4. (2009) 12 SCC 715 : State of Madhya Pradesh -V- Sheikh Shahid
5. (2004) 8 SCC 153 : State of H.P. -V- Shree Kant Shekari
5. (1996) 18 SCC 490 : Bodhisattwa Gautam -V- Subhra Chakraborty

For Appellant : Mr. Parmanand Gaur
For Respondents : Mr. Shibashish Misra

ORDER

Date of Order : 18.09.2012

1. Leave granted.

2. This appeal is directed against the judgment and order passed by the High Court of Judicature of Orissa at Cuttack in Criminal Revision No.676 of 1999, dated 28.09.2010. By the impugned judgment and order, the High Court, while confirming the order passed by the learned Sessions Judge, Keonjhar, Orissa in Criminal Appeal No.59 of 1995, has modified the sentence awarded to the accused to the period already undergone by him. It is this portion of the order which is taken exception to by the complainant in this appeal. The only issue that arises for our consideration and decision in this appeal is: whether the High Court was justified in altering/modifying the quantum of sentence awarded by the learned Trial Judge and confirmed by the Sessions Court.

3. The complainant was employed as a Matron in a Government Women's College Hostel. The accused was a chowkidar/night watchman in that hostel. The offence that was alleged against the appellant was that he committed an offence of rape under Section 376 of the Indian Penal Code on the complainant. The prosecution had led its evidence. The Trial Court, after analysing the evidence on record, concluded that the prosecution has proved its case and accordingly, convicted the accused and awarded the sentence directing the accused to undergo imprisonment for a period of 7 years.

4. Being aggrieved by the aforesaid order passed by the Trial Court, the accused had filed an appeal before the learned Sessions Judge, Keonjhar, Orissa. The appellate court, after considering the entire evidence on record has confirmed the order passed by the Trial Court.

5. The accused, being aggrieved by the aforesaid two orders, had filed a Revision Petition before the High Court. The High Court once again has considered the entire issue in detail and thereafter has come to the conclusion that the Trial Court was justified in coming to the conclusion that the accused has committed the offence of rape against the matron of the hostel. However, taking a lenient view of the matter, has reduced the sentence awarded by the Trial Court from 7 years to the period already undergone by the accused i.e. about a year.

6. We had issued notice against the accused confining to the issue regarding the sentence. The accused could not be served through the regular process. Therefore, we had issued non-bailable warrants against the accused to secure his presence. The police authorities have secured the presence of the accused and he is present before us today.

7. We have heard learned counsel for the appellant, the State and also for the accused person and have also looked into the provisions of Section 376 of the Indian Penal Code, 1860. The said provision reads as under :

> "376. Punishment for rape.—(1) Whoever, except in the cases provided for by subsection (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:
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> Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.
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> (2) Whoever: -
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> (a) Being a police officer commits rape-
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> (i) Within the limits of the police station to which he is appointed; or
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> (ii) In the premises of any station house whether or not situated in the police station to which he is appointed;
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> or
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> (iii) On a woman is his custody or in the custody of a police officer subordinate to him; or
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> (b) Being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him;
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> or
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> (c) Being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution;
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> or
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> (d) Being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) Commits rape on a woman knowing her to be pregnant; or

(f) Commits rape when she is under twelve years of age; or

(g) Commits gang rape,

Shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1

Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2

"Women's or children's institution "means an institution, whether called an orphanage or home for neglected women or children or a widows' home or by any other name, which is established and maintained for the reception and care of women or children.

Explanation: 3

"Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation]."

8. A reading of the above provisions would clearly indicate that if a person is convicted under Section 376 of the I.P.C., the Court can award imprisonment for not less than 7 years which may also extend for life. The provision also makes it abundantly clear that, if for any reason, the sentence has to be reduced, the Court ought to give appropriate reasons.

9. In the instant case, we have gone through the judgment of the High Court reducing the sentence from 7 years to the period already undergone. We are not convinced with the reasons assigned by the High Court.

10. This Court in State of Madhya Pradesh v. Pappu, (2008) 16 SCC 758, considered the similar question of validity and justifiability of reduction of

sentence, awarded by the Trial Court to the accused convicted under Section 376(1) read with Section 511 of the Indian Penal Code, 1860 (in short "IPC") and Sections 324 and 452 IPC, by the High Court. This Court relying upon its earlier observations in State of M.P. v. Ghanshyam Singh, (2003) 8 SCC 13 and State of M.P. v. Babbu Barkare, (2005) 5 SCC 413 observed that undue sympathy towards the accused by imposition of inadequate sentence would do more harm to the justice system by undermining the confidence of society in the efficacy of law and society could not long endure under such serious threats. The Courts therefore are duty bound to award proper sentence having regard to the nature and manner of execution or commission of the offence. This Court, highlighted the dangers of imposition of sentence without due regard to its effects on the social order and opined as follows:

> "9. "17. The social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic a view merely on account of lapse of time in respect of such offences will be resultwise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by a string of deterrence inbuilt in the sentencing system.
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> 19. … The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. If for the extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance.""

11. This Court in State of Madhya Pradesh v. Sheikh Shahid, (2009) 12 SCC 715, relying upon its earlier judgment in State of M.P. v. Munna Choubey, (2005) 2 SCC 710 has recorded its observations on the yardstick of determining sentence as the nature and gravity of the offence and has

cautioned against placing reliance upon reasons such as accused being from a rural background or length of time.

> 8. "6… "8. The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but a deep sense of some deathless shame.
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> 9. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of 'order' should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that: 'State of criminal law continues to be—as it should be—a decisive reflection of social consciousness of society.' Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation the sentencing process should be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. For instance a murder committed due to deep-seated mutual and personal rivalry may not call for penalty of death. But an organised crime or mass murders of innocent people would call for imposition of death sentence as deterrence. In Mahesh v. State of M.P. this Court while refusing to reduce the death sentence observed thus: (SCC p. 82, para 6)
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> '6. ... it will be a mockery of justice to permit these appellant accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the appellant accused would be to render the justicing system of this country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon.'

10. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law, and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc. This position was illuminatingly stated by this Court in Sevaka Perumal v. State of T.N.

11. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread.

12. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. … Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

13. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in McGautha v.

California that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.

14. In Jashubha Bharatsinh Gohil v. State of Gujarat it has been held by this Court that in the matter of death sentence, the courts are required to answer new challenges and mould the sentencing system to meet these challenges. The object should be to protect the society and to deter the criminal from achieving the avowed object of law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. Even though the principles were indicated in the background of death sentence and life sentence, the logic applies to all cases where appropriate sentence is the issue.

15. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic a view merely on account of lapse of time in respect of such offences will be result wise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

16. In Dhananjoy Chatterjee v. State of W.B. this Court has observed that a shockingly large number of criminals go unpunished thereby increasingly encouraging the criminals and in the ultimate, making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the court responds to the society's cry for justice against the criminal. Justice demands that courts should impose punishment befitting the

crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment.

17. Similar view has also been expressed in Ravji v. State of Rajasthan. It has been held in the said case that it is the nature and gravity of the crime and not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. If for an extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, the most deterrent punishment is not given, the case of deterrent punishment will lose its relevance."

12. Learned counsel for the accused has taken us through the reasons assigned by the High Court. The case on hand, in our considered opinion, does not fall within the category of exceptional cases and as we have already observed, we are not convinced with the reasons assigned by the High Court for reducing the sentence. In this view of the matter, while allowing this appeal, we set aside that portion of the order passed by the High Court reducing the period of sentence from 7 years to the period already undergone by the accused. We now direct that the accused be convicted and sentenced for a period of 7 years. It is needless to mention that the period already undergone by the accused shall be set off.

13. Before parting, we wish to reflect upon the dehumanizing act of physical violence on women escalating in the society. Sexual violence is not only an unlawful invasion of the right of privacy and sanctity of a woman but also a serious blow to her honour. It leaves a traumatic and humiliating impression on her conscience offending her self-esteem and dignity. This Court in State of H.P. v. Shree Kant Shekari, (2004) 8 SCC 153 has viewed rape as not only a crime against the person of a woman, but a crime against the entire society. It indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, honour, reputation and not the least her chastity. It destroys, as noted by this Court in Bodhisattwa Gautam v.

Subhra Chakraborty,(1996) 1 SCC 490 the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights, and is also violative of the victim's most cherished of the fundamental rights, namely, the right to life contained in Article 21 of the Constitution. The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely.

14. In the light of the above discussion, we allow this appeal. The impugned order is set aside. We restore the order passed by the Trial Court. Ordered accordingly.

Appeal allowed.

2014 (I) ILR - CUT- 1024

A.K. GOEL, C.J. & DR. A.K.RATH, J.

W.P.(C) NO. 20774 OF 2013 (WITH BATCH)

FEDERATION OF INDIA MINERAL INDUSTRIES, NEW DELHI & ANR. ……..Petitioners

.*Vrs.*

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

MINERAL CONCESSION RULES, 1960 – RULE 27(i)(m)

State based iron ore industries facing acute shortage of iron ore – State issued the impugned memo to take measures to make adequate raw materials available to the State based industries in order to maintain industrial growth and to avoid adverse socio economic consequences – Even mines and minerals vests exclusively under the control of the Union, State has the right of pre-emption to ensure proper supply of raw materials to the iron and steel industries – Held, the impugned memo is a valid exercise of right of pre-emption under Rule 27 (1)(m) of MCR subject to the state evolving a mechanism to

give notice to the lessees of quantum of mineral to be purchased and the price there of, ensuring taking delivery and payment of price within reasonable time – Such mechanism may be notified within three months – In absence there of on expiry of the period mentioned above, the impugned memo will cease to operate. (Paras 25 & 26)

Case Law Referred to:-

1. AIR 1961 SC 459 : Hingir-Rampur Coal Co.Ltd. -V- State of Orissa
2. (1964)4 SCR 461 : State of Orissa -V- M.A.Tulloch & Co.
3. 1991 Supp (1)SCC 430 : Orissa Cement Ltd. -V- State of Orissa
4. (2004)4 SCC 489 : Association of Natural Gas & Ors. -V- Union of India & Ors.
5. 2010)13 SCC 1 : Sandur Manganese & Iron Ore Ltd. -V- State of Karnataka
6. (1995)2 SCC 402 : State of TN -V- MPP Kavery Chetty
7. (1991)2 SCC 128 : Bhoop Alleged son of Sheo -V- Matadin Bhardwaj (dead) by LRs
8. (2006)7 SCC 241 : Jindal Stainless Steel -V- State of Haryana
9. (2012)11 SCC 1 : Monnet Ispat & Energy Ltd. -V- Union of India & Ors.
10. (1996)9 SCC 376 : Vijayalakshmi -V- B.Himantharaja Chetty & Anr.
11. (2001)8 SCC 24 : Shyam Sunder & Ors. -V- Ram Kumar & Anr.
12. (1981)1 SCC 166 : Maharao Sahib Shri Bhim Singhji -V- Union of India & Ors.
13. (1988)2 SCC 513 : Hemeedia Hardware Stores, rep. by its Partner S. Peer Mohammed -V- B.Mohan Lal Sowcar

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S.C.Samantray, B.D.Sahu-2 & R.C.Patnaik
Mr. R.K.Mohapatra (Govt. Adv.)
M/s. S.P.Panda & R.R.Swain

Date of hearing : 06.03.2014
Date of Judgment : 02.04.2014

JUDGMENT AND ORDER

A.K.GOEL, CJ.

1. The common question raised in this group of writ petitions is about the validity of Memo No. 8620/SM dated 5th December, 2012 issued by the Principal Secretary to Government of Odisha, Steel and Mines Department. While in all other petitions the said memo is sought to be quashed, in W.P.(C) No. 17682 of 2013, the petitioners seeks direction to implement thereof.

The operative part of the memo is as follows:-

> " …the State Government hereby directs that at least 50% of the iron ore lumps and 50% of the fines won from the mines in any month, but not put to captive use by the lessees, shall be sold to the stand alone mineral based industries located in the State, limited to the requirement of such user industries, in an equitable manner, on payment of the prevailing fair market price by the user industries to the mining lessees."

2. The reason for the above direction as mentioned in the impugned order, is that the State based iron ore industries are facing acute shortage of iron ore, seriously affecting the production. Few of them are facing closure and others are experiencing low utilization of their existing capacity. There is likelihood of adverse socio-economic consequences of unemployment, loss of wages and impact on investment climate and industrialization process in the State. Therefore, it became necessary, in the greater public interest, to take measures to make adequate raw material available to the State based industries so as to maintain the pace of industrial growth and avoid adverse socio economic consequences. The exercise of power purports to be under Rule 27(1)(m) of the Mineral Concession Rules, 1960 (MCR) which provides that the State Government shall at all times have the right of pre-emption of

the minerals won from the land in respect of which the lease has been granted, on payment of fair market price.

3. The case of the petitioners is that the Mines and Minerals (Development and Regulation) Act, 1957 (MMDR Act) has been enacted with reference to entry no.54 of List-I. Section 2 of the Act declares that it is expedient in public interest that the Union should take under its control the regulation of mines and the development of minerals, to the extent provided under the Act. Thus, the subject of legislation is exclusively covered by the MMDR Act and the State Legislature has no competence to enact any law on the subject nor the State has competence to exercise executive power except in accordance with the Scheme of MMDR Act. Section 13 empowers the Central Government to make rules for regulating the grant of reconnaissance permits, prospecting licences and mining leases for minerals (other than minor minerals) while the power to make rules for regulating the grant of quarry leases, mining leases or mineral concessions in respect of minor minerals is with the State Governments. The mineral in question, not being minor mineral as defined in Section 3(e) of the Act, only such conditions can be prescribed for leases in respect thereof as prescribed by the Central Government under Section 13(2)(g). The MMDR Act or MCR do not provide for exercise of right of pre-emption before any minerals are won from the land in respect of which the lease has been granted. The said right cannot make the grant of mining lease redundant. Clause 21(a) of the Mining Lease (in Form-K) requires the State Government to issue notice for the purpose of exercising the right of pre-emption in absence of which the said right cannot be exercised. The State Government has not undertaken any study of impact of its decision on the national economy. There was ample raw material available for the industries in the State of Orissa where the demand is far less. None of the industries situated within the State of Odisha have the technology to use the iron ore having high magnetite content and as such 50% of the produce from such mine will remain completely unutilized. The demand of iron ore from the Iron and Steel Industry in the State of Odisha is around 12-13 % of the actual demand and thus the mining lessees cannot sell 50% of the iron ore extracted from the mines to the industries situated in the State. For this reason, the Director of Mines, Odisha requested the Principal Secretary, Department of Mines to issue directions for carrying forward the left out stock of iron ore vide letter dated 15th January, 2013. Thus, the lessees are prevented from disposing of even the unutilized quantity which are not capable of being consumed in the State of Odisha. The Central Government vide letter dated 13th February, 2013 advised the State Government to withdraw the impugned memo on the ground that the right of pre-emption vested in the State cannot be transferred

to mineral based industries in the State and the condition imposed amounted to a special condition of lease, without approval of the Central Government, as required under Rule 27(3) of the MCR. In view of the impugned memo, the lessees are denied permits for transportation of minerals beyond 50% of the produce. Thus, the impugned condition is an unreasonable restriction on the right of lessees under Article 19(g) and also violates Article 301 of the Constitution of India.

4. A counter affidavit has been filed on behalf of opposite party no.1-State of Odisha. According to the State, it is the owner of mineral resources within its territories and right of pre-emption is in acknowledgment of the State's ownership rights for equitable distribution of the natural resources and greater common good. Mineral resources in the State are being exploited since long by the stand alone miners without commensurate benefit to the State and the community. The benefits to the State from stand alone mining were meager compared to the super normal profits to the lessees. The royalty fixed by the Central Government vis-à-vis the sale price of minerals is inadequate. The State has adopted a policy of value addition to the mineral resources by establishment of mineral based industries in the State, thereby generating employment opportunities and also greater revenues for the State. Many of these steel plants having no captive mining leases were finding it difficult to source iron ore for their plants since most of the iron ore mining leases in the State are held by stand alone miners who have continued to hold mining leases for decades. These miners find it lucrative to export the iron ore produced in their mines instead of supplying to the local industries. Industries are facing the threat of closure due to raw material scarcity which may have negative impact on the investment climate and slow down the process of industrialization. In these circumstances, the State has exercised its power as lessor/owner which is not the power with regard to regulation of mines, but as owner of the mineral. There is no unreasonable restriction on the freedom of trade as against the commercial interest of handful of mining lessees for equitable distribution of material resources of the community to subserve the common good. Prudent utilization and equitable distribution of minerals are vital aspects of mineral development. Use of minerals locally for production of metals is much more beneficial as it obviates the requirement of transportation. The iron and steel industry in the State requires almost 50% of the total iron ore raised in the mines within the State but was not getting adequate supplies. There is no obstruction to the free flow of the minerals. The State Government has issued the Memo after due application of mind and after consideration of relevant facts and circumstances. By exercise of right of pre-emption, the State Government can itself buy the minerals and then distribute the same to

the user industries. To save the Government time and resources, the Memo directs sale by the lessees to user industries at the prevailing market price. Keeping in view the objectives of the National Minerals Policy, 2008 the State Government decided to resort to its right of pre-emption to ensure proper supply of raw material to the iron and steel industries.

5. We have heard Sarvshri A.K.Ganguli, Sr.Advocate, R.K.Rath, Sr.Advocate, S.S.Das, Sr. Advocate, A.K.Mohapatra, Sr.Advocate for the petitioners and Ashok Mohanty, Advocate General and R.K.Mohapatra, Government Advocate for the State of Odisha, S.D.Das, Asst.Solicitor General for the Central Government and S.C.Lal, Sr. Advocate for the petitioner in W.P.(C) No. 17682 of 2013.

6. Sri Ganguli submitted that regulation of mines and minerals vests exclusively under the control of Union. Minerals are national wealth and no State can claim exclusive right to use such mineral. The State Government cannot enforce its own policy regarding mining and use of minerals and has no jurisdiction to channelize sale of iron ore. The right of pre-emption is a limited right which is not transferable. Restriction of sale outside the State of Odisha violates Article 301 of the Constitution of India. The impugned memo issued is in violation of Rule 27(3) of the MCR as, an additional condition of lease cannot be imposed without the consent of the Central Government. The impugned memo is not based on application of mind and no study had been undertaken by the State and the decision is based only on the representation of the local industries which suffers from malice.

7. He has placed reliance on the judgments of the Supreme Court in ***Hingir-Rampur Coal Co.Ltd. Vs. State of Orissa, AIR 1961 SC 459, State of Orissa vs. M.A.Tulloch & Co., (1964)4 SCR 461 and Orissa Cement Ltd. vs. State of Orissa, 1991 Supp (1)SCC 430*** in support of his submission that the State Government exercises its power as a delegate of the Parliament only and has no role to play save and except in the manner prescribed under the MMDR Act. The State is also denuded of its executive power in the matter covered by MMDR Act. Relying on the decision of the Supreme Court in ***Association of Natural Gas & ors. vs. Union of India and ors, (2004)4 SCC 489*** and ***Sandur Manganese and Iron Ore Ltd. Vs. State of Karnataka, (2010)13 SCC 1***, it is submitted that the whole country has a right on the natural resources and the State cannot claim exclusive right to use such mineral. He also relied on the decision of the Supreme Court in ***State of TN vs. MPP Kavery Chetty, (1995)2 SCC 402*** to submit that the State cannot exercise any authority over minerals after they have been excavated. He further relied on a decision of the Supreme Court in ***Bhoop Alleged son of Sheo vs. Matadin Bhardwaj (dead) by LRs***

(1991)2 SCC 128 to submit that pre-emption right cannot be transferred to a third party. In support of his submission that restriction of sale of minerals outside the State of Orissa was violative of Article 301 of the Constitution of India, reliance has been placed in the decision of the Supreme Court in ***Jindal Stainless Steel Vs. State of Haryana, (2006)7 SCC 241.***

8. Sri R.K.Rath, Sr.Advocate and Sri S.S.Das, Sr.Advocate reiterated the submission of Sri Ganguli.

9. Sri Ashok Mohanty, learned Advocate General submitted that the impugned memo was in exercise of power as lessor and owner of the minerals and grievance, if any, can be raised by the lessee alone and not by the industries located outside the State of Odisha. He submitted that the MMDR Act and MCR do not affect the State Government's paramount right over the iron ore. Section 4 of MMDR Act only regulates the grant of lease and the Legislative Power of the State is affected only to the extent of control by the Union. He submitted that after review of the entire law on the point the legal position has been recently clarified in the case of ***Monnet Ispat and Energy Limited Vs. Union of India and others, (2012)11 SCC 1.*** The right to pre-emption mentioned expressly under Rule 27(1)(m) of MCR is a preferential right to purchase mineral at market price. Though this right is exercised after extraction of minerals, this is a statutory condition of lease itself which is within the scope of the rules. Under these circumstances, there is no violation of right to trade or free flow of trade nor there is transfer of right to preempt. The nature of right under Rule 27(1)(m) of MCR is different from nature of preemption right considered in the judgment relied upon by the petitioners.

10. The following questions arise for consideration:-

(a) Whether the impugned memo is within the competence of the State under Rule 27(1)(m) of the MCR or is an additional condition of lease which is beyond the scope of Rule 27(3) of MCR?

(b) Whether the restriction of sale of 50% iron ore as raw material to the industries within the State violates the right of the lessees under Article 19(1)(g) read with Article 301 of the Constitution of India?

11. After due consideration, we are of the view that the impugned memo is within the competence of the State under Rule 27(1)(m) of the MCR and is not an additional condition of lease which is beyond the scope of Rule 27(3) of MCR, but there is curable procedural deficiency for want of procedure for exercise of right by the State itself and fixation of price and quantity of the minerals in respect of which right of preemption is exercised. The impugned

order is neither beyond the scope of competence of the State nor violates the right of lessee under Article 19(1)(g) or under Article 301 of the Constitution of India.

12. The MMDR Act and MCR do not affect the ownership of mines and minerals which is vested in the State. The right of lessees flows only from the lease. The lessees do not have a fundamental right to claim right of mining the minerals which are vested in the State. It is undisputed that Rule 27(1)(m) expressly reserves the right of the State to purchase minerals by way of preemption at a fair market price prevailing at the time of pre-emption. While this right of the State cannot be fettered, it is mandatory to lay down procedure for exercise of the right so as to ensure that exercise of the right is by the State itself and not by a third party either in substance or in form.

13. Rule 27(1)(m) of the MCR is as follows:

> "27. Conditions:-
>
> (1) Every mining lease shall be subject to the following conditions:-
>
> (m) the State Government shall at all times have the right of preemption of the minerals won from the land in respect of which the lease has been granted:
>
> Provided that the fair market price prevailing at the time of pre-emption shall be paid to the lessee for all such minerals.
>
> Covenant 21 of Part VII of Form K reads as under:
>
> Right of pre-emption:-
>
> 21(a) The State Government shall from time to time and all times during the said term have the right (to be exercised by notice in writing to the lessee/lessees) of pre-emption of the said minerals (and all products thereof) lying in or upon the said lands hereby demised or elsewhere under the control of the lessee/lessees and the lessee/lessees shall with all possible expedition deliver all minerals or products or minerals purchased by the State Government under the power conferred by this provision in the quantities at the times in manner and at the place specified in the notice exercising the said right
>
> (b) Should the right of pre-emption conferred by this present provision be exercised and a vowel chartered to carry the minerals

or products thereof procured on behalf of the State Government or the Central Government be detained on demurrage at the port of loading the lessee/lessees shall pay the amount due for demurrage according to the terms (The charter party of such vessel unless the State Government shall be satisfied that the delay is due to causes beyond the control of the lessee/lessees.

(c) The price to be paid for all minerals or products of minerals taken in pre-emption by the State Government in exercise of the right hereby conferred shall be the fair market price prevailing at the time of pre-emption

Provided that in order to assist in arriving at the said fair market price the lessee/lessees shall if so required furnish to the State Government for the confidential information of the Government, particulars of the quantities descriptions and prices of the said minerals or products thereof sold to other customers and of charters entered into for freight for carriage of the same and shall produce to such officer or officers as may be directed by the State Government original or authenticated copies of contracts and charter parties entered into for the sale or freightage of such minerals or products.

(d) In the event of the existence of a state of war or emergency (of which existence and President of India shall be the sole judge and a notification to this effect in the Gazette of India shall be conclusive proof), the State Government with the consent of the Central Government shall from time to time and all times during the said term have the right (to be exercised by a notice in writing to the lessee/lessees forthwith take possession and control of the works, plant, machinery and premises of the lessee/lessees on or in connection with the said lands or operations under this lease and during such possession or control the lessee/lessees shall conform to and obey all directions given by or on behalf of the Central Government or State Government regarding the use or employment of such works, plants, premises and minerals:

Provided that fair compensation which shall be determined in default of agreement by the State Government shall be paid to the lessee/lessees for all loss or damage sustained by him/them by reason or in consequence of the exercise of the powers conferred by this clause and Provided also that the exercise of such powers shall not determine the said term hereby granted or affect the terms and provisions of these presents further than may be necessary to give effect to the provisions of this clause."

14. Pre-emption is "the right of a person to purchase a property in preference to others." (***K.J. AIYER'S Judicial Dictionary, 8th Edition 1980, Law book co.)*** As per the law Lexicon by ***P. Ramanatha Aiyer, Reprint 2002, WADHWA***, "Pre-emption is the right of first buying of a thing."

15. In ***Vijayalakshmi (Smt), Appellant Versus B.Himantharaja Chetty and another, Respondents, (1996) 9 Supreme Court Cases 376*** it was observed:

> "The word 'pre-emption' as is well understood is a term of law . It is a right of substitution conferred on someone either by statute, custom or contract. The right is to step into the shoes of the vendee preferentially, on the terms of sale already settled between the vendor and the vendee."

Thus, while preemption is preferential right of purchase, its content and procedure for exercise may vary as per a particular statute, custom or contract by which the right is conferred. While exercise of right has to be initially by individual or authority on which right is conferred, its benefit may be transferable.

16. No doubt where nature of right is dependent on particular relationship or qualification such right or benefit thereof cannot be transferred up to the stage it is incohate and has not ripened into vested right. Even in such cases once decree is passed, the right becomes vested right and can be transferred. This is clear even from the judgment in ***Bhoop Singh*** relied upon by the petitioner. Therein, the original preemptor transferred the right after decree in his favour. The trial court upheld the objection of the judgment debtor that the decree was rendered inexecutable. The High Court reversed the said view which was upheld by the Hon'ble Supreme Court. Distinction was made in a pre-emption right under the custom where decree also may not be transferable and a statutory right. It was concluded:

> **"10.** On a conjoint reading of the aforesaid provisions of the Code, it seems clear to us that Matadin was entitled in law to execute the decree transferred to him and obtain possession of the land from the judgment debtor. In ***Jugal Kishore Saraf v. Raw Cotton Co. Ltd. AIR 1955 SC 376,*** this Court held that a person who claims benefit under a decree by reason of its transfer can apply under Section 146 and failing that under Order 21 Rule 16 CPC. In ***Zila Singh vs. Hazari (1979)3 SCC 265,*** this Court while disagreeing with the majority view of Punjab and Haryana High Court in ***Hazari case AIR 1970 P & H 215*** held that a transferee of the pre-emptor's

> right in the land which has vested in him by virtue of Order 20 Rule 14 on compliance of the requirement of payment of the purchase money by the specified date, can maintain an application for execution under Section 146, or Order 21 Rule 16, CPC. In other words it was said that if the transferee of the decree cannot avail of the latter provision he can certainly resort to the former."

To the same effect is law laid down in ***Habiba Khatoon Vs. Ubaidul Huq & ors (1997)7 SCC 452*** and ***Shyam Sunder & ors vs. Ram Kumar & anr. (2001)8 SCC 24***. In ***Shaym Sunder***, it was observed that once decree was passed, vested right accrued to the decree holder which was not affected by subsequent amendment.

17. No decision has been brought to our notice to the effect that after the preemption right is crystallized, benefit or interest thereunder cannot be transferred. In any case, the content of right under rule 27(1)(m) is *sui generis.* There is no compulsion to read any fetter on transferability of benefit of exercise of such right. Fettering the said right on comparison with a customary right will defeat the object thereof. The State has to be left free to exercise its statutory right to promote public interest subject to well known limitation on exercise of power by a public authority in dealing with the public property in accordance with Article 14 of the Constitution.

18. Thus, having regard to the nature of preemption right in the present context, while right of pre-emption must be exercised by the State, benefit of such right can be transferred, in absence of any prohibition. In doing so, there is no violation of any law. Objection of Central Government is also to transfer of *exercise* of right and not to transfer of *benefits* of the right. In this view of the matter, only sustainable criticism against the impugned memo is that preferential right of purchase should be exercised by State in the first instance and the State must give notice to the lessee indicating the price and quantum of mineral sought to be purchased in exercise of pre-emption right but in the impugned memo this procedure is not clearly laid down. This being essentially a matter of procedure, can be cured by laying down appropriate mechanism and validity of impugned memo can be upheld subject to the requirement of procedure being followed. The State must work out an appropriate mechanism to determine price and quantum so that there is compliance of procedure of law even when the State has the right. Since exercise of right of purchase has to be by the State while delivery may be taken and price paid by its nominee, the State must work out such mechanism failing which enforcement of the impugned memo may not be permissible.

19. In ***Monnet Ispat & Energy Limited Vs. Union of India & ors,*** it was observed:-

> 139**.** …….The decisions of this Court in ***State of Orissa vs. M.A. Tulloch & Co., AIR 1964 SC 1284, Baijnath Kadio vs State of Bihar, (1969) 3 SCC 838, Bharat Coking Coal Ltd. Vs. State of Bihar, (1990) 4 SCC 557*** and few other decisions where this Court has held with reference to declaration made by Parliament in Section 2 of the 1957 Act and the provisions of that Act that the whole of the legislative field was covered were in the context of specific State legislations under consideration. In the context of subject State legislation, the whole legislative field was found to be occupied by the Central law. The same is the position in ***Hingir-Rampur Coal Co.Ltd. vs. State of Orissa, AIR 1961 SC 459*** where whole of the legislative field relating to "minerals" was found to be covered by the declaration made in Section 2 of the 1948 Act in the context of the State legislation under consideration. In *Hingir-Rampur Coal Co.* while examining the constitutional validity of the Orissa Mining Areas Development Fund Act, 1952 this Court held that the State Act was covered by the 1948 Act. In *M.A. Tulloch & Co.* this Court was concerned with the same Orissa Act which was under consideration in *Hingir-Rampur Coal Co.* and in the light of Section 18(1) of the 1957 Act which was under consideration it was held that the intention of Parliament was to cover the entire field. In *Baijnath Kadio* this Court was concerned with the constitutional validity of proviso (2) to Section 10(2) added by the Bihar Land Reforms (Amendment) Act, 1964. While examining the constitutional validity of the above provision, the Constitution Bench of this Court analysed the 1957 Act. In the light of List I Entry 54 and List II Entry 23 the observation that whole of the legislative field was covered by the parliamentary declaration read with the 1957 Act was with reference to the State legislations under consideration and the whole of the legislative field was found to be occupied by the 1957 Act. Similar observations in various other decisions by this Court were made in the context of the topic under consideration.
>
> 140. I am supported in my view by a three-Judge Bench decision of this Court in *Orissa Cement Ltd. Vs State of Orissa, 1991 Supp(1) SCC 430* wherein it was emphatically asserted that in the case of a declaration under Entry 54, the legislative power of the State Legislatures is eroded only to the extent control is assumed by the Union pursuant to such declaration as spelt out by the legislative enactment which makes the declaration. The three-Judge Bench on

a careful consideration said: (*Orissa Cement Ltd.* SCC p. 480, para 49)

"*49.* …The measure of erosion turns upon the field of the enactment framed in pursuance of the declaration. While the legislation in *Hingir-Rampur Coal Co.* and *M.A. Tulloch & Co.* was found to fall within the pale of the prohibition, those in State of Haryana v. Chanan Mal, (1977) 1 SCC 340, *Ishwari Khetan Sugar Mills (P) Ltd. Vs. State of U.P. (1980) 4 SCC 136* and *Western Coalfields Ltd. Vs. Special Area Development Authority, (1982) 1 SCC 125* were general in nature and traceable to specific entries in the State List and did not encroach on the field of the Central enactment except by way of incidental impact."

141. Secondly, after the enactment of the 1957 Act and the 1960 Rules made thereunder, the Central Government has all throughout understood that the **State Governments as owner of mines and minerals within their territory have inherent right to reserve any particular area for exploitation in the public sector. This position is reflected from the order of the Central Government that was passed by it and which was under challenge in *Amritlal Nathubhai Shah Vs. Union Govt. of India, (1976)4 SCC 108*.** In its order the Central Government had stated:

"… The State Government had the inherent right to reserve any particular area for exploitation in the public sector. **Minerals vest in them and they are owners of minerals … and the Central Government are in agreement with the State Government insofar as the reservation of areas is concerned…."**

144. …….The judgment of this Court in *Amritlal Nathubhai Shah* establishes the distinction between the power of reservation to exploit a mineral as its own property on the one hand and the regulation of mines and minerals development under the 1957 Act and the 1960 Rules on the other. The authority of the State Government to make reservation of a particular mining area within its territory for its own use is the offspring of ownership; and it is inseparable therefrom unless denied to it expressly by an appropriate law. By the 1957 Act that has not been done by Parliament. Setting aside by a State of land owned by it for its exclusive use and under its dominance and control, in my view, is an incident of sovereignty and ownership. There is no incongruity or inconsistency in the decisions of this Court in *Hingir-Rampur Coal*

> *Co.*, *M.A. Tulloch & Co.*, *Baijnath Kadio*[4] and *Amritlal Nathubhai Shah*. The Bench in *Amritlal Nathubhai Shah* was alive to the legal position highlighted by this Court in *Hingir-Rampur Coal Co.*, *M.A. Tulloch & Co.* and *Baijnath Kadio* although it did not expressly refer to these decisions. This is apparent from the observations made in para 3 wherein it has been stated that in pursuance of its exclusive power to make laws with respect to the matters enumerated in List I Entry 54 in Schedule VII, Parliament specifically declared in Section 2 of the 1957 Act that it was expedient in the public interest that the Union should take under its control, regulation of mines and the development of minerals to the extent provided therein. The Bench noticed that the State Legislature's power under List II Entry 23 was, thus, taken away and regulation of mines and minerals development had therefore to be in accordance with the 1957 Act and the 1960 Rules. The legal position exposited in *Amritlal Nathubhai Shah* is that even though the field of legislation with regard to regulation of mines and development of minerals has been covered by the declaration of Parliament in Section 2 of the 1957 Act, **but that cannot justify the inference that the State Government has lost its right to the minerals which vest in it as a property within its territory and hence no person has a right to exploit the mines other than in accordance with the provisions of the 1957 Act and the 1960 Rules. …"**
>
> **(emphasis added)**

20. The above observations are complete answer to the submissions on behalf of the petitioners as to right of ownership of the State. Moreover, the State is exercising right under the MMDR Act and MCR only and not by an administrative order unbacked by a valid law. This being the undoubted position of law, there could be no violation of Articles 19(1)(g) or 301. The lessee is acting as per statutory obligation under the covenant of lease as per the Act of Parliament to which Article 304 does not apply. Moreover, there is no challenge to the MMDR Act or MCR. The memo cannot be read as being beyond the scope of Rule 27(1)(m) and is not an additional condition.

21. Since we find that the State has undoubted competence to pre-empt the sale of mineral and objection can at best be to the procedure and form and not to the inherent power, instead of quashing the memo as being deficient in respect of procedure, the memo can be upheld by being read as subject to procedure by which the right is exercised by State itself but benefit thereof is transferred to local industry by laying down due procedure. The

State can exercise preferential right of purchase at a fair market value and evolve mechanism to enable its nominee to take delivery against price.

22. 'Shooting at sight' is not the rule as held in ***Maharao Sahib Shri Bhim Singhji Vs. Union of India & ors, (1981)1 SCC 166:***

> 17. …….To sustain a law by interpretation is the rule. To be trigger-happy in shooting at sight every suspect law is judicial legicide. Courts can and must interpret words and read their meanings so that public good is promoted and power misuse is interdicted. 'As Lord Denning said: ' A Judge should not be a servant of the words used. He should not be a mere mechanic in the powerhouse of semantics'."

23. In ***Hemeedia Hardware Stores, represented by its Partner S.Peer Mohammed vs. B.Mohan Lal Sowcar, (1988) 2 SCC 513*** following famous passage that 'ironing' out creases is permissible has been cited with approval:

> "11. In *Seaford Court Estates Ltd.* v. *Asher, (1949)2 All ER 155,* Lord Denning, L.J. said:
>
> " When a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament ... and then he must supplement the written word so as to give 'force and life' to the intention of the legislature.... A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they should have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

24. In view of above, contention that no study in respect of local demand had been made or that there is no demand in the local market is rendered insignificant. The mechanism to be worked out will ensure prompt payment of fair market value and taking delivery which will happen only if there is demand. There will be no scope for arbitrary exercise of right to stall sale of mineral which may not be needed in the local market.

25. We sum up our conclusions as follows:

(i) Ownership of mineral is vested in the State and it has statutory preferential right to purchase the mined mineral against fair market price at the time of preemption;

(ii) Right of preemption must be exercised by State itself and price fixed by it but benefit of such right can be transferred in its discretion;

(iii) Impugned memo lacks procedural mechanism by which State directly exercises its right by fixing price, quantum of mineral to be purchased and beneficiary thereof but this deficiency can be cured by mechanism being laid down which is mandatory for validity of exercise of preemption right.

26. Accordingly, we uphold the impugned memo as being valid exercise of right of pre-emption under rule 27(1)(m) of MCR subject to the State evolving a mechanism to give notice to the lessees of quantum of mineral to be purchased and the price thereof, ensuring taking delivery and payment of price within reasonable time. Such mechanism may be notified within three months. In absence thereof, on expiry of period mentioned above, the impugned memo will cease to operate.

27. The petitions are disposed of accordingly.

Writ petitions disposed of.

2014 (I) ILR - CUT- 1039

A.K. GOEL, C.J. & DR. A.K.RATH, J.

ARBP NO. 57 OF 2011

RAMESH CHANDRA SAMANTRAY ……..Petitioner

.*Vrs.*

EXECUTIVE ENGINEER, RURAL WORKS DIVISION.-II, KENDRAPARA & ORS. ……..Opp. Parties

ARBITRATION & CONCILIATION ACT, 1996 – S.11(4),(6)

Appointment of arbitrator - Unless an agreement envisages a decision final and binding on the parties, the same cannot be held to be the arbitration agreement.

