SUPREME COURT OF INDIA

DIPAK MISRA, J. & ADARSH KU. GOEL, J.

CRIMINAL APPEAL NO. 859 OF 2016
(@ S.L.P.(CRIMINAL) NO. 5717 OF 2012)

DHARIWAL INDUSTRIES LTD. ……..Appellant

.Vrs.

KISHORE WADHWANI & ORS. ……..Respondents

CRIMINAL PROCEDURE CODE, 1973 – Ss. 301, 302

Scope of private person to conduct prosecution – Distinction between sections 301 and 302 Cr.P.C – Trial before sessions court as well as Magistrate's Court – Role of Public Prosecutor and role of a Complainant – The role of the informant or the private party is limited during the prosecution of a case in a Session's Court, where the counsel engaged by him is to act under the directions of the Public Prosecutor – However U/s. 302 Cr.P.C. power conferred on the Magistrate to grant permission to the complainant to conduct the prosecution independently – So when a complainant wants to take benefit U/s. 302 Cr.P.C. he has to file a written application seeking permission to conduct the prosecution independently and the same shall be dealt with on its own merit – Held, provision U/s. 302 Cr.P.C. applies to every stage, including the stage of framing charge.

(Paras 18,19,20)

Case Laws Referred to :-

1. (2001) 3 SCC 462 : J.K. International v. State (Govt. of NCT of Delhi) & Ors.[2]
2. (2014) 16 SCC 623 : Sundeep Kumar Bafna v. State of Maharashtra & anr[3].
3. (1999) 7 SCC 467 : Shiv Kumar v. Hukam Chand and Anr.[4]

Appellant : M/s. Parekh & Co.
Respondents : Mrs. Priya Puri

Date of Judgment: 06.09.2016

JUDGMENT

DIPAK MISRA, J.

Leave granted.

2. The present appeal, by special leave, assails the order dated 13th February, 2012 passed by the High Court of Judicature at Bombay in Criminal Writ Petition No. 3438 of 2010 whereby the learned Single Judge has modified the order dated 30th August, 2010 whereunder the Additional

Chief Metropolitan Magistrate, 8th Court, Esplanade, Mumbai in C.C.No.927/PW/2007 had permitted the appellant to be heard at the stage of framing of charge under Section 239 of the Code of Criminal Procedure (for short, "CrPC"), by expressing the view that the role of the complainant is limited under Section 301 CrPC and he cannot be allowed to take over the control of prosecution by directly addressing the Court, but has to act under the directions of Assistant Public Prosecutor in charge of the case.

3. The facts which are requisite to be stated for the purpose of adjudication of the present appeal are that the appellant filed a complaint under Section 200 CrPC for the offences punishable under Sections 109, 193, 196, 200, 465, 467 and 471 read with Section 120-B of Indian Penal Code (IPC). The learned Magistrate exercising the power under Section 156(3) CrPC, directed the police to investigate into the allegations. The investigating agency registered an FIR and eventually laid the charge-sheet before the Court and thereafter the case was registered as C.C. No. 927/PW/2007.

4. After the charge-sheet was filed, the accused persons filed an application under Section 239 CrPC seeking discharge. At that juncture, the appellant made an oral prayer before the learned Magistrate seeking permission to be heard along with the Assistant Public Prosecutor. The learned Magistrate after hearing the learned counsel for the parties observed that the original complainant is not alien to the proceeding and, therefore, he has a right to be heard even at the stage of framing of charge and, accordingly, granted the permission.

5. Being dissatisfied with the aforesaid order, the accused-respondents preferred the criminal writ petition before the High Court. The High Court referred to Section 301 CrPC and certain authorities of this Court and came to hold thus:-

> "Undoubtedly the first informant now enjoys a role higher than earlier as already seen in the preceding paragraphs. In fact perusal of the petition shows that the petitioners also not wish to deny participation of the first informant altogether. They only want his role to be limited as under Section 301 Cr.P.C. An application for discharge can result into putting an end to the prosecution either partly or fully. This stage is in that respect similar to the stage of consideration of the police report by the Magistrate under Section173(2) Cr.P.C and the proceedings for quashing of the complaint filed by the accused person. The first informant, therefore, is likely to be interested in seeing that the matter reaches the stage of trial and is disposed off

> after recording of evidence. If by judicial pronouncements, he is now granted hearing at the earlier two stages, he can be granted hearing at the stage of discharge also, though the Criminal Procedure Code does not make provision for hearing to him at that stage. If the first informant appears before the Court and desires to participate in the application, opportunity cannot be refused to him. Now the next question would be about the nature of the hearing to be given to the first informant. Should the hearing be independent to the hearing to the Public Prosecutor or it be through the Public Prosecutor. In my opinion, his role will have to be limited as under Section 301 Cr.P.C. for the same reasons, as given in Anthony D'Souza's1 case and keeping in focus the role of the Public Prosecutor. He cannot be allowed to take over the control of prosecution by allowing to address the court directly. Therefore, the petition is partly allowed. The impugned order is modified to the extent that the Counsel engaged by respondent no. 2 shall act under the directions of the Assistant Public Prosecutor in-charge of the case."