In this case, neither expressly nor impliedly, the provisions for reference to Special Empowered Committee can be treated as arbitration clause - Held, the application for appointment of arbitrator cannot be entertained. (Paras 10 & 11)

Case Law Referred to:-

1. (1998) 3 SCC 573 : K.K.Modi -V- K.N.Modi & Ors.
2. (1999) 2 SCC 166 : Bharat Bhushan Bansal -V- U.P.Small Industries Coorpn.Ltd.
3. (2007) 5 SCC 719 : Jagadish Chander -V- Ramesh Chander & Ors.
4. (2014) 1 SCC 516 L: Vishnu (Dead) by LRs. -V- State of Maharashtra & Ors.

For Petitioner : Mr. S.R.Patnaik, Advocate

For Opp. Parties :

Date of Order 04.04.2014

ORDER

Present : Mr S.R. Patnaik, Advocate for the petitioner.

This application seeks direction to appoint arbitrator.

2. The case of the petitioner is that he entered into a contract with the Executive Engineer, Rural Works Division-II, Kendrapara, for construction and maintenance of Road under the PMGSY. The said work was to commence from 27.02.2006 and the time for execution of work was up to 26.11.2006. The work could not be completed for reasons not attributable to the petitioner. He raised a dispute as per Clause-24 of the agreement and on failure of the department to resolve the dispute, he has approached this Court for appointment of arbitrator.

3. We have heard the learned counsel for the petitioner.

4. The clauses in question claimed to be arbitration clauses are as follows:

> "24.4. The Contractor and the Employer will be entitled to present their case in writing duly supported by documents. If so requested, the Standing Empowered Committee may allow one opportunity to the Contractor and the Employer for oral arguments for a specified period. The Empowered Committee shall give its decision within a

period of 90 days from the date of appeal, failing which the Contractor can approach the appropriate court for the resolution of the dispute.

24.5 The decision of the Standing Empowered Committee will be binding on the Employer for payment of claims up to five per cent of the Initial Contract Price. The Contractor can accept and receive payment after signing as "in full and final settlement of all claims". If he does not accept the decision, he is not barred from approaching the courts. Similarly, if the employer does not accept the decision of the Standing Empowered Committee above the limit of five per cent of the Initial Contract Price, he will be free to approach the courts applicable under the law.

25. Arbitration:

25.1 In view of the provision of the Clause 24 on Dispute Redressal System, it is the condition of the Contract that there will be no arbitration for the settlement of any dispute between the parties."

5. A perusal of the above clauses clearly shows that there is no arbitration agreement. Clause 25.1 specifically states that "there will be no arbitration". Clause 24 cannot be read as arbitration agreement. The Standing Empowered Committee can take a decision on the dispute, but the said decision is not binding on both the parties. Clause 24.5 shows that the decision is binding on the employer to a limited extent. Similarly, the contractor is free to accept it or to approach the court. The department also may not accept the decision fully. It is well settled that to constitute the arbitration agreement, it must provide for a binding decision to be arrived at.

6. In ***K.K. Modi Vs. K.N. Modi & Ors,*** (1998) 3 SCC 573, it was observed:

"17. Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:

(*1*) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,

(*2*) that the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration,

(*3*) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,

(*4*) that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,

(*5*) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,

(*6*) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

18. The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law."

7. In ***Bharat Bhushan Bansal Vs. U.P. Small Indutries Corpn. Ltd.,*** (1999) 2 SCC 166, it was observed:

"9. In the present case, the Managing Director is more in the category of an expert who will decide claims, rights, or matters in any way pertaining to the contract. The intention appears to be more to avoid disputes than to decide formulated disputes in a quasi-judicial manner. In para 18.067 of Vol. 2 of *Hudson on Building and Engineering Contracts*, Illustration (8) deals with the case where, by the terms of a contract, it was provided that the engineer

"shall be the exclusive judge upon all matters relating to the construction, incidents and the consequences of these presents, and of the tender, specifications, schedule and drawings of the contract, and in regard to the execution of the works or otherwise arising out of or in connection with the contract, and also as regards all matters of account, including the final balance payable to the contractor, and the certificate of the engineer for the time being, given under his hand, shall be binding and conclusive on both parties".

It was held that this clause was not an arbitration clause and that the duties of the Engineer were administrative and not judicial.

10. Since clause 24 does not contemplate any arbitration, the application of the appellant under Section 8 of the Arbitration Act, 1940 was misconceived. The appeal is, therefore, dismissed though for reasons somewhat different from the reasons given by the High Court. There will, however, be no order as to costs."

8. In ***Jagadish Chander v. Ramesh Chander and others*****,** (2007) 5 SCC 719, it was observed:

"**8**. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in K.K. Modi v. K.N. Modi, (1998) 3 SCC 573, Bharat Bhushan Bansal v. U.P. Small Industries Corpn. Ltd., (1999) 2 SCC 166 and Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd.,(2003) 7 SCC 418. In State of Orissa v. Damodar Das, (1996) 2 SCC, 216, this Court held that a clause in a contract can be construed as an "arbitration agreement" only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well-settled principles in regard to what constitutes an arbitration agreement:

(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words "arbitration" and "Arbitral Tribunal (or arbitrator)" are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are: (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner,

giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically exclude any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word “arbitration” or “arbitrator” in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as “parties can, if they so desire, refer their disputes to arbitration” or “in the event of any dispute, the parties may also agree to refer the same to arbitration” or “if any disputes arise between the parties, they should consider settlement by arbitration” in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that “if the parties so decide, the disputes shall be referred to arbitration” or “any disputes between parties, if they so agree, shall be referred to arbitration” is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.”

9. In ***Vishnu (Dead) by Lrs. V. State of Maharashtra & others,*** *(2014) 1 SCC 516,* it was observed as follows*:*

> **"13.4.** However, there is nothing in the language of Clause 30 from which it can be inferred that the parties had agreed to confer the role of arbitrator upon the Superintending Engineer of the Circle.
>
> **14.** In *Russell on Arbitration*, 21st Edn., the distinction between an expert determination and arbitration has been spelt out in the following words:
>
> "Many cases have been fought over whether a contract's chosen form of dispute resolution is expert determination or arbitration. This is a matter of construction of the contract, which involves an objective enquiry into the intentions of the parties. First, there are the express words of the disputes clause. If specific words such as 'arbitrator', 'Arbitral Tribunal', 'arbitration' or the formula 'as an expert and not as an arbitrator' are used to describe the manner in which the dispute resolver is to act, they are likely to be persuasive although not always conclusive…. Where there is no express wording, the court will refer to certain guidelines. Of these, the most important used to be, whether there was an 'issue' between the parties such as the value of an asset on which they had not taken defined positions, in which case the procedure was held to be expert determination; or a 'formulated dispute' between the parties where defined positions had been taken, in which case the procedure was held to be an arbitration. This imprecise concept is still being relied on. It is unsatisfactory because some parties to contract deliberately choose expert determination for dispute resolution. The next guideline is the judicial function of an Arbitral Tribunal as opposed to the expertise of the expert;…. An Arbitral Tribunal arrives at its decision on the evidence and submissions of the parties and must apply the law or, if the parties agree, on other consideration; an expert, unless it is agreed otherwise, makes his own enquiries, applies his own expertise and decides on his own expert opinion…."

10. From the above decisions, it is clear that unless an agreement envisages a decision final and binding on the parties, same cannot be held to be the arbitration agreement. Expert determination is different from arbitration.

11. In the present case, neither expressly nor impliedly, the provisions for reference to Special Empowered Committee can be treated as arbitration clause.

The application for appointment of arbitrator cannot thus be entertained. The petition is dismissed.

Application dismissed.

2014 (I) ILR - CUT- 1046

FULL BENCH

A.K. GOEL, C.J., C.R.DASH, J. & DR. A.K.RATH, J

O.J.C. NO. 93 OF 1995

RABI NAYAK & ORS. ……..Petitioners

.Vrs.

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

SERVICE LAW – Merit list – How to fill up vacancies – Held, vacancies cannot be filled up over and above the number of vacancies advertised since recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right enshrined under Article 14 read with Article 16 (I) of the constitution of those persons who acquired eligibility to the posts subsequent of the date of notification of vacancies – Filling up vacancies over and above the notified vacancies, tantamount to filling up future vacancies, which are not permissible under law. (Para 11)

Case Law Referred to:-

1. 82 (1996) CLT 585 : Himanshu Parida -V- District Judge, Balasore
2. AIR 1996 SC 976 : Ashok Kumar & Ors. -V- Chairman, Banking Service Recruitment Board & Ors.
3. (1996) 4 SCC 319 : Prem Singh & Ors. -V- Haryana State Electricity Board & Ors.
4. 1992 Suppl (3) SCC 84 : Union of India & Ors. -V- Ishwar Singh Khatri & Ors.
5. (2009) 1 SCC 386 : Mukul Saikia & Ors. -V- State of Assam & Ors.
6. (2010) SCC 777 : State of Orissa & Anr. -V- Rajkishore Nanda & Ors.

For Petitioner : Mr. H.B. Dash, Advocate
For Opp. Parties : Addl. Government Advocate

Date of hearing : 09.01.2014
Date of judgment : 24.01.2014

JUDGMENT

DR.A.K.RATH, J.

Cleavage of decisions between two coordinate Benches, necessitated the latter Division Bench to refer the matter to the Full Bench. The reasons set forth in point of reference are culled out in paragraph 12. The same are reproduced below:

> "12. We may observe that there now exist two different views regarding the effect of a merit list prepared on the basis of a recruitment test held under Rule 6 of 1969 Rules. One view is that the merit list shall remain in force till the preparation of a fresh merit list of the next examination and in the interim, all vacancies are to be filled up from the present list. The other view is that the list will be valid for the purpose of filling up the posts which were in existence on the date of advertisement. In other words, only those posts which were in existence on the date of advertisement can only be filled up and that the subsequent posts which may be available due to fresh sanction or otherwise, cannot be filled up from the select list prepared in pursuance of the advertisement except in exceptional circumstances and in public interest. Since there are conflicting views of the Division Benches of this Court, we are of the opinion that the matter needs to be reconsidered by a larger Bench so that the controversy in question is resolved."

2. Interpreting sub-rule (5) of Rule 6 of the Orissa District and Subordinate Courts' Ministerial Services (Method of Recruitment and Conditions of Service) Rules, 1969 (in short the "Rules"), a Division Bench of this Court in case of ***Himanshu Parida Vs. District Judge, Balasore*** (OJC No.8007 of 1995 decided on 29.7.1996) reported in ***82 (1996) CLT 585*** came to hold that the merit list published remains valid till the publication of the result of the next examination. In case the vacancy occurs after the list of successful candidates is exhausted and before the announcement of the result of the next examination, such vacancy can be filled up by a successful candidate of the previous years provided his age had not exceeded the maximum limit as laid down in sub-rule (3) of Rule 6.

3. The same rule was the subject-matter of interpretation in the case of ***Pradipta Kumar Samanta Vs. State of Orissa and others*** (OJC No.632 of 1996 decided on 12.12.1996). The Bench came to hold that the number of posts which was in existence on the date of advertisement can only be filled up and subsequent posts which may be available due to fresh sanction or otherwise cannot be filled up from the select list prepared in pursuance of the advertisement unless there are exceptional grounds and that too in public interest.

4. For better reference, sub-rule (5) of Rule 6 of the Rules is quoted below :

"6. **Competitive Examination** – (1) to 4

xxx xxx xxx

(5) In case a vacancy occurs after the list of successful Candidates is exhausted and before the announcement of the result of the next examination, such vacancy may be filled up by a successful candidate of the previous years; provided that his age does not exceed the maximum limit laid down in Sub-rule (3) and failing that by any candidate who possesses the requisite qualification and is within the prescribed age-limit laid down in Sub-rule (3). In the latter event, the appointment of a candidate shall be made temporarily and shall not continue beyond the date when result of the next year's examination is declared, unless he passes the said examination."

5. Law operating in the field is no longer res integra. The same is set at rest by the Supreme Court in a plethora of the judgments. In ***Ashok Kumar and others Vs. Chairman, Banking Service Recruitment Board and others,*** reported in ***AIR 1996 SC 976,*** *the Supreme Court* in Para-5 of the report held as follows:-

"5. Article 14 read with Article 16(1) of the Constitution enshrine fundamental right to every citizen to claim consideration for appointment to a post under the State. Therefore, vacant posts arising or expected should be notified inviting applications from all eligible candidates to be considered for their selection in accordance with their merit. The recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution. The procedure adopted, therefore, in appointing the persons kept in the waiting list by the respective Boards, though the vacancies had arisen subsequently without being notified for recruitment, is

> unconstitutional. However, since the appointments have already been made and none was impleaded, we are not inclined to interfere with these matters adversely affecting their appointments. However, hereafter the respective Boards should notify the existing and excepted vacancies and the Recruitment Board should get advertisement published and recruitment should strictly be made by the respective Boards in accordance with the procedure to the notified vacancies but not to any vacancies that may arise during the process of selection."

6. In ***Prem Singh and others Vs. Haryana State Electricity Board and others,*** reported in (1996) 4 SCC 319, the Supreme Court held that if the requisition and advertisement are for a certain number of posts only, the State cannot make more appointments than the number of posts advertised.

7. In ***Union of India and others Vs. Ishwar Singh Khatri and others*** reported in 1992 Suppl (3) SCC 84, it is held that selected candidates have right to appointment only against 'vacancies notified' and that too during the life of the select list as the panel of selected candidate cannot be valid for indefinite period. Empanelled candidates cannot have a right against future vacancies.

8. In ***Mukul Saikia and others Vs. State of Assam and others*** reported in ***(2009) 1 SCC 386***, it is held that appointment of posts cannot be made more than the number of posts advertised.

9. After having survey of all the earlier decisions, the Supreme Court, in the case of ***State of Orissa and another Vs. Rajkishore Nanda and others*** reported in (2010) SCC 777, in Paragraph-11 of the report held as under:

> "11. It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated and such a deviation is permissible only after adopting policy decision based on some

rational", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law."

10. Thus the view expressed in *Himanshu Parida (supra)* that as per sub-rule (5) of Rule 6 of the Rules, in case a vacancy occurs after the list of successful candidates is exhausted and before the announcement of the result of the next examination, such vacancy may be filled up by a successful candidate of the previous years, provided that his age does not exceed the maximum limit laid down in sub-rule (3) of Rule 6 is not correct. The same is hedged by the subsequent sentence that "in the latter event, the appointment of a candidate shall be made temporarily and shall not continue beyond the date when result of the next year examination is declared, unless he passes the said examination."

11. In view of the authoritative pronouncements of the Supreme Court in the decisions cited supra, we hold that the vacancies cannot be filled up over and above the number of vacancies advertised, since recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right enshrined under Article 14 read with Article 16(1) of the Constitution of those persons who acquired eligibility to the posts subsequent of the date of notification of vacancies. If the advertisement is made for certain number of posts, no appointment can be made more than the number of posts advertised over and above the notified vacancies. Filling up of vacancies over and above the notified vacancies tantamount to filling up future vacancies, which are not permissible under law.

12. The reference is answered accordingly. The Registry is directed to place the matter before the assigned Bench

Reference answered.

2014 (I) ILR - CUT- 1051

PRADIP MOHANTY, J & BISWAJIT MOHANTY, J.

JCRLA NO. 4 OF 2003

GURUA NAIK …….Appellant

.Vrs.

STATE OF ODISHA

……..Respondent

PENAL CODE, 1860 - S.300, Exeption-4

Sudden quarrel of appellant with his wife and he picked up a stone from the ground and attacked her as a result she was killed – Whether the appellant can take the benefit of Exception-4 to Section 300 I.P.C. when he has not taken the said stand during his examination U/s. 313 Cr. P.C. – Held, since this Court is satisfied from the evidence that the appellant attacked the deceased in the heat of passion without premeditation he is entitled to the benefit of Exception-4 to Section 300 I.P.C. and in this Case the appellant should be convicted U/s.304 Part-I I.P.C. instead of Section 302 I.P.C. (Para 8)

Case laws Referred to:-

1.2012 CRI.L.J. 35 : (Dharminder-V- State)
2.AIR 2011 SC 840 : (Gurdial Singh & Ors.-V- State of Punjab)
3.2014 (I) Supreme 705 : (Nanak Ram-V- State of Rajasthan)

For Appellant - Mr. Gauri Sankar Pani
For Respondent - Mr. Sk. Zafarulla (Addl. S.C.)

Date of Judgment: 13.03.2014

The present Jail Criminal Appeal is directed against the judgment dated 12.12.2002 passed by the learned Sessions Judge, Sundargarh in S.T. No.215 of 1998 convicting the appellant under Section 302, IPC and sentencing him to undergo imprisonment for life.

2. The prosecution case in brief is that on 26.05.1998 Bishnu Patra (P.W.1), the Gram Rakhi appeared before the S.I. of Tensa Out-Post and orally reported that on the previous night at about 9 P.M. when he was in his house, the appellant-Gurua Naik came to him and confessed before him that on 25.05.1998 at about 4 P.M., he and his wife were returning from his in-

law's house. They were walking on the Rajabasa-Siliguda road. On the way, there was a quarrel between them, as a result of which the appellant lost his temper, picked up a stone from the road side and attacked the deceased on her head. She sustained bleeding injury on her head and died there. On the next day i.e., 26.5.1998 the Gram Rakhi (P.W.1) went to the spot and found the deceased lying there and a lot of blood had come out from her head. Then, he left the appellant-Gurua Naik with the Ward-Member and other villagers and proceeded to the Tensa Out-Post and orally reported about the incident to the Investigating Officer, who reduced the same into writing and sent the same to the Lahunipada Police Station for registration of the case.

In course of investigation, the Investigating Officer examined witnesses and sent the dead body for post-mortem examination, seized incriminating articles, etc. After completion of investigation, the Investigating Officer submitted the final form under Section 302, I.P.C. against the appellant.

3. The prosecution in order to prove its case examined as many as 9 witnesses including the doctor (P.W.2) and the Investigating Officer (P.W.9) and exhibited 15 documents and produced the stone (M.O. I) and the defence examined none.

On completion of trial, the learned Sessions Judge, Sundargarh convicted the present appellant under Section 302, IPC basing upon extra-judicial confession made by the appellant before P.Ws.1 and 3, which according to him was well corroborated by other materials available on record. Thereafter, the present appellant preferred this appeal. At the time of hearing of the case, a question was raised relating to admissibility of confessional statement made before the Choukidar. Accordingly, the case was referred to a larger Bench. The larger Bench decided the matter and delivered the judgment on 24.01.2014 to the effect that Grama Rakhi is not a police officer and the confessional statement made before him is admissible and remitted the matter back.

4. Mr. Gouri Sankar Pani, learned counsel for the appellant submits that even if the prosecution case is entirely accepted, the case is not coming under the purview of Section 302, I.P.C., but at best the same can be a case under Section 304 Part I, I.P.C. being covered by Exception-4 to Section 300, I.P.C. Learned counsel for the appellant mainly relies on the evidence of P.W.3, who is an independent witness. Therefore, he prays the case may be converted to Section 304, I.P.C.

5. Mr. Sk. Zafarulla, learned Additional Standing Counsel for the State vehemently opposes the submission made by the learned counsel for the

appellant and contends that the case is not coming under the purview of Section 304, I.P.C. He relies mainly on the evidence of P.Ws.1, 3 and 4. He further contends that the appellant cannot get the benefit of Exception-4 of Section 300, I.P.C. as in his examination under Section 313 Cr.P.C. he denied the story of quarrel. Thus, the crux of the case rests on the nature of extra-judicial confession made by the appellant.

6. Perused the evidence of the witnesses.

P.W.1 is the Gram Rakhi. He lodged the F.I.R. before the Lahunipada Police Station and thereafter, the case was registered. In his examination-in-chief, he stated that on Monday night the appellant came to him and confessed his guilt saying that he had killed his wife by means of a stone in the jungle path near Rajabasa. He was acquainted with the appellant prior to the occurrence, because they had worked together in the same Mines. After confessing his guilt and as it was dead hour of the night, P.W.1 asked the appellant to sleep in his house with the assurance that he would take him to the police station on the next day. On the next day, P.W.1 took the appellant to the police station. But, before he went to the police station he verified the dead body of the deceased which was lying near the road. Then they proceeded to the Tensa Out-Post and P.W.1 orally reported about the incident before the Sub-Inspector (P.W.9), who reduced his report into writing and read-over the same before him and finding the same to be correct, P.W.1 put his signature. P.W.1 proved the F.I.R. (Ext.1). In cross-examination, the core prosecution story relating to confession remains un-demolished.

P.W.2 is the Doctor. In his examination-in-chief, he has stated that the deceased was aged about 23 years. He found the following external and internal injuries;

"External injuries;

(i) A lacerated wound of the size 3 c.m. x 4 c.m. situated over 5 c.m. above from the left ear.

(ii) A lacerated wound of the size 4 c.m. x ½ c.m. situated over 9 c.m. above from the left ear.

(iii) A lacerated wound of the size 2 c.m. x 2½ c.m. situated over 15 c.m. above from the left year.

(iv) A lacerated injury of the size 3 x 3½ c.m. situated above 4 c.m. above the right eye brow.

(v) One lacerated wound of size 3 c.m. x ½ c.m. situated over 5 c.m. above the right eye brow.

(vi) One lacerated wound of size 2 c.m. x ½ c.m. situated over 6½ c.m. above from the right ear.

(vii) One lacerated wound of the size 4 c.m. x ½ c.m. situated over 7 c.m. from right ear.

(viii) Two lacerated wounds of sizes 4½ c.m. x ½ c.m. and 5 c.m. x ½ c.m. on the right occipital part of the head."

"Internal Injuries;

(1) Comminuted fracture over the right occipital bone and right parietal bone and left parietal bone.

(2) Brain matter was liquefied. The spinal cord was soft and pulpy."

P.W.2 opined that all the visceras were preserved for chemical examination. He further stated that all the injuries were ante-mortem in nature. P.W.2 further stated that cause of death of the deceased was due to external and internal bleeding caused due to the injuries to the head leading to shock and death. Nothing substantial has been elicited from P.W.2 during his cross-examination.

P.W.3 is a Ward Member of the village. He is also a witness before whom, the appellant had confessed about the incident. The appellant admitted before P.W.3 that on the day of occurrence, he and his wife were proceeding through the forest and at that time her wife was carrying a child. When the appellant asked his wife to carry the child properly, she became angry and picked-up quarrel with the appellant. The appellant stated that due to such quarrel, he picked-up a stone from the ground and assaulted the deceased on her head, thereby causing her death. Bishnu Patra (P.W.1) went to make a report in Tensa Out-Post. After the arrival of the police, the I.O. in presence of P.W.3 seized some sample earth, bloodstained earth and bloodstained stone and also prepared the seizure list (Ext.5). The above facts are corroborated by the evidence of P.Ws. 1 and 2 (Doctor) and F.I.R. In the cross-examination, the prosecution story on confession remains undemolished.

8. In view of the above, there is no dispute that the present appellant made confessional statement before P.Ws.1, 3 and 4 and from scanning of the entire evidence, it is crystal clear that the appellant was the author of the

crime and due to sudden quarrel in the heat of passion, he picked up a stone from the ground and attacked the deceased and killed her. The only question that remains is whether he can take the benefit of the above evidence as he has not taken the said stand during his examination under Section 313 Cr.P.C. In this context, the learned counsel for the appellant drew our attention to the case of **Dharminder v. State** reported **2012 CRI.L.J. 35,** wherein it has been held by Delhi High Court that:-

> "The settled law is that the burden of proving that his case falls within any of the exceptions of Section 300, I.P.C. is upon the accused. But the mere fact that the accused adopted another defence in his statement under Section 313 Cr.P.C. and did not claim the benefit of any of the exceptions of Section 300, I.P.C. is not enough to deny the accused the benefit of any of the exceptions of Section 300, I.P.C., if the Court can cull out materials from the evidence on record pointing to the existence of the circumstances leading to an exception."

Relying on above proposition of law, if we analyse the evidence, it is clear that the appellant attacked the deceased without premeditation in the heat of the passion on account of sudden quarrel. Thus, the appellant is entitled to benefit of Exception-4 to Section 300 I.P.C. Therefore, it is a fit case where instead of Section 302, I.P.C., the appellant should be convicted under Section 304 Part I. In this context, this Court also relies on the case of (**Gurdial Singh & Ors V. State of Punjab, A.I.R. 2011 S.C. 840)** and (**Nanak Ram V. State of Rajsthan, 2014 (I) Supreme 705)** as cited by learned counsel for the appellant.

Accordingly, this Court modifies the conviction of the appellant to one under Section 304 Part I, I.P.C. and sentence him to undergo R.I. for 10 years.

It is stated at the Bar that the appellant is languishing in custody from the date of his arrest, i.e., 26th May, 1998, thus for more than 15 years. By accepting the statement, this Court directs release of the appellant from custody forthwith, if his detention is not required in any other case.

The Jail Criminal Appeal is accordingly allowed in part by modifying the impugned judgment of conviction and sentence to the extent indicated.

Appeal allowed in part.

2014 (I) ILR - CUT- 1056

PRADIP MOHANTY, J. & BISWAJIT MOHANTY, J

JCRLA NO. 14 OF 2004

BUNA PANIGRAHI & ANR. ……..Appellants

.Vrs.

STATE OF ORISSA ……..Respondent

CRIMINAL TRIAL – Murder by administration of poison – Circumstances required to be proved are (1) there has to be a clear motive for an accused to administer poison to the deceased; (2) that the deceased should have died on account of poison said to have been administered; (3) that the accused had the poison in his possession; and (4) that the accused had an opportunity to administer the poison to the deceased.

In the present case there exists no legal proof to the effect that the appellants possessed the poison in question which resulted in the death of the deceased so one of the most essential ingredients is missing – Moreover prosecution has not led any evidence to completely exclude the possibility of deceased having committed suicide by consuming poison on account of continuous torture and the trial court has completely lost sight of the above fact – Held, conviction of the appellants u/s 302/34 IPC is set aside – However since the appellants all throughout tortured the deceased it cannot be ruled out that the deceased committed suicide out of desperation which established the factum of abatement by the appellants and as such the appellants are held to be guilty U/ss. 306/34 IPC and this Court convicts them there under. (Paras 11 & 12)

Case Law Relied on:-

1. AIR 1984 SC 1622 : Sharad Biridhichand Sarda -V- State of Maharashtra

For Appellants : Mr. Debasis Nayak
For Respondent : Mr. Sk. Zafarulla (Addl. Standing Counsel)

Date of Judgment: 09. 04. 2014

JUDGMENT

BISWAJIT MOHANTY, J.

The appellants in this appeal assail the judgment and order of conviction passed by the learned Additional Sessions Judge (Fast Track Court), Chatrapur for commission of offences under Sections 498-A/302/34, IPC read with Section 4 of the D.P. Act. The learned Additional Sessions Judge (F.T.C.) has sentenced each of them to undergo imprisonment for life and to pay a fine of Rs.2000/- and in default to undergo imprisonment for six months for the offence under Sections 302/34, IPC and to undergo R.I. for two years and to pay a fine of Rs.500/- and in default to undergo R.I. for three months each for the offence under Sections 498-A/34, IPC and to undergo R.I. for six months and to pay a fine of Rs.500/- and in default to undergo R.I. for one month each for the offence under Section 4 of the D.P. Act, which are to run concurrently.

2. The prosecution case is that appellant no.1, who is the son of appellant no.2, had married the deceased Jyochhana Panigrahi as per Hindu rites and customs. Before the marriage, appellant no.1 had made a demand of Rs.14,000/- in cash and Rs.10,000/- for purchasing furniture as dowry. Out of the said demand of Rs.24,000/- the bride party had given only Rs.14,000/- at the time of marriage and promised to pay the balance amount of Rs.10,000/- later. After the marriage, the deceased stayed in her matrimonial home and sometime thereafter, the appellants demanded the balance amount of dowry of Rs.10,000/-. Since the said demand was not fulfilled, both the appellants tortured and assaulted the deceased every now and then. Whenever the deceased visited her parental home, she intimated her family members about the demand advanced by the appellants to bring the balance amount of Rs.10,000/- and also about the torture and assault made by the appellants to which her family members consoled saying that they would make payment at a later stage. Sometimes thereafter, the deceased and appellant no.1 went to Bombay and stayed there for sometime. Thereafter, they returned to the village. In the village, the deceased was subjected to assault and torture. On 26.6.2002 in the early morning at 5 A.M., appellant no.1 came to the house of the informant (P.W.4), who is the brother of the deceased and informed that his wife-Jyochhana Panigrahi had died of scorpio bite in the previous night. Getting the information the informant along with his other brother and some of his villagers went to the house of the appellants and noticed injuries on the person of the deceased. The informant suspected that her sister was beaten to death and after gathering information of such assault on the deceased by the appellants in the previous night, he lodged F.I.R. before the O.I.C., Hinjili Police Station, which led to the registration of the case and commencement of the investigation. The I.O. visited the spot, made inquest of the dead body of the deceased and sent the dead body for post-mortem examination and

started investigation of the matter. After completion of the investigation, the I.O. submitted the charge sheet as against the appellants.

3. The plea of the appellants was complete denial. Their plea was that the deceased had committed suicide by taking poison and that the appellants never tortured or assaulted her for dowry. The appellant no.2 took a plea of alibi by stating in her statement under Section 313, Cr.P.C. that she was absent from her house in the night of occurrence and had stayed in the house of her daughter Rajkumari and came to know about the death in the following morning.

4. In order to prove the case, the prosecution examined as many as twelve witnesses and exhibited eleven documents. On the other hand the defence examined none. Upon completion of trial and after a detailed examination of materials, the learned Additional Sessions Judge (F.T.C.) came to the conclusion that the prosecution had established that both the appellants were guilty under Sections 498-A/302/34, IPC read with Section 4 of the D.P. Act and accordingly he convicted them thereunder. However, the learned trial court held the appellants not guilty under Section 304-B/406/34, IPC and acquitted them of the said charges.

5. In assailing the impugned judgment, Mr. Nayak, learned counsel for the appellants made the following submissions;

(i) There exists major contradictions in the evidence of prosecution witnesses and therefore, the learned trial court has gone wrong in convicting the appellants under Sections 498-A/302/34, IPC read with Section 4 of the D.P. Act.

(ii) There exists no legal proof of demand of dowry and accordingly there exists no motive to commit the crime as alleged.

(iii) In the alternative there exists no clear cut legal proof beyond reasonable doubt to convict the appellants for committing the murder of the deceased by administering poison. In this context, Mr. Nayak relies on a decision of the Hon'ble Supreme Court as reported in **AIR 1984 SC 1622** (**Sharad Biridhichand Sarda** v. **State of Maharashtra**). According to him the prosecution evidence may at best point to the guilt of the appellants only under Section 306, IPC. Maximum punishment for 306, IPC being imprisonment of either description for a term, which may extend to 10 years with fine, since appellant no.1 has already undergone imprisonment for more than 9 years and appellant no.2 is an old lady of 70 years and has already undergone imprisonment for more than 6 years, they have been sufficiently punished. Accordingly, the jail criminal appeal may be disposed of.

6. On the other hand Mr. Sk. Zafarulla, learned Additional Standing Counsel for the State while defending the impugned judgment submitted that there exists no major contradictions in the evidence of prosecution witnesses and there exists enough legal proof relating to the demand of dowry and mere fact that the learned trial court recorded an acquittal order under Section 304-B, IPC does not mean the evidence relating to demand of dowry has been completely wiped out. According to him the conviction under Section 498-A, IPC itself shows that the deceased suffered harassment as she failed to meet unlawful demand of dowry. Lastly, Mr. Zafarulla submitted that the chain of circumstances in the present case was complete in all respects so as to attract a conviction under Sections 302/34, IPC.

7. Perused the L.C.R. and gone through the evidence on record carefully.

P.W.1 scribed the F.I.R. under Ext.1 and proved the same. In his examination-in-chief he made it clear that he scribed the F.I.R. as per instruction of the informant (P.W.4) and later read over and explained the contents of the report to P.W.4, who admitted the contents and signed the same. He further made it clear that he did not know anything else. In the cross-examination, he admitted that he was examined by the police.

P.W.2 is a co-villager of P.W.4. In the examination-in-chief he deposed that he attended the marriage of appellant and the deceased Jyochhana. He did not know anything else. P.W.2 was declared hostile. In the cross-examination he stated that he could not attend the marriage of the deceased and appellant no.1 as he was ill.

P.W.3 is the mother of the deceased. In her examination-in-chief she deposed that at the time of marriage they had paid Rs.14,000/- as dowry as per the previous settlement and they could not give the rest dowry amount of Rs.10,000/- for purchase of furniture. For one year her daughter Jyochhana remained well at her in-law's house. A son was born to her. After the birth of the son, demanding the balance dowry amount of Rs.10,000/- appellant no.2 and her daughter Raja Kumari had assaulted her daughter Jyochhana and had denied to give food to her. At times she was also driven out by them from their house. When the deceased daughter was nine months pregnant she was left at the house of P.W.3 for delivery. Seven months after the delivery, the deceased daughter was taken to her in-law's house and there she was assaulted by appellant no.1 and denied food by appellant no.2 by demanding dowry amount. The deceased was not allowed to come to her father's place for about two years despite her approach. Thereafter, a daughter was born to the deceased (Jyochhana). Then, the deceased

stayed at the house of P.W.3 for about one and half years. Sometimes after the deceased was taken to her in-law's house and again assault on the deceased by both the appellants along with sister-in-law Rajkumari started. They continued to torture the deceased and she was kept in a miserable condition. About one year three months back appellant no.1 came to the house of P.W.3 in the morning at about 5.00 A.M. and informed P.W.3 that her daughter Jyochhana had died due to scorpio bite. After informing her, appellant no.1 had left her house. Thereafter P.W.3 informed her two sons one of whom is P.W.4 and they went to the house of the appellants. After returning from the house of the appellants, both the sons informed her that they noticed injuries on the dead body of Jyochhana. In her cross-examination, P.W.3 made it clear that she had paid the dowry amount of Rs.14,000/- to the appellants at the time of marriage and the entire money was given in five hundred currency notes and one hundred currency notes. She also stated that she had heard from her deceased daughter about the torture and assault to her. During visit of P.W.3 to the house of the appellants, she had also seen that a very little food was given to her daughter and her daughter told her about assault and torture to her by the appellants and had shown the injuries on her body caused to her due to assault. P.W.3 also deposed that she had questioned about the torture of the deceased to appellant no.2 and her stock reply was usually the husbands assault the wives. While at Bombay, the deceased sent a letter to P.W.3 intimating regarding assault and torture to her by her husband appellant no.1. Thinking that the torture and assault might aggravate, she did not report the matter to the police. Thus nothing has been elicited from P.W.3 in her cross-examination to demolish her version relating to core prosecution story.

P.W.4 is the informant and brother of the deceased. In his examination-in-chief he deposed that at the time of marriage Rs.14,000/- was given as dowry and a promise was made to pay Rs.10,000/- later towards the wooden furniture like cot and almirah. During the first year of marriage, the deceased was looked after well. As they could not give the balance dowry amount as promised, the appellants along with Rajkumari started assaulting and torturing the deceased. He further deposed that the deceased was also not given proper food at her in-law's house and assault and torture by the appellants continued till the death of the deceased. About one year and four months back appellant no.1 came to the house of P.W.4 at about 5.00 A.M. in the morning and informed that due to scorpio bite his sister had suffered from 'Sanipata' and had expired. After giving this message to P.W.3, appellant no.1 went away. Thereafter, on getting the information P.W.4 along with his brother and other persons went to the house of the appellants. On reaching there, they saw that the dead body of

the deceased lying in the front room of the house of the appellants and appellant no.1 was making arrangements for cremation of the dead body. P.W.4 and Sibaram kept guarding the dead body of his sister so that the dead body would not be cremated. Thereafter, P.W.4 proceeded to his village and called P.W.1 to scribe a report. Accordingly, he proceeded with the report under Ext.1 to Hinjilicut Police Station. Within one hour, the police reached near the dead body of the deceased and made inquest over the dead body. Ext.2 is the inquest report prepared by the police. The police sent the dead body of the deceased to Berhampur Hospital for post-mortem examination and released the dowry articles given by the father of the deceased at the time of marriage, after seizure of the same from the house of the appellants. Ext.4 is the Zimanam executed by P.W.4. In the cross-examination, P.W.4 stated that his parents had promised to pay the balance amount of Rs.10,000/- for purchase of the wooden furniture afterwards in presence of Rajkumari and others. During the life time of his father, none of the appellants or anybody on their behalf had made any demand for payment of the promised balance dowry amount of Rs.10,000/-. About four months after the death of his father, the appellants started making demand for the dowry. While P.W.4 returned to his village from the house of the appellants, the neighbourers of the appellants had informed him that the appellants had beaten his sister to death. Thus nothing has been elicited in the cross-examination to doubt the core prosecution story as deposed by P.W.4.

P.W.5 is the neighbour of the appellants. In his examination-in-chief he deposed that his house was situated one house apart from the house of the appellants. After the marriage the deceased was being assaulted by her husband appellant no.1 but he could not say the reason for the assault. According to him, assault on the deceased by the appellants started sometime after the birth of the second child. About one year and four months back on a Tuesday in the night at about 9 P.M. both the appellants assaulted the deceased, Jyochhana inside their house. When the deceased came outside of their house towards the back yard during the assault she was again dragged inside the house by both the appellants. While the assault was continuing on the deceased, P.W.5 slept in his house after taking meal. He got up in the morning on the next day. He heard that Jyochhana had died. The dead body of Jyochhana was inside the house of the appellants. As he belonged to scheduled caste, he did not enter into the house of the appellants, who were Brahmins. He saw the dead body of the deceased, when the appellants brought the dead body from inside in order to take it for the cremation. The dead body was covered by a cloth. In the cross-examination, P.W.5 admitted that in the night of occurrence both the appellants, the deceased Jyochhana and two children were only staying in

their house and that he never had any quarrel with the appellants. Further he stated that none of the appellants had cried after the death of Jyochhana. However, the I.O. (P.W.10) in the cross-examination stated that P.W.5 had not stated before him that the deceased had come out to back yard while she was being assaulted by the appellants. P.W.5 also did not state before the I.O. that the appellants assaulted the deceased in the night of occurrence.

P.W.6 happens to be another neighbour, who in his examination-in-chief stated that for first six months of marriage the deceased lived peacefully. Thereafter, appellant no.1 used to assault the deceased almost every day demanding dowry. He further stated that he had seen the appellant assaulting the deceased in the back yard of their house and inside of their house demanding more dowry. Whenever the deceased asked for food, the appellants used to say her to bring dowry from her parents house so that food would be given to her. She was not given food most of the time. Appellant no.2 also used to assault the deceased demanding her to bring dowry. As the assault on the deceased by the appellants was almost a daily affair, he did not attach much importance. On 25.6.2002 at about 9 P.M. in the night when P.W.6 was taking his food, he heard the crying sound of Jyochhana Panigrahi saying “Marigali Marigali” coming from the house of the appellants. He went to the back yard of the house of the appellants and saw appellant no.1 holding tuft of hair of the deceased and assaulting her by a stick and appellant no.2 by holding at the waist portion of the deceased was pulling her towards their house. The deceased was taken inside the house and the door of the backyard was closed. Then P.W.6 returned to his house and after taking meal, he went to sleep. At about mid night when he went out of his house, he saw appellant no.1 came out of the house holding a bamboo basket and proceeded towards the river. Thereafter P.W.6 went inside his house and slept. In the cross-examination, P.W.6 stated that whenever he heard the row resulting from the assault to the deceased, he went to the house of the appellant and witnessed the assault on the deceased by the appellants. He never interfered during the assault on the deceased as the appellants used to shout at him saying that he should not interfere in their family matter. He further stated that assault on the deceased in the night of occurrence had taken place for about half an hour in the backyard. Further in the cross-examination, he denied the suggestion to the effect that appellant no.1 had never demanded dowry and had never tortured and assaulted the deceased at any time including in the night of occurrence on 25.6.2002. P.W.6 denied a suggestion that he was inimical towards the appellants. Thus, nothing has been elicited from P.W.6 in cross-examination to draw adverse inference.

P.W.7 is the family priest, who presided over the marriage of appellant no.1 and the deceased. In his examination-in-chief he stated that during the marriage, the father of the deceased paid Rs.14,000/- as dowry at the marriage pandal and he promised to pay Rs.10,000/- later on towards the wooden furniture and other articles. After marriage, the deceased stayed at her in-law's house and about one and half years back, P.W.7 heard that Jyochhana was murdered while staying at her in-law's house. In the cross-examination, P.W.7 has stated that nobody had forced the father of the deceased to pay money and to make promise for payment of further money at the marriage pandal.

P.W.8 was the Tahasildar of Hinjilicut and proved the inquest report.

P.W.9 the witness to the seizure and proved the seizure list under Ext.5, containing the dowry articles.

P.W.10 was the I.O. In his examination-in-chief, he deposed that he received the written report of the informant (P.W.4) and registered the case. He sent the requisition to the S.D.M., Chatrapur and made inquest over the dead body. He issued command certificate to the police constable-Nakula Nayak (P.W.11) and examined the witnesses. He issued dead body challan to the police constable for post-mortem examination of the dead body and also prepared the spot map. He proved the same as Ext.7. He forwarded the appellants to court on 27.6.2002. He examined P.W.2, who stated that the appellants demanded Rs.14,000/- as dowry money and Rs.10,000/- towards purchase of wooden articles to be given to them at the marriage pandal and after the marriage he was informed by the appellants that only Rs.14,000/- was given to them towards dowry and the rest of Rs.10,000/- was promised to be paid later on. P.W.2 also stated before the I.O. that due to non-payment of balance dowry amount, both the appellants used to assault the deceased and denied food to her. However, it may be noted that as indicated earlier P.W.2 turned hostile during his examination in the court. In the cross-examination, P.W.10 stated that he had examined P.W.3, who has not stated before him that the settlement of dowry was made about one month prior to the marriage. She had not stated before him that Rs.3,000/- out of the balance dowry amount of Rs.10,000/- was paid to their daughter. P.W.3 has not stated before him that the deceased was sent to her house once and she was not allowed to come to her house, when her father died and that the appellants asked the deceased not to see the face of her parents. P.W.10 in his cross-examination, further stated that he examined P.W.4 and P.W.4 had not stated before him that at the time of settlement of the dowry amount, the sworn friend of the father of the appellants were also

present. He had not also stated that appellant no.1 had demanded for the balance dowry amount by going to the house of his in-law. He had also not stated before P.W.10 that he had been to the house of the appellants about six months prior to the death of the deceased and at that time the deceased had complained before him about the torture by the appellants. The appellants had not allowed the deceased to accompany him to his house. P.W.10 in his cross-examination also stated that he had also examined P.W.5, who had not stated before him that the deceased had come out to the backyard when she was assaulted and the appellants took her inside the house by dragging in the night of occurrence. P.W.5 had not stated before P.W.10 that he saw the appellants assaulting the deceased in the night of occurrence. P.W.10 denied that his investigation is perfunctory and he filed the charge sheet falsely.

P.W.11 is the Constable, who in his examination-in-chief spoke about the command certificate issued to him and issuance of dead body challan and direction to take the dead body of the deceased to Berhampur Hospital for post-mortem. He identified the dead body of the deceased to the Medical Officer, who had conducted the post-mortem. In the cross-examination he denied a suggestion that the Medical Officer had not handed over M.O.I and M.O.II after post mortem examination to him.

P.W.12 is the doctor who conducted the post mortem examination of the dead body of the deceased. On 26.6.2002 he found the following external and internal injuries;

"External injuries

i. A parallel burise 6 cm x 1.25 cm on the front of the chest over right mammary area.

ii. A parallel bruise 6 cm. x 1.25 cm on the outer aspect of right forearm.

iii. A parallel bruise 5 cm. x 1.25 cm on the outer aspect of left forearm.

iv. A parallel bruise 4 cm. x 3 cm. on the outer aspect of left arm.

v. A parallel bruise 10 cm. x 1.25 cm. on the back over right scapular region.

vi. Contusion with echymosis 12 cm. x 12 cm over the right shoulder joint embedding 3 no. of elongated bruises overlapping each other.

vii. A parallel bruise 7 cm. x 1.25 cm on the outer aspect of the right thigh.

viii. Contusion 6 cm x 4 cm. on the right thigh 7 cm. below the injury no. vii.

ix. A parallel bruise 4 cm x 1.25 cm on the outer aspect of the right knee.

Internal Injuries

i. The under surface of the scalp was found contused 3 cm. x 3 cm. over left parietal eminence.

ii. The stomach contained about 200 grams of partially digested identifiable rice food mixed to it some dirty semi-liquid substance emitting kerosene like odour. The mecosa of the stomach looked smooth, hypermic and odematus with patchy haemorrhagic area. The meussa of the intestine also looks hyperemic. All other internal abdominal organs were found intact and congested.

iii. Both the lungs were found congested and oedematous. No internal mechanical injury of any type could be detected in the internal organs."

On observation of the injuries, P.W.12 opined that all the injuries were ante-mortem in nature and the parallel bruises could have been caused by blow from a lathi like cylindrical weapon. The injuries were not fatal to cause death in ordinary course of nature. The external injuries since were purplish blue in colour might have been caused within 24 hours prior to the death. He further opined that the death of the deceased could have been due to ingestion of an oral poison possibly an insecticidal. The time of death was within 12 to 18 hours from the time of the post mortem. The external injuries noticed by him on the dead body of the deceased might be possible at about 9 to 10 P.M. on 25.6.2002. In the cross-examination, P.W.12 admitted that there was internal bleeding in the underlying soft tissues of the external injuries. But there was no external bleeding. All the external injuries were simple in nature. From the nature of the food contents and odour and the nature of the injuries that he had noticed in the stomach and the other internal organs, he could conclusively say that it was the case of poisoning. He further stated that chemical test of the viscera would only confirm the nature and character of the poison.

8. All the above discussion and analysis would show that except on the factum of assault made by the appellants on the deceased from time to time including prior to the date of occurrence on account of non-payment of dowry, there does not exist any direct evidence with regard to the death of the deceased. However, from an analysis of evidence following circumstances are found in this case;

(a) At the time of marriage of appellant no.1 with the deceased, Rs.14,000/- was paid as dowry and the balance dowry amount of Rs.10,000/- was promised to be paid later.

(b) On account of non-payment of the balance dowry, the appellants used to assault and torture the deceased. On that ground she was also denied food.

(c) On 25.6.2002 at about 9 P.M., both the appellants assaulted the deceased inside their house. Appellant no.1 assaulted the deceased by a stick in presence of appellant no.2. As per the evidence of the Doctor (P.W.12), the deceased suffered around 11 injuries out of which 9 injuries were external and 2 injuries were internal injuries. The external injuries were simple in nature. The doctor further opined that the injuries were not fatal to cause death in ordinary course of nature.

(d) In the same night intervening 25.6.2002 and 26.6.2002 at about mid night the deceased expired due to poisoning.

(e) Appellant no.1 was found in the dead of the night of 25.6.2002/26.6.2002 proceeding towards the river side of the village from his house holding a basket.

(f) Both the appellants were last seen together with the deceased inside the same house from where the dead body of the deceased was recovered.

(g) Appellant no.1 went to the house of P.W.3 and informed her that her daughter had died out of scorpio bite which information has not turned out to be true and has not been corroborated by the evidence of the doctor.

9. In the above background, let us examine the submission made by Mr. Nayak, learned counsel for the appellants that there exist major contradictions with regard to the version of prosecution witnesses and on that ground the impugned judgment of the learned trial court ought to be set aside. In this context he drew attention of this Court to some contradictory statements of P.Ws.3, 4 and 5 vis-à-vis the evidence of P.W.10. On examination of the evidence of P.Ws.3 and 4 vis-à-vis the evidence of P.W.10, according to us there exists some minor contradictions without affecting the core prosecution evidence relating to cruelty inflicted on the deceased all throughout on account of non-payment of balance dowry amount. So far as this part is concerned, the evidence of P.Ws.3 and 4 corroborate one another. Inflicting of cruelty on account of non-payment of

dowry amount has also been corroborated by the evidence of P.W.6, who is a neighbour of the appellants. It may be noted here that P.W.6 is a trustworthy witness, who inspires confidence. He is an eye-witness to the part of occurrence, i.e., assault on the deceased from time to time and on the night of occurrence. He clearly stated about participation of both the appellants on assault on the night of occurrence thereby falsifying the plea of alibi being taken by appellant no.2. Therefore, much cannot be read into the contradictions in the evidence of P.Ws.3 and 4 those being minor in nature. So far as the evidence of P.W.5 is concerned, we accept the contention urged by the leaned counsel for the appellants that there exists some major contradictions in his evidence with regard to the deceased being dragged inside the house and P.W.5 having seen the assault on the deceased by the appellants inside their house on the date of occurrence. Even if we ignore the evidence of P.W.5 with regard to his version relating to occurrence at 9 P.M. of 25.6.2002, still then on a cumulative reading of rest part of evidence of P.W.5 along with evidence of P.Ws.3,4,6 and 12 clearly make out a case under Sections 498-A/34, IPC read with Section 4 of the D.P. Act against the appellants.

10. With regard to the contention of the learned counsel of the appellants that there exists no proof relating to demand of dowry and therefore, this is a case where no motive for committing the crime has been proved by the prosecution and in such background, the learned trial court's judgment cannot stand the scrutiny of law; our response would be that such a contention has no legs to stand. A scanning of evidence of P.Ws.3,4 and 6 would show that on account of non-payment of balance dowry amount, the deceased suffered torture and assault till her death. Though, answers to questions under Section 313, Cr.P.C. cannot be strictly construed as evidence, however, we want to remind the learned counsel for the appellants that appellant no.1 while answering first two questions has admitted that they had demanded Rs.14,000/- and the said dowry amount was paid on the date of marriage. All these would show that there exists enough proof with regard to demand of balance amount of dowry and on account of non-payment of same the deceased was subjected to torture. In such background, it cannot be accepted that the appellants have no motive to commit the crime.

11. The last submission of the learned counsel for the appellants was that with regard to death of the deceased the appellants could not be fastened with liabilities under Sections 302/34, IPC and at best the prosecution could be said to have made out a case under Sections 306/34, IPC. In this context, he relied on a decision of the Hon'ble Supreme Court of

India reported in **AIR 1984 SC 1622** (**Sharad Biridhichand Sarda** v. **State of Maharashtra**). We accept the above contention of the learned counsel for the appellants for the following reasons. In this context, we may make it clear that we are not satisfied that the chain of circumstances, as proved provide a complete chain in order to hold the appellants guilt under Sections 302/34, IPC. It may be seen that the doctor (P.W.12) in his evidence has made it clear that though all the injuries on the deceased were ante mortem in nature, but those were not fatal to cause death in ordinary course of nature. He, however, made it clear that the cause of death was due to poisoning. Now the question remains as to whether there is enough evidence on record to show that it was the appellants and appellants alone who administered poison to the deceased. The learned trial court has come to a conclusion that as the appellants did not rush the deceased to a nearby doctor and since one of them was found moving towards the river at the dead of night, and as the appellant no.1 had given false information that the deceased died of scorpio bite, since there has been a failure of the plea of alibi taken by appellant no.2, all these things form additional links in chain of circumstances to prove the charge of murder against the appellants notwithstanding the fact that there existed no injury on the face of the deceased, pointing towards forcible administration of poison. According to the learned trial court at that point of time the deceased must have been completely subdued and exhausted by the merciless beating before administration of poison and in such circumstances there cannot be much of resistance from the side of the deceased. To us such conclusion of the learned trial court is based on conjectures and surmises. In this context we cannot ignore the dictum that the graver the offence higher should be the standard of proof. In this context, let us examine the citation relied by the learned counsel for the appellants on the case law relating to death on account of poisoning. In the case of (**Sharad Biridhichand Sarda** v. **State of Maharashtra**) reported in **AIR 1984 SC 1622** it has been authoritatively laid down that four important circumstances are required to be proved in order to convict a person under Section 302, IPC for causing death by poisoning. These are (1) there has to be a clear motive for an accused to administer poison to the deceased; (2) that the deceased should have died on account of poison said to have been administered; (3) that the accused must have had the poison in his possession; and (4) that accused had an opportunity to administer the poison to the deceased. It was further made clear in the said case that merely because the accused had the opportunity to administer poison and the same was found in the body of the deceased, it can not be presumed that the accused was in possession of poison. Possession of the poison by accused has to be proved either by direct/circumstantial evidence. If the same is not proved, on that ground

alone prosecution must fail. In the present case, there exists no legal proof to the effect that the appellants possessed the poison in question, which resulted in the death of the deceased. Thus one of the most essential ingredients/requirements for proving, causing of death by the appellants by administering poison is missing. Further prosecution has not led any evidence to completely exclude the possibility of deceased having committed suicide by consuming poison on account of continuous torture. This part has been completely lost sight of by the learned trial court. It appears that the learned court below while ignoring the fundamentals, has been unnecessarily swayed by additional links, which includes false defence. Thus, according to our considered opinion, Mr. Nayak, learned counsel for the appellants is right in contending that the appellants cannot be fastened with liability under Sections 302/34, IPC. For all these reasons conviction of the appellants under Sections 302/34, IPC and consequent sentence is set aside. However, since the appellants all throughout tortured the deceased and since the prosecution has not led evidence to completely exclude the possibility of suicide, it cannot be ruled out that the deceased committed suicide out of desperation in order to escape from such torture. This clearly establishes the factum of abatement by the appelants. Under such circumstances, we find that the appellants are guilty under Sections 306/34, IPC and accordingly, we convict them thereunder.

13. It is stated at the Bar that appellant no.1 has already undergone imprisonment for more than 9 years and appellant no.2, who is an old lady of 70 years has undergone imprisonment for more than 6 years. In such background while directing that their sentence for having been convicted under Sections 306/34, IPC would be confined to the period of incarceration already undergone by them, we impose on them a fine of Rs.14,000/- (Rupees fourteen thousand) which if realized shall be deposited in the names of two children of appellant no.1. In case of default in payment, both the appellants will undergo further imprisonment for three months.

Before closing the matter, we make it clear that we maintain the conviction of the appellants under Sections 498-A/34, IPC read with Section 4 of the D.P. Act., but no separate sentence is imposed. Accordingly, the Jail Criminal Appeal is partly allowed.

Appeal allowed in part.

2014 (I) ILR - CUT- 1070

M.M. DAS, J. & R. DASH, J.

W.P.(C) NO. 19619 OF 2010

SAILENDRA NATH MOHANTY ……...Petitioner

.*Vrs.*

UNION OF INDIA & ORS. ……..Opp. Parties

SERVICE LAW – Charges framed against the petitioner in the disciplinary proceeding and the charges framed against him in the criminal case are grounded on the same set of facts and the same set of evidence – The petitioner having been acquitted in the criminal case, the order of punishment passed in the disciplinary proceeding against him cannot be sustained.

In this case, the sole allegation against the petitioner was misappropriation of money and the charges in the criminal case was also the same – The criminal charges against the petitioner having failed, it cannot be concluded in the disciplinary proceeding that he has committed misappropriation – Held, the impugned judgment passed by the Tribunal is quashed – Opp. parties are directed to reinstate the petitioner in his previous post – The period for which the petitioner remained out of service will be treated as to be in service - With regard to arrear salary, he will be entitled to 30% of the salary for the said period.

Case Law Referred to:-

1. AIR 2006 SC 2129 : G.M.Tank -V- State of Gujarat & Anr.
2. AIR 2013 SC 14 : Dy.Inspector General of Police & Anr. -V- S.Samuthiram
3. (2008) 15 SCC 657 : State Bank of Hyderabad -V- P.Kata Rao
4. (1993) 3 SCC 679 : Cap.M Paul Anthony -V- Bharat Gold Mines Ltd. & Anr.

For Petitioner : Mr. Ganeswar Rath, Sr. Advocate

For Opp. Parties : Mr. S.D.Das, Asst. Solicitor General

Date of Order: 29.01.2014

ORDER

Heard Mr. Ganeswar Rath, learned senior counsel for the petitioner and Mr. S.D. Das, learned Assistant Solicitor General for the opp. parties.

The petitioner has challenged the order dated 19.10.2010 of the learned Central Administrative Tribunal passed in O.A. No.207 of 2008, by which the said Tribunal dismissed the Original Application filed by the petitioner.

The petitioner assailed the disciplinary proceeding initiated against him, the report of the I.O. dated 05.07.2009, the order of punishment dated 26.10.2007 and the order of the appellate authority dated 1/5.02.2008, before the learned Tribunal, seeking quashing of the said orders and the said proceeding as well as claiming consequential financial benefits.

Mr. Rath, learned senior counsel for the petitioner urges that the petitioner for the self-same charges was proceeded in a criminal case, in which he was acquitted. On the same set of charges and evidence, the disciplinary authority imposed the punishment of compulsory retirement. According to Mr. Rath, the petitioner having been acquitted of the charges framed against him in the criminal case, he could not have been punished in the disciplinary proceeding.

It is a fact that the order of acquittal in a criminal proceeding was passed subsequent to the order of punishment in the disciplinary proceeding. Mr. Rath places heavy reliance on the decision in the case of G.M. Tank v. State of Gujarat and another, A.I.R. 2006 sc 2129 in support of his contention that the Hon'ble Supreme Court in the said case has categorically laid down that where the departmental proceeding and the criminal case are based on identical and similar set of facts and the charges in a departmental case as well as the charge before the criminal court are one and the same and both dependent on the same set of evidence, it was not just and fair and rather oppressive to allow the findings recorded in the departmental proceeding to stand. Mr. Rath also relies upon a plethora of other judgments of the Hon'ble Supreme Court in support of his aforesaid contention.

Mr. S.D. Das, learned Assistant Solicitor General, on the other hand, submits that in the case of **Deputy Inspector General of Police and another v. S. Samuthiram**, A.I.R. 2013 SC 14, the Hon'ble Supreme Court taking note of all its earlier judgments, has laid down that mere acquittal of an employee by a criminal court has no impact on the disciplinary proceeding initiated by the department.

Before going to the aforesaid case laws, it would be apt to hold that law has been well settled that the jurisdiction of the superior courts in interfering with the finding of fact arrived at by the Enquiring Officer is limited and that the High Court would also ordinarily not interfere with the quantum of punishment and there can be no doubt or dispute that only because the

delinquent employee, who was also facing a criminal charge and is acquitted, the same, by itself, would not debar the disciplinary authority in initiating afresh departmental proceeding and/or where the departmental proceeding had already been initiated to continue the same. (See **State Bank of Hyderbad v. P. Kata Rao**) (2008) 15 SCC 657. In the aforesaid case, the Hon'ble Supreme Court also held that the legal principles enunciated to the effect that on the same set of facts, the delinquent shall not be proceeded in a disciplinary proceeding and in a criminal case simultaneously, has, however, been deviated from. The dicta of the Hon'ble Supreme Court in the case of **Cap. M. Paul Anthony V. Bharat Gold Mines Ltd. and another** (1999) 3 SCC 679, however, remains unshaken, although the applicability thereof had been found to be dependent on the facts situation obtaining in each case

We, however, find that in the case of Deputy Inspector General of Police and another (supra), that the Hon'ble Supreme Court was considering the case with regard to the proceedings, both departmental and criminal, initiated against the respondent therein, who was an employee of the Armed Reserve and finding that the said respondent belongs to a discipline force, considering the charges levelled against him in the disciplinary proceeding with regard to eve-teasing, though he was acquitted from the criminal case, the Hon'ble Supreme Court allowed the appeal at the instance of the employer by setting aside the judgment of the High Court. In the case of G.M. Tank (supra), the Hon'ble Supreme Court found that reading of both the charges in the departmental proceeding as well as the criminal case clearly showed that both the charges are grounded upon the same set of facts and evidence and also pertains to the known source of income of the accused and the presumption raised that the said amount was obtained by him by illegal and corrupt means. In such back ground, the Hon'ble Supreme Court analyzing the enquiry report and the relevant provisions of the service rules as well as scanning the earlier judgments of the Hon'ble Supreme Court, finding the facts and the evidence in the departmental proceeding as well as criminal proceeding, were the same without there being any iota or difference, came to the conclusion that the appellant G.M. Tank should succeed and, accordingly, quashed the punishment imposed in the disciplinary proceeding against him.

Applying the ratio of the aforesaid decision to the facts of the present case, we are of the view that in the instant case also, the charges framed against the petitioner in the disciplinary proceeding and the charges framed against him in the criminal case are grounded on the same set of facts and the same set of evidence. The petitioner having been acquitted in the criminal case, the order of punishment passed in the disciplinary

proceeding against him cannot be sustained. No doubt, by the date, the order of acquittal was passed in favour of the petitioner in the criminal case, the disciplinary proceeding was already complete. But, however, this Court finding that allowing the petitioner to be punished in the disciplinary proceeding, even though on the same set of charges, same set of evidence, the criminal court has acquitted him, would be unjust. It may be mentioned here that the sole allegation against the petitioner was misappropriation of money and the charges in the criminal case was also the same. The criminal charges against the petitioner having failed, it cannot be concluded in the disciplinary proceeding that he has committed misappropriation.

In the result, therefore, this Court finds that the impugned judgment of the learned Tribunal is unsustainable and the same is accordingly quashed. The opposite parties are directed to reinstate the petitioner in his previous post. However, the period for which the petitioner already remained out of service will be treated as to be service period and not a break in service. With regard to arrear salary, the petitioner, having not worked for the said period, will be entitled to 30% of the salary, which he would have received, had he worked during the said period. Such arrear amount shall be paid to him by the opposite parties within a period six months on being reinstated. The writ application is accordingly allowed. Writ petition allowed.

Writ petition allowed.

2014 (I) ILR - CUT- 1073

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

O.J.C. NO. 5363 OF 1995

HALADHAR DASH ……..Petitioner

.Vrs.

HON'BLE THE ACTING CHIEF JUSTICE OF THE HIGH COURT OF ORISSA & ORS. ……..Opp. Parties

SERVICE LAW – Promotion of OP. 4 challenged – Order Dt. 27.4.1988 passed by the then Chief Justice adopting relevant

provisions of O.R.V. (SC & ST) Act 1975 and O.R.V. (SC & ST) Rules 1976 in respect to promotion of the members of the High Court Staff belonging to Scheduled Castes and Scheduled Tribes against the reservation quota - Rule 7 of the Orissa High Court (Conditions of Service of Staff) Rules 1963 – O.P. 4 being a member of the Scheduled Caste was eligible for being Considered for promotion to the post of Superindent level-II after being considered against the Roster Point No. 22 which was meant for Scheduled Caste Candidates – Held, petitioner does not possess any lawful ground to challenge the promotion made to O.P. 4 (Para 9)

For Petitioner : In person
For Opp. Parties 1 to 3 : Addl. Standing Counsel
For Opp. Parties No.4 : M/s. Bijan Ray (Sr. Advocate), C.Choudhury, B.Mohanty, A.K.Moahnty, S.K.Dwivedy, D.Chhotray,Subhashis Patnaik & R.K.Biswal

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Date of Hearing : 23.04.2014
Date of Judgment : 13. 05. 2014

JUDGMENT

I. MAHANTY, J.

The present writ application has been filed by the petitioner-Haladhar Dash seeking to challenge the promotion given to Opposite Party No.4, namely, Gajendra Behera to the post of Superintendent Level-II from the post of Senior Assistant vide Notification dated 25.7.1995 under Annexure-2.

2. The brief facts of the case are that while the petitioner joined in the service as L.D.Assistant in the establishment of Orissa High Court on 26.10.1970 and was promoted to the post of Grade-II Assistant in the year 1976, Sri Gajendra Behera (Opposite Party No.4) joined in the establishment of Orissa High Court as L.D.Assistant on 4.5.1979. Thereafter, the petitioner was promoted to the post of Grade-I Assistant and Opposite Party No.4 was promoted to the post of Grade-II Assistant. However in the year 1995, Gajendra Behera was promoted to the post of Superintendent Level-II by superseding 43 persons in the senior list.

3. The petitioner contended that the provisions of Orissa Reservation of Vacancies in Posts and Services (For Scheduled Caste and Scheduled Tribes) Act, 1975 (hereinafter referred to as 'the ORV Act, 1975') are not applicable to the employees of Orissa High Court and Hon'ble the then Chief Justice has not framed the relevant rules in exercise of powers conferred under Article 229(2) of the Constitution of India for making the provision for reservation in the case of promotion. Consequently, the promotion of Opposite Party No.4 was in clear violation of Rule-6 of the Orissa High Court (Conditions of Service of Staff) Rules, 1963 (herein after referred to as the 'Rules, 1963') since admittedly, the petitioner was senior to Opposite Party No.4.

4. The counter affidavit came to be filed by the Special Officer (Special Cell) on behalf of the Registry of the Orissa High Court (Opposite Parties 2 and 3) wherein reliance has been placed to an order dated 27.4.1988 passed by Hon'ble the then Chief Justice under Annexure-A to the counter affidavit regarding adoption of relevant provisions of the Orissa Reservation of vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 as well as the rules framed thereunder with respect to promotion of the members of the High Court staff belonging to Scheduled Castes and Scheduled Tribes against the reservation quota.

5. Accordingly, it is stated on behalf of the Registry of the Court that on the adoption of the ORV Act, 1975 and ORV Rules, 1976 and by virtue of the order of Hon'ble the then Chief Justice dated 27.04.1988, five posts in the cadre of the Superintendent Level-II were required to be filled up on account of the creation of four new posts and promotion of one Superintendent to the rank of Assistant Registrar (Establishment). These posts in the cadre of the Superintendent Level-II have been filled up by way of promotion from amongst the eligible candidates of Senior Assistant, in consonance with Rule 6(2) of the Rules, 1963 read with the provisions of the ORV Act, 1975 and the ORV (SC and ST) Rules, 1976. It is further stated that after adoption of reservation in promotion, 21 roster points had been earlier filled up in the cadre of Superintendent Level-II and out of the 5 vacancies in the cadre of Superintendent Level-II, fell on the roster point Nos.22 to 26 which were meant for Scheduled Caste and Scheduled Tribe candidates respectively in view of the ORV (Amendment) Rules, 1994.

It is also stated in the counter affidavit that at the time of promotion of Opposite Party No.4, while the petitioner was at Serial No.7 of the senior list, Opposite Party No.4 was at Serial No.44 and both were eligible for consideration for promotion to the post of Superintendent Level-II. Since

Opposite Party No.4 belongs to Scheduled Caste community, his case for promotion to the post of Superintendent Level-II was considered against Roster Point No.22 which was meant for Scheduled Caste candidate in view of the letter No.35692 dated 4.12.92 of the Tribal Welfare Department.

6. It is the undisputed fact that in pursuance of powers vested under Clause (1) of Article 229 of the Constitution of India, Hon'ble the then Chief Justice of Orissa made the rules, known as "The Orissa High Court (Appointment of Staff) Rules, 1963" in order to regulate the method of appointment of officers and servants of the Court.

7. The petitioner has sought to place reliance on Rule-6 of the Rules, 1963 in order to state that the promotions had to be made only on the basis of merit with due regard to seniority, which is as follows:

> "6. (1) Promotions to the various posts in the High Court staff shall be made by the respective appointing authorities.
>
> (2) Promotions shall be made on the basis of merit with due regard to seniority.
>
> (3) Vacancies, permanent or casual, in the posts of Stamp Reporter and Oath Commissioner and in categories 1 and 2 in Class III service shall ordinarily be filled up by promotion.
>
> (4) A vacancy in the post of the Additional Assistant Registrar may be filled either by promotion of a competent member of the staff with adequate service, or, if in the opinion of the Chief Justice there is no such competent person available for filling up the vacancy, by deputation of a Munsif for a period not exceeding three years at a time.
>
> (5) A vacancy in the post of the Joint Registrar may be filled either by promotion of a competent member of the staff who is a Graduate in Law or, if in the opinion of the Chief Justice there is no such competent person available for filling up the vacancy, by deputation of an officer of the Orissa Superior Judicial Service (Junior Branch). The period of deputation shall ordinarily be for three years but can be extended at the discretion of the Chief Justice."

He further contended that the reliance placed by Opposite Parties 2 and 3 in their counter affidavit on the orders passed by Hon'ble the then Chief Justice on 27.4.1988, is wholly without jurisdiction since no consequent amendment to the Rules, 1963 has been carried out. For

better appreciation, the orders passed by Hon'ble the then Chief Justice dated 27.4.1988 is quoted as hereunder:

> "In view of the office notes, let the relevant provisions of the Orissa Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 as well as the rules framed thereunder with respect to promotion of the members of the High Court staff belonging to scheduled castes and scheduled tribes against reservation quota be adopted.
>
> Office to put up further notes as early as possible as to whether there is any existing vacancy which should be filled up by promotion of any member of the High Court staff belonging to scheduled caste/scheduled tribe against the reservation quota on account of adoption of the Act and the rules framed thereunder.
>
> Sd/-
> ……..
> Chief Justice.
> 27- 4- 88"

8. On consideration of the submissions made hereinabove, we are of the considered view that the aforesaid contentions of the petitioner are to be rejected outright since Rule-7 of the Rules, 1963 has mandated that "no provision has been made in the said rules, the rules and orders for the time being in force and applicable to servants holding corresponding posts in the State Government shall regulate the conditions of service of court servants subject to such modifications, variations or exceptions, if any, in the said rules and orders, as the Hon'ble Chief Justice may, from time to time, specify". Rule-7 of the aforesaid Rules is quoted herein below:

> "7. (1) In respect of such matters regarding the conditions of service of court servants for which no provision or insufficient provision has been made in these rules, the rules and orders for the time being in force and applicable to servants holding corresponding posts in the State Government shall regulate the conditions of service of court servants subject to such modifications, variations or exceptions, if any, in the said rules and orders, as the Chief Justice may, from time to time, specify:
>
> Provided that no order containing modifications, variations or exceptions in rules relating to salaries, allowances, leave or

pensions, shall be made by the Chief Justice except with the approval of the Governor:

Provided further that the powers exercisable under the rules and orders of the State Government by the Governor or by any authority subordinate to the Governor shall be exercisable by the Chief Justice or by such person as he may, by general or special order, direct."

9. In view of the clear and categorical provision as noted hereinabove, we are of the considered view that the order of Hon'ble the then Chief Justice dated 27.4.1988 as extracted hereinabove read with Rule-7 of the Rules, 1963 clearly making the ORV Act, 1975 applicable to all employees of the Orissa High Court. There can be no dispute that the Rules, 1963 did not provide for any reservation and consequently, due to operation of Rule-7 of the Rules, 1963, the ORV Act, 1975 *if so facto* would apply and the order of Hon'ble the then Chief Justice dated 27.4.1988 did not direct any modifications, variations or exceptions to the applicability of the said ORV Rules, 1976 to the employees of Orissa High Court. From the counter affidavit of the Special Officer (Special Cell) on behalf of Opposite Parties 2 & 3 and in particular, the averments made in Para-7 thereof, it is clear that Opposite Party No.4-Gajendra Behera being a member of the Scheduled Caste, was eligible for being considered for promotion to the post of Superintendent Level-II after being admittedly considered against the Roster Point No.22 which was meant for Scheduled Caste candidates. We afraid that no lawful ground exists to challenge the promotion made to Sri Gajendra Behera (Opposite Party No.4) under Annexure-2 to the writ application.

10. Accordingly, the writ petition stands dismissed but, in the circumstances, without any cost.

Writ petition dismissed.

2014 (I) ILR - CUT- 1079

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

W.P.(C) NO. 18070 OF 2009

PIUSA KANTA PATRA ……..Petitioner

.Vrs.

STATE OF ODISHA & ORS. ……Opp. Parties

SERVICE LAW – Petitioner worked in the promotional post till the order of promotion was cancelled – There was no allegation or complaint regarding his performance in the promotional post – Held, impugned order for recovery of the excess amount paid to the petitioner in the promotional post is quashed. (Paras 10)

For Petitioner : M/s. N.Lenka, M.Mohapatra, M.K.Mohanta, L.Sahoo & N.Behera

For Opp. Partyies : Addl.Government Advocate

Date of Judgment : 11.03.2014

JUDGMENT

B.N. MAHAPATRA, J.

This writ petition has been filed with a prayer for quashing the order No.3972/PH-OA-06/09 dated 20.10.2009 (Annexure-10) by which opposite party No.2-Director of Health Services, Orissa cancelled the promotional order No.6865 dated 06.12.2008 issued in favour of the petitioner and further directed recovery of excess payment, if any, made by way of enhanced salary in trained post as well as order dated 12.11.2009 (Annexure-14) passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.2714(C)/09 declining to interfere with the order passed under Annexure-10.

2. Petitioner's case in a nut-shell is that on 01.01.1983, initially the petitioner was appointed against the post of Field Worker in the office of the CDMO, Balasore. In the year 1985, he was directed to undergo MPHW (male) training for a period of eight weeks in two phases. After training his scale of pay was revised from time to time under ORSP Rules, 1989, 1996 and 2008. In 2007, the petitioner was assigned duties to collect the Blood

Samples along with other MPHW (M). On 06.12.2008, the petitioner joined in the promotional post with an undertaking to submit the MPHW (M) Training Certificate within one month. In 2009, he approached opposite party No.4 to provide the Training Certificate, but opposite party no. 4 expressed his inability to provide the same. Thereafter, the petitioner approached the learned Tribunal in O.A. No.680(C) of 2009 praying for a direction to the concerned authority to issue the training certificate. By order dated 02.04.2009, the said O.A. was disposed of with a direction to opposite party No.2 to verify and if the petitioner had undergone training, then relevant certificate be issued within a period of one month. Opposite party No.2 instead of complying with the aforesaid order of the Tribunal, by order dated 20.10.2009, cancelled the promotion order dated 06.12.2008 with a direction for recovery of excess payment, if any, made to the petitioner in the promotional post in 48 equal monthly instalments. Challenging the said order, the petitioner approached the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 2714 (C) of 2009, which was dismissed by order dated 12.11.2009. Hence, the present writ petition.

3. Mr. N. Lenka, learned counsel appearing for the petitioner submitted that in the service book of the petitioner, it was clearly mentioned that on 23.12.2008 (U/A 11) Dr. B.K. Das, the M.O. I/c, CHC, Jaleswarpur issued a certificate stating therein that the petitioner be treated as trained MPHW (male) as per Fifth Schedule of ORSP Rules, 1985, which was duly signed by the CDMO, Balasore. The petitioner had undergone the training of MPHW (male) in the year 1985. In 2008, gradation list of MPHW (M) was published, where it has been mentioned that the petitioner had undergone the said training. On 20.12.2008, the petitioner was posted at CHC, Hatigarh as MPHS (M) in the district of Balasore. Concluding his argument Mr. Lenka submitted to allow the writ petition.

4. Learned Additional Government Advocate for the State-opposite parties submitted that the action taken by opposite party Nos.1 and 2 are justified and in consonance with the provisions of law. The petitioner has never been selected to undergo MPHW training for a period of eight weeks in two phases in the year 1985. There is no sufficient documentary proof in support of his training. In the pay fixation statement, a line has been incorporated, i.e., to be designated as trained MPHW (M), which does not mean that the applicant has undergone MPHW (M) training for a period of eight weeks and is a trained MPHW (M). If the applicant could have undergone such training, the same would have been specifically mentioned in his Service Book that he is a trained MPHW (M) like others, who have undergone such training. Therefore, the order issued by the M.O., I/c, CHC,

Jaleswarpur is wrong and unauthorized. The duties of MPHW (M) are to collect blood samples from the persons suffering from fevers and to distribute the medicines to the patients, which the applicant cannot do without training. Pursuant to the direction of the learned Tribunal vide order dated 02.04.2009 passed in O.A. No.680(C)/2009, enquiry was conducted and it was found that the petitioner had not undergone eight weeks training in MPHW(M) course. The petitioner was given a last chance before cancellation of his promotion order asking him to submit MPHW (M) training certificate within 15 days, which he failed to produce. Therefore, the promotion order of the petitioner was cancelled. The gradation list of MPHW (M) in which the name of the petitioner appears at Sl.No.417 was prepared by the CDMO, Balasore which was a provisional one and the name of the applicant was mentioned as "Ex-PMW-trained" basing on which the promotion of the petitioner was considered to the post of MPHS(M) subject to production of relevant certificate/document before the concerned authority. Due to non-production of any such authenticated training certificate/document, promotion given to the petitioner was cancelled.

5. On the rival contentions of the parties, the only question arises for consideration by this Court is whether the Tribunal is justified in not interfering with the impugned order of cancellation of petitioner's promotion and directing for recovery of excess payment already made by way of enhanced salary in the trained post by upholding the order dated 20.10.2009 under Annexure-10 of the Director of Health Services, Orissa.

6. It is not in dispute that the petitioner despite availing several opportunities has failed to produce any training certificate/document before the concerned authority. Moreover, pursuant to direction of the Tribunal given in O.A. No.680(C)/2009 on 02.04.2009, the CDMO, Balasore was requested vide Directorate letter No.1905 dated 15.05.2009 to furnish original Service Book of the petitioner for verification of the authenticity of the entry made with regard to completion of such training by him. Simultaneously, the M.O. I/c, CHC, Jaleswarpur and Hatigarh were also requested to verify the authenticity of the training certificate. On verification of the record, it was found that the petitioner is untrained and has not completed MPHW (M) course. On receipt of the original Service Book of the applicant from CDMO, Balasore, the authenticity of the training completion certificate was verified and it was found that no such entry has been made showing that the applicant has undergone/completed eight weeks MPHW (M) training. Besides, the M.O. I/c, CHC, Jaleswarpur vide his letter No.386 dated 14.05.2009 stated that the applicant has not availed MPHW (M) training as it was found on being verified from his service book and no such

documents with regard to his training is available. Before us, the petitioner also could not be able to produce any document to show that he has been selected to undergo MPHW training for a period of eight weeks in two phases at any point of time. He also could not produce any document/certificate in support of his claim that he had undergone MPHW (M) training for a period of eight weeks, except the certificate issued by Dr. Bijay Kentan Dash, M.O. I/c, CHC, Balasore to the effect that the petitioner be treated as trained MPHW (M).

7. In view of the above, we are of the considered view that the Tribunal has rightly not interfered with the impugned order passed under Annexure-10 cancelling the promotion order of the petitioner, which was based on wrong certificate.

8. Now, the question arises for consideration is whether the Tribunal is justified in upholding the direction of the opposite party no.2 to recover excess payment made to the petitioner by way of enhanced salary in the trained post.

9. Vide order dated 02.11.2007 of the M.O. I/c, CHC, Balasore (Annexure-2), the petitioner was directed to collect blood samples from fever cases and distribute medicine to them. Under Annexure-3, he has been promoted to the post of MPHS(M) for a period of one year in the pay scale of Rs.4000-100-6000/- as per the recommendation of the DPC without prejudice to the claim of others in the cadres w.e.f. the date of their joining in the promotional post. In the service book, it was mentioned that on 23.12.2008 Dr. Bijay Ketan Dash, M.O. I/c, CHC, Jaleswarpur issued a certificate stating therein that the petitioner be treated as trained MPHW (M), which was duly signed by the concerned CDMO. Now at a belated stage a stand is taken by opposite parties that the petitioner has not undergone MPHW (M) training for a period of eight weeks. This shows that there is lot of confusion because of negligent and carelessness of the officers of the concerned Department.

It is not denied by the opposite parties that the petitioner had been working in the promotional post till the order of promotion was cancelled and there was no llegation/complaint regarding his performance in the promotional post.

10. Considering the facts and circumstances of the case, while upholding the impugned order of cancellation of the promotion of the petitioner, we quash the order for recovery of the excess amount paid to the petitioner in the promotional post.

11. In view of the above, order No.3972 dated 20.10.2009 (Annexure-10) passed by opposite party No.2-Director of Health Services, Orissa and order dated 12.11.2009 (Annexure-14) passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.2714(C)/09 are partly modified as indicated above.

12. In the result, the writ petition is allowed in part.

Writ petition allowed in part.

2014 (I) ILR - CUT- 1083

I. MAHANTY, J. & S. PUJAHARI, J.

W.P.(C) NO. 1562 OF 2008

SUVENDU KUMAR MOHANTA ……..Petitioner.

.Vrs.

UNION OF INDIA & ORS. ……..Opp. Parties

CONSTITUTION OF INDIA, 1950 – ART.311(2)

Disciplinary Proceeding – Petitioner, a constable in C.R.P.F. – Unauthorised absence from duty for about 1092 days – Punishment of removal from service imposed – Action challenged in writ petition – As per section 10 of the CRPF Act, the Act committed by the petitioner is not heinous and u/s 11 of the said Act disciplinary authority could have awarded other punishment – Punishment imposed is shockingly disproportionate in view of the nature of delinquency and this court feels it proper to remit the matter to the Disciplinary Authority to reconsider the punishment imposed – Held, the impugned order removing the petitioner from service is quashed – Direction issued to the Opp.Parties to allow the petitioner to join the post and pass necessary punishment except the punishment of removal.

(Paras 11 & 12)

Case Law Referred to:-

1. AIR 1964 SC 1419 : Thansingh Nathmal -V- Superintendent of Taxes
2. AIR 1970 SC 645 : Champalal -V- CIT
3. AIR 1976 SC 2446 : Custodji -V- Sarafaraz Ali
4. AIR 1984 SC 1512 : Jagadeesan -V- A.N.J.A. College
5. 1987 (55) F.L.R. 831 : Dalbir Singh -V- Director General, CRPF, New Delhi
6. 1998(I) OLR 494 : Bhajaman Pattanaik -V- Union of India & Ors.

For Petitioner : M/s. A.C.Mohanty, G.N.Rout, B.Pradhan & S.Bhagat

For Opp. Parties: Mr. S.K.Patra, Central Govt. Advocate

Date of hearing : 16. 04. 2014
Date of judgment : 21. 04.2014

JUDGMENT

S. PUJAHARI,J.

The petitioner in this writ petition challenges the order dated 18.3.2006 passed by opposite party no.4 at Annexure-9, imposing the punishment of removal from service in a disciplinary proceeding initiated against him vide Annexure-5 and prayed for quashing the same and also direct the opposite parties to reinstate him in service with back wages .

2. Facts relevant for disposal of the writ petition are as follows:-

The petitioner was enrolled as a constable in 26 Battalion, Central Reserve Police Force (hereinafter referred to as 'CRPF'), Keirengei, Imphal, Manipur on 4.4.1991. While continuing in the service, the petitioner applied for 60 days Earned Leave and was allowed Earned Leave from 17.11.2001 to 15.01.2002. On expiry of the leave, petitioner did not report on his duty and sought for extension of the leave telegraphically on the ground of self illness on 2.2.2002. Thereafter, as the mother of the petitioner died on 18.3.2002, the petitioner sent a resignation letter on the ground of domestic problem and self illness which was not acted upon. On 11.11.2004 petitioner made a representation to allow him to join in his duty as in the meanwhile he became physically fit and had financial constraint. The authority pursuant to such representation of the petitioner allowed him to join on his duty w.e.f. 12.01.2005 in 26 Battalion, CRPF at Jammu (J&K). While he was continuing in such duty, a disciplinary proceeding was initiated against him on

16.09.2005 by opposite party no. 4 on the charges of unauthorized absence from the duty from 16.01.2002 to 11.01.2005 which for about 1092 days. The petitioner participated in the said departmental proceeding and took the defence that the absence from the duty was due to self illness and death of petitioner's mother. In the conclusion of the departmental proceeding, punishment of removal from service was imposed on the petitioner vide the impugned order at Annexure-9, which the petitioner challenges in this writ petition, inter alia, on the ground that the finding in the departmental proceeding is an outcome of non-application of mind on the part of the Enquiry Officer and also violative of principle of natural justice. Besides the same the petitioner has also challenged the punishment imposed by the Disciplinary Authority to be disproportionate.

3. The opposite parties in their counter to the averments made in the writ petition denied the fact that action taken against the writ petitioner suffers from the vice of violation of the principles of natural justice, an outcome of non-application of mind on the part of the Enquiry Officer and the punishment imposed by the Disciplinary Authority to be disproportionate, inasmuch as the petitioner was given due chance of hearing and after going through the material on record, the Enquiry Officer found him guilty of the charges by a reasoned order, which was accepted by the Disciplinary Authority, so also the misconduct being serious, as the petitioner was a member of the discipline force, punishment of removal of service can never be deemed as disproportionate. Hence, the writ petition is devoid of merit. Furthermore it has also been averred that a speedy and efficacious remedy being available against the order of the Disciplinary Authority, inasmuch as the Rules framed under Central Reserve Police Force Act (fort short "CRPF Act") provides for an appeal against such order at the instance of the petitioner, the writ petition is not maintainable.

4. During the course of hearing, it has been contended by the learned counsel for the petitioner that it is well settled in law that availability of an alternative is no bar to approach this Court under Article 226 of the Constitution of India and regard being had to the fact that in spite of availability of the same, this Court having entertained the prayer of the petitioner, the challenge to the maintainability of the writ petition on the said ground at this stage, is without any substance. However, during the course of hearing, the counsel for the petitioner has not challenged the finding of the Enquiry Officer on the misconduct which was accepted by the Disciplinary Authority. It has only been submitted that for the delinquency/misconduct, punishment imposed to be shockingly disproportionate and, as such, liable to be quashed and substituted by any other punishment.

5. In response to the same, it is submitted by the learned counsel for the opposite parties that it is settled in law that availability of an alternative remedy does not preclude a party to approach this Court under Article 226 of the Constitution of India for redressal of his grievance, but considering the fact that the remedy available being speedy and efficacious, this Court should be loathed in interfering in this matter in exercise of power under Article 226 of the Constitution of India. Furthermore, it is also submitted by him that otherwise also the punishment imposed being not shockingly disproportionate in the facts and circumstances of the case, inasmuch as the petitioner remained absent unauthorizedly for about 1092 days though a member of the discipline force, the same is not subject to interference of this Court within the scope available.

6. The order passed against the petitioner removing him from service is an appeallable one under Rule 28 of the Central Reserve Police Force Rules, 1955. Therefore, a speedy and efficacious remedy is available against the petitioner for redressal of his grievance. It has since been well settled in law that when speedy and efficacious remedy is available, a writ petition though in strict sense cannot be said to be not maintainable, but the Court should be loathed in entertaining the prayer in a writ petition. In this regard reliance can be placed on a decision of the Hon'ble Apex Court in the case of **Thansingh Nathmal v. Superintendent of Taxes**, AIR 1964 SC 1419, wherein the Hon'ble Apex Court at para-7 have been pleased to hold as follows:-

> "The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restriction…..But the exercise of the jurisdiction is discretionary; it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain well imposed limitation. Resort to that jurisdiction is not intended as an alternative remedy of relief which may be obtained in a suit or other mode prescribed by the statute. Ordinarily, the court will not entertain a petition for writ under Article 226 where the petitioner has alternative remedy, which without being unduly onerous, provides an equally efficacious remedy…The High Court does not therefore act as a court of appeal against the decision of a court or tribunal to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal or even itself another jurisdiction for obtaining redress in the matter provided by a

statute, the High Court normally will not permit by entertaining under Article 226 of the Constitution the machinery created by the statute to be bypassed and leave the party applying to it to seek resort to that machinery so set up."

7. In a case of **Champalal v. CIT**, AIR 1970 SC 645, the Hon'ble Apex Court have held that if some body approached the High Court under Article 226 without availing himself the alternative remedy, he must make out a strong case or there must be good grounds to invoke the extraordinary remedy. In the case of **Manek Custodji v. Sarafaraz Ali**, AIR 1976 SC 2446, the Hon'ble Apex Court strongly disapproved the approach made by a party in a writ jurisdiction to the High Court under Article 226, where he could have otherwise approached the High Court in some other capacity. In the case of **Jagadeesan v. A.N.J.A. College**, AIR 1984 SC 1512, the approach under Article 226 was not approved where the incumbent had a right to prefer appeal against the order of termination of service under the relevant College Act. Therefore, the normal rule is that High Court would not interfere in a matter in exercise of its writ jurisdiction, if a speedy and efficacious remedy is available for redressal of the said grievance, though has jurisdiction to do so. But, the aforesaid rule laid down by the Hon'ble Apex Court is also subject to certain exception. In the case of **Himmatlal v. State of M.P.**, AIR 1954 SC 403, the Hon'ble Apex Court held that where there is any allegation of infringement of fundamental rights, the bar alternative remedy does not apply. So also in the case of **Baburam v. Zila Parishad**, AIR 1969 SC 556, the Hon'ble Apex Court referring to its earlier decisions held that there were at least two well recognized exceptions to the doctrine of exhaustion of statutory remedies. In the first place, it is well settled that where proceedings are taken before tribunal under provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent, without a party being obliged to wait until those proceedings run their full course, as held in **Carl Still v. State of Bihar**, AIR 1961 SC 1615 and **Bengal Immunity v. State of Bihar**, AIR 1965 SC 661. In the second place, the doctrine has no application where the impugned order has been made in violation of the principles of natural justice vide **State of U.P. v. Mohd. Nooh**, AIR 1958 SC 86.

8. When the impugned order in this case is examined taking note of the aforesaid law laid down, the learned counsel for the petitioner has not brought to our notice that the order impugned fall on any of the categories nor there is material to substantiate them though pleaded that there was violation of the principle of natural justice. Therefore, we would have held

that this writ petition filed by the petitioner challenging the impugned order is not maintainable in view of the law laid down as above, inasmuch as the petitioner has a speedy and efficacious remedy. But the Hon'ble Apex Court in the case of **Hirday Narain v. ITO**, AIR 1971 SC 33 having held that when a writ petition is entertained in spite of availability of the speedy efficacious remedy and hearing on the merit was done, dismissal of the same on the ground of availability of alternative remedy was not proper, inasmuch as by the time the petition is taken up, the cause would have been barred by the law of limitation. Therefore, at this belated stage, we are unable to agree with the contention raised by the learned counsel for the opposite parties that this writ petition is not maintainable in view of the availability of speedy and efficacious remedy and as such this Court should not interfere with the impugned order in this petition under Article 226 of the Constitution, which has been filed by-passing or without exhausting the available statutory Appellate Forum.

9. The learned counsel for the petitioner in this writ petition has prayed for interference with the punishment imposed by the disciplinary authority advancing the submission that the same is disproportionate in view of the mitigating circumstances and the nature of delinquency. The learned counsel for the opposite parties, however, submitted that since this court has limited scope of interference and the punishment imposed cannot be said to be disproportionate much less shockingly disproportionate, the same warrants no interference. We are conscious of the fact that the scope of interference of this Court on the penalty imposed in a disciplinary proceeding is limited but there is scope of interference in appropriate case, if the facts and circumstances, so warrant.

10. The Hon'ble Apex Court in the case of **B.C. Chaturvedi v. Union of India and others**, AIR 1996 SC 484 has dealt with the scope of interference by the High Court in the matter of nature of punishment to be imposed in a disciplinary proceeding in the following words:-

> "A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or

> the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

In another decision reported in 1987 (55) F.L.R. 831(**Dalbir Singh v. Director General, CRPF, New Delhi**), keeping in view the exceptional facts and circumstances, the Hon'ble Apex Court had modified the punishment imposed by the departmental authority in a proceeding under the CRPF Act. Relying on the aforesaid law laid down, a Division Bench of this Court in the case of **Bhajaman Pattanaik v. Union of India and others**, 1998(I) OLR 494 have interfered with the punishment imposed even if the appellate forum is available.

11. In this case, it is revealed from the record that petitioner had proceeded on leave duly sanctioned in his favour, but did not report after the expiry of the leave and overstayed. He had prayed extension on the health ground and also one point of time decided to resign on death of his mother due to domestic problem and his ill-health. The same was not accepted. Later, due to recovery of his health and poor financial condition, he desired to join and was allowed to join. But, for his delinquency of overstay, the departmental proceeding in question was initiated. Under the CRPF Act, delinquency committed by the petitioner appears to be not a heinous offence as seen from Section-10 of the said Act. For the aforesaid delinquency, the disciplinary authority may award removal from the service. However, Section-11 of the said Act bestowed the disciplinary authority with discretion to award the other punishment in lieu of the same or in addition to the same. The delinquency, therefore, also can be visited with lesser punishment than removal and appears to be condonable one. From the facts appearing the petitioner absence appears to be due to domestic problem and ill-health and not intentional, inasmuch as at one point of time he had also decided to leave the service for the same. In the aforesaid facts and circumstances, especially the mitigating circumstances in which delinquency alleged to have been committed, the punishment of removal from service imposed appears to be shockingly disproportionate. Hence, we feel it proper to remit back the matter to the Disciplinary Authority to reconsider and re-visit the punishment imposed.

12. In the result, the order passed under Annexure-9 removing the petitioner from service is quashed. The opposite parties should now call

upon the petitioner to join at any suitable place of posting within a period of three weeks of receipt of this order and the petitioner should join the post within a period of two weeks from the date of receipt of such communication from the appropriate authorities, who shall thereafter within a period of one month pass necessary punishment except punishment of removal.

13. The writ petition allowed to the aforesaid extent. In the facts and circumstance, however, there will be no order as to costs.

Writ petition allowed.

2014 (I) ILR - CUT-1090

SANJU PANDA, J.

W.P.(C) NOS.12036 & 13067 OF 2008

THE MANAGEMENT OF DIRECTORATE OF PRINTING STATIONARY & PUBLICATION, ORISSA, CTC. .....Petitioner

.Vrs.

ALL ORISSA TECHNICAL PRINTING EMPLOYEES ASSOCIATION. ……..Opp.Party

INDUSTRIAL DISPUTES ACT,1947 - S. 25-F

Award passed by the Labour Court directing reinstatement of the workman in service without back wages – Management challenged the award – Specific stand of the management that there was no work for the establishment as the manual work which was performed by the workmen are being managed by machineries – Learned Labour Court has not taken such fact in to consideration while passing the impugned award – Since the workmen are daily wagers and compensation in lieu of reinstatement is proper for them this Court modified the impugned award directing the petitioner management to pay a sum of Rs.95,000/- to each of the 63 workmen. (Para 10)

Case laws Referred to:-

1.AIR 2011 SC 2532 : (Devinder Singh-V- Municipal Council, Sanaur)

2.2013 LLR 225 : (Asstt, Engineer, Rajasthan Dev. Corp. & Anr.-V- Gitam Singh)

For Petitioner - Addl. Standing Counsel
For Opp.Party - M/s. P.K. Das (1), S. Das, S. Mohanty, S. Sahoo & P. R. Bhuyan,
M/s. K.P. Mishra, S. Mohapatra, T.P. Tripathy & L.P. Dwivedy.

Date of Judgment : 30.04.2013

JUDGMENT

S. PANDA, J.

In W.P.(C) No.12036 of 2008, the petitioner-management challenges the award dated 14.09.2007 passed by the Presiding Officer, Labour Court, Bhubaneswar in Industrial Dispute Case No.54 of 2001 directing the petitioner to reinstate the workmen in service without any back wages.

In W.P.(C) No. 13067 of 2008, the petitioner- All Orissa Technical Printing Employees Association (in short 'the Association') prays for modification of the aforesaid order passed by the Presiding Officer, Labour Court, Bhuabaneswar in Industrial Dispute Case No.54 of 2001 with a further prayer to grant reinstatement without any back wages to 63 workmen and to grant reinstatement in service to all the 83 workmen with effect from 01.04.2001, continuity of service, full back wages and other benefits.

As legal issues involved in these writ petitions are similar, this court is taking up W.P.(C) No.12036 of 2008 as a leading case.

2. The facts s narrated in the present writ petitions are as follows:

The Management of Printing Stationary and Publication, Orissa, Cuttack (in short "the management") is a vast organization of Orissa having its main press at Cuttack and many branch presses at different locations in Orissa having about 2689 regular employees besides having sanctioned strength of 507 numbers of Helpers. The workmen of these writ petitions were under the employment of the management in different sections i.e.

Production Section, Binding Section etc. for doing the job of printing of books, manual, calendar, stationeries, diary etc. for the Govt. of Orissa. Accordingly, the workmen were under the employment of the management as N.M.R. helpers for a quite long period and they have rendered services continuously to the management ranging from at least 6 years to 12 years before termination of their services with effect from 01.04.2001. It is averred that services of 133 numbers of casual helpers were terminated, but out of them, 50 helpers were retained by virtue of an order of State Administrative Tribunal. The rest 83 casual helpers are the workmen, who raised industrial dispute and the same having failed, the present writ petition has been filed. It is averred that neither any individual notice has been sent to them before their retrenchment from service nor any pay or compensation has been paid to them while terminating their services. Similarly the management did not obtain any prior permission from the competent authorities before termination of their services, even if an industrial dispute was pending before the authorities of the Labour Department. As averred, ignoring seniority of the present workmen, juniors to them are still continuing in employment of the management. Accordingly, they have challenged the order of termination of their services by the management stating the same to be illegal, claiming their reinstatement in service with back wages.

3. It is contended that the workmen have filed written statement before the labour court stating therein that the management is a Government organization engaged in printing and supply of stationery articles to all Government offices besides repairing of type writers and duplicators of all such offices and the management concerned being not involved in any business activity and its work being only in public interest of the State of Orissa, the management is not an industry and the dispute raised by the workmen cannot be entertained under the Industrial Disputes Act, 1947 (in short the I.D. Act). The workmen were causal helpers, and were being engaged by the management from time to time on daily wage basis as and when need arose and as per availability of funds for payment of wages. They have not been assigned any specific work and none of them had rendered service to the management for 6 to 12 years continuously. The management organization is under the administrative control of the Government of Orissa and it carries out the orders of the Government and due to non-availability of fund for payment of their wages, they were disengaged from service with effect from 01.04.2001. Further Contention of the management is that the present industrial dispute before the labour Court is not maintainable in the eye of law and as such the workmen are not entitled to the benefit of reinstatement in service much less to any benefit of back wages and that the award dated 14.09.2007 passed by the Labour Court is liable to be set aside. As claimed by the workmen, the management denies that 83 helpers

are employees of Orissa Government Press and that they were engaged by the management for doing some manual work of casual nature at the time of need subject to availability of funds in wage head and that there was no specific work for any specific workman. Therefore, it can be presumed that they have no work for 6 to 12 years continuously. It is further averred that merely because a temporary employee or a causal employee or a casual wage worker is continued to work for a long time beyond the term of his appointment, he would not be entitled to be absorbed in a regular service or made permanent. Merely on the strength of such continuance, as temporary employee cannot claim to be made permanent on the expiry of his term of appointment. Accordingly, it is prayed that the award dated 14.09.2007 passed by the Presiding Officer Labour Court Bhubaneswar in I.D. Case No.54 of 2001 is liable to be set aside.

4. On the other hand, the Association of the workmen challenges the award dated 14.09.2009 passed by the learned Presiding Officer Labour Court in the aforesaid I. D. Case where out of 83 employees involved, only 63 employees have been directed to be reinstated without any back wages. It is contended that the State Government referred the matter to the Labour Court for adjudication of the Industrial Dispute and after failure of conciliation proceeding before the Asst. Labour Officer, Cuttack, the reference was made to the Presiding Officer, Labour Court for adjudication on the following points.

> "Whether the demand of the Technical Printing Association regarding termination of services of Shri Mahendra Nayak and 82 other casual Helpers, as per the list enclosed, by the Director, Printing Stationery and Publication, Orissa, Cuttack with effect from 1st April 2001 is legal/or justified ? if not what relief they are entitled to ?"

5. The Labour Court on a threadbare discussion of the evidence adduced by both management and workmen's Association, came to a conclusion that the management organization is an industry within the meaning of Section 2 (j) of the I.D. Act, the workmen are workmen within the meaning of Section 2 (s) of the I. D. Act and it is an Industrial Dispute. Accordingly, the Tribunal held that the service of the workmen were illegally terminated and as such they are entitled to the relief of reinstatement in service without any back wages, which is under challenge.

6. Learned Additional Government Advocate contended that since new technology is adopted in the establishment i.e. Directorate of Printing Stationary and Publication Orissa, there was no work for the workers, as the

manual work, which was being done by them, are being managed by machineries and the establishment is only doing Government departmental work, being the sovereign of the State and as such, it is not an industry as defined in the Industrial Disputes Acts. He further contended that the court below should have considered the compensation in lieu of reinstatement. In support of his contention, he has cited the decision in the cases of **Devinder Singh v. Municipal Council, Sanaur, AIR 2011 SC 2532 and Asstt. Engineer, Rajasthan Dev. Corp. & Anr. V. Gitam Singh**, 2013 LLR 225, wherein the apex court has observed that the condition precedent for retrenchment compensation on termination of a workmen is, who has worked for more than 240 days.

7. Learned counsel for the workmen, however, submitted that the termination of 63 workmen out of 83 workmen, was held to be illegal and unjust and were directed to be reinstated in service without back wages, whereas the workmen have claimed reinstatement in to service to all the 83 workmen with full back wages and continuity in service.

8. Misc. Case No.17840 of 2012 arising out of W.P.(C) No.12036 of 2008 has been filed by six persons, who are the mother, widow wife and four children of the workman, namely, Ashok Kumar Swain who died on 20.06.2008, out of 63 workmen to whom the court below has directed for reinstatement into service. Since they are necessary party to the writ petition, their petition for intervention was allowed and they were impleaded as opposite parties also. Out of 63 workmen, 27 workmen also filed Misc. Case No.7633 of 2012 arising out of W.P.(C) No.12036 of 2008 for intervention, even though the association is contesting the case on their behalf and they have also engaged counsel who supported the impugned award passed by the Presiding Officer, Labour Court Bhubaneswar. It is submitted by learned counsel for the workmen that sufficient work is available for all 133 workmen including 83 workmen involved in the case. However, the management has only retained 53 numbers of workmen and some of them are juniors to the present 83 workmen and the court below rightly ignored the fact that whether the establishment is a profitable organization or not. The court below has considered that the establishment engaged the workmen, who ere rendering service as the establishment has engaged them for its work. Therefore, the establishment is an industry within the meaning of Section 2 (j) of the Industrial Disputes Act. The workmen were working as casual labourers and discharging their duties in its different sections doing printing and supply of stationery articles to all Government offices, besides repairing of type writers and duplicators of all such offices. Admittedly the workmen were being paid wages on hire for such work and as such they are coming within the meaning of the term “workmen” as per the

Industrial Disputes Act. Since the Court below on analyzing the evidence on record held that except 20 workmen, out of 83, who have rendered more than 240 days of service during the period of 12 months preceding to the date of their retrenchment with effect from 01.04.2001, the termination of the services of the workmen is illegal and unjustified and should be interfered with. It is further submitted that 20 workmen, whose applications were rejected, were also continuing in service for several years as reflected under Ext.11 series and as per the principle of law last come first go, retrenchment of those 20 workmen is illegal, as the said principle has not been followed and the juniors have been retained in service. The Finance Department passed a resolution on 04.09.2012 notified in the extraordinary gazette on 26.09.2012 wherein it was stipulated that casual/daily wage labourers engaged in different Government establishments prior to 12.04.1993 are to be given temporary status first then for absorption against regular Group 'D' vacancies. In view of the above, the finding of the court below so far as 20 workmen are concerned to be set aside and their case should be considered afresh.

9. Considering the rival submission of the parties and since the workmen are daily labourers and in view of the principle laid down by the apex court in the case of Asstt. Engineer, Rajasthan Dev. Corp (supra) that principle as/is relevant for granting relief of reinstatement when termination of workmen is held to be illegal before exercising its judicial discretion. The Labour Court has to keep in view all relevant factors, including the mode and manner of appointment, nature of employment, length of service, the ground on which the termination has been set aside and the delay in raising the industrial dispute held that there is no such principle that for an illegal termination of service, the normal rule is reinstatement with back wages and instead the Labour Court can award compensation. Further it is held that a distinction has been drawn between a daily wager and an employee holding the regular post for the purposes of consequential relief.

10. In the present case, it is the specific stand of the management that there was no work for the establishment as manual work which was being performed by the workmen are being managed by machineries and the establishment is only doing Government work. The Labour Court has not taken into consideration such fact while passing the impugned award. There is no doubt that the workmen are daily wagers and they have not been engaged in any regular posts. Therefore, this Court modifies the impugned order in exercising its jurisdiction under Article 227 of the Constitution of India. As the compensation in lieu of reinstatement is proper to a daily wager, the petitioner management is directed to pay a sum of Rs.95,000/- (Rupees ninety-five thousand) to each of the 63 workmen, who have been

directed to be reinstated into service by the Labour Court. Similarly, so far as other 20 workmen named in the award abandoned their respective services prior to 31st March, 2001, no compensation is awarded in their favour.

With the aforesaid observation, both the writ petitions stand disposed of.

Writ petitions disposed of.

2014 (I) ILR - CUT-1096

B.N.MAHAPATRA, J

BLAPL NO. 21418 OF 2013

LOKANATHA SAHU & ORS. ……..Petitioners

.Vrs.

STATE OF ORISSA ……..Opp. Party

N.D.P.S. ACT, 1985 – SS. 20, 37

Whether 21.150 Kgs. of Ganja recovered from four accused persons jointly should be taken as commercial quantity warranting punishment u/s 20(b)(ii)(c) of the Act upon each of the accused or it would be apportioned among the four accused persons, so that the rigour u/s 37 would not come to play while considering the bail application – Held, since 21.150 Kgs. of Ganja recovered from four accused persons jointly it should be taken as commercial quantity warranting punishment u/s 20(b)(ii)(c) of the N.D.P.S. Act, 1985 upon each of the accused persons. (Paras 11 & 12)

For Petitioners : M/s. Arjuna Ch. Behera & B.K.Barik
For Opp. Party : Mr. S.Dash, Additional Standing Counsel

Date of Order: 10.12. 2013

ORDER

B.N.MAHAPATRA

This petition has been filed under Section 439, Cr. P.C. in connection with T.R. Case No.34 of 2013 corresponding to C.T. Case No.380 of 2013 arising out of Kundheigola P.S. Case No.53 of 2013 now pending in the file of learned Additional District and Sessions Judge-cum-Special Court, Deogarh.

2. The petitioners are alleged to have committed offence punishable under Section 20(b) (ii) (C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "NDPS Act, 1985")

3. Prosecution story is that all the four petitioners were carrying 21.150 Kgs. of Ganja in one gunny bag on 20.07.2013 by a Cement Colour (Bolero) Car which was intercepted by the S.I. of Police, Kundheigola Police Station, while he was on patrolling duty. It is further stated that all the petitioners have admitted that they had been doing business in purchasing and selling of ganja regularly.

Mr. S. Dash, learned Additional Standing Counsel for the State submitted that since the quantity seized is above 20 Kgs., it is commercial quantity and therefore, the petitioners may not be released on bail in view of Section 37 of the NDPS Act, 1985.

4. Mr. Behera, learned counsel for the petitioners submitted that since the petitioners alleged to have been carrying 21.150 Kgs. Ganja are four in number, it cannot be said that each person was carrying the commercial quantity. If 21.150 Kgs. Ganja is divided by four, the quantity of Ganja which falls in the share of each person would be little more than 5 Kgs. which is much less than 20 Kgs. In other words, it is not more than 20 Kgs. to be said as commercial quantity as prescribed by the Central Government vide Notification No.1055(E) dated 19.10.2001 issued under Clauses (vii-a) and (xxiii-a) of Section 2 of the NDPS Act, 1985. Therefore, Section 37 of the NDPS Act, 1985 has no application. Moreover, the accused persons are in custody since 21.07.2013. Hence, a prayer was made to grant bail to the petitioners.

5. On the rival contentions of the parties, the only question that falls for consideration by this Court is as to whether 21.150 Kgs. of Ganja recovered from four accused persons jointly should be taken as commercial quantity warranting punishment under Section 20(b)(ii)(C) of the NDPS Act, 1985

upon each of the accused or it would be apportioned among the four accused persons so that the rigour of Section 37 of the NDPS Act would not come to play while considering the bail application.

6. To deal with the above questions, it is necessary to know what is contemplated in Section 20(b)(ii)(C) and Section 37 of NDPS Act. Section 20(b)(ii)(C) reads as follows:-

> "20. **Punishment for contravention in relation to cannabis plant and cannabis**.—Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder:--
>
> (a) xx xx xx
>
> (b) produces, manufactures, possesses sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable.—
>
> (i) xx xx xx
> (ii) where such contravention relates to sub-clause(b),--
> (A) xx xx xx
> (B) xx xx xx
>
> (C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees and which may extend to two lakh rupees:
>
> Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

Undisputedly, the quantity of Ganja involved in the present case is 21.150 Kgs., which is commercial quantity. Once the quantity of Ganja involved is commercial quantity, the mandate of Section 37 of NDPS Act comes into operation which reads as follows:-

> "**37. Offences to be cognizable and non-bailable**.— (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

7. Thus, every offence punishable under NDPS Act shall be cognizable. The power to grant bail to a person alleged to have committed offence punishable under Section 20(b)(ii)(C) of NDPS Act, 1985 is subject to the restriction prescribed by sub-clause (b) of sub-section (1) of Section 37 of NDPS Act, 1985. First of all, an opportunity to the Public Prosecutor has to be given to oppose the application for release of the accused. The other twin conditions are (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the offence alleged to have been committed; (ii) he is not likely to commit any offence while on bail. Thus, recording of satisfaction on both aspects is *sine qua non* to grant bail in respect of offence punishable under Section 19 or Section 24 or Section 27-A and also offence involving commercial quantity.

Section 37(2) further provides that the limitations on granting bail specified in sub-clause (b) of sub-section (1) are in addition to the limitation under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail. As it appears from the language of Section 37(1)(b), the Court must adopt a negative attitude towards bail.

8. By the Amending Act, 2001 (Act 9 of 2001) amendments were brought to the NDPS Act, 1985 which rationalized the punishment structure under the NDPS Act, 1985 by providing greater or lesser sentence depending upon the quantity of narcotic drugs or psychotropic substances carried. 'Small quantity' has been defined under Section 2(xxiii-a) to mean

the quantity lesser than the quantity specified in the notification by the Central Government in its Official Gazette. Commercial quantity has been defined under Section 2 (vii-a) to mean any quantity greater than the quantity specified by the Central Government by Notification in the Official Gazette. As per Serial No.55 of the Notification of the Central Government bearing No.S.O.1055(E), dated 19.10.2001 issued under Clauses (vii-a) and (xxiii-a) of Section 2 of the NDPS Act, 1985, so far ganja is concerned, the quantity specified is 1000 Gms. and 20 Kgs. in relation to "small quantity" and "commercial quantity" respectively.

9. The statement of objects and reasons of the Amending Act, 2001 inter alia states as follows:

> "Statement of Objects and Reasons of 2001:-
>
> The Narcotic Drug and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of a minimum ten years rigorous imprisonment which may extend up to twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformative approach towards addicts. In view of the general delay in trial it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery. Therefore, it is proposed to rationalize the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalization of the sentence structure under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences."

10. The intention of the legislature for introduction of the amendment as it appears is to punish the people who commit less serious offence with less severe punishment and those who commit grave crime such as trafficking in significant quantities with more severe punishment.

11. Since in case of involvement in commercial quantity more severe punishment is provided, an attempt is being made by the petitioners to take plea of apportionment of the entire quantity of 21.150 Kgs. among four accused persons from whom it was seized. Such a plea is not permissible since the accused were individually and jointly possessing and carrying 21.150 Kgs. of Ganja in one gunny bag without any pass or permit.

Therefore, all of them are liable to be prosecuted for offence punishable under Section 20(b)(ii)(C) of the NDPS Act, 1985. In course of hearing, no statutory provision was brought to the notice of this Court to the effect that where any quantity of narcotic drugs and/or psychotropic substance is seized from the possession of more than one person, the same shall be divided by number of persons from whom seized and apportioned towards share of each of them

12. In the fact situation, this Court is of the considered view that 21.150 Kgs. of Ganja recovered from four accused persons jointly should be taken as commercial quantity warranting punishment under Section 20(b)(ii)(C) of the NDPS Act, 1985 upon each of the accused persons.

13. In view of the above, it is not possible on my part to give a finding as required under Section 37 of the NDPS Act for grant of bail that there are reasonable grounds for believing that the petitioners are not guilty of the offence alleged to have been committed and that they are not likely to commit any such offence while on bail.

14. In the result, the petition for bail is dismissed.

Application dismissed.

2014 (I) ILR - CUT-1101

B.K.PATEL, J

W.P.(C) NO. 12072 OF 2012

BALAKRUSHNA POLAI .....Petitioner

.Vrs.

NABARD & ORS. .....Opp. Parties

SERVICE LAW – Petitioner was appointed as Manager (Legal Service) in a Bank – He had suppressed pendency of Criminal cases against him and his detention in judicial custody – Petitioner discharged from service – Order challenged.

Conscious suppression of material information sought by the employer or furnishing false information itself amounts to moral turpitude – Held, there being no dispute that the petitioner had made material suppression of information sought by the employer, there is no scope to interfere with the order of discharge.

(Para 15)

Case Laws Relied on :-

1. 1988 (supp) SCC 795 : T.S.Vasudavan Nair -V- Director of Vikram Sarabhai Space Centre & Ors.
2. (2011) 4 SCC 644 : Commissioner of Police & Ors. -V- Sandeep Kumar
3. (2011) 14 SCC 709 : Ram Kumar -V- State of Uttar Pradesh & Ors.
4. 2013 (139) FLR 284 : Devendra Kumar -V- State of Uttaranchal & Ors.

For Petitioner : M/s Sandeep Parida & Deepali Mohapatra

For Opp. Parties : Sri J.K.Tripathy, Sr. Advocate
B.P.Tripathy, D.Pradhan, G.S.Das & P.Tripathy

Date of hearing : 07.03.2014
Date of judgment : 23.04.2014

JUDGMENT

B.K. PATEL, J.

In this writ petition, petitioner has made prayer to quash Annexure-10 dated 11.8.2011 by which he was discharged from the services of National Bank for Agriculture and Rural Development (NABARD) and Annexure-12 dated 15.5.2012 by which his letter of appeal requesting for re-instatement/re-appointment in the service was rejected by the Board.

2. While in practice as an Advocate, petitioner participated in a recruitment process, and received offer for appointment under Annexure-1 dated 16.12.2010 as Manager (Legal Service) in Grade 'B'. It is stipulated under Annexure-1 that the petitioner would be on probation for a period of 2 years (extendable up to 3 years at the discretion of the Bank) from the date of his appointment. Upon acceptance of terms and conditions of appointment by the petitioner, and completion of Induction Training Programme, appointment letter under Annexure-3 dated 9.2.2011 as Manager (Direct Recruit) in Grade 'B' (on probation) was issued to the petitioner.

3. It is not disputed that in course of recruitment and appointment, the petitioner made suppression on two occasions with regard to criminal prosecutions against him and detention in custody. Before appearing for interview on 30.11.2010, the petitioner submitted Bio-Data-Cum-Attestation Form under Annexure-A in which in answer to column no. 27 providing for "Particulars of any prosecution/detention/fine/conviction/sentence against you awarded by any court of law for any offence", the petitioner answered "NOT APPLICABLE" and in answer to column no. 28 providing for "Particulars of any case pending against you in any Court of Law at the time of filling up this form", also the petitioner answered "NOT APPLICABLE". Thereafter, at the time of joining for induction training on 31.1.2011, the petitioner submitted Staff Application Form at Annexure-B in which at column no.19, in answer to the query, "Whether he/she was ever arrested for any reason or convicted or committed to prison or subjected to any penalties by any previous employer or adjudicated insolvent", the petitioner answered "NOT APPLICABLE". From the police report dated 24.5.2011 under Annexure-D received by NABARD, it was found that at the relevant time as many as seven criminal cases were pending against the petitioner. It was also reported that the petitioner had been arrested and remanded to Berhampur Circle Jail in connection with the criminal cases.

4. Petitioner's case is that he had been falsely implicated in seven criminal cases and was arrested and released on bail. On completion of investigation, charge sheets were submitted. It is however pleaded that the petitioner being falsely implicated on misconception had not indicated in Annexures-A and B regarding those seven cases. Upon receipt of letter under Annexure-5 from NABARD, he submitted his explanation under Annexure-6 stating therein that he was ignorant regarding the fact that G.R. cases were filed against the members of Bar Association. Petitioner also stated therein that he did not mention regarding the criminal cases while joining "because due to spelt out of" petitioner's mind. It is further averred that letters under Annexures-7 and 8 were written to NABARD by the concerned Assistant Public Prosecutor and the Secretary, Ganjam Bar Association stating that there is no *prima facie* evidence against the petitioner and that as the cases related to incidents which occurred during agitation by the Bar members for establishment of High Court Bench at Berhampur, steps were being taken for withdrawal of the cases. The Law Department of NABARD also in the report under Annexure-9 observed that though the petitioner had technically not mentioned the details of arrest in the Staff Application Form, the case may be treated as non-submission of full facts and not as a case of furnishing wrong declaration for which the Bank may not terminate the petitioner from his service. After the order of

discharge under Annexure-10, the petitioner approached this Court for quashing of the criminal case and by order dated 13.12.2011 the criminal cases against the petitioner were quashed. Thereafter, the petitioner preferred appeal under Annexure-11 in response to which order under Annexure-12 was passed.

5. Learned counsel for the petitioner strenuously contended that suppression by the petitioner of the fact of pendency of criminal cases and detention in custody, under the facts and circumstances of the case and in view of the nature of criminal cases instituted in connection with the agitation, is disproportionate. Opposite parties representing NABARD ought to have taken lenient view in the matter. In this connection, learned counsel for the petitioner placed reliance on the decisions in **T.S.Vasudavan Nair –vs- Director of Vikram Sarabhai Space Centre and others**: 1988(Supp) Supreme Court Cases 795; **Commissioner of Police and others –vs-Sandeep Kumar** : (2011) 4 Supreme Court Cases 644; and **Ram Kumar –vs-State of Uttar Pradesh and others**: (2011) 14 Supreme Court Cases 709.

6. The second limb of argument was that the petitioner was discharged from the services in violation of the provision under Rule-16 (1) of the NABARD (Staff) Rules, 1982 (for short, 'the Rules'). It was also contended that penalty of termination of the services of the petitioner having been imposed by the selfsame authority which passed order on petitioner's appeal under Annexure-12, the order under Annexure-12 is not sustainable.

7. Counter-affidavit has been filed by the opposite parties asserting therein that discharge of the petitioner from service was in accordance with the specific provisions of the terms of contract of employment as contained in the offer of appointment at Annexure-1, candidate's Bio-Data-Cum-Attestation Form at Annexure-A and Staff Application Form at Annexure-B. Annexure-1 stipulates, *inter alia*, as follows:

> "Clause-1
>
> Xxx xxx xxx
>
> Clause-(i)
>
> Xxx xxx xxx.
>
> Clause(xxiii)- Your appointment will be subject to your furnishing such information as the Bank may require from time to time and subject to your services being acceptable in the light of the information furnished.

Xxx xxx xxx

Clause(xxvi) – Your appointment will be subject to verification of your character and antecedents by the police authorities concerned. In the event of NABARD receiving any unfavourable police report/s at a later date, your appointment in NABARD would be liable for termination forthwith without any notice or compensation in lieu thereof.

Xxx xxx xxx

3. Your appointment in the Bank's service shall be liable to be terminated forthwith without any notice, if any, of the informations/documents submitted by you are found to be false or incorrect."

Annexure-A stipulates, *inter alia*, as follows:-

" xxx xxx xxx

Warning: If the fact that false information has been furnished or that there has been suppression of any factual information in the Bio-data-cum-attestation form comes to notice at any time during the service of a person, his services would be liable to be terminated without any notice or compensation in lieu thereof."

Annexure-B, *inter alia*, filled up, signed and submitted by the petitioner at the end contains the following undertaking in the form of declaration:-

"I hereby declare that all the information and particulars given by me in this form are true and correct. I also note that if any of the above statements are incorrect or false or if any material information or particulars have been suppressed or omitted therefrom, my appointment will be liable to be terminated without notice or any compensation in lieu of notice."

It is further averred that in terms of Clause(xxvi) at Annexure-1 the opposite parties required verification report with regard to antecedents of the petitioner from the local police by letter dated 22.3.2011 at Annexure-C in response to which police report dated 24.5.2011 at Annexure-D was received indicating that the petitioner was involved in seven criminal cases in connection with which he was arrested and remanded to Berhampur

Circle Jail. In the report at Annexure-D it was specifically stated that "Character and antecedents of the candidate is unsatisfactory as per the verification of the P.S. records." In the above circumstances, in accordance with the specific terms in Annexures-1 and A, and undertaking in Annexure-B, which were accepted by the petitioner, the opposite parties discharged services of the petitioner while he was on probation for a period of only about six months on account of suppression of information. Discharge of the petitioner from service was not by way of imposition of any punishment, and as such there is no scope to contend that punishment or penalty is highly disproportionate to the charges.The petitioner having categorically admitted that criminal cases were pending against him while filling up, signing and submitting Annexures 1, A and B, plea of the petitioner, who is an advocate, of ignorance cannot be accepted as petitioner's appointment was to the legal department in the officers category in the Bank. In the note sheet of the Law Department of the Bank at Annexure-9, it has been opined that technically the petitioner had suppressed information about pending of criminal cases. Such opinion was duly considered before discharging the petitioner from service in accordance with the stipulations and undertaking made at Annexures 1, A and B. Petitioner, being a lawyer, well understood that his discharge from service is consequential to the terms of declaration made by him and the conditional appointment against omission/commission on his part while furnishing information required from him at the time of his selection and appointment. Board of Directors examined petitioner's appeal for reappointment/reinstatement and thereafter order of rejection at Annexure-12 was passed. Petitioner was discharged from service in accordance with Rule 16(1) of the NABARD (Staff) Rules,1982 for suppression of facts under Annexures 1, A and B in terms of undertaking and stipulations made thereunder. In terms of Rule 16(1) of the Rules the petitioner has been paid one month salary in lieu of notice as is evident from salary slip at Annexure-E.Conduct of the petitioner in suppressing information pertaining to pendency of criminal cases tells upon petitioner's integrity and truthfulness. By suppressing fact of pendency of criminal cases the petitioner deliberately furnished false/ wrong information.

8. Learned counsel for the opposite parties, in course of hearing, reiterated the stand taken in the counter-affidavit. It was argued that order of discharge of the petitioner from service was not by way of imposition of penalty or punishment consequent upon departmental proceeding but automatic consequence of terms of employment voluntarily accepted by the petitioner under the Rules which governed service conditions of the petitioner. Petitioner has not disputed pendency of seven criminal cases or his detention in judicial custody in connection with criminal cases at the time

of filling up, signing and submitting forms at Annexures 1, A and B. Even though criminal cases are stated to have been quashed subsequently, the petitioner cannot escape from imputation of having suppressed required information and submitting false particulars in Annexures 1, A and B. 'Discharge from service' has not been provided as one of the penalties under Rule 47 which occurs at Part-I of Chapter-IV of the Rules providing for 'Conduct, Discipline and Appeals'. Order of discharge was passed in accordance with Rule 16 of the Rules which occurs under Part-II of Chapter-II providing for 'Probation'. Provision for appeals has been made under Part-II of Chapter-IV. Therefore, petitioner has no scope to urge that his appeal was one under Rule 47 of the Rules. On the contrary, it is apparent that petitioner simply submitted a representation or letter of appeal at Annexure-11 directly to the Chairman, NABARB and not to the appellate authority through proper channel as required under the Rules and that too "to reconsider his case and, to recall" the order of discharge. Therefore, order of discharge having not been passed as one of the penalties contemplated under the Rules, petitioner's technical plea that order of discharge being disproportionate with the alleged conduct of the petitioner and the appeal to have been considered by the Board, are misconceived. Placing strong reliance on the decision of the Supreme Court in **Devendra Kumar –vs- State of Uttaranchal and others**: 2013(139) FLR 284 it was argued that it is well settled that information sought for by the employer if not disclosed as required, would definitely amount to suppression of material information, and in that eventuality the service becomes liable to be terminated, even if there had been no further trial or the person concerned stood acquitted or discharged. It was argued that there is no scope to take a liberal view as urged on behalf of petitioner in view of the fact that suppression of material information sought by the employer or furnishing false information itself amounts to moral turpitude. Considering the status of the petitioner as a lawyer, and importance of the post in NABARD to which he was seeking appointment, there is absolutely no scope to bestow leniency. It was submitted that in accordance with the provision under Rule 16 (1) of the Rules the petitioner was directed to be paid salary for one month in lieu of notice.

9. It has been rightly contended that 'discharge from service' is not one of the penalties provided under Rule 47 of the Rules. Rule 47 provides for six types of penalties namely (a) Reprimand; (b) delay or stoppage of increment or promotion; (c) degradation to a lower post or grade or to a lower stage in his incremental scale; (d) recovery from pay of the whole or part of any pecuniary loss caused to the National Bank by the employee; (dd) compulsory retirement and (e) dismissal.Chapter-IV of the Rules

providing for Conduct, Discipline and Appeals containing Part-I from Rules 25 to 47 and Part-II from Rules 48 to 57 does not provide for the eventuality of 'discharge from service'. One of the conditions for filing appeal under Rule 50 is that it shall be submitted through proper channel. Under Rule 49 in case of Officers in Grade 'B' an appeal lies to the Managing Director. Thus, it is evident that neither order of discharge of the petitioner was by way of imposition of penalty nor the appeal under Annexure-11 submitted by the petitioner to the Chairman of the NABARD was an appeal under Part-IV of Chapter of the Rules.

10. The petitioner was discharged from service while he was on probation. Sub-Rule(1) of Rule 16 of the Rules provides:

> "During the first three months of his probationary period, a directly recruited employee shall be liable to be discharged at one day's notice or pay in lieu thereof and thereafter at one month's notice or pay in lieu thereof."

The petitioner had completed first three months of his probationary period. In such circumstances, as is evident from pay slip of the petitioner for the month of August, 2011 at Annexure-E, one month salary was directed to be paid to the petitioner in lieu of one month notice in accordance with Sub-Rule(1) of Rule 16 of the Rules. In such circumstances, the petitioner has no scope to raise the plea of that order under Annexure-12 passed in response to his letter under Annexure-11 appealing for reinstatement/reappointment violates of any provision under Chapter-IV of the Rules.

11. In the offer of appointment at Annexure-1 it is categorically stipulated that petitioner's appointment would be subject to furnishing such information as the Bank might require, and subject to verification of his character and antecedents by the police authority. It is also stipulated that in the event of receipt of any unfavourable police report, petitioner's appointment in Bank would be liable for termination. It is further stipulated that petitioner's appointment shall be liable to be terminated forthwith if any information/documents submitted were found to be false or incorrect. Bio-Data-cum-Attestation Form at Annexure-A contains a specific 'WARNING' to the effect that if furnishing of false information or suppression of any factual information would come to the notice at any time, petitioner's service shall be liable to be terminated. In the Staff Application Form at Annexure-B the petitioner himself furnished undertaking that if any of the statements were found incorrect or false or if any material information or particulars had been

suppressed or omitted, petitioner's appointment would be liable to be terminated. The petitioner does not dispute to have suppressed the fact of pendency of criminal cases as well as the fact of his detention in jail. Therefore, evidently it was well within NABARD's jurisdiction to discharge petitioner from service in exercise of provision under Sub-Rule(1) of Rule-16 of the Rules.

12. The main thrust of the argument by the learned counsel for the petitioner was that under the facts and circumstances of the case a lenient view should to be taken. It was in fact urged that the writ petition be treated as a 'mercy petition', and misconduct on the part of the petitioner in suppressing pendency of criminal cases and detention in custody may be condoned. However, decisions relied upon by the learned counsel for the petitioner to claim leniency are of no assistance to him. In **T.S.Vasudavan Nair –vs- Director of Vikram Sarabhai Space Centre and others** (supra) it has been specifically pointed out by the Supreme Court that in the special facts and circumstances of the case, as appellant had been convicted under the Defence of India Rules for having shouted slogans on one occasion only, order cancelling offer of appointment to the appellant was set aside and the respondents were directed to issue order of appointment as a Lower Division Clerk. Decision in **Commissioner of Police and others –vs- Sandeep Kumar**(supra) related to cancellation of offer of appointment as Head Constable (ministerial) and decision in **Ram Kumar –vs-State of Uttar Pradesh and others**(supra) related to cancellation of appointment to the post of Constable. In **Sandeep Kumar's** case (supra) Supreme Court was inclined to bestow mercy on and condone the petitioner considering the facts that though the respondent did not mention in his application form for appointment that he was involved in a criminal case, he had disclosed the same while filling up in the Attestation Form after his selection; and that the alleged occurrence in the criminal case had taken place when the respondent was about 20 years of age. In **Ram Kumar's** case(supra) order of cancellation of appellant's candidature was quashed on the basis of observation that the recruiting authority Senior Superintendent of Police, Gaziabad had cancelled the order of selection of the appellant without going into the question and satisfying himself as to whether the appellant was suitable for appointment to the post of Constable as required under the Government Order providing for, "*Verification of the character and antecedents of government servants before their first appointment*."

13. In the present case, petitioner is an Advocate and he got himself involved in as many as seven criminal cases while in practice as a lawyer. He was arrested, forwarded to judicial custody and detained in jail. His

appointment related to the post of Manager(Legal Service) in a Bank. Importance of such an office does not require elaboration. Petitioner suppressed the fact of pendency of criminal cases and detention in judicial custody on two different occasions – once while filling up Bio-Data-Cum-Attestation Form at Annexure-A and for the second time while filling up Staff Application Form at Annexure-B. He admitted regarding prosecution, arrest and detention in jail only after his employer sought for his reply after receipt of police verification report. Therefore, it is obvious that the petitioner consciously suppressed the information and also violated the stipulations in the Forms accepted and undertaking made by him.

14. Facts and circumstances of the present case are similar to the facts and circumstances in **Devendra Kumar –vs- State of Uttaranchal and others**(supra) relied upon by the learned counsel for the opposite parties. The facts and circumstances in the above cited decision as enumerated by the Supreme Court were as follows:

> "A. An advertisement was published in September,2001 inviting applications from candidates eligible for the 250 posts of Constables in the State of Uttaranchal. The appellant applied in response to the same vide application dated 7.9.2001. He appeared for the physical test and qualified on 28.9.2001. Subsequently, upon passing the written test, the appellant faced an interview in September,2001 and, ultimately his name was mentioned in the list of selected candidates published on 30.9.2001. The appellant was called for medical examination on 4/5.10.2001, by which he was found fit. Thus, he was sent for training of six months on 18.10.2001.
>
> B. While joining the training, the appellant was asked to submit an affidavit giving certain information particularly, whether he had even been involved in any criminal case. The appellant submitted an affidavit stating that he had never been involved a criminal case. The appellant completed his training satisfactorily and it was at this time in January,2002, that the respondent authorities in pursuance of the process of character verification came to know that the appellant was in fact involved in a criminal case. The final report in that case had been submitted by the prosecution and accepted by the learned Magistrate.
>
> C. On the basis of the same, the appellant was discharged abruptly on 8.4.2002 on the ground that since he was a temporary

> Government servant, he could be removed from service without holding any inquiry."

It was observed and propounded by the Supreme Court at paragraph-10 of the decision as follows:

> "So far as the issue of obtaining the appointment by misrepresentation is concerned, it is no more *res integra*. The question is not whether the applicant is suitable for the post. The pendency of a criminal case/proceeding is different from suppressing the information of such pendency. The case pending against a person might not involve moral turpitude but *suppressing of this information itself amounts to moral turpitude*. In fact, the information sought by the employer if not disclosed as required, would definitely amount to suppression of material information. In that eventuality, the service becomes liable to be terminated, even if there had been no further trial or the person concerned stood acquitted/ discharged."

> At paragraph-22 of the decision it was further held:

> " xxx xxx xxx xxx

> The purpose of seeking such information is not to find out the nature or gravity of the offence or the ultimate result of a criminal case, rather such information is sought with a view to judge the character and antecedents of the job seeker or suitability to continue in service. Withholding such material information or making false representation itself amounts to moral turpitude and is a separate and distinct matter altogether than what is involved in the criminal case."

15. Thus, it has been propounded by the Supreme Court that suppression of material information sought by the employer or furnishing false information itself amounts to moral turpitude and is separate and distinct from the involvement in a criminal case. Therefore, nature and result of criminal case in which the person seeking employment was involved are not relevant. In the present case, there being no dispute that the petitioner had made material suppression of information sought by the employer, there is no scope to interfere with the order of discharge. There is no merit in the writ petition and the writ petition is, accordingly, dismissed.

Writ petition dismissed.

2014 (I) ILR - CUT-1112

B.K. NAYAK, J.

W.P.(C) NO. 22254 OF 2013

GITANJALI SAHU ……..Petitioner

.Vrs.

MAMATA BADATYA & ORS. ……..Opp. Parties

Election dispute – Order for recounting of votes – An order of recount of votes has to stand on the nature of the averments made in the election petition and the materials produced in support there of – Mere allegation that the election petitioner suspects or believes that there has been improper rejection of votes will not be sufficient to support an order for inspection.

In this case there was no necessary pleading of material facts as to improper acceptance of invalid votes or improper rejection of valid votes but the learned trial court allowed the prayer and the same was confirmed by the appellate Court – Merely because the returned candidate did not raise any objection cannot be a ground to allow such petition – Held, the impugned judgments are quashed.

(Paras 10, 11 & 12)

Case Law Referred to:-

1. AIR 1964 SC 1249 : Ram Sewak Yadav -V- Hussain Kamil Kidwai
2. AIR 1984 SC 654 : D.P.Sharma -V- Commissioner & Returning Officer
3. (2000) 8 SCC 35 : Vadivelu -V- Sundaram & Ors.
4. (2004) 6 SCC 341 : M.Chinaswamy -V- K.C.Pallaniswamy
5. (2009) 10 SCC 170 : Udey Chand -V- Surat Singh
6. (2001) 3 SCC 81 : V.S.Achuthanandan -V- P.J.Francis

For Petitioner : M/s. Pitambar Acharya, P.Pattanaik, B.K.Jena & J.P.Pradhan

For Opp. Parties : M/s. Deepali Mohapatra & S.Parida (opp.party no. 1)

Date of hearing : 18.02.2014
Date of judgment : 14.03.2014

JUDGMENT

B.K.NAYAK, J.

Judgment dated 12.02.2013 under Annexure-1 passed by the learned Additional Civil Judge (Junior Division), Digapahandi in Election Petition No.1 of 2012 and the judgment dated 20.08.2013 under Annexure-2 passed by the learned District Judge, Ganjam in Election Appeal No.3 of 2013 confirming the judgment passed in Election Petition no.1 of 2012 have been challenged in this writ petition by the petitioner.

2. The petitioner, opposite party no.1 and some other candidates contested the election for the office of Sarpanch of Jiura Grama Panchayat under Sanakhemundi Block in the district of Ganjam. In the election the present petitioner got 1015 number of votes as against her nearest rival, opposite party no.1, who secured 760 votes and accordingly the petitioner was declared elected. The petitioner's election as Sarpanch was challenged by opposite party no.1 in the court of the Additional Civil Judge (Junior Division), Digapahandi in Election Petition no.1 of 2012.

Election of the petitioner was challenged on the ground that the petitioner along with her henchmen resorted to all sorts of unfair and corrupt practices during election. It was also alleged that the petitioner committed rigging of votes during polling in Ward Nos.4,7,8 and 11. It is stated that in Ward No.4 a voter, namely, Pramod Sahu, son of Raghunath Sahu was prevented from casting his vote and one Pramod Sahu S/o. Bancha belonging to congress party voted in his place. The supporters of the petitioner managed to cast the vote of one Nisakumari Patra of Ward No.7, who was not available in the village during voting. Some voters of Ward No.7, who are permanently domiciled at Berhampur and are registered as voters of Berhampur municipality, did not cast their vote, but the petitioner managed to cast their votes through other persons. One vote in Ward No.8 and one vote in Ward No.11 were forcibly polled in favour of the petitioner by his supporters, preventing those two voters to cast their vote under fear of injury. It was also alleged that there has been improper acceptance of votes in favour of the petitioner and improper rejection of valid votes polled by opposite party no.1. The allegations of improper acceptance and rejection of votes have been averred in paragraphs-7 and 8 of the election petition filed by opposite party no.1 before the court below which are extracted hereunder :

> "**7.** It is submission of the petitioner that the mischief and misdeeds of the OP No.4 and her supporting elements did not stop there. In Ward No.6 the petitioner's husband was contesting for the office of Ward Member and even he was detained in the jail custody during election period, he got 149 votes whereas the petitioner secured 149

votes as against 36 votes polled in favour of OP No.4. The counting results was declared by the Presiding Officer of Ward No.6 in presence of the petitioner's agent Simanchal Sahu. But taking advantage of the absence of the petitioner's husband, the opposite party no.4 and her supporters malinfluenced upon the Presiding Officer of Ward No.6 and altered the result of counting recorded in Form No.8A. The petitioner asserts that she has bagged 149 votes as against 36 secured by OP No.4. But the figure 149 was maliciously mentioned in the result sheet of counting of votes against the name of OP No.4 and 36 was mentioned in the name of the petitioner by the OP No.3. The reality would be disclosed if the polling of votes of the aforesaid Ward No.6 would be verified. During initial counting of votes by the Presiding Officers 873 votes were found in favour of the petitioner as against 902 in favour of the OP No.4 and thus there was a difference of only 29 votes even after admission of a large number of unlawful votes in favour of the OP No.4 and rejection of valid votes polled in favour of the petitioner. But after manipulation of the counting results in the result sheet by OP No.3, the Election Officer declared that the OP No.4 bagged 1015 votes as against petitioner was shown to have procured 760 leaving 83 votes to have rejected.

8. It is further submission of the petitioner is that the OP No.4 was declared to be elected by reason of wrong recording of counting results in the result sheet of Ward No.6, the improper rejection of valid votes polled in favour of petitioner and admission of more rejected votes in favour of OP No.4 and thus for the aforesaid reasons the OP No.4 ought not be declared to be elected by a majority of lawful votes. Ballots not found with cross mark against the symbol have also been wrongfully admitted in favour of OP No.4. Immediately after totaling of counting of votes mentioned in result sheets, when OP No.4 was declared to have been elected, the petitioner through her agent claimed to recount the votes polled in all the 11 booths, but unfortunately the Election Officer refused to take up the recounting process. So it is imperative to call for the used ballots from the custody of OP No.1 for the purpose of reexamination and recounting of the same for ensuring fair election in order to respect the constitutional mandate and to do justice to the petitioner."

3. All the allegations made in the election petition were denied by the present petitioner in her show cause. Opposite party no.1 during the course of proceeding before the court below filed a petition on 20.04.2012 for

inspection of all used ballots in all the eleven wards of the Grama Panchayat and for recounting the same. In the said petition a reference was made to the averments made in paragraph-7 of the election petition. The petition was resisted by the present petitioner, who filed her objection stating that the averments made in the election petition do not justify inspection of ballots and recounting of votes. It was also stated that on the date of counting neither the election petitioner nor her agents raised any objection. It was also stated that in the election petition no prayer for recounting of ballot papers has been made.

4. By order dated 16.01.2013 the learned Civil Judge (Junior Division), Digapahandi allowed the petition stating that for fair and just decision of the case all the ballot papers be produced for recounting. The said order has been annexed as Annexure-11 to the additional affidavit filed by the present petitioner. Thereafter, the learned Civil Judge (Junior Division) recounted all the used ballot papers of the Grama Panchayat in presence of the parties and their advocates and came to find that on recounting the opposite party(election petitioner) secured 867 votes and the present petitioner got 811 votes.

5. On the basis of the recounting of votes made by him the learned Civil Judge (Junior Division) came to hold that the present petitioner did not raise any objection to recounting of votes and thus answered issue No.iii holding that the opposite party (election petitioner) secured 55 votes more than the present petitioner and accordingly passed judgment setting aside the election of the present petitioner and declaring present opposite party no.1 as elected. The judgment of the Civil Judge (Junior Division) has been confirmed by the learned District Judge, Ganjam by upholding the recounting of votes by the learned Civil Judge.

6. The learned counsel for the petitioner submitted that there was no justifiable ground for inspection and recounting of votes particularly when there was no necessary pleading of material facts. It is submitted that even taking the averments made in paragraph-7 of the election petition to be correct, it shows that the present petitioner polled 902 votes and opposite party no.1 secured 873 votes and, therefore, the election petition should have been dismissed on that ground and direction for recounting was not justified. It is also his submission that no reason was given by the learned Civil Judge for directing inspection and recounting of ballots. It is also his submission that even though on recounting by the court opposite party no.1 was found to have secured more votes than the petitioner, still then the said result cannot be accepted and petitioner’s election cannot be set aside since

there was no justification at all for directing recounting of votes by the trial court.

The learned counsel for opposite party no.1, on the other hand, submitted that the petitioner did not raise any objection to the recounting of votes and that on recounting by court the opposite party no.1 having found to have secured more votes than the petitioner, the courts below are justified in setting aside the election of the petitioner and declaring opposite party no.1 as elected and as such the impugned orders warrant no interference.

7. In the case of ***Ram Sewak Yadav v. Hussain Kamil Kidwai: AIR 1964 SC 1249***, the apex Court held that an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the election petitioner must be set out with precision supported by averments of material facts. To establish a case so pleaded an order for inspection may undoubtedly, if the interest of justice requires, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper rejection, refusal or rejection of votes will not be sufficient to support an order for inspection.

8. With regard to requirements which may justify recounting of votes the apex Court in the case of ***D.P. Sharma v. Commissioner and Returning Officer: AIR 1984 SC 654*** observed as follows in paragraph-4 thereof :

> "It is well established that in order to obtain recount of votes a proper foundation is required to be laid by the election petitioner indicating the precise material on the basis of which it could be urged by him with some substance that there has been either improper reception of invalid votes in favour of the elected candidate or improper rejection of valid votes in favour of the defeated candidate or wrong counting of votes in favour of the elected candidates which had in reality been cast in favour of the defeated candidate."

In the case of ***Vadivelu v. Sundaram and others : (2000) 8 SCC 35***, the apex Court has held that the petitioner, who seeks recount should allege and prove that there was improper acceptance of invalid votes or improper rejection of valid votes. If only the court is satisfied about the truthfulness of the above allegations it can order recount of votes. Secrecy of ballot has always been considered sacrosanct in a democratic process of election and it cannot be disturbed lightly by bare allegations of illegality or irregularity in counting.

In the case of ***M.Chinaswamy v. K.C. Pallaniswamy : (2004) 6 SCC 341***, it has been held by the apex Court that the question as to what would constitute material facts would however depend upon the facts and circumstance of each case. It is trite that an order of recounting of votes can be passed when the following ingredients are satisfied; (i) if there is a prima-facie case; (ii) material facts therefor are pleaded; (iii) the court shall not direct recounting by way of roving or fishing enquiry; and (iv) such an objection had been taken recourse to. The direction for recounting shall not be issued only because the margin of votes between the returned candidate and the election petitioner is narrow.

9. It is pleaded in paragraph-7 of the election petition that the Election Officer declared the present petitioner to have secured 1015 votes whereas opposite party no.1 secured 760 votes. With regard to improper acceptance of invalid votes in favour of the petitioner and improper rejection of valid votes polled by opposite party no.1, it is asserted in paragraph-7 of the election petition that in ward no.6 opposite party no.1 (election petitioner) secured 149 votes and the present petitioner secured 36 votes, but the Presiding Officer of the ward illegally and maliciously mentioned in the result sheets that the present petitioner secured 149 votes and opposite party no.1 secured only 36 votes.

10. If the entire allegations made in paragraph-7 of the election petition are taken to be correct, still then the result would work out to the petitioner securing 902 votes and opposite no.1 securing 873 votes and therefore, the petitioner gets elected by margin of 29 votes against his nearest rival, opposite party no.1. There was also no pleading of material facts as to improper rejection and acceptance of votes. The pleadings considered in the light of the decisions of the apex Court seen above did not justify an order for recounting of votes. The contention of the learned counsel for opposite party no.1 that no objection was raised from the side of the petitioner for recounting of votes is not correct as apparent from the order dated 16.01.2013 whereby the learned Civil Judge (Junior Division), Digapahandi allowed the petition of opposite party no.1 for recounting of votes.

11. The learned counsel for opposite party no.1 raises the contention that after recounting of votes by the learned Civil Judge (Junior Division) opposite party no.1 has been found to have secured more votes than the petitioner and hence been elected. This contention is not acceptable in view of the law laid down by the Hon'ble apex Court in the case of ***Udey Chand v. Surat Singh : (2009) 10 SCC 170*** where without there being any justification for recounting the election tribunal recounted the votes and resultantly found the

election petitioner to have secured more votes than the returned candidate, the Hon'ble apex Court held as follows :

> "**32.** Before parting with the case, we may also deal with the contention urged on behalf of the election petitioner to the effect that re-counting having taken place in terms of the Tribunal's order, this appeal is rendered infructuous. The argument is noted to be rejected. An order of re-count of votes has to stand or fall on the nature of the averments made in the election petition and the material produced in support thereof before the order of re-count is made and not from the result emanating from the re-count of votes."

Similar view has also been expressed in the case of ***V.S. Achuthanandan v. P.J. Francis : (2001) 3 SCC 81*** and the case of ***M. Chinaswamy*** (supra).

12. For the reasons as aforesaid the recounting of votes by the learned Additional Civil Judge (Junior Division), Digapahandi in Election Petition No.1 of 2012 and setting aside the election of the petitioner on the basis of result of such recounting cannot be sustained. The Judgment passed by the learned District Judge, Ganjam in Election Appeal No.3 of 2013 mechanically confirming the order of the learned Civil Judge also cannot be upheld.

13. Accordingly, the impugned judgments under Annexures-1 and 2 are quashed and the writ petition is allowed. No costs.

Writ petition allowed.

2014 (I) ILR - CUT-1118

S.K. MISHRA, J

CRLA NO. 89 OF 1990

MANORANJAN MOHANTY …….Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

PREVENTION OF CORRUPTION ACT, 1947 – S.20

Conviction u/s 161 I.P.C. r/w section 5(2) P.C. Act, 1947 challenged - Admittedly the tainted money was recovered below the table cloth of the accused's office table - There is no proof beyond reasonable doubt regarding the demand of bribe money by the accused and acceptance of the same by him - Held, the accused is not found guilty and the impugned conviction and sentence is set aside.

(Para 14)

Case Laws Relied on :-

1. (2013) 55 OCR 957 : Biswajit Pattnaik –V- State of Orissa
2. (2009) 15 SCC 200 : State of Maharashtra –V- Dnyaneshwar Laxman Rao Wankhede
3. (2001) 20 OLR (SC) 507 : State of U.P. –V- Jagadish Singh Malhotra

For Appellant : M/s N.C.Pati, S.K.Swain, B.Sahoo & R.N.Dash
For Respondent : Miss Savitri Ratho (Standing Counsel)

Date of Judgment : 26.02.2014

JUDGMENT

S.K.MISHRA, J.

In this appeal, the appellant assails the judgment of conviction and order of sentence dated 28.03.1990 passed by the learned Special Judge (Vigilance), Sambalpur.in T.R. Case No.2 of 1987 convicting him for the offence under Section 161 of the Indian Penal Code, 1890 read with Section 5(2) of the Prevention of Corruption Act, 1947, hereinafter referred to as 'the Act' for brevity.

2. Facts of the case may be narrated briefly as follows:

The complainant, one Khemchand Agrawalla, had entered into a partnership with his brother and father in the name of "Chhabila Chandra Ghasiram". The firm was appointed as storage agent and made security deposit of Rs.10,000/- at Kanara Bank, Bhuban in the district of Dhenkanal. The firm appointed the complainant as its representative and executed power of attorney. As there was loss of business, the firm informed the Collector that it would not proceed with the business and accordingly, it was stopped. In 1982, the firm applied for refund of security deposit.

The complainant pursued in the Civil Supply Office (CSO) and requested the Auditor to refund the security deposit. The authority of the said office said that the file was lost. On 01.12.1984, the complainant applied for refund of security deposit and for that purpose he approached the CSO one Mr. Rath. Accordingly, he instructed the accused to finalize the matter. However, the accused said that the file was not traceable and as such, all papers were to be prepared afresh. In order to do all these things, the accused demanded Rs.1000/-.Despite repeated request by the complainant, it was not complied with by the accused. In 1986, the complainant requested his brother Lal Babu working as Chartered Accountant at Bhubaneswar to look into the matter. At that time, his brother rang up to the CSO and the telephone was received by one Sasmal Babu of the Accounts Section, who replied that the file was available and the matter would be finalized. Thereafter, the complainant talked to the Sasmal Babu, who said that the file was available and instructed him to talk with the accused.

On 24.03.1986, the complainant requested to the accused to give clearance certificate for refund of security deposit. But, the accused replied that there was no value in the file and all the papers were to be prepared afresh. For that purpose, he wanted bribe of Rs.1000/-. The complainant replied that as his business was not flourishing and he incurred loss, he would be able to pay Rs.200/- to 300/-. However, the accused insisted upon payment of Rs.1000/-. Hence, the complainant reported the matter to the Vigilance Department. Thereafter, he made a request before the accused that he would be able to arrange Rs.600/- and would pay the same on the next day and the balance would be paid later on. The accused agreed on the bargain and wanted Rs.40/- for preparation of paper book and accordingly, it was paid by the complainant. As the accused demanded Rs.600/- immediately otherwise refused to do his work, the complainant finding no other way was compelled to agree with the same. Accordingly, he lodged FIR before the Inspector of Vigilance, Dhenkanal, who submitted the same to the S.P., Vigilance, Sambalpur and a case was registered under Section 5(2) read with Section 5(1)(d) of the P.C. Act, 1948 and Section 161 of the I.P.C.

A trap was arranged on 25.03.1986. For this purpose, the presence of P.W.3, accompanying witness was secured, the pre-trap procedure was conducted and the complainant produced six nos. of hundred rupee G.C. notes, which were tainted with phenolphthalein powder and the same was given to him to keep it in his left side shirt chest pocket. The raiding party proceeded to the C.S.O. After arriving at the office, the complainant talked to the accused and paid Rs.600/- in the shape of currency notes in the presence of P.W.3. P.W.3 gave a signal as it was prearranged by rubbing

his back side of head. Thereafter, the vigilance staff and the Magistrate rushed to the spot and the accused was standing in front of the accounts section, who was identified by the complainant. The Inspector of Vigilance challenged the accused to have accepted bribe of Rs.600/- and wanted him to give his hand wash and to produce the bribe. The accused gave his hand wash by dipping fingers in sodium carbonate solution, which turned into pink and that was collected in a glass container. Then, the accused led the I.O. for discovery of the currency notes kept under his office table cloth and accordingly those were recovered, the numbers of which were tallied with the numbers noted earlier and seized. The solutions preserved were sent for chemical examination. The I.O. seized relevant papers and prepared the detection report and after completion of investigation, he submitted charge- -sheet against the accused.

3. The case of the defence is that there was no such demand or acceptance of bribe by the accused. As regards the hand wash of the accused turning pink after dipped in sodium carbonate solution, the explanation of accused is that the complainant might have previously come in touch with the currency notes treated with phenolphthalein powder and after arrival of the complainant in the office, the accused shook hand with him and while doing so, the accused might have come in contact with phenolphthalein powder from the hands of the complainant. It is alleged that the complainant arranged the files on the table of the accused and the accused took the files to do office work. In that process, he might have come in contract with phenolphthalein powder and as such his hand wash might have turned pink. Regarding the recovery of money, the explanation of the accused is that the complainant kept the currency note under the table cloth and during search the I.O. recovered the same from under the table cloth and it was not within the knowledge of the accused.

4. The prosecution, in order to bring home the charges leveled against the appellant, examined 10 witnesses. One witness was examined on behalf of the defence. P.W.1 is the Assistant Accountant of the C.S.O. office, who made over charge of the documents relating to the transaction of the complainant to the accused and is a witness under Ext.1. P.W.2 is the Senior Accounts Supervisor, who received the phone message from the Accounts Officer, Civil Supplies Department, Bhubaneswar named in the FIR and he instructed the accused to expedite the matter. P.W.3 is the accompanying witness. P.W.4 is the decoy or complainant himself. P.W.5 is the S.I. of Vigilance, who prepared and demonstrated the chemical reaction sodium carbonate solution with phenolphthalein powder in presence of P.Ws.2, 3, 7 & vigilance staff and smeared the G.C. notes with

phenolphthalein power. P.W.6 is the C.S.O., who stated about the refund of security deposit and clearance certificate. P.W.7 is the Magistrate, who was present during preparation and raid. P.W.8 is the witness, who obtained the order of sanction and submitted charge sheet. P.W.9 is the Investigating Officer and P.W.10 is the Section Officer, Food and Civil Supplies Department, Bhubaneswar who purported to have proved the sanction order and application of mind by the sanctioning authority.

5. The learned counsel for the appellant in course of hearing contended that the learned Special Judge while dealing with various aspects of the case has entered into conjecture and surmises and has held that the accused is guilty of the offence alleged. It is further contended by learned counsel for the appellant that the P.W.4 has not supported the prosecution case in its entirety and has stated that he has kept the money on the table under table cloth of the accused. Such version is supported by P.W.3, the over-hearing witness. It is, therefore, contended that the judgment of conviction and order of sentence are illegal. The learned Standing Counsel for the Vigilance Department, on the other hand, argued that the findings recorded by the learned Special Judge are correct and there are no reasons to interfere with the same in order to acquit the accused from the charges proved against him. The learned Standing Counsel further relies upon the case of ***Biswajit Pattnaik vs. State of Orissa,*** (2013) 55 OCR 957. However, it is seen from the reported decision that the decoy or the complainant himself has been declared hostile to the prosecution. The over-hearing witness has supported the prosecution and has stated about the acceptance of bribe by the accused. Hence, the facts of the reported case stand as a different footing then the present case.

6. The Hon'ble Supreme Court in the case of ***State of Maharashtra vs. Dnyaneshwar Laxman Rao Wankhede,*** (2009) 15 SCC 200, at Paragraph-16, has held that indisputably, the demand of illegal gratification is a sine qua non for constitution of an offence under the provisions of the Act. For arriving at the conclusion as to whether all the ingredients of an offence viz. demand, acceptance and recovery of the amount of illegal gratification have been satisfied or not, the court must take into consideration the facts and circumstances brought on record in their entirety. It is further held that for the said purpose indisputably, the presumptive evidence, as laid down in Section 20 of the P.C. Act, 1947, must be taken into consideration but then in respect thereof, it is trite, the standard of burden of proof on the accused vis-a-vis the standard of burden of proof on the prosecution would differ. The Apex Court, further, held that the accused is called upon to explain as to how the amount was found in his possession and the foundational facts must be

established by the prosecution. While invoking the provisions of Section 20 of the P.C. Act, 1947, the court is required to consider the explanation offered by the accused only on the tough stone of preponderance of probability and not on the proof beyond all reasonable doubt. The same principles apply to a case under the old Prevention of Corruption Act.

7. Applying the aforesaid ratio to the case in hand, this Court is to see whether there was any demand for the bribe money or not. In this connection, the findings of learned Special Judge, viz., at Paragraph-9 of his judgment require careful consideration. It reads as follows.

> " 9. xxx…. On a careful perusal of the charge report, it shows that item no.29 is the file regarding refund of security deposit. The name of the depositor is not indicated against this item. Similarly, Sl. 121 also relates to refund of security deposit of 1979 which cannot be concerned in this case as the firm of the complainant applied for refund of his security deposit in 1982. There is another item pertaining to refund of security deposit of 11/66 and 6/67 at sl. no.89. This also cannot relate to p.w.4. There is no other item pertaining to refund of security deposit in respect of the storage agent. Thus sl. no.29 might be the file in all reasonable probabilities concerning the firm in question which was made over by Sri Das to the accused. Of course in the absence of the name of the firm or the name of the complainant against sl. no.29, some doubt can be raised in this respect which can be clarified keeping in view the ambiguity of the charge list itself which was not explained by the defence, who has proved the same. Therefore, positive interference can be drawn to the fact that the file in question was made over charge by Sri Das to the accused, p.w.1 deposed that he handed over the documents to the accused on 24.3.86 for the purpose of audit and this evidence was not whittled down by the defence in any manner. Thus, the accused was dealing with the file and for this reason p.w.4 approached the accused to issue the clearance certificate for processing the matter for refund of the security deposit cannot be disbelieved which is a circumstance to show that the accused might have the occasion to demand Rs.1000/- from p.w.4 to do his work." (underlined to emphasise)

8. From the use of expressions the like "might be the file" and "the accused might have the occasion to demand of Rs.1000/- from P.W.4" reveal that the learned Special Judge did not believe that the prosecution has proved the allegation that the accused was handling the concerned file

in which the refund of money is to be effected and that there is no proof that he demanded money in pursuance of such handling of file to do the work of the complainant.

9. So far as the question of acceptance of bribe money is concerned, it is appropriate to look into the evidence of the decoy and the over-hearing witness. P.W.4 is the decoy or complainant himself. He has stated regarding the demand of bribe by the accused and his bargain to pay Rs.600/-. Thereafter, the complainant reported to the Vigilance Inspector and subsequent events relating to the pre-trap arrangements took place. As far as the trap is concerned, the witness stated in cross examination that when he reached along with the over-hearing witness to the room of the accused, the accused was alone present in his room. He further stated that he entered inside the room of the accused and P.W.3 stood near the door, outside the room. He further stated that when he reached the room, the accused shook hand with him and told him that he came. The witness further states that he told the accused that he brought Rs.600/-, as per the previous talk but the accused declined and insisted for payment of Rs.1000/- at a time. The witness, however, stated in cross examination that he kept Rs.600/- on the table of the accused but the accused declined to receive the same as it was less than Rs.1000/-. The witness further stated that the accused came out of his room and two to three minutes thereafter he entered inside his room. Then, he called the witness to come and see the position of the file. Both of them went to accounts section of the office. Then other members of the raiding party came near them. The I.O. gave his identification and that of the members of raiding party. The I.O. challenged the accused that he has received Rs.600/- as bribe from the complainant and asked the accused to produce the same. At that stage the accused denied the allegation. The I.O. took the hand-wash of the accused, which turned pink rose. The accused however denied to have received the same. On query, the witness told the I.O. that he kept money on the table under the table cloth and the same was recovered from the table of the accused. Thereafter, the I.O. prepared seizure list and seized security papers and cash. The prosecution cross-examined the witness under Section 154 of the Indian Evidence Act treating him to be a hostile witness. The statement of the witness has been confronted to him. However, he denied to have made statement before the I.O. that he gave money to the accused.

10. It is apparent from the evidence of P.W.3 that he stated that after his arrival at the C.S.O. office along with P.W.4, they went to the room of the accused. The complainant entered inside the room of the accused and the witness remained present at the entrance of that room. P.W.3 stated that he

was standing at a distance of six cubits from the table of the accused. The witness further stated that the complainant asked about his file with the accused and thereafter the accused came outside the room for two minutes. The complainant kept cash of Rs.600/- on the table of the accused below the table cloth. The accused entered inside his room. Thereafter, the witness gave signal by robbing his head in his left hand. At that time, the members of the raiding party arrived at the spot and the complainant and the accused were going to the verandah of the office. The Inspector of Vigilance challenged the accused and arrested him. This witness has also been treated to be a hostile witness to the prosecution and has been cross-examined under Section 154 of the Indian Evidence Act.

11. Thus, a bare reading of the evidence of these important witnesses, it is apparent on the record that the accused did not accept money from the complainant. The complainant has positively stated, which is corroborated by P.W.3, that the complainant kept the bribe money under the table cloth of the desk of the accused. Therefore, the second ingredient appears not to have been proved beyond all reasonable doubts. The learned Standing Counsel however argued that since the hand-wash of the accused turned pink when dipped with sodium carbonate solution, the prosecution case should be believed regarding his acceptance of bribe money from the complainant. In this regard, the defence has put forth a stand that after preparing the trap when they were proceeding to CS Office on the way the complainant purchased betel and inadvertently he put his hand inside chest pocket where the tainted currency notes were kept. Thereafter, he brought out Rs.1 from the back side pocket of his pant and purchased the betel. It is also consistently stated by the complainant that after arrival at the office he shook hand with the accused and that he handed the files that were placed on the table of the accused. There appears to be a reasonable explanation regarding the fact of phenolphthalein test. In this regard, the learned counsel for the appellant relies upon the reported case of ***State of U.P. Vs. Jagadish Singh Malhotra,*** (2001) 20 OLR (SC) 507, wherein at paragraph-8, the Hon'ble Supreme Court has held that:

> "8. Insofar as the phenolphthalein test is concerned, we find that the explanation given by the respondent for presence of crystals of phenolphthalein on his hands, which were washed in a solution of sodium carbonate, and the solution had turned pink, is quite plausible. Categorically denying the handling or receipt of the tainted currency notes, he stated that he shook hands with the officers and the phenolphthalein crystals could have come on to his hands during that time. This factor becomes probable, when we find that

witnesses examined at the trial are interested witnesses who may have a reason to falsely implicate the respondent, who had been challenging their vehicles on various grounds. x x x ”

12. The reported decision lays down that when a plausible explanation is put forth by the defence, which is to be considered in the touch stone preponderance of probability, the trial court should not reject the same on the ground that it is not proved beyond all reasonable doubt.

13. In this case, as far as this explanation is concerned, the learned Special Judge has entered into a conjecture by holding that if the currency notes were kept in the chest pocket of the complainant and the trap was laid, the accused would have been kept under surveillance by the vigilance staff and the magistrate. The learned Special Judge, further, entered into a conjecture holding that in all reasonable probability the vigilance staff would not have freely let out P.W.4 to take ‘paan’. It is further held by him that if at all the accused want betel, the same could have been purchased by the vigilance staff. This approach of the learned Special Judge, Vigilance is contrary to established tenets of law. The trial court has to accept the evidence as led before him instead of entering into conjectures and put his own opinion on the same when the same is not stated by any of the witnesses.

14. Thus, in the case as there is failure of proof, beyond reasonable doubt regarding the demand of bribe money by the accused and acceptance of the same by him, the prosecution case has failed to prove the guilt of the accused beyond all reasonable doubt. It is also pertinent to take note of the fact that the money was admittedly recovered from under the table cloth of the accused’s office table.

In that view of the matter, the appeal succeeds. The judgment of conviction and order of sentence dated 28.03.1990 passed in T.R. Case No.2 of 1987 are hereby set aside. The accused is not found guilty and is set at liberty if his detention is not required in any other case. The bail bonds be cancelled.

Appeal allowed.

2014 (I) ILR - CUT-1127

S. K. MISHRA, J.

CRLREV NO. 160 OF 2014

NIRANJAN PRADHAN ……..Petitioner

.Vrs.

STATE OF ORISSA ……...Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – S.167(2)

Whether the period the accused was on interim bail shall be counted as "Under Custody" while deciding an application u/s 167(2) Cr.P.C. – Held – Yes.

In this case the petitioner-accused was remanded to judicial custody on 24.12.2013 for the offences U/ss. 420, 406 & 120-B I.P.C. – He made an application on 22.2.2014 for bail u/s 167(2) which was rejected on the ground that he was released on interim bail on 15.1.2014 for 11 days so he cannot be said to be in custody for 60 days to get the benefit u/s 167(2) Cr.P.C. – Hence this revision – Held, the period of interim bail should be considered as 'under custody' in calculating 120 days or 60 days as the case may be for graning compulsive bail u/s 167 Cr.P.C. (Para 3)

Case Law Referred to:-

1. (2006) 9 SCC 540 : Kanaksinh Mohansinh Mangrola -V- State of Gujrat

For Petitioner : M/s. Ashwini Kumar Das, P.Sahoo & S.N.Biswal
For Opp. Party: Standing Counsel

Date of Judgment : 24. 04. 2014

JUDGMENT

S.K.MISHRA,J.

The simple question that arises for determination in this case is whether the period the accused was on interim bail shall be counted as to be under custody while deciding an application under Section 167(2) of the Code of Criminal Procedure, 1973(hereinafter referred to as the "Code" for brevity). The petitioner has been remanded to judicial custody on

24.12.2013 for the alleged commission of offences under Sections 420/406/120-B of the Indian Penal Code. His application for bail was rejected and he was sent to judicial custody. It is submitted by the learned counsel for the petitioner that as per the statutory provision of Section 167(2) of the Code after lapse of 60 days an application was filed before the learned S.D.J.M., Bhubaneswar in G.R. Case No.731/2008 to release the petitioner on bail. The learned S.D.J.M., Bhubaneswar has held that because of the fact that the petitioner was released on interim bail vide order dated 15.1.2014 for 11 days on conditions and the petitioner surrendered before the learned S.D.J.M. on 28.1.2014, he cannot be said to have been in custody for 60 days for the purpose of investigation.

2. In this connection, the reported case of ***Kanaksinh Mohansinh Mangrola Vs. State of Gujrat***; (2006) 9 SCC 540 was cited by the learned counsel for the petitioner which lays down that the day the appellant was in custody as he was on interim bail for 15 days from 13.4.2005 and his application could have been considered on merits instead of dismissing the same on the ground of non-maintainability.

3. Section 167 of the Code provides for the procedure when investigation cannot be completed twenty-four hours. Sub-section (2) of Section 167 of the Code provides that the Magistrate to whom an accused person is forwarded under this Section may, whether he has or has not jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction. It is provided that the Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody for a total period exceeding – (i) one hundred twenty days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years; (ii) sixty days, where the investigation relates to any other offence. So the provision of Section 167 of the Code speaks about the judicial custody to a person during investigation. In case the investigation cannot be completed within 24 hours, the procedure to be followed by the court as has been enshrined in Section 167 of the Code. Since the interim application for bail has been allowed and he was still under the process of the Code, this Court is of the opinion that the period of interim bail should be taken into consideration in calculating

the 120 days or 60 days as the case may be for granting compulsive bail under Section 167 of the Code.

4. In that view of the matter, this Court comes to the conclusion that the order dated 22.2.2014 passed by the learned S.D.J.M., Bhubaneswar in G.R. Case No.731 of 2008 is liable to be set aside. Hence the CRLREV is allowed. The aforesaid order is set aside. It is ordered that the petitioner be released on bail by the learned S.D.J.M., Bhubaneswar in the aforesaid case on such terms and conditions as deemed just and proper by him.

Revision allowed.

2014 (I) ILR - CUT-1129

C. R. DASH, J.

W.P.(C) NO. 11134 OF 2005

SAILABALA @ KRUSHNAPRIYA PARIDA ……..Petitioner

.Vrs .

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

ODISHA SURVEY & SETTLEMENT ACT, 1958 – S.15(b)

Revision – Limitation – Revision to be filed within one year from the date of publication of R.O.R. – However a revision can be entertained after one year if ends of justice require entertaining such revision and delay has not resulted in accrual of right over the property in question in favour of any other person.

In this case there is delay of 15 years in preferring the revision – The commissioner himself observed in paragraph 5 of the impugned order that the case of the petitioner has some merit and there is nothing in the impugned order to show that for the delay in filing the revision by the petitioner some right has accrued in favour of any other person over the property involved in the case – Held, the impugned order passed by the commissioner dismissing revision filed by the petitioner on the ground of delay only cannot be sustained and the same is quashed. (Paras 5, 6 & 7)

Case Law Relied on :-

1. 2003 (II) OLR - 306 : Krushna Chandra Mahakul -V- State of Orissa & Ors.
2. 2008 (II) OLR - 385 : Parikhita Das -V- Commissioner, Consolidation, Orissa, Cuttack & Anr.

For Petitioner : M/s. Ramesh Mohanty, M.R. Sarangi, S.K.Patnaik & G.M.Rath

For Opp. Parties : Mr. S.Mishra, Addl. Govt. Advocate (for O.Ps. 1 to 3)

Date of Judgment : 28.03.2014

JUDGMENT

C.R. DASH, J.

Petitioner has impugned the order dated 23rd June, 2004 passed by the Commissioner, Consolidation & Settlement, Cuttack in Revision Petition No.322 of 2003 dismissing the revision on the ground of limitation.

2. Late Sarada Parida is the mother of the present petitioner and opposite party nos.4, 5 and 6. Hal Khata No.261 containing plot no.227 measuring Ac.0.14 decimals, plot no.21 measuring Ac.0.20 decimals and plot no.22 measuring Ac.0.09 decimals stands recorded in the name of aforesaid Sarada Parida. The Hal Record of Rights was finally published on 05.02.1988 in favour of the aforesaid Sarada Parida so far as the land in question is concerned. By that time Sarada Parida was dead. The petitioner, on 26.09.2003 preferred the revision with a prayer to record the land in the name of the petitioner herself and opposite party nos.4, 5 and 6. It was further prayed before the revisional authority to delete the "forcible note of possession" made in the Hal R.O.R. in favour of present opposite party nos.7, 8, 9 and 10. Learned revisional court dismissed the revision solely on the ground of delay, as there was delay of more than 15 years in preferring the revision. Before the revisional court all the opposite parties were set ex parte except opposite party no.6 (present opp. party no.9). So far as the present writ petition is concerned, though notice was issued to opposite party nos.4 to 10, they refused to accept notice and the same was served through affixture on their refusal. Notice having been served through affixture on refusal by opposite party nos.4 to 10, service of notice is to be held as sufficient. In spite of such service of notice, opposite party nos.4 to 10 have chosen not to appear in the case.

3. Learned counsel for the petitioner making a comparative analysis of Section 15 of the Orissa Survey and Settlement Act, 1958 ('the Act' for short) and Section 5 of the Limitation Act, 1963, submits that the language of both the Sections being different and there being scope of entertaining a revision under Section 15 of the Act even after one year of the publication of the R.O.R., learned revisional court should not have thrown away the revision solely on the ground of delay when it has been held in paragraph 5 of the impugned order that the case has some merit. Learned counsel for the petitioner relies on the case of **Krushna Chandra Mahakul *vs.* State of Orissa and others,** 2003 (II) OLR – 306 and **Parikhita Das *vs.* Commissioner, Consolidation, Orissa, Cuttack and another,** 2008 (II) OLR – 385, to substantiate his contention.

4. Mr. Siddharth Mishra, learned Addl. Govt. Advocate on the other hand supports the impugned order and submits that, by no stretch of imagination the revision can be said to have been filed within a reasonable time, as the same has been filed after about 15 (fifteen) years of the final publication of the R.O.R.

5. This Court, in the case of **Krushna Chandra Mahakul** *(supra),* on a comparative analysis of Section 15 of the Orissa Survey and Settlement Act, 1958 and Section 5 of the Limitation Act, 1963, has held thus :-

> "Whereas under Section 5 of the Limitation Act, 1963, the applicant has to show sufficient cause for not preferring the appeal or making the application, as the case may be, within the period prescribed, under Section 15(b) of the Orissa Survey and Settlement Act, 1958, there is no such requirement. Hence, even if the petitioner has not been able to explain sufficiently the entire period of delay of four years, eight months and twelve days in filing the revision, his revision should not be thrown out only on the ground of delay in filing the revision beyond the period of one year. **In each case, the authority hearing the revision will have to consider as to whether ends of justice require entertaining the application for revision beyond the period of one year or as to whether any valuable right has accrued to some other party on account of delay in filing the application for revision on account of which the revision petition should not be entertained beyond the period of one year."**
>
> (emphasis supplied)

On the aforesaid analysis, this Court condoned delay of about four and half years in preferring the revision solely on the ground that there is no

finding by the Commissioner in the impugned order that on account of delay in filing the revision petition, someone else has acquired a valuable right to the land. This Court, in the case of **Parikhita Das** *(supra)* has held that, as the delay in filing the revision does not prima facie show that the same has resulted in accruable interest of any other person over the property involved in the case, the revision should not have been dismissed on the ground of delay. Going further, this Court has observed thus :-

> "Moreover, since maintaining of Record of Rights, after preparation of the same, is done by the State, for collecting land revenue from the respective land owners, it should be always seen that correct records are maintained by the revenue authorities. The petitioner, who claims to be tenant over the disputed property, should have been afforded an opportunity to substantiate his right before the Commissioner so that in the event the Record of Rights published finally reflects an incorrect statement, the same should have been corrected to facilitate maintenance of correct Record of Rights for collection of revenue and for reference for the posterity."

6. If the present case is examined in the light of the aforesaid two decisions, it is found that the Commissioner himself, in paragraph-5 of the impugned order, has observed that the case of the petitioner has some merit. Learned Commissioner was constrained to observe as such perhaps for the reason that the R.O.R. has been published in favour of a dead person, i.e. late mother of the petitioner and opposite party nos.4, 5 and 6. There is nothing in the impugned order to show that for the delay in filing the revision by the petitioner, some right / interest has accrued in favour of any other person over the property involved in the case. The dictum of the aforesaid two decisions makes it clear that a revision can be entertained even after one year of the publication of the R.O.R., if entertaining the revision shall be for the ends of justice and delay has not resulted in accrual of right over the property in question in favour of any other person. In the case of **Parikhita Das** *(supra),* on the basis of such analysis, this Court has thought it proper to condone the delay of about 13 (thirteen) years in preferring the revision.

7. In view of the discussion supra, I am of the considered view that the impugned order dismissing the revision filed by the petitioner on the ground of delay only cannot be sustained and the same is accordingly quashed. The matter is remitted back to the Commissioner, Consolidation and Settlement, Odisha, Cuttack (opp. party no.1) for disposal of the same on merit afresh after affording opportunity of hearing to all the parties

concerned. The revision petition shall be disposed of on merit by the end of this year. The writ petition is accordingly allowed.

Writ petition allowed.

2014 (I) ILR - CUT- 1133

RAGHUBIR DASH, J.

F.A.O. NO. 438 OF 2012

LAXMIPRIYA PAIKARAY …….Appellant

.Vrs.

BICHITRA NANDA DAS & ORS. …….Respondents

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

Interim Injuction – Trial Court refused injuction in favour of the plaintiff-appellant – Hence this appeal – Respondents assert that they are proceeding with construction of residential complex for commercial purpose – Plaintiff-appellant has filed the suit for partition – In the event she succeeds in the suit, she will suffer irreparable injury if construction work for commercial purpose is allowed to proceed – Held, it is necessary to restrain the respondents from making further construction or creating any third party interest by making further alienation till disposal of the suit – Direction issued to the parties not to change the nature of the suit land till disposal of the suit. (Para 9)

For Appellant - M/s. P.K.Mohapatra, K.K.Mishra, S.Mohanty & A.Mohapatra

For Respondents - M/s. D.P.Das, B.K.Mishra, S.K.Barik, S.K.Dalai, N.K.Sahu & B.Swain (for Respondent No.1)
M/s. A.P.Bose, R.K.Mohanta, N.Hota, S.S.Routray & V.Kar(for Respondent Nos. 2 to 4)

Date of Hearing : 06.03.2014
Date of Judgment : 12. 03.2014

JUDGMENT

R. DASH, J.

This appeal is against the order dated 03.11.2011 passed by the learned Civil Judge (Senior Division), Bhubaneswar in I.A. No.221 of 2011 arising out of C.S. No.395 of 2011 disallowing the prayer for interim injunction restraining the Respondents from making any construction over the suit property as well as creating third party interest therein till disposal of the suit.

2. The Appellant is the petitioner and Respondent Nos.1 to 4 are the opposite parties in the same order before the learned trial court.

3. The Appellant-petitioner has filed the suit for partition and declaration that the sale deeds executed by opposite party Nos.1 and 2 (Respondent Nos.1 and 2 herein) in favour of defendant Nos.6, 7 and 8 (Respondent Nos.3 and 4 are defendant Nos.6 and 7 in the suit. Defendant No.8 is not a party either in the I.A. or in the present appeal) have no binding effect on him. The Appellant-plaintiff's case in the suit, in short, is that the suit schedule property is ancestral property, the common ancestor being late Banamali Das, who died leaving behind two sons, i.e., Respondent Nos.1 and 2, and three daughters, namely, Laxmipriya (the Appellant), Angurabala (defendant No.3) and late Khirodabala, who has died leaving behind defendant Nos.4 and 5 as her legal heirs. It is alleged that after the death of the common ancestor his two sons (Respondent Nos.1 and 2), practising fraud by suppressing the fact that the common ancestor had left behind three daughters, mutated and converted the suit schedule property in their names and after the mutation both of them executed three sale deeds in favour of defendant Nos.6, 7 and 8 alienating the suit property wherein the plaintiff has got $1/5^{th}$ share. In all the sale deeds Respondent Nos.1 and 2 have falsely stated that they are the only legal heirs of late Banamali Das. Much after the execution of the sale deeds, they approached the Appellant-plaintiff on 30.6.2010 and in the garb of an agreement to sale, they took a deed of relinquishment from her. When the purchasers made arrangement for undertaking construction work over the suit land, the Appellant protested but the purchasers claimed to have purchased the property. On enquiry the Appellant came to know that her two brothers by practising fraud first sold the suit property and then obtained a deed of relinquishment from her.

Alleging that Respondent Nos.3 and 4 are going to make construction over the suit land, she filed the I.A. seeking for interim relief. Respondent No.1, who has filed objection to the I.A., without disputing that the Appellant is one of the daughters of Late Banamali Das has contended that Angurabala Mohanty, another daughter of late Banamali Das and Alekha Chandra Baral, husband of late Khirodbala Baral, a daughter of late Banamali Das, have executed registered deed of relinquishment on 30.12.2009 in respect of their interest in the properties left by late Banamali Das in favour of Respondent Nos.1 and 2 but the Appellant, who had agreed to execute such deed of relinquishment could not do so as she was then staying outside. However, on 30.06.2010 she executed a registered deed of relinquishment in respect of her share in suit property in favour of Respondent Nos.1 and 2. In view of such relinquishment, it is contended, the Appellant has no subsisting legal right to be enforced in the suit and thus, there is no prima facie case in her favour. Thus, it is claimed that Respondent Nos.1 and 2 have become the absolute owner of the suit schedule property. It is further contended that between Respondent Nos.1 and 2 there has been a settlement, with the intervention of village gentries, effecting division of the properties and separate allotment thereof between the two brothers. Thus, it is contended that the suit for partition as laid is not maintainable. Respondent No.1 has further pleaded in his written statement that Respondent No.2 has already sold his allotted share creating third party interest therein and Respondent No.1 has entered into a collaboration-agreement with one Harish Kumar Shivani for construction of a multi-storied residential complex over a portion of the suit land and the latter has invested huge sum of money for the purpose of construction of the complex. With regard to the Appellant's execution of the deed of relinquishment, Respondent No.1 has contended that she is not an illiterate lady and having full knowledge that she was going to execute a deed of relinquishment in favour of Respondent No.1, voluntarily executed and registered the deed.

4. Respondent-opposite parties 2 to 4 have filed their counter contending, inter alia, that Respondent Nos.3 and 4 having purchased a portion of the suit land from Respondent Nos.1 and 2, have completed a substantial part of construction over the suit land. So any kind of restraint order against them will put them to grate inconvenience and they would suffer irreparable injury.

5. Learned lower court observed that since the Appellant-petitioner has executed a deed of relinquishment in favour of Respondent Nos.1 and 2, she is now estopped to challenge the same in any legal forum. On her plea that the deed has been fraudulently obtained by Respondent Nos.1 and 2,

learned trial court has observed that the same shall be decided during the trial. With that observation the trial court has opined that the Appellant-petitioner has no prima facie case. Learned trial court's further observation is that since Respondent Nos.1, 3 and 4 are carrying on construction over the suit land by investing huge amount of money for commercial purpose, the balance of convenience tilts in favour of the Respondents and in the event any restraint order is made, Respondents would sustain irreparable injury. Accordingly, the prayer for interim injunction has been refused.

6. Learned counsel for the Appellant argues that since the Appellant has pleaded that the deed of relinquishment has been obtained fraudulently from an old illiterate lady without letting her know anything about its contents, learned lower court while disposing of the interim application should not have observed that the Appellant is estopped to challenge the deed in the legal forum. The trial court's observation, it is argued, that plaintiff has got no prima facie case in the sense that she has not made out an arguable case in her favour to be raised during the trial is also erroneous. It is further contended that since Respondent Nos.1 and 2 have executed sale deeds in favour of Respondent Nos.3 and 4 much prior to the execution of the impugned deed of relinquishment, in such a situation, Respondent Nos.1 and 2 cannot be said to have got legal right to transfer the Appellant's share to Respondent Nos.3 and 4. It is further submitted that since Respondent Nos.1 and 2 by practising fraud converted the status of the suit land and also sold the same to Respondent Nos.3 and 4 before obtaining the so called deed of relinquishment it cannot be said that the Appellant has no prima facie case in her favour. It is submitted that if the Respondents are allowed to proceed with the construction work, then the Appellant shall suffer irreparable injury and grate deal of inconvenience to retrieve her share in the suit property in the event she succeeds in the suit.

7. On behalf of the Respondents, learned counsels have argued supporting the impugned order and contending that if any order of restraint is passed against the Respondents, then it would cause irreparable injury to them, who are carrying on construction by investing huge amount of money for commercial purpose.

8. It is not in dispute that late Banamali Das left behind two sons and three daughters and Appellant is one of the daughters. It is also not specifically denied that while seeking for conversion of the status of the suit land in OLR Case No.321 of 2010 and seeking mutation in their names vide M.C. No.418 of 2010, Respondent Nos.1 and 2 suppressed the fact that late Banamali Das had three daughters. They obtained the order of conversion as well as mutation behind the back of the Appellant. It is also not in dispute

that while executing the sale deed in favour of Respondent Nos.3 and 4, Respondent Nos.1 and 2 have suppressed the fact that there are also other co-shares in respect of the suit property. The purchasers also do not appear to have taken due care to find out whether late Banamali Das had left behind any other heirs. In this background, the plea taken by the Appellant that her brothers fraudulently obtained a deed of relinquishment from her cannot be out-rightly rejected at this stage to further proceed to say that she, having executed the deed of relinquishment, is estopped to challenge the same. No doubt, she has put signature on the deed of relinquishment but mere putting one's signature is not an indication that he or she is literate. She has taken the stand that she is an old illiterate lady and one deed of relinquishment has been obtained from her by way of misrepresentation and fraud. Under such circumstances, it cannot be said that the petitioner has not raised a substantial question which needs investigation and decision on merits. Therefore, she has got a prima facie case in her favour.

9. The Respondents assert that they are proceeding with construction of residential complex for commercial purpose. The Appellant has filed the suit for partition. In the event she ultimately succeeds in the suit, she will definitely suffer a grate deal of inconvenience as well as irreparable injury, if construction work for commercial purpose is allowed to proceed. Therefore, it is considered necessary to restrain the opposite parties from making further construction or creating any third party interest by making further alienation till disposal of the suit.

Accordingly, the F.A.O. is allowed. Parties are directed not to change the status quo of the suit land till disposal of the suit. Parties to bear their own cost.

Appeal allowed.

2014 (I) ILR - CUT-1138

DR. B. R. SARANGI, J.

CRLMC. NO. 446 OF 2002

SATYANARAYAN DASH .....Petitioner

.Vrs.

RANKANIDHI SETHI .....Opp.Party

CRIMINAL PROCEDURE CODE, 1973 - S.197

Sanction – Petitioner-accused is a Police Officer – The act of the petitioner has no nexus with due discharge of his official duty as a public servant, rather his action amounts to misutilization of his power as a police officer – Held, sanction U/s.197 Cr.P.C. not required – Impugned order taking cognizance against the petitioner calls for no interference. (Paras 13,14)

Case laws Referred to:-

1.2013 (II) OLR 374 : (Sarat Chandra Panda-V- State of Orissa & Anr.)
2.(2010) 46 OCR 614 : (Rohit Kumar That-V- State of Orissa & Anr.)
3.(2009) 44 OCR 765 : (Biswanath Hota & Ors.-V- State of Orissa & Anr.)
4.(1999) 16 OCR (SC) 530 : (N.K. Ogle-V- Sanwaldas @ Sanwalmal Ahuja).
5.AIR 1956 SC 44 : (Motajog Dobey -V- H.C. Bhari)
6.AIR 2001 SC 2198 : (Rizwan Ahmed Javed Shaikh & Ors.-V- Jammal Patel & Ors.)
7.2001 (1) OLR 238 : (Sri Satyabadi Padh-V- Nepal Chandra Kar & Ors.)
8.1995 (II) OLR 284 : (Kremjit Mohananda-V- Mohanpani Karua & Anr.).

For Petitioner - M/s. D.D. Nayak, M. Mohanty, R. K. Pradhan, B. Rout, B.K. Das.
For Opp.Party - M/s. A.C. Sethi (for sole Opp.Party).

Date of hearing : 03.09.2013
Date of judgment : 19.09.2013

JUDGMENT

DR. B.R.SARANGI, J.

In this application, the petitioner, who is a Police Officer, seeks to quash the order dated 19.6.2002 passed by the learned SDJM, Banki taking cognizance of the offence under Sections 204, 294, 342, 506, IPC in I.C.C. No.11 of 2001.

2. Opposite party as complainant, filed a complaint case bearing ICC No. 11 of 2001 before the learned S.D.J.M., Banki stating that on 18.8.2000 at about 8.00 P.M. he lodged a written report at Banki Police Station regarding a occurrence, which happened on the same day at 1.00 P.M. on that day. At that time in absence of the Officer-in-charge, the Second Officer, namely, Maguni Charan Das received the report from him, registered the case as P.S.Case No. 120 of 2000 against Rabindra Kumar Barik and others for the offence under Sections 447, 341, 323, 324, 354, 506/34, IPC and under Section 3 of the S.C. & S.T. (P.A.) Act and under Section 25/27 of the Arms Act and handed over a copy of the F.I.R. to him. The complainant-opposite party and his son were sent to Banki hospital for treatment by the Second Officer with instruction to come to the police station on the next day at about 10 A.M. As per the direction of the Second Officer, the complainant-opposite party went to the police station with his son. The O.I.C. told him to wait till he returned from village Dulanpur. At about 10 P.M., the O.I.C returned to the police station and scolded the complainant-opposite party stating "MAGIHA MADORCHOD EMITIKI KANA ETALA LEKHI CHHU MUN JEMITI KAHUCHHI SEMITI LEKHE' and directed his staff to place him in the hazat. Then the complainant-opposite party and his son were put in the hazat and after some time, the accused-petitioner called the complainant-opposite party to his office room and scolded him saying "MAGIHA KENTHU GOTE LEKHI ANICHHI". The accused-petitioner torn the earlier F.I.R. lodged by the complainant-opposite party. The complainant-opposite party and his son were confined in the hazat from 19.8.2001 to 21.8.2001 and on the same day, i.e. on 21.8.2001 they were forwarded to the Court in a false case initiated at the instance of the persons against whom the F.I.R. was lodged by the complainant.

3. Mr.D.Nayak, learned Sr. Counsel appearing for the accused-petitioner submitted that the offence alleged in the complaint petition in Annexure-1 prima facie does not make out a case against the petitioner. Therefore, the learned Magistrate has committed error by taking cognizance vide impugned order dated 19.6.2002. He further submitted that the petitioner is a public servant and cognizance has been taken in absence of sanction under Section 197, Cr.P.C. as the Act done is coming within the

purview of due discharge of official duty and the act so done does not amount to misutilization of his official power. Therefore, the impugned order taking cognizance by the learned SDJM need be quashed. In order to substantiate his contention, Sri Nayak has relied upon the judgments in **Sarat Chandra Panda v. State of Orissa and another,** 2013(II) OLR 374, **Rohit Kumar That v. State of Orissa and another**, (2010) 46 OCR 614, **Biswanath Hota and others v. State of Orissa and another** (2009) 44 OCR 765, **N.K.Ogle v. Sanwaldas alias Sanwalmal Ahuja** (1999) 16 OCR (SC) 530.

4. Learned counsel appearing for the opposite party submitted that the order of cognizance is well within the jurisdiction of the learned Magistrate as the allegation made out a prima facie case against the petitioner. The act committed has no nexus with due discharge of official function. There is no reasonable connection between the act complained of and due discharge of official duty by the petitioner. Therefore, this Court may not interfere with the order passed by the learned Magistrate taking cognizance. Admittedly, in the absence of the petitioner, who was working as O.I.C., Banki Police Station, the complainant-opposite party lodged the F.I.R. and handed over the same to S.I. of Police Sri Maguni Charan Das. On receipt of the same, P.S. Case was registered and copy of the F.I.R. was handed over to the complainant-opposite party and the complainant-opposite party and his son were sent to Sub-divisional Headquarters Hospital, Banki for treatment through Gramarakhi with instruction to come to the police station on the next date i.e. on 19.8.2000. In obedience to the said direction only, the complainant-opposite party and his son came to the police station on 19.8.2000 and the petitioner detained both the complainant-opposite party and his son in the police hazat and abused them in obscene language and kept them in the police hazat till 21st August, 2000, and thereafter forwarded them to the court on the very same day. Being aggrieved by the inhuman conduct of the petitioner, the complainant-opposite party lodged the complaint before the learned SDJM, Banki vide Annexure-1 on 23.1.2001, which was registered as ICC Case No.11 of 2001.

5. On the basis of the complaint lodged under Annexure-1, learned S.D.J.M., recorded the initial statement vide order no.4 dated 1.3.2001 and directed for enquiry under Section 202, Cr.P.C. and recorded the statement of one Kuber Choudhury on 18.8.2001. On perusal of the initial statement of the complainant-opposite party and the statement of the witnesses recorded during enquiry under Section 202, Cr.P.C., learned Magistrate took cognizance of the offence vide order no.31 dated 19.6.2002 against the petitioner under Sections 204, 294, 342, 506, IPC as the allegations made

out a prima facie case. The impugned order taking cognizance also indicates that the accused-petitioner is a police officer and a public servant and as such, sanction under Section 197, Cr.P.C. is not necessary before proceeding against him as the act done by him does not come within the purview of official duty and he has done the act by misutilizing his power as a Police Officer.

6. In the judgment in **Sarat Chandra Panda (supra)**, cited by Mr.Nayak, since the act complained of has nexus with official duty of the accused person, this Court held that the order taking cognizance of the offence is bad for want of sanction and accordingly quashed the order taking cognizance.

7. In **Rohit Kumar That** (supra) this Court held that the accused, who was a police officer, while performing his official duty in investigating a criminal case on an F.I.R. disclosing cognizable offence, went to the house of the complainant in search of the accused . Though allegation has been made that the act committed by the petitioner exceeds his official duty, it cannot be said that it had no nexus with the performance of official duty of the petitioner. Therefore, this Court held that the order of cognizance and issuance of process is vitiated and accordingly, quashed the proceeding.

8. In **Biswanath (supra)** this Court held that the accused persons, who were police officers and discharging their official duties of maintaining law and order situation during the visit of the Hon'ble Chief Minister to Berhampur, is said to have committed the act against the lawyers of Ganjam District Bar Association in excess of discharge of official duties. Therefore, this Court held that the act complained of has a reasonable nexus with the discharge of their official duties and consequently, quashed the order of cognizance in absence of any sanction of the State Government under Section 197, Cr.P.C..

9. In **N.K.Ogle (supra),** the apex Court has held that the accused-appellant, who was discharging the duties of Tahasildar issued demand notice and subsequently attachment order. The complainant went in his scooter to the Tahasildar's office to object to the legality of the order, where the scooter was seized and subsequently auction was held. The complainant stated that the appellant forcibly kept his scooter and as such committed offence under Section 379, IPC and cognizance has been taken without any sanction. The apex Court held that the act complained of by the complainant against the Tahasildar had been committed in discharge of his

official duty and therefore, no cognizance can be taken by any court without prior sanction of the competent authority.

10. On consideration of the aforesaid judgments cited by Mr.Nayak, it appears that in all these cases the act done has got nexus with the official function. Therefore, criminal proceedings had been quashed as prior sanction under Section 197, Cr.P.C. had not been obtained by the time the order of cognizance was passed. The position of law no more remains res integra. It is settled law that the provisions contained in Section 197, Cr.P.C. makes it clear that no cognizance can be taken without prior sanction under Section 197, Cr.P.C. against a public servant, who is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty.

11. In the case of **Motajog Dobey v. H.C.Bhari**, A.I.R. 1956 SC 44, the Constitution Bench held that whether sanction is to be accorded or not is a matter for the Government to consider. The absolute power to accord or withhold sanction conferred on the Government is irrelevant and foreign to the duty cast on the Court which is the ascertainment of the true nature of the act. In this respect, the Court has to see whether it can take cognizance of the case without previous sanction and for this purpose, the Court has to find out if the act complained against is committed by the accused while acting or purporting to act in the discharge of official duty. Once this is settled, the case proceeds or is thrown out. The Supreme Court further held that the offence alleged to have been committed must have something to do or must be related in some manner, with the discharge of official duty and no question of sanction can arise under Section 197 unless the act complained of is an offence; the only point to determine is whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What the Court must find out is whether the act and the official duty are so inter-related that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation.

12. In **Rizwan Ahmed Javed Shaikh and others v. Jammal Patel and others**, AIR 2001 SC 2198, the Supreme Court reiterated the position with regard to the test to be applied to attract the applicability of Section 197(3) Cr.P.C. The facts of the case in the decision rendered in the case of **Sri Satyabadi Padh v. Nepal Chandra Kar and Ors.,** 2001 (1) OLR 238 are

also similar to the facts of the present case, where the Court relied upon various earlier decisions of this Court more specifically, the decision of **Kremjit Mohananda v. Mohanpani Karua and another,** 1995(II) OLR 284 in which it was held that a middle line which is adopted is that it is not every offence committed by a public servant in course of performance of his official duty which entitles him to the protection under Section 197, Cr.P.C. What comes under the protective umbrella is an act constituting an offence, which directly or reasonably connects with his official duty.

13. Referring to the judgments mentioned supra and considering the initial statement as well as enquiry conducted under Section 202, Cr.P.C. it is found that the act of the petitioner has no nexus with due discharge of official function as a public servant and more so, the act of the petitioner affecting the dignity of the complainant-opposite party amounts to violation of Article 21 of the Constitution of India. Therefore, the act done by the petitioner does not come within the sweep of due discharge of official duty, rather, it amounts to misutilization of his power as a police officer for which sanction under section 197, Cr.P.C. may not be required.

14. In view of the aforesaid facts and circumstances of the case, and the position of law, this Court is not inclined to interfere with the impugned order dated 19.6.2002 passed by the learned S.D.J.M., Banki in I.C.C. No. 11 of 2001 under Annexure-2 taking cognizance against the petitioner. Accordingly, the CRLMC fails and the same is dismissed.

15. Before parting, this Court may observe that since the complaint case is of the year 2001, learned SDJM, Banki shall do well to conclude the same as expeditiously as possible.

Application dismissed.

2014 (I) ILR - CUT-1144

DR. B.R.SARANGI, J

W.P.(C) NO. 17183 OF 2010

PRADEEP KUMAR BEHERA .....Petitioner

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.226

Writ petition - Service matter – Petitioner is a state government employee – Jurisdiction – Instead of approaching the State Administrative Tribunal the petitioner straight away invoked the jurisdiction of this Court by suppressing material facts - Held, writ petition is dismissed with cost of Rs. 500/- (Para 9)

Case Law Referred to:-

1. (2006) 5 SCC 446 : G.M.Tank -V- State of Gujurat & Ors.

For Petitioner : M/s. S.P.Mishra, Sr.Advocate,
S.Nanda, S.K.Sahoo, S.S.Kashyap

For Opp. Parties : Mr. B.Senapati (Addl.Govt.Advocate)

Date of hearing : 20.03.2014
Date of judgment : 27.03.2014

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who is working as a Constable LNK/218 under the D.I.B., Baripada assails the notice under Annexure-9 dated 22.9.2010 directing him to attend the departmental proceeding bearing No.MBJ district Prog.No. 15/10 on 30.09.2010 at Headquarter, Baripada and further seeks for a direction to stay the departmental proceeding till disposal of Baripada Town P.S. Case No.182 of 2010 arising out of G.R. Case No. 668 of 2010 pending in the court of the learned S.D.J.M., Baripada vide Annexure-7.

2. The brief fact of the case in hand is that the petitioner, who was discharging his duty as Constable bearing LNK 218 while working in

Reserve Office at Baripada, Mayurbhanj was involved in a case under Sections 498-A/506, IPC read with Section 4 of the D.P. Act and Section 3 of S.C. and S.T. (P.A.) Act basing on the report of one Pana Singh Constable bearing No. 1194 in connection with Baripada Town P.S. Case No. 182 dated 8.7.2010. The matter was investigated into and in course of investigation, there was prima facie case made out against the petitioner and accordingly, charge was framed against him to stand his trial in the court of law. Since the petitioner was involved in a criminal case, departmental proceeding has been initiated against him for serious charges of criminal misconduct, moral turpitude involvement in criminal case and violation of Govt. Servants conduct rules. Accordingly, charge-sheet was submitted followed by initiation of a departmental proceeding against him and on that basis the petitioner has been noticed vide Annexure-9 to participate in the inquiry, which is the subject matter of challenged in the present writ petition.

3. Mr. S.P. Mishra, learned Senior Counsel appearing for the petitioner referring to Misc. Case No. 18437 of 2013 states that the judgment passed in G.R. Case No. 668 of 2010 in Trial Case No. 33 of 2011 dated 26.3.2012, the petitioner has been acquitted by the learned Addl. District Judge-cum-Special Judge, Baripada on the allegation under Sections 498-A/406/506 read with Section 4 of the D.P. Act and Section 3 (1) (x) of S.C. and S.T. (P.A.) Act. It is stated that the petitioner having been acquitted and having not found guilty of the offence alleged, the departmental proceeding initiated on the selfsame charge pursuant to which the notice was issued under Annexure-9 should be dropped.

4. The notice under Annexure-9 was challenged before this Court in the present writ petition and while entertaining the same, this Court passed interim order on 06.10.2010 in Misc. Case No. 16075 of 2010 that there shall be stay of further proceeding of the departmental enquiry against the petitioner till 13.12.2010 and subsequently the same has been extended from time to time and due to subsequent development, prayer was made to drop the departmental proceeding in view of the judgment of the apex Court in ***G.M. Tank v. State of Gujurat and others,*** (2006) 5 SCC 446.

5. Mr. Sangram Das, learned Addl. Govt. Advocate appearing for the State vehemently argued that the departmental proceeding initiated against the petitioner should not be dropped even though the petitioner has been acquitted in a criminal case that *ipso facto* cannot debar the authority to proceed with the departmental proceeding initiated against the delinquent officer. He further argued that charges leveled against the delinquent officer

in a criminal proceeding, the departmental proceeding has to continue and seeks for dismissal of the writ petition.

6. Admittedly, the petitioner is working as a Constable having LNK No. 218 and so far continuing in the D.I.B., Baripada and is a State Government employee. The departmental proceeding has also been initiated by the competent authority basing upon which he has been called upon to participate in the proceeding by issuing notice under Annexure-9. In course of hearing, none of the counsel brought to the notice of the Court that the petitioner is a Government employee and he assails the departmental proceeding initiated against him. On the other hand, Mr. S.P. Mishra, learned Senior Counsel appearing for the petitioner proceeded with his argument that the departmental proceeding should be dropped in view of the acquittal of the petitioner on the alleged selfsame charge in the criminal proceeding pursuant to the judgment passed by the learned Addl. District Judge-cum-Special Judge, Baripada in Annexure-10 dated 26.03.2012 and he has relied upon the judgment in ***G.M. Tank*** (supra) and basing upon which the judgment was reserved by this Court.

7. In course of preparing judgment, it appears that the petitioner was a State Government employee working under the Police establishment having posted in D.I.B., Baripada and was continuing as a Constable bearing LNK No. 218. The petitioner being a State Government employee, the writ petition at his instance is not maintainable in view of the availability of alternative remedy by approaching the Odisha Administrative Tribunal under the provisions of the Administrative Tribunal Act, 1986. It appears that none of the counsel appearing for the parties brought to this fact to the notice of the Court at the time of hearing the matter. Therefore, the matter has been listed under the heading “To be mentioned” on 19.3.2014 to make a query with regard to the maintainability of the writ petition before this Court.

8. Mr.S.P.Mishra, learned Senior Counsel appearing for the petitioner seeks time till 20th March, 2014 to examine the same and when the matter was taken up on 20th March, 2014, he candidly admitted that the petitioner was a State Government employee and this Court has no jurisdiction. It is further stated that inadvertently, it could not be brought to the notice of the Court on the date of hearing. Learned Addl. Govt. Advocate also admitted the said fact and stated that remedy lies before the State Administrative Tribunal and not before this Court.

9. It is further stated by Mr.S.P.Mishra, learned Senior Counsel appearing for the petitioner that as this Court has entertained this petition,

and proceeded with the matter for just and proper adjudication of the case, therefore availability of alternative remedy will not preclude, this Court to exercise the power under Article 226 of the Constitution of India. If a forum has been created under the Administrative Tribunal Act to adjudicate upon the disputes of the employees of the State Government, instead of approaching the learned State Administrative Tribunal, the petitioner has straight away invoked the jurisdiction of this Court under Article 226 of the Constitution, which is not permissible. As it appears from the order-sheet, only notice has been issued and the writ petition is not being admitted. If the writ petition is not being admitted, merely notice has been issued on the question of admission that itself cannot accrue a right in favour of the petitioner to claim that this Court can exercise the power under Article 226 of the Constitution in exclusion of the provisions contained in the Administrative Tribunals Act. Since a special forum has been constituted under Article 323-A of the Constitution and without availing such remedy before the appropriate forum, if the writ petition will be entertained and admitted under Article 226, it will defeat the very purpose of establishment of such Tribunal. In any case, without bringing to the notice of the Court that this Court has no jurisdiction to entertain the petition for adjudication of a State Government employee, proceeding with the matter for hearing clearly indicates suppression of material facts and this Court has no jurisdiction to entertain the same. Accordingly, the writ petition is dismissed as not maintainable imposing a cost of Rs. 500/- on the petitioner. The said amount shall be paid to the High Court Bar Association. However, liberty is granted to the petitioner to move the appropriate forum for ventilating his grievance, if he is so advised.

Writ petition dismissed.

2014 (I) ILR - CUT-1147

DR. B.R.SARANGI, J

O.J.C. NO. 6227 OF 1993

NARAYAN SAMANTARAY ……Petitioner

.Vrs.

DIRECTOR GENERAL, CRPF & ORS. …….Opp. Parties

SERVICE LAW - Departmental proceeding - Long absence from duty - Petitioner a constable in a disciplined service like C.R.P.F. - Held, keeping in view the unauthorized absence of about three years by the petitioner, there is sufficient ground to inflict harshest punishment of removal from service - No reasonable ground for interference of this Court. (Para 16)

Case Laws Referred to:-

1. AIR 2005 SC 4289 : Union of India & Ors. –V- Gulam Mohd. Bhat
2. 2011 (II) ILR, 100 : Laxmidhar Nayak –V- Union of India & Ors
3. (1996) 1 SCC 302 : State of UP & Ors.-V- Ashok Kumar Singh & Anr.
4. (2001) 3 SCC 309 : Mithilesh Singh –V- Union of India & Ors.
5. (2006) 9 SCC 583 : S.C.Saxena –V- Union of India & Ors.
6. 2011 (I) ILR-CUT-712 : Santosh Kumar Sahu (Dead) after him Sabita Sahu -V- Group Centre, CRPF, BBSR & Anr.

For Petitioner : Mr. G.A.R.Dora
For Opp. Parties : Mr. S.D.Das, Asst.Solicitor General

Date of hearing : 31.03.2014
Date of judgment : 16.04.2014

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner has filed this application challenging the order of dismissal passed by the disciplinary authority, Commandant, 21 BN CRPF dated 30.11.1983 in Annexure-2 as well as the order of the appellate authority dated 23.11.1992 under Annexure-5 confirming the order of dismissal on the ground of long absence from duty.

2. The short fact of the case is that the petitioner having been selected as a Constable by following due procedure of selection joined in CRPF in May, 1979. After completion of his training, he was posted at Mukamaghat and thereafter posted at 21st CRPF BN, Mizoram and then transferred to 21st BN CRPF, Ajmer-7. While he was continuing at Ajmer, he applied for two months leave from 26.02.1983 but one month leave, i.e. from 26.02.1983 to 27.03.1983 was sanctioned. As his marriage was suddenly fixed, he sent a telegram on 25.03.1983 for extension of his leave. As a murder was committed in his village on 24.03.1983 wherein the petitioner

was falsely implicated, he sent a letter to the Commandant 21st BN CRPF, Ajmer on 26.04.1983 under Annexure-1 intimating that he has been falsely implicated in a case and is likely to be arrested at any moment and will report to duty after acquittal from the criminal case. Thereafter the petitioner was arrested and remanded to jail custody till he was released on 04.02.1991 after the judgment was passed by this Court on 31.01.1991 in Criminal Appeal No. 177 of 1987 acquitting him from the criminal case. Due to non-joining of the petitioner in duty after expiry of one month sanctioned leave, charge was framed and an ex-parte inquiry was conducted whereafter he was dismissed from service on 30.11.1983 vide Annexure-2. It is stated that he had no knowledge about the charge and ex-parte inquiry. As he was in jail custody no notice was issued to him and after acquittal and release from jail he preferred an appeal on 07.05.1991 explaining the position stating that his absence from duty was neither due to his own fault or willful due to negligence. Therefore, there is no question of disobedience of any order on his part. The Disciplinary Authority vide letter dated 11.11.1991 under Annexure-3 asked the petitioner to intimate the period of detention in police/judicial custody for necessary action. In appeal dated 28.11.1991 vide Annexure-4, the petitioner intimated the period of detention in jail custody and explained the detailed position. The appellate authority on consideration of the same, confirmed the order of dismissal vide order dated 23.11.1992 under Annexure-5.

3. Mr. G.A.R. Dora, learned Senior Counsel appearing for the petitioner, states that the order of dismissal has been passed ex-parte without giving opportunity of hearing to the petitioner. Therefore, the order passed by the disciplinary authority as well as the appellate authority is liable to be set aside. Moreover, no notice has been given to the petitioner in view of the fact that the petitioner was in jail custody and as such, there is no material available on record to indicate that notice has been issued to the petitioner in the address of the jail giving opportunity to him. Therefore, the order of dismissal has to be set aside. Apart from the same, it is urged that the petitioner having intimated the authorities vide Annexure-1 that due to village dispute, he has been falsely implicated in the criminal case and FIR has been lodged against him and he is likely to be arrested at any moment he shall report to his duty after acquittal from the criminal case. Therefore, sufficient intimation has been given to the authority indicating his long absence thereby the authority could not have taken such harsh step for dismissal against the petitioner.

4. Mr. S.D. Das, learned Asst. Solicitor General appearing for the opposite parties urged that remaining in long absence without any authority

more particularly in a disciplined job like that of CRPF, the action taken against him is wholly and fully justified. More so, after the petitioner availed one month leave i.e. from 26.02.1983 to 27.03.1983 he did not join in duty on expiry of such leave. Vide letter dated 30.06.1983 and 04.10.1983 though he was directed to join his duty, he did not join. Therefore, due to unauthorized absence from duty from 28.03.1983, for disobedience of the order, the disciplinary inquiry was ordered on 16.10.1983 and memorandum of charge was submitted. Since no reply was given, and no document about the period of detention either in police or judicial custody has been provided and no order of acquittal has been submitted by the petitioner, action was taken against the petitioner. Due to long absence, the petitioner has been declared as 'deserter' vide order dated 23.09.1983. As some departmental articles were lying with him in the barrack, as per the report in the court inquiry, the same were recovered. The petitioner has intentionally absented from Government duty and not complied with the order and charges have been proved. In that view of the matter, no illegality has been committed in taking action taken against him. In support of his contention, he has relied upon the judgments of the apex Court in **Union of India and others v. Gulam Mohd. Bhat,** AIR 2005 SC 4289, **Laxmidhar Nayak v. Union of India and others,** 2011 II ILR, 100 and an unreported judgment of this Court in **Sushant Kumar Gouda v. Union of India and others** in W.P. (C) No. 7984 of 2010 disposed of on 07.02.2013.

5. Considering the aforesaid facts and circumstances of the case, the admitted fact that emerges is that the petitioner was continuing as constable having been duly selected by following due procedure of selection. He applied for leave for two months but leave was sanctioned w.e.f. 26.02.1983 to 27.03.1983. He did not join after expiry of the leave. Thereafter vide orders dated 30.06.1983 and 04.10.1983 though he was called upon to join in his duty, he did not join, thereby he remained unauthorized absence from duty w.e.f. 28.03.1983 and for disobedience of orders, a disciplinary inquiry was directed on 16.10.1983 and memorandum of charges were also submitted to him, which was received on 22.10.1983 and the said charges were sent vide letter dated 16.10.1983 by registered post with A.D. and the A.D. has been returned and formed part of the record. That itself indicates that the petitioner was aware of the proceeding initiated by the authorities due to unauthorized absence from duty by the authorities and in spite of that he did not take any step. The authorities appointed inquiry officer. In course of inquiry he sent a telegram requesting for extension of time in the disciplinary inquiry for seven days more i.e. from 31.10.1983 to 06.11.1983. Even though such time was granted, he did not participate in the inquiry. Therefore, the authorities proceeded with the

inquiry by examining three witnesses as P.Ws. on behalf of the department. But the petitioner did not examine any person. After conducting due inquiry, the inquiry officer submitted his report on 21.11.1983 wherein the charges leveled against him have been proved.

6. Considering the said inquiry report, the disciplinary authority ordered for dismissal from service. The petitioner preferred an appeal against the order of dismissal passed by the disciplinary authority on 07.05.1991 wherein he has stated that he was involved in a murder case and was an accused in that case and subsequently he was acquitted from the said criminal case. The petitioner relied upon the letter dated 26.04.1983 wherein it is stated that though leave was sanctioned for the period from 25.02.1983 to 26.03.1983, but due to sudden fixation of his marriage in the last week of March, 1983 he sent a telegram for extension of his leave for one month but due to village dispute he has been falsely implicated in the criminal case and was likely to be arrested at any moment and further intimated that he would report to duty after acquittal from the criminal case. The said letter has not been received by the authorities and after acquittal, when the petitioner brought the said fact to the notice of the appellate authority by formulating grounds of appeal the same has also been taken into consideration and the order of dismissal has been made confirmed by the appellate authority. The contention raised that no opportunity of hearing was given to the petitioner by the authorities is not correct in view of the fact that the petitioner has been called upon vide letters dated 30.06.1983 and 04.10.1983 to join in his duty. In spite of that he did not join and remained in unauthorized absence from duty from 28.03.1983. When the charge was framed, the same was communicated by registered post with A.D. and though he acknowledged the same, he did not choose to participate in the proceeding itself. In view of this, the inevitable conclusion is that though opportunity of hearing had been given to the petitioner, he did not avail the same. In view of such position, the contention raised that no opportunity has been given to the petitioner, has no legs to stand.

7. It is further urged that there is no material available before this Court with regard to the communication of the notice to the petitioner in his jail address. Once the notice regarding framing of charge has been communicated to the petitioner in his own address, which has been duly acknowledged, question of any fresh notice in the jail address is not warranted and more so the petitioner having been given opportunity to participate in the proceeding and he having not chosen to avail the same, it cannot be said that principle of natural justice has not been complied with. Therefore the contention raised by Mr. G.A.R. Dora, learned Senior Counsel appearing for the petitioner fails.

8. It appears from Annexure-2, the office order dated 30.11.1983 that following a departmental enquiry under Section 11(1) of CRPF Act, 1949 read with Rule 27(b) of CRPF Rules, 1955 against the petitioner bearing No. 791140712/CT, he has been dismissed from service for an act of misconduct in his capacity as a member of the Force w.e.f. 30.11.1983 i.e. from the date he remained in unauthorized absent.

9. On perusal of the CRPF Act, 1949, it appears that Section 9 of the said Act mentions serious or heinous offences and also prescribes penalty, which may be awarded for them. Section 10 deals with less heinous offence and clause (m) thereof shows that absence of a member of the force without leave or without sufficient cause or overstay without sufficient cause, is also mentioned as less heinous offence and for that also a sentence of imprisonment is provided. It is, therefore, clear that Section 11 deals with only those minor punishments, which may awarded in a departmental inquiry and a plain reading thereof makes it quite clear that a punishment of dismissal can certainly be awarded thereunder even if the delinquent is not prosecuted for an offence under Section 9 or Section 10.

10. On bare perusal of the Section 11 of the CRPF Act, 1949, it further appears that the said section deals with minor punishment as compared to the major punishments prescribed in the preceding section. It lays down that the Commandant or any other authority or Officer, as may be prescribed, may, subject any Rules made under the Act, award any one or more of the punishment to any member of the force who is found guilty of disobedience, neglect of duty, or remissness in the discharge of his duty or of other misconduct in his capacity as a member of the force. The use of words “in lieu of, or in addition to, suspension or dismissal” appearing in sub-section (1) of Section 11 before clauses (a) to (e) shows that the authorities mentioned therein are empowered to award punishment of dismissal or suspension to the member of the Force who is found guilty and in addition to, or in lieu thereof, the punishment mentioned in clause(a) to (e) may also be awarded. It is fairly well settled position of law that removal is a form of dismissal as both stand in the same footing and bring about termination of service. Rule 27 of CRPF Rules, 1955, clearly permits removal by the competent authority. Referring to **Gulam Mohd. Bhat(supra)** the petitioner having overstayed w.e.f. 30.11.1983 there is no infirmity in passing the order of dismissal of service by the authority.

11. In **State of UP and Others V. Ashok Kumar singh and Another** (1996) 1 SCC 302 where the employee is a police constable, the apex Court held that an act of indiscipline by such person needs to be dealt with sternly.

It is for the employee concerned to show how the penalty was disproportionate to the proved charges and serving as a police constable in a disciplined force demands strict adherence to the rules and procedures more than any other department. Having noticed the fact that the petitioner had remained absent from duty unauthorizedly for petty long period, the action taken for dismissal from service by the authority by following due procedure of law cannot be faulted.

12. In **Mithilesh Singh v. Union of India and Others**, (2003) 3 SCC 309, the apex Court held that mere making an application for grant of leave cannot be construed to be of any consequence in the background of the strict requirement of giving proper intimation. Therefore, the contention raised by the petitioner that vide Annexure-1 he has intimated the authority expressing his inability to join, has no consequence and more particularly the said letter has not reached the authorities so that the same could not be taken into consideration. Having remained absent after expire of the sanctioned period of leave of one month leaving the arms and ammunitions in the barrack, which has been subsequently recovered by the authority shows gross indiscipline on his part which aggravated the aberration. Therefore, the impugned order of dismissal passed by the authority cannot be interfered with.

13. In **S.C. Saxena v. Union of India and Others,** (2006) 9 SCC 583 where the Govt. servant defied the order of transfer and remained on leave for a long period, it was held that the said Government servant is guilty of misconduct of unauthorized absence from duty and in compliance with the transfer order for a long period coupled with submitting successive leave applications order of compulsory retirement held to be justified due to long unauthorized absence, as it leads to gross indiscipline in public service.

14. Applying the same analogy to the case in hand, the petitioner who is a constable in a disciplined service could not have remained in unauthorized absence w.e.f. 30.11.1983 and due to long absence the action taken by the authorities by dismissing him from service cannot be interfered with. More so the misconduct of the concerned employee having been proved by following proceeding any subsequent explanation cannot mitigate the situation.

15. This Court in **Santosh Kumar Sahu(Dead) after him Sabita Sahu v. Addl. D.I.G.P., Group Centre, CRPF, BBSR & Anr.** 2011 (1) ILR-CUT-712 referring to **Gulam Mohd. Bhat(supra)** has taken a similar view that due to overstay by following a departmental proceeding the petitioner having been punished, this Court did not inclined to interfere with such punishment.

16. In **Laxmidhar Nayak(supra)** this Court held that the punishment awarded to the petitioner in the background of the fact that the petitioner was a member of the force, who is required to maintain absolute discipline in the matters of performance of duty as well as in the matter of conduct in the normal life. The conduct and discipline expected from a member of a Force cannot be equated with other employees like a Sweeper or a Peon or even a Class-III employee of the Government establishment. Thus, keeping in view the unauthorized absence of about three years by the petitioner, it is held to be sufficient ground to inflict harshest punishment of removal from service. Therefore, this Court does not consider it expedient to interfere with the same.

17. Keeping in view the ratio decided by this Court as well as apex Court, directing to retain the petitioner in service or showing any lenience in the matter of punishment would set a bad example for other members of the organization to follow. In that view of the matter this Court is not inclined to interfere with the order of punishment imposed on the petitioner. Accordingly, this court finds no merit in the writ petition which is dismissed.

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Writ petition dismissed.

2014 (I) ILR - CUT-1154

DR. B.R. SARANGI, J.

WP(C) NO. 14416 OF 2006

JASODA GIRI ……..Petitioner

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART. 226

Law is well settled that a document which is not a part of the brief cannot be set aside - However in exceptional circumstances

Court can set aside an order or a document even though the same has not been annexed to the writ petition.

In this case, the order impugned has not been annexed to the writ petition as it is not provided to the petitioner and the petitioner prayed to call for the relevant records indicating the date of the order - Held, since the order passed by an authority having no jurisdiction to pass the order, the order is void ab-initio and it cannot be construed that no relief can be granted to set aside the same even though the same has not been annexed to the writ petition.

(Para 21)

Case Laws Relied on:-

1. 54 (1982) C.L.T. 515 : Gopinath Deb -V- Budhia Swain & Ors.
2. 2008(II) OLR 438 : Jayaram Bhuyan -V- State of Orissa & Ors.
3. AIR 2000 SC 1165 : United India Insurance Co. Ltd. -V- Sanjay Singh & Ors.
4. AIR 1996 SC 2592 : Indian Bank. -V- Satyam Fibers (India)
5. 109 (2010) CLT 396 : Sachidananda Das -V- State of Orissa & Ors.

Case Laws Referred to:-

6. (2000) 6 SCC 224 : Lily Thomas –V- Union of India
7. 1993 Supp (4) SCC : 595 (619) : S. Nagraj –V- State of Karnataka
8. AIR 2006 Bom. 44 : State of Maharashtra –V- Smt. Sobha Vithal Kolte
9. AIR 1990 SC 1605 : Simrikhia –V- Dollely Mukharjee
10. AIR 1984 SC 1621 : Tikaram –V- Mundikota Shikshan Prasarak Mandal & Ors.
11. AIR 1987 SC 2186 : Dr.Smt.Kuntesh Gupta –v- Management of Hindu Kanya Mahavidyalays Sitapur (U.P) & Ors.
12. 2010, 8 SCC 383 : Meghmala & Ors. -V- G.Narasimha Reddy & Ors.

For Petitioner - M/s. Sameer Kumar Das, Mr. R.N.Mishra-II, Mr. S.K.Mishra

For Opp. Parties - Mr. A.K.Pandey, SC(SME) (O.P.Nos. 1 to 4)
M/s. Manoj Kumar Mohanty Mr. M.R.Pradhan, Mr. K.C.Tripathy, Mr. T.Pradhan, Mr. J.R. Bhuyan (O.P.Nos. 5 to 6)

Date of Hearing : 25.03.2014
Date of Judgment : 22.04.2014

DR. B.R. SARANGI, J

The petitioner has filed this petition seeking for the following reliefs:

> "Under the above circumstances it is therefore humbly prayed that this Hon'ble Court be graciously pleased to call for the records of Review Petition No. 2 of 2006 from the opposite party no.3 and set aside the order dated 19.10.2006 and the communication thereof to the petitioner under Annexure-4;
>
> And further this Hon'ble Court be pleased to direct the opposite party no.3 to hear the Review application by giving an opportunity of hearing to the petitioner and passed speaking order;
>
> And/or pass any other appropriate order/orders, writ/writs, direction/directions in the fitness of the case;
>
> And for this act of kindness, the petitioner shall as in duty bound ever pray."

2. The brief fact of the case in hand is that Jagulai High School, Sana Barchi Kayan in the district of Bhadrak was established in the year 1992. The School got recognition in the year 1993 from the Government. The Board of Secondary Education, Orissa granted recognition in the year 1996 to present the candidates in the Annual H.S.C. Examination. The petitioner was appointed as an Assistant Teacher (TG Teacher) having trained Graduate qualification on 05.08.1998, pursuant to which he joined on 10.08.1998 but she was prevented to discharge her duty in the School w.e.f. 01.08.1999. The petitioner filed a representation before the Inspector of Schools, Bhadrak against such illegal action of the Managing Committee and the Headmaster of the School. Thereafter, she filed an appeal bearing Appeal No.10 of 1999 before the Director, Secondary Education, Odisha against such prevention which amounted to termination of service as per the Government Circular dated 27.03.1983. The Government vide notification dated 15.12.2000 authorized the Regional Joint Director to hear the appeal against termination instead of Director Secondary Education. Therefore, the appeal bearing No.10 of 1999 was transferred to the Regional Joint Director, Bhuabneswar for hearing. When the matter was subjudice before the appellate forum, the institution was notified to receive grant-in-aid vide notification dated 20.2.2004. The appeal preferred by the petitioner bearing Appeal No.10 of 1999 was allowed and the termination was set aside. Further the Managing Committee was directed to reinstate the petitioner as the 3rd TG Teacher of the School vide Annexure-2. Despite the order of the Appellate Authority, the petitioner was not allowed to join in her post on the plea that there is no Managing Committee of the School. The petitioner approached the Inspector of Schools with regard to non-compliance of the

order passed by the Appellate Authority but the same has not been considered. In the meantime, since the institution was notified to receive grant-in-aid, the school authorities sent the proposal in favour of the other staff except the petitioner. Therefore, the petitioner filed GIA Case No.162 of 2004 before the State Education Tribunal, which is pending for adjudication. The opposite party nos. 5 and 6 coming to know about the order dated 20.03.2004 passed in GIA Appeal No.10 of 1999, filed a petition for recalling the said order dated 20.03.2004 and also sent a petition to the Joint Director by registered post on 29.03.2005 in Annexure-F/5. The opposite party nos. 5 and 6 filed W.P.(C) No.9414 of 2005 with following reliefs.

> "The petitioners most respectfully pray that the Hon'ble Court may be graciously pleased to allow the writ petition and issue a writ or direction in the nature of certiorari or other appropriate writ or direction quashing the order No.4542 dated 20.03.2004 passed by the Joint Director (school), Regional Directorate under Annexure-2 and further issue a writ or direction in the nature of mandamus or other appropriate writ or direction to opposite parties no.1 and 3 to give approval to the service of petitioner No.2 as Trained Graduate Teacher (arts) of Jagulai High School and give him all the consequential, financial benefits and further pass such other or further order/orders as are deemed just and proper.

3. After considering the same, this Court disposed of the said writ petition by order dated 17.11.2005, which reads as follows:

> " Heard learned counsel for the petitioners.
>
> The petitioners in this writ application have assailed the order passed by the Regional Director of Education, Bhubaneswar (Annexure-2) on the ground that the said order was passed without impleading the Managing Committee represented through its Secretary, as a party and only the Headmaster was made a party to the proceeding.
>
> In course of hearing we find that the petitioners have filed an application to recall the aforesaid order, and the said application is pending before the Regional Director, Education, Bhubaneswar, under Anneuxre-4. We are not inclined to entertain this writ application at this stage. Let the Director of Education deal with the matter in accordance with law. The review application filed by the petitioners be disposed of within a period of two months from the date of receipt of this order."

This Court while disposing of the writ petition, relying upon the statement made by the petitioner that without impleading the Managing committee represented through the Secretary as a party, only the Headmaster was made party to the proceeding, disposed of the matter directing the Director of Education to deal with the matter in accordance with law and further directed to dispose of the review application filed by the petitioners in the said case within a period of two months from the date of receipt of the order. The said order of this Court dated 17.11.2005 has also been passed without giving notice to the present petitioner but the order itself indicates that this Court has not interfered with the order passed by the Appellate Authority dated 20.03.2004 in Appeal Case No. 10 of 1999 under Annexure-2. The copy of the petition for review/recall filed by the opposite party nos. 5 and 6 was not served on the petitioner when the matter was posted for hearing on 18.03.2006. However, the petitioner filed counter to the petition for review/recall on 29.04.2006 and thereafter the matter was posted to 20.05.2006 on which date due to absence of the Joint Director the matter was posted to 01.07.2006 on which date the matter was again adjourned to 29.07.2006. Thereafter on 29.07.2006 the matter was again adjourned to 19.08.2006 and 13.09.2006 but on 13.09.2006 when the recall petition was heard in part, since the petitioner was not served a copy of the review petition or writ petition, learned counsel appearing for the petitioner prayed before the forum to direct the review petitioner to serve a copy of the petition. Accordingly the Regional Joint Director directed the Review petitioner to supply the copy of the Review Petition No. 2 of 2006 and writ petition filed before this Court and posted the matter for hearing on the question of maintainability of Review Petition No. 2 of 2006 after Puja vacation by passing the following order:

> " Heard both the parties. Respondent No.1 of the Review Petition No. 2/2006 raised question regarding non availability of the Original writ petition filed before the Hon'ble High Court and the Order passed by the Hon'ble High Court thereof. This appellate authority directs review petitioner to provide Xerox copy of the above documents in 2 sets, one to the Respondent No.1 and another to this forum. Hearing on maintainability as per law of the review petition No.2/06 will be fixed preferable after Puja Vacation. The Inspector of Schools concerned be directed to appear before the Court with factual report as regards the status and the position of the M.C. as on the date the institution became aided.
>
> Sd/- B.N. Parida, dt.13.9.06
> Joint Director(Schools)"

4. From the aforesaid order, it appears that the matter was adjourned for hearing on the question of maintainability of Review Petition No. 2 of 2006 without fixing any date and without any notice to the petitioner the matter was posted to 19.10.2006 by the Regional Director for hearing. But the order sheet reveals that initial order was passed for adjourning the matter for fresh hearing on 01.11.2006 but later on the order was scored through and on the same date i.e. on 19.10.2006 another order was passed recalling the order dated 20.03.2004 and Appeal Case No. 10 of 1999 was posted for hearing to 01.11.2006. In view of the order dated 19.10.2006 the GIA Case No.162 of 2004 also stood dismissed. The petitioner immediately filed the present writ petition challenging the order dated 19.10.2006 passed by the Regional Joint Director and though copy of the said order has not been provided to the petitioner on the basis of the communication made under Annexure-4, he filed this writ petition before this Court. While recalling order dated 20.03.2004 passed in Appeal Case No. 10 of 1999, it was directed that the original appeal was posted for hearing on merit on 01.11.2006 at 11.30 a.m. While entertaining this writ petition considering the situation in absence of the order dated 19.10.2006, this Court passed order in the main writ petition as well as in the Misc. Case which reads as follows:

> " Heard
>
> Issue notice on admission indicating therein that this writ application shall be disposed of at the stage of admission. Learned Standing Counsel for the School and Mass Education Department accepts notice and enters appearance for opposite parties no. 1 to 4. Four extra copies of the writ petition be served on him and receipt be filed as undertaken by tomorrow. Mr. Manoj Mohanty, learned Advocate enters appearance for opposite parties no. 5 and 6. Two extra copies of the writ petition be served on him and receipt be filed as undertaken by tomorrow.
>
> Opposite parties no. 5 and 6 have filed an affidavit on one Narottam Sahu (Opp.Party no.6) and has annexed documents, copy of the same has been served on the learned counsel for the petitioner.
>
> It is also stated at the Bar and noted in the order, Annexure-H regarding disposal of writ petition (W.P.(C) No. 9414 of 2005). Therefore, we direct learned Standing Counsel to produce entire case records of the Appeal/Revision/Review petition filed and the order passed by opposite party no.2 "in original". We also direct the

Deputy Registrar (Judl.) of this Court to tag W.P.(C) No.9414 of 2005 disposed of on 17.11.2005 for reference.

List this writ petition next week. Records and affidavit, if any, be filed in the meantime.

Misc. Case No.12656 of 2006 and
Misc. Case No. 13066 of 2006

Copy of Misc. Case No.12656 of 2006 was filed together with the writ petition and the other Misc. Case is filed today and copy served on the learned counsel for the opposite parties.

Heard.

Further proceeding of the Appeal/Review/Recall application pending before opp.party no.3 shall remain stayed till next week. ”

Since the writ petition was filed before this Court on 31.10.2006 assailing the order dated 19.10.2006, the petitioner sought for adjournment before the Regional Director on 02.11.2006 and accordingly the matter was adjourned.

5. Mr. S.K. Das, learned counsel for the petitioner states that as the Appeal Case No. 10 of 1999 has been disposed of by the Appellate Authority, the said authority has become functus officio and more so in absence of any power of review, the application filed for review of the order dated 20.03.2004 passed in Appeal Case No. 10 of 1999 is without jurisdiction and as such the same is not maintainable and therefore, he seeks to quash the order dated 19.10.2006 passed by the Joint Director in Review Petition No. 2 of 2006. In order to substantiate his contention, he has relied upon the judgments of this Court in **Gopinath Deb v. Budhia Swain and others,** 54 (1982) C.L.T. 515 and **Jayaram Bhuyan v. State of Orissa and others,** 2008(II) OLR 438.

It is further urged that the opposite party nos. 5 and 6 having not come to this Court with clean hand and having practised fraud on the Court by adopting falsehood and by giving misleading statement in the appeal that the Managing Committee was not made a party, no relief can be granted to them. But in fact the Appeal Case No. 10 of 1999 in Annexure-1, the appeal memo which has been annexed itself indicates that the Managing Committee of Jagulai High School represented through its Secretary has

been made a party. Therefore, on that score, the order passed by the Joint Director dated 19.10.2006 is liable to be set aside.

6. Mr. M.K. Mohanty, learned counsel for the opposite party nos. 5 and 6 strenuously urged that opposite party nos. 5 and 6 have never intended to review the order dated 20.03.2006 passed by the Appellate Authority in Appeal Case No. 10 of 1999. On the other hand, they moved the application for recall of the said order and such recalling order has been passed in view of the order passed by this Court on 17.11.2005 in W.P.(C) No.9414 of 2005. It is further argued that since the order dated 20.03.2004 in Appeal Case No. 10 of 1999 has been passed by playing fraud, the order has to be recalled. It is stated that the application for recall of the order dated 20.03.2004 is maintainable. In order to substantiate his contention, he has relied upon the judgments of the apex Court in **United India Insurance Co. Ltd. v. Sanjay Singh and others,** AIR 2000 SC 1165 and **Indian Bank v. Satyam Fibers (India),** AIR 1996 SC 2592. In addition to the same it is argued that the writ petition is not maintainable since the order sought to be quashed i.e. 19.10.2006, having not been annexed, the same cannot be set aside. To that extent, he has relied upon the judgment of this Court in **Sachidananda Das v. State of Orissa & Ors.** 109 (2010) CLT 396.

7. Mr. A.K. Pandey, learned Standing Counsel appearing for the School and Mass Education Department referring to paragraph-7 of the counter affidavit, supported the stand of the Regional Director of Education, Orissa, Bhuabneswar and stated that the petitioner was never given appointment as an Assistant Teacher in the T.G. post at Jagulai High School. Further, it is stated that the Regional Director has no power to review his own order. Therefore, the impugned order passed is without jurisdiction.

8. Considering the above contention raised and after hearing the learned counsel for the parties and on perusal of the records, the sole question arises for consideration is whether the Joint Director of the Secondary Education has got any power of review for reviewing the order dated 20.03.2004 in Review Petition No. 2 of 2006 passed in Appeal No. 10 of 1999.

9. The order dated 20.03.2004 passed in Appeal No. 10 of 1999 has not been assailed by the opposite party nos. 5 and 6 before this court in W.P.(C) No. 9414 of 2005 on the ground that the opposite party nos. 5 has not been made a party in the appeal and the order has been passed without giving any opportunity to him. Therefore, the application for review/ recall has been filed, which is pending for consideration. At the stage of admission of the writ

petition, believing on the contention raised by the opposite party nos. 5 and 6 and recording the contention that the Managing Committee represented through the Secretary is not a party, this Court disposed of the writ petition directing the Director to consider the Review Application in accordance with law. The fact that the Managing Committee has not been made a party, is absolutely a misleading statement made by the opposite party nos. 5 and 6 in W.P.(C) No.9414 of 2005. The appeal memo filed registered as Appeal Case No. 10 of 1999 which has been annexed as Annexure-1 to the writ petition clearly indicates that the Managing Committee of the Jagulai High School represented through its Secretary has been impleaded as respondent no.1 in the appeal. In all fairness, the opposite party nos. 5 and 6 could not have made such patent erroneous statement before this Court to grab an order in their favour in W.P.(C) No.9414 of 2005 and as such, this Court has not interfered with the order assailed, i.e., the order of the Appellate Authority dated 20.03.2004 passed in Appeal No. 10 of 1999, which was annexed as Annexure-2 to the said W.P.(C) No. 9414 of 2005 nor the said order has been set aside by this Court. But this Court passed order in W.P.(C) No. 9414 of 2005 only enabling the opposite party nos. 5 and 6 to move application for recall before the Regional Director, Bhubaneswar under Annexure-4 of the writ petition. This clearly indicates that by playing fraud on Court, the opposite party nos. 5 and 6 have succeeded to get an order dated 17.11.2005 and while passing such order, this Court has also not issued notice to the opposite parties in the said writ petition, who is the petitioner before this Court in the present writ petition. Apart from the same, in compliance to the order passed by the Director dated 13.09.2006, copy of the Review Application No.2 of 2006 has been served on learned counsel for the petitioner which has been annexed as Annexure-4 in WP(C) No. 9414 of 2005. In the cause title, it has been specifically mentioned “in the matter of an application for review/recall of the order dated 20.03.2004”. From this expression, it is made clear that the opposite party nos. 5 and 6 are not certain about the provision under which they have moved the application and more so the said application has been registered in the office of the Regional Director, Bhubaneswar in Review Application No.2 of 2006 but in course of hearing Mr. M.K. Mohanty, learned counsel appearing for the opposite party nos. 5 and 6 emphatically stated that since there is no provision under the Act and Rules of the Orissa Education Act, the application so filed cannot be nomenclatured as ‘review’ rather it is a ‘recall’ application filed by opposite party nos. 5 and 6. But the said application has been registered as Review Application No. 02 of 2006 which is apparent on the face of record.

10. Once the appeal bearing Appeal No. 10 of 1999 has been disposed of vide order dated 20.03.2004, the Appellate Authority has become functus officio and it cannot entertain any application for review/recall filed by any party, because the statute does not empower it for review of its owner order. If the application filed by the opposite party nos. 5 and 6 is nomenclatured as "review/recall" of the order dated 20.03.2004, in this circumstances, the meaning of 'review' and 'recall' vis-à-vis the jurisdiction of this Court has to be taken note of.

11. According to Black's Law dictionary, 7th Edn., p. 1320 , 'review' means consideration, inspection, or re-examination of a subject or thing. As per the decision of the apex Court in **Lily Thomas v. Union of India**, (2000) 6 SCC 224, 'review' is the act of looking, offer something again with a view to correction or improvement. In **Major Chandra Bhan Singh v. Latafat Ullah Khan,** AIR 1978 SC 1814 (1817): (1979) 1 SCC 321: (1978) 1 SCR 891, the apex Court has held that 'review' is a creature of statute and cannot be entertained in the absence of a provision thereof. In **Delhi Cloth and General Mills Co. Ltd. V. Rajasthan State Electricity Board,** AIR 1986 SC 1126: (1986) 2 SCC 431: (1986) 1 SCR 633, the word 'review' necessarily implies the power of the Board to have a second look and to so adjust from time to time its changes as to carry on its operations under the Act without sustaining a loss.

12. In **S. Nagraj v. State of Karnataka,** 1993 Supp (4) SCC 595 (619), apex Court held that 'review' literally and even judicially means re-examination or re-consideration. The basic philosophy inherent in it is the universal acceptance of human fallibility. In **State of Maharashtra v. Smt. Sobha Vithal Kolte,** AIR 2006 Bom. 44, the expression 'review' used in two different senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal, to set aside a palpably erroneous order passed under by misapprehension under it and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. In **Simrikhia v. Dolley Mukharjee,** AIR 1990 SC 1605, the apex Court held that if there had been change in the circumstances of the case, it would be an order for the High Court to exercise its inherent powers in the prevailing circumstances and pass appropriate orders to secure the ends of justice or to prevent the abuse of the process of the Court. Where there is no such changed circumstance and the decision has to be arrived at on the facts that existed as on the date of the earlier order, the exercise of the power to reconsider the same materials to arrive at different conclusion is in effect a review.

13. This Court in Gopinath Deb(supra) held as follows:

> "The term 'review' means a judicial re-examination of the case in certain specified and prescribed circumstances. The power of review is not inherent in a Court or Tribunal. It is a creature of the statute. A Court or Tribunal cannot review its own decision unless it is permitted to do so by statute. The Courts having general jurisdiction like Civil Courts have inherent power. But the Courts or Tribunals of limited jurisdiction creates under special statutes have no inherent power. "

14. Considering the above meaning of 'review', since there is no power vested under the statute to review the order, the Joint Director could not have entertained such application for review of the order dated 20.03.2004 passed by him in Appeal No. 10 of 1999 because the power of review is not available under any of the provisions created under the statute.

15. Now the question that arises for consideration is whether the Joint Director has considered it as a 'recall' application.

16. The apex Court in **Budhia Swain v. Gopinath Deb,** AIR 1999 SC 2089, held as follows:

> "A tribunal or a court may recall an order earlier made by it if

(i) the proceedings culminating into an order suffer from the inherent lack of jurisdiction and such lack of jurisdiction is patent,

(ii) there exists fraud or collusion in obtaining the judgment,

(iii) there has been a mistake of the court prejudicing a party, or

(iv) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented.

> The power to recall a judgment will not be exercised when the ground for reopening the proceedings or vacating the judgment, was available to be pleaded in the original action but was not done or where a proper remedy in some other proceeding such as by way of appeal or revision was available but was not availed. The right to seek vacation of a judgment may be lost by waiver, estoppel or acquiescence."

The distinction between 'review' and 'recall' has come up for consideration before apex Court in **Asit Kumar v. State of West Bengal,** 2009 AIR SCW 2784, wherein the apex Court has held that there is a distinction between a petition under Article 32 and a petition for 'review' and 'recall'. While 'review' considers merit where there is error apparent on the face of the record, in a 'recall' petition Court does not go into the merits but simply recall the order.

17. In view of the aforesaid law laid down by the apex Court and applying the same to the present context, it appears that Joint Director has acted in excess of his jurisdiction which was not conferred on him and more so he is not competent to do so in view of the judgment in **Jayaram Bhuyan (supra),** in which this Court has referred to the judgment of the apex Court in **Tikaram v. Mundikota Shikshan Prasarak Mandal and others,** AIR 1984 SC 1621 and **Dr.Smt.Kuntesh Gupta v. Management of Hindu Kanya Mahavidyalaya Sitapur (U.P.) and others**, AIR 1987 SC 2186 wherein the apex Court has taken a consistent view even by referring to the earlier precedent that in the absence of specific power conferred, review jurisdiction cannot be exercised by quash judicial body while discharging the quasi judicial function.

18. The reliance placed by Mr.M.K.Mohanty, learned counsel appearing for opposite parties 5 and 6 on the judgment of the apex Court in **United India Insurance Company Ltd. (supra)**, where reference has also been made to **Indian Bank (supra),** the apex Court held that since 'fraud' affects the solemnity, regularity and orderliness of the proceedings of the Court and also amounts to an abuse of the process of Court, the Courts have been held to have inherent power to set aside an order obtained by fraud practiced upon that Court. Similarly, where the Court is misled by a party or the Court itself commits a mistake, which prejudices a party, the Court has the inherent power to recall its order. It is further held that remedy to move for recalling the order on the basis of the newly discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No Court or Tribunal can be regarded as powerless to recall its own order, if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim. The above two judgments cited by Mr.Mohanty, learned counsel appearing for the opposite parties 5 and 6 has no assistance to his case in the present writ petition, rather, it has got full-fledged application to the case of the petitioner in view of the fact that the order dated 17.11.2005 passed in W.P.(C) No. 9414 of 2005 has been obtained by the opposite parties 5 and 6 by misrepresenting the Court and playing fraud on Court. Therefore, no relief can be granted to

the opposite parties 5 and 6, who have misrepresented or played fraud on the Court. That itself vitiates from the very beginning.

19. This Court in W.P.(C) No. 24527 of 2013 disposed of on 11.02.2014 (**Urmila Tripathy and another v. Smt.Charulata Kar and others**) referring to the judgment of the apex Court in **Meghmala and others v. G.Narasimha Reddy and others**, 2010, 8 SCC 383 held as follows:

> "It is settled proposition of law that where an applicant gets an order/office by making misrepresentation or playing fraud upon the competent authority, such order cannot be sustained in the eye of the law. "Fraud avoids all judicial acts, ecclesiastical or temporal." (Vide *S.P. Chengalvaraya Naidu* v. *Jagannath*) In *Lazarus Estates Ltd.* v. *Beasley* the Court observed without equivocation that: (QB p. 712) "No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."
>
> In *A.P. State Financial Corpn.* v. *GAR Re-Rolling Mills* and *State of Maharashtra* v. *Prabhu* this Court observed that a writ court, while exercising its equitable jurisdiction, should not act as to prevent perpetration of a legal fraud as the courts are obliged to do justice by promotion of good faith. "Equity is always known to defend the law from crafty evasions and new subtleties invented to evade law."
>
> In *Shrisht Dhawan* v. *Shaw Bros.* it has been held as under: (SCC p. 553, para 20)
>
> "*20*. Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It is a concept descriptive of human conduct."
>
> In *United India Insurance Co. Ltd.* v. *Rajendra Singh* this Court observed that "Fraud and justice never dwell together" (*fraus et jus nunquam cohabitant*) and it is a pristine maxim which has never lost its temper over all these centuries.
>
> The ratio laid down by this Court in various cases is that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and in such circumstances the Court should not perpetuate the fraud. (See *Vizianagaram Social Welfare Residential School Society* v. *M. Tripura Sundari Devi*, *Union of India* v. *M. Bhaskaran*, *Kendriya Vidyalaya Sangathan* v. *Girdharilal Yadav*, *State of Maharashtra* v.

Ravi Prakash Babulalsing Parmar, *Himadri Chemicals Industries Ltd.* v. *Coal Tar Refining Co.* and *Mohd. Ibrahim* v. *State of Bihar*.)

Fraud is an intrinsic, collateral act, and fraud of an egregious nature would vitiate the most solemn proceedings of courts of justice. Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. The expression "fraud" involves two elements, deceit and injury to the person deceived. It is a cheating intended to get an advantage. [Vide *Vimla (Dr.)* v. *Delhi Admn.*, *Indian Bank* v. *Satyam Fibres (India) (P) Ltd.*, *State of A.P.* v. *T. Suryachandra Rao*, *K.D. Sharma* v. *SAIL* and *Central Bank of India* v. *Madhulika Guruprasad Dahir*.]

An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. Fraud is proved when it is shown that a false representation has been made (*i*) knowingly, or (*ii*) without belief in its truth, or (*iii*) recklessly, careless whether it be true or false. Suppression of a material document would also amount to a fraud on the court. (Vide *S.P. Chengalvaraya Naidu*, *Gowrishankar* v. *Joshi Amba Shankar Family Trust*, *Ram Chandra Singh* v. *Savitri Devi*, *Roshan Deen* v. *Preeti Lal*, *Ram Preeti Yadav* v. *U.P. Board of High School & Intermediate Education* and *Ashok Leyland Ltd.* v. *State of T.N.*)

In *Kinch* v. *Walcott* it has been held that:

"… mere constructive fraud is not, at all events after long delay, sufficient but such a judgment will not be set aside upon mere proof that the judgment was obtained by perjury".

20. In the present case, by asking an innocuous order by misrepresenting the Court that the Managing Committee is not a party and believing on the statement, this Court having passed the order directing for 'review' or 'recall' of the order dated 20.3.2004 and taking advantage of the same, the opposite parties 5 and 6 cannot avail the benefit out of the same as the order dated 17.11.2005 passed in W.P.(C) No. 9414 of 2005 obtained by playing fraud on the Court.

21. It appears that the impugned order dated 19.10.2006 has not been annexed and it is the settled law that a document, which is not a part of the brief cannot be set aside. But then, it appears that in this case the order, which is impugned, having not been provided to the petitioner, he prayed for calling for records in Review Petition No.2 of 2006 referring to the communication made by the authorities in Annexure-4 he sought for setting aside the order dated 19.10.2006 recalling the ex parte order dated 20.3.2004 passed in Appeal No. 10 of 1999. Since the order has been passed by an authority having no jurisdiction to pass the order, that itself is a nullity in the eye of law. Therefore, if the petitioner indicates the date of the order and reference is made to the lower court record, as the said copy of the order has not been provided to him and further communication has been made him referring to the same vide Annexure-4, it cannot be construed that no relief can be granted to set aside the same even though the same has not been annexed to the writ petition. The order impugned being a nullity, the Court can on perusing the record set aside the order and grant relief to the petitioner as the order so passed is void ab initio in view of the fact that the authority has no jurisdiction to pass such order.

22. In view of the foregoing discussions and the ratio of the judgments referred to supra, the order dated 19.10.2006 passed by the Joint Director, Regional Directorate of Education, Bhubaneswar-cum-Appellate Authority in Review Application No.2 of 2006 communicated to the petitioner vide letter dated 19.10.2006 under Annexure-4 is hereby quashed.

23. The writ petition is accordingly allowed. No cost.

Writ petition allowed.

2014 (I) ILR - CUT-1168

DR. B.R.SARANGI, J.

W.P.(C) NO. 7764 OF 2014

KABITA DHAL .....Petitioner

.Vrs.

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

EDUCATION – **Petitioner, a lecturer in English – Her post could not be approved to receive grant-in-aid as she secured 54.6% marks in M.A. examination as against the minimum percentage of 55% - Writ petition filed – As per Government circular Dt. 25.7.1989 in Education and Youth Services Department, candidates who have secured 54.6% marks or more but below 55% at the M.A. examination that should be rounded off to 55% - Held, since the petitioner has secured 54.6% at her Master's degree examination the same may be rounded off to 55% as per the above decision of the Govt. and the petitioner would be entitled to get the benefits of approval of her appointment and sanction of grant-in-aid if she is otherwise eligible.**

(Paras 9 & 10)

Case Law Referred to:-

1. (2011) 3 SCC 436 : State of Orissa & Anr. -V- Mamata Mohanty
2. (2012) 8 SCC 568 : Registrar, Rajiv Gandhi University of Health Sciences, Bangalore -V- G.Hemlatha & Ors.
3. (2011) 8 SCC 108 : Orissa Public Service Commission & Anr. -V- Rupashree Chowdhary & Anr.
4. (1997) 4 SCC 560 : State of Orissa & Anr. -V- Damodar Nayak & Anr.

For Petitioner : M/s. H.M.Dhal, B.B.Swain, T.K.Pattnaik, P.K.Mohanty & P.K.Samantray

For Opp. Parties : Mr. Sangram Das, Asst. Standing Counsel (opp.party nos. 1 & 2)

Date of hearing : 02.05.2014
Date of judgment : 02.05.2014

JUDGMENT

DR. B.R. SARANGI, J.

The petitioner has filed this petition challenging the inaction of the opposite parties in not considering her case for approval of appointment as Lecturer in English of Rani Sukadei Mahila Degree Mahavidyalaya, Banki in the district of Cuttack and seeking for a direction to round off the percentage of her marks 54.6% (in Master's Degree Examination) to 55% in consonance with the circular issued by the Government of Orissa in Education and Youth

Services Department vide letter No.32578(2)- III E/A-55/89-EYS dated 25.7.1989 under Annexurer-5.

2. Rani Sukadei Mahila Degree Mahavidyalaya was established at Banki in the district of Cuttack having Arts faculty only in +2 or +3 courses. Initially the college was established having +2 wing in the year 1993-94 with Arts stream and the said Junior College received temporary recognition from the Directorate of Higher Education and thereafter +3 Degree Arts stream was opened in the year 1998-99 and the degree courses received affiliation from the Utkal University. Both the Junior College and Degree College was a Women's College and the degree courses received its recognition and affiliation on or before 1st June, 2000. Therefore, the institution in question is eligible to receive block grant in terms of Rule 4 of the Orissa (Non-government Colleges, Junior Colleges & Higher Secondary Schools) Grant-in-aid Order, 2008, hereinafter to be referred to as "Grant-in-aid Order, 2008". As such, the college in question is an aided educational institution within the meaning of Section 3(b) of the Orissa Education Act, 1969 and the teaching and non-teaching staff of the Institution are regulated by the provisions contained in Orissa Education Act and the Rules framed thereunder. In order to fill up the post of Lecturers in various disciplines including English in +3 Degree courses, applications were invited by publishing a notice widely. Pursuant to such advertisement/ notice, the petitioner, who has acquired the Post Graduation qualification in English securing 54.6% of marks submitted her application for consideration for appointment as Lecturer in English. By following due procedure of selection, she was selected to be appointed as Lecturer in English and accordingly, order of appointment was issued in her favour vide letter dated 16.6.1998, pursuant to which, she joined on 23.6.1998 and discharging her duties as Lecturer in English in the college since then.

3. Mr.H.M.Dhal, learned counsel for the petitioner states that the petitioner has acquired Master's Degree in English from Revenshaw (Autonomous) College being placed in 2nd Division securing 437 marks out of 800 marks in the subject English, which comes to 54.6%. While the petitioner was continuing as Lecturer in English, as per the Grant-in-aid Order, 2008, which came into force with effect from 7.1.2009, proposal in prescribed Form-A was submitted to the opposite party no.2 for approval of the post of teaching and non-teaching staff of the college and to release grant-in-aid, which was received by the Directorate on 17.4.2009. All the documents for the purpose of verification has been submitted and such documents have been duly verified by the authorities and accordingly, notification was issued in the website of the Department indicating the

teaching and non-teaching staff, which are approved. As it appears, the petitioner's name did not find place in the said notification in the order of approval of the post. So the petitioner analyzed about the matter and came to know that the post in which the petitioner was working was not approved because the petitioner has not secured 55% of marks in M.A. examination. It is stated that such action of the authorities is contrary to the Government circular dated 25.7.1989 issued under Annexure-5 under which the Government in Education & Youth Services Department has taken a decision that candidates, who have secured 54.6% of marks or more, but below 55% at the Master's Degree Examination that should be rounded up to 55%. Undisputedly the petitioner has secured 54.6% marks in M.A. Examination and the said marks ought to have been rounded off to 55% in view of Annexure-5. But without doing so, approval of the post held by the petitioner has not been done by the authorities. It has also been brought to the notice of the Court by learned counsel appearing for the petitioner that similar question came up for consideration before this Court in W.P.(C) No. 8653 of 2010 (**Krupsindhu Mishra v. State of Orissa and others**) disposed of on 03.08.3010 and W.P.(C) No.17095 of 2010 (**Manoranjan Nayak v. State of Orissa and others**) disposed of on 30.11.2010 wherein this Court directed the authorities to take a decision on the approval of the appointment of the incumbents and sanction of grant-in-aid treating his/her percentage of marks as 55% and therefore, applying the ratio of the said orders, the marks secured by the petitioner i.e. 54.6% should be rounded off to 55% taking into account the circular in Annexure-5 and extend the benefit of approved her post as Lecturer in English by granting block grant in accordance with law.

4. When the matter was taken up on 16.04.2014, Mr.S.Das, learned Addl.Standing Counsel for the State, stated that the orders relied upon by the learned counsel for the petitioner mentioned supra are not applicable to the present context and as such, rounding off of marks is not permissible and he sought time to produce the judgments of the apex Court in support of his contention. Accordingly, the matter was adjourned to 24.04.2014 giving opportunity to the learned Addl.Standing Counsel to produce the judgment of the apex Court on which date, learned Addl.Standing Counsel produced the judgments in **State of Orissa and another v. Mamata Mohanty**, (2011) 3 SCC 436, **Registrar, Rajiv Gandhi University of Health Sciences, Bangalore v. G.Hemlatha and others**, (2012) 8 SCC 568 and **Orissa Public Service Commission and another v. Rupashree Chowdhary and another**, (2011) 8 SCC 108 and stated that rounding off of marks is not permissible and sought for dismissal of the writ petition.

5. Mr.H.M.Dhal, learned counsel for the petitioner sought time to verify the applicability of the said judgments cited by the learned Addl.Standing Counsel and wanted to address the Court. On his request, the matter was adjourned to 2.5.2015.

6. In compliance to the order dated 24.4.2014, Mr.Dhal referring to **Mamata Mohanty (supra)** states that the said case is not applicable to the present context inasmuch as, that is a case where the apex Court has considered grant of UGC scale of pay admissible to the lecturers continuing in service, but not a case of rounding off marks and he has referred to paragraph 69 of the judgment wherein the apex Court has observed that a teacher, who had been appointed without possessing the requisite qualification at the initial stage cannot get the benefit of grant-in-aid scheme unless he acquires the additional qualification and therefore, question of grant of UGC pay scale would not arise in any circumstances unless such teacher acquires the additional qualification making him eligible for the benefit of grant-in-aid scheme. The cumulative effect therefore comes to that such teacher will not be entitled to claim the UGC pay scale unless he acquires the higher qualification, i.e. MPhil/PhD.

7. Mr.Dhal stated that has **Rupashree Chowdhary (supra)** Rule 24 of the Orissa Superior Judicial Service and Orissa Judicial Service Rules, 2007 which provided that the Commission shall call the candidates for interview who have secured not less than forty-five per centum of marks in aggregate and a minimum of thirty-three per centum of marks in aggregate in each paper in the main written examination. Considering the said provision, the apex Court held that rounding off the aggregate marks of 44.93% to 45% so as to make a candidate eligible for appearing at the interview dehors the rule as directed by the High Court was not permissible. In that context the apex Court held that the Rules are statutory in nature and there is no power provided in the rules permitting any such rounding off or giving grace marks so as to bring up a candidate to the minimum requirement. Therefore, the apex Court held that no such rounding off or relaxation was permissible.

8. Mr.Dhal also stated that **Registrar, Rajiv Gandhi University of Health Sciences (supra),** the apex Court relying upon the ratio decided in **Rupashree Chowdhary (supra)** has stated that question of rounding off marks is not permissible in absence of any provision in the Statute empowering the authority to make such rounding off. He specifically referred to paragraph 12 wherein the apex Court observed that there is no provision of any statute or any rules framed thereunder, which permit rounding off of eligibility criteria prescribed for the qualifying examination for admission to

the PG course. Apex Court further held that when the eligibility criteria is prescribed in a qualifying examination, it must be strictly adhered to.

9. Mr.Dhal states that the facts of the case at hand is different from the facts of the case cited by learned Addl. Standing Counsel for the State mentioned supra. In the present case, relaxation has been given by the State vide Annexure-5, the notification under which the Government has decided that the candidates who have secured 54.5% marks or more but below 55% at the Master's Degree examination that may be rounded off to 55%. Since relaxation power has been given by the State to make rounding of marks from 54.5% or more to 55%, the ratio decided by the apex Court in the aforesaid judgements is not applicable. Mr.Dhal has relied upon the decision of the apex Court in **State of Orissa and another v.Damodar Nayak and another** (1997) 4 SCC 560, more particularly para 3, which reads as follows :

> "The question limited to the notice is whether the respondent would be entitled to payment of salary under the Grants-in-aid Scheme from the date of initial appointment till he improved his qualification or from the date of his acquiring the qualification? The admitted position is that Respondent no. 1 came to be appointed as a lecturer in 1978. The Government issued clarification on 5.1.1987 that unqualified lecturers having minimum second class, i.e., 48% or above and below 54% of marks in P.G. examination and appointed on or after 1.8.1977 in recognized non-government colleges would be eligible to receive grant-in-aid for payment of salary to the first respondent from the date of his acquiring qualification or from the date of initial appointment? Admittedly, since the first respondent on the date of his appointment was not possessing the requisite qualification and acquired the same only on 21.3.1989, he will be eligible to the benefit of the grants-in-aid w.e.f.1.4.1989 and onwards."

In the aforesaid case since the respondent no.1 has secured 53.9% marks, which is almost equivalent to 54% marks on 21.3.1989, question arose whether the second respondent is entitled to receive grants-in-aid for payment of salary to the first respondent from the date of his acquiring qualification or from the date of initial appointment. Admittedly, since the first respondent on the date of his appointment was not possessing the requisite qualification and acquired the same only on 21.3.1989, he will be eligible to the benefit of the grants-in-aid w.e.f.1.4.1989 and onwards. In that view of the matter, therefore the apex court has permitted to rounding off from

53.9% to 54%. In the present case the rounding off of marks pursuant to the notification of the State Government under Annexurer-5 can also be permitted. Similar question also arose before this Court in W.P.(C) No. 8653 of 2010 disposed of on 3.8.2010 and W.P.(C) No.17095 of 2010 disposed of on 30.11.2010, wherein this Court considering the relaxation power of the State Government for rounding off of marks, directed the State authorities to round off the percentage of marks of the petitioner in that case to 55%.

10. In view of the foregoing discussions, this Court is of the view that since the petitioner has secured 54.6% at her Master's degree examination as per the Government decision vide Annexure-5 the same be round off to 55% and the petitioner would be entitled to get the benefits of approval of her appointment and sanction of grant-in-aid, if she is otherwise eligible, treating her percentage of marks as 55% and this Court directs accordingly.

11. With the aforesaid observation and direction, the writ petition is disposed of.

Writ petition disposed of.

2014 (I) ILR - CUT-1174

D. DASH, J.

JCRLA 46 OF 2006

GOVINDA BAG @ TARIA ……Appellant

.Vrs.

STATE OF ODISHA ……Respondent

PENAL CODE, 1860 -. 304-II

Conviction U/s. 304-II I.P.C. – Conviction recorded cannot be found fault with – Sudden quarrel for petty matters - Appellant hails from a rural background and remaining with depression being

issueless for quite a long time after marriage – Held, period of R.I. imposed U/s. 304-II as 10 years is reduced to 7 years along with a fine of Rs.1000/- in default to undergo R.I. for 2 months instead of 6 months.
(Paras 10.11.)

For Appellant - M/s. G. N. Mishra, S. Rout,
S. Adhikari, S.C. Sahoo.
For Respondent - Mr. S.B. Mohanty, Addl. Standing Counsel.

Date of hearing : 21. 02. 2014
Date of Judgment : 12. 03. 2014

JUDGMENT

The judgment of conviction and sentence passed by the learned Additional Sessions Judge (FTC), Padmapur in S.T case No.231/31/8 of 2004 convicting the appellant for offence under Section 304(I), IPC, and sentencing him to undergo rigorous imprisonment for 10 years with payment of fine of Rs.1,000/- (one thousand) in default to undergo rigorous imprisonment for a period of 6 (six) months has been called in question by presenting the appeal from in side the jail.

2. The prosecution case in short is that the appellant had married deceased Kumari as per Hindu rites as well as caste, custom of the parties in the year, 1985. It is stated that on 15.04.2001 during morning hour around 9.00 A.M. the appellant mercilessly assaulted his wife and left her at village-Gidemal near a road under a banyan tree and fled away from the place. It is the further case of the prosecution is that one Mohan Bag and Nepali Sahu having seen the appellant taking his wife and leaving there, when asked him about the same, the appellant maintained silence. So they informed the brother in law of the appellant regarding the serious condition of his sister and the fact about her being left there by the appellant, also about blood oozing out of her face and that she was lying unconscious. Balagopal the brother in law of the appellant arrived and they shifted his sister Kumari to Telpali Hospital in a bullock cart. The matter was then informed to the police and a case was registered against the appellant for commission of offence under Section 307, IPC which led to the commencement of investigation. Kumari for better treatment was shifted to Padmapur, Sub-Divisional Hospital where she died. Inquest was held over the dead body and on police requisition post mortem was conducted. Finally on completion of investigation charge sheet having been submitted and the case having been

committed to the court of Sessions the appellant faced the trial for offence under Sections 302/498-A, IPC.

3. During trial, prosecution in order to bring home the charges against the appellant examined in total 14 witnesses.

P.W.1 is the informant and brother of the deceased, i.e. the brother in law of the appellant. P.W.2 is the witness who claims to have seen the appellant while he was carrying his wife and then to have left the place. P.W. 3 is a witness who has stated about strained relationship between the deceased and the appellant, whereas P.W.4 is the mother of the deceased who has also been examined for the said reason. P.W.5, P.W. 6, P.W.7, P.W.8 and P.W. 9 have also been examined as witnesses in that regard. P.W.10 is the doctor, who had conducted the post mortem examination and P.W.11 is the witness to seizure of wearing apparels of the deceased. P.W.12 and 13 are the doctors who had first examined the deceased and who had given opinion on certain query being made by the investigating officer respectively. P.W. 14 is the investigating officer of this case. Besides the above, prosecution has proved documents such as F.I.R Ext.1, inquest report Ext.2, Post mortem report Ext.3, medical examination report Ext.15 etc. The defence has examined two doctors, one who had admitted the deceased in Sub-Divisional Hospital, Padmapur and other one who had attended the deceased in the hospital and through them the bed head tickets have been proved and marked as Ext. B with a report on query as regards probable cause of death marked as Ext. A.

4. The plea of the defence is that of denial with a specific case that death was due to fever from which the deceased was suffering. The defence has examined two doctors of S.D. Hospital who had admitted the deceased and treated her.

5. The trial court in view of charges formulated two points for decision i. e. as regards treating the deceased with cruelty with a view to coerce the deceased to meet unlawful demand and the next one with regard to incident of merciless assault by the appellant finally leading to death of Kumari, the wife of the appellant.

6. Learned counsel for the appellant submits that the appreciation of the evidence as done by the court below is highly improper and on proper appreciation of evidence let in by the prosecution as well as the defence, the finding of guilt rendered by the trial court for the offence under Sections 498-A/304-II, IPC can not sustain in the eye of law.

Learned Additional Government Advocate submits that the overwhelming evidence on record remains in favour of a finding of guilt and the court below taking the facts and circumstances into consideration has rightly convicted the appellant for offence U/s.304-II, IPC.

7. With the above rival submission in mind, it first stands for decision as to whether the death in present case is homicidal or not. Besides the oral evidence of the witnesses, it is the evidence of P.W. 10 the doctor, who conducted post mortem examination over the dead body of Kumari that she had noticed a number of external injuries on the dead body and those are on the both limbs, right cheek below right palpibral conjuctiva, left parietal region of the scalp etc. She has also stated the injuries to have been possible by hard and blunt weapon and to be ante mortem in nature although are not sufficient to cause of death in ordinary course of nature. P.W.12 is the doctor of Telapali Hospital, has also stated that while giving treatment to Kumari at the first instance, he had noticed external injuries on her person and at that time as her condition was serious, he referred to S.D. Hospital for better treatment. P.W. 13 is the Assistant Professor, who was asked to give his opinion as regards the death after going through the post mortem report prepared by P.W.10, has stated that the external injuries on the head are sufficient to produce concussion to the brain and that leads to unconsciousness and circulatory failure inviting death. It is also his evidence that such concussion in the present case might have been the cause of death. Report has been proved as Ext.8. The witness has been put to serious cross-examination. This expert has stated that in some cases of concoction death is the result and in some cases the patient recovers fully and also in some cases recovery is with residual paralysis. With this medical evidence, now the oral evidence of P.W.1 is required to be glanced. It becomes clear that when he went being informed by P.W.2 to that place where his sister was lying being left by the appellant, he found her sister with bleeding injury on face and she was then lying in an unconscious state. Next he states to have taken to Telapali Hospital, then to Padmapuru Sub-Divisional Hospital where the death took place. P.W. 2 has also stated to have seen Kumari at the spot.

8. The defence case is that the death is due to suffering of the deceased from fever. So now let us turn to the evidence of D.W.1. It has simply been stated by this doctor that the bed head ticket revealed that the deceased was suffering from fever for three days but he has clearly stated that the patient was declared dead due to peripheral circularly failure and during treatment, she died. Such noting in bed head ticket is of little significance when it is not shown that it was so recorded as per version of

Kumari or any person upon hearing from Kumari D.W. 2 has stated that the patient was under coma. The evidence of Assistant Professor P.W.13 taken together with the existence of external injuries and other evidence as discussed above, that the appellant left the deceased in an unconscious state are also quite enough to hold in favour of homicidal death. Thus I am led to conclude that the death was homicidal in nature.

9. With the above, let me now examine the evidence with regard to the complicity of the appellant.

P.W.1 the brother of the deceased, who is the informant of this case has deposed about the factum of assault by the appellant upon the deceased in past. It is also his evidence that the appellant was not doing any work, his sister was objecting and that was the reason for frequent quarrel between them. All these have been brought out from the lips of this witness during cross-examination. P.W. 4 the mother of deceased has also stated so that there was frequent quarrel in the house. P.W. 5 has also supported said version. About quarrel evidence of P. W. 8 is also very clear. All of them have also described the instances. So, I do not find any improper appreciation of the evidence on behalf of the trial court in holding that deceased was tortured and cruelty was being meted out at her for quite some time till she was left at the place after being assaulted as has been stated by P.W.2. The evidence of above witnesses are found to be having the ring of truth and there appears absolutely no justification on their part to falsely implicate the appellant.

10. With regard to the incident P.W.1, the brother of the informant has stated to have received the information from P.W.2 about her sister being left near the banyan tree at one end of village and he has further deposed to have immediately rushed down to the place and to have been seen his sister Kumari lying with injury on her face and blood oozing out of her nose, when her state was unconscious. P.W. 2 has deposed that it is the appellant who left the deceased in that condition under that banyan tree at one end of their village. The plea of the defence at this stage is found to be wholly unacceptable for the simple reason that if the deceased was suffering from fever, there was no reason further to be left by appellant at one end of the village under a banyan tree that too in an unconscious state which fact is not in dispute. It is also not there in the evidence that the appellant had ever gone to the hospital to see his wife at any point of time prior to her death and rather it stands that the accused was last seen by P.W.2 while leaving deceased and thereafter his whereabouts were not known. It has also been deposed by P.W.1 regarding longstanding bitterness prevailing in the

matrimonial home. The F.I.R lodged in the case Ext.1 corroborates the version of P.W.1 as regards existence of injury on the person of the deceased which he had seen**,** immediately on his arrival. P.W.7 has further deposed that the deceased was taken by the appellant on a cycle and left under that banion tree and P.W. 8 is the witness who is a neighbour of the appellant had seen the appellant mercilessly assaulting the deceased after the quarrel regarding giving of paddy, rice and money which was alleged to have been taken by the brother in law of the appellant. He has also stated that the appellant had given the threat to kill his wife as she was begetting no children. This witness is really an important witness about authorship of injuries upon Kumari that being asked as to where appellant was taking Kumari, the appellant replied that she was suffering from fever and for that she was being taken to the parent's house. This witness is seen to have responded in a very natural manner in telling the appellant that after assaulting her for the entire night how she was being taken to the parents house to be left there. The witness further stated that it was an act of pretension on the part of the appellant that deceased was suffering from fever for which she was being taken to the house of her parents. When the evidence of P.W. 8 is taken into consideration along with the medical evidence, in the absence of any material to suggest otherwise, the role of the appellant stands proved that after having mercilessly assaulted his wife she was taken and left under the banion tree where after his wife Kumari died in course of treatment in the hospital. The version of the defence is found to have not been proved by preponderance of the probabilities.

Considering the nature of injuries and other attending circumstances that the assault is in course of sudden quarrel for petty matters the injuries as noticed and their seats, the conviction recorded for offence U/s.304-II,IPC can not be found fault with as those clearly suggest that the act done is not with the intention of causing death or with the intention to cause such bodily injury as is likely to cause death though it can be said that such bodily injuries were caused with the knowledge that the same is likely to cause death.

11. Lastly stands for consideration, the submission of learned defence counsel that it is a fit case for reduction of the period of substantive sentence as ordered for the said offence under Section 304-II, IPC which the learned Standing Counsel resists.

Considering the facts and circumstances of the case and cumulatively viewing all other relevant factors that the appellant hails from a rural back ground and was some how earning his livelihood and also to have

been remaining issue-less even for quite a long time after his marriage with a depression, the period of rigorous imprisonment awarded for commission of offence under Section 304-II, IPC as 10 (ten) years in my considered view needs reduction. In view of aforesaid, the appellant is hereby sentenced to under go rigorous imprisonment for a period of 7 years for the offence under Section 304-II, IPC in stead of rigorous imprisonment for 10 years followed by a fine of Rs.1,000/- (one thousand) in default to undergo rigorous imprisonment for a period of 2 (two) months.

Appeal allowed in part.