6. Questioning the legal propriety and the approach of the High Court, it is submitted by Mr. K.T.S. Tulsi, learned senior counsel appearing for the appellant that the High Court has gravely erred by placing reliance on Section 301 CrPC and completely ignoring the stipulations inherent in Section 302 CrPC. According to Mr. Tulsi, there is a distinction between a trial before a Magistrate and a sessions trial and Section 302 CrPC has exclusive 1 Anthony D'Souza v. Mrs. Radhabai Brij Ratan Mohatta, 1984 (1) BC.R. 157 application to a magisterial trial and hence, the complainant can address the Court directly, if permitted by the Court. To strengthen the said submission, he has commended us to the authorities in ***J.K. International v. State (Govt. of NCT of Delhi) and others***[2] and ***Sundeep Kumar Bafna v. State of Maharashtra and another***[3].

7. Mr. Vikas Singh, learned senior counsel, in his turn, contends that Section 301 CrPC is applicable to all categories of cases and therefore a complainant is entitled to assist the Court under the directions of the public prosecutor. That apart, submits Mr. Singh, he has the only other liberty to file the written arguments with the permission of the court. Mr. Singh would vehemently urge that the appellant had never sought to conduct the case under Section 302 CrPC and as envisaged, no application in that regard was filed and, therefore, no fault can be filed with the order of the High Court. It

[2] (2001) 3 SCC 462 [3] (2014) 16 SCC 623

is further submission that as the factual matrix would exposit, the learned Magistrate allowed the prayer on the basis of an oral submission which is one under Section 301 CrPC and, in such a situation, no laxity should be given to him to take the benefit of Section 302 CrPC. Additionally, propones Mr. Singh, that there is slight disharmony in the pronouncement in ***J.K. International*** (supra) *and* ***Shiv Kumar v. Hukam Chand and another***[4] which needs to be reconciled.

8. Section 301 CrPC reads as follows:-

> "Appearance by Public Prosecutors.-(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any court in which that case is under inquiry, trial or appeal.
>
> (2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case."

9. In ***Shiv Kumar*** (supra), the Court has clearly held that the said provision applies to the trials before the Magistrate as well as Court of Session.

10. Section 302 CrPC which is pertinent for the present case reads as follows:-

> "Permission to conduct prosecution-(1)Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than police officer below the rank of Inspector; but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:
>
> Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.
>
> (2) Any person conducting the prosecution may do so personally or by a pleader."

11. In ***Shiv Kumar*** (supra) interpreting the said provision, the Court has ruled:-

[4](1999) 7 SCC 467

> "8. It must be noted that the latter provision is intended only for magistrate courts. It enables the magistrate to permit any person to conduct the prosecution. The only rider is that magistrate cannot give such permission to a police officer below the rank of Inspector. Such person need not necessarily be a Public Prosecutor.
>
> 9. In the Magistrate's Court anybody (except a police officer below the rank of Inspector) can conduct prosecution, if the Magistrate permits him to do so. Once the permission is granted the person concerned can appoint any counsel to conduct the prosecution on his behalf in the Magistrate's Court.
>
> xxx xxx xxx
>
> 11. The old Criminal Procedure Code (1898) contained an identical provision in Section 270 thereof. A Public Prosecutor means any person appointed under Section 24 and includes any person acting under the directions of the Public Prosecutor,(vide Section 2(u) of the Code).
>
> 12. In the backdrop of the above provisions we have to understand the purport of Section 301 of the Code. Unlike its succeeding provision in the Code, the application of which is confined to magistrate courts, this particular section is applicable to all the courts of criminal jurisdiction. This distinction can be discerned from employment of the words any court in Section 301. In view of the provision made in the succeeding section as for magistrate courts the insistence contained in Section 301(2) must be understood as applicable to all other courts without any exception. The first sub-section empowers the Public Prosecutor to plead in the court without any written authority, provided he is in charge of the case. The second sub-section, which is sought to be invoked by the appellant, imposes the curb on a counsel engaged by any private party. It limits his role to act in the court during such prosecution under the directions of the Public Prosecutor. The only other liberty which he can possibly exercise is to submit written arguments after the closure of evidence in the trial, but that too can be done only if the court permits him to do so."

12. It is apt to note here that in the said decision it has also been held that from the scheme of CrPC, the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other than the public prosecutor. It is because the legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a

Sessions Court. The Court has further observed that a public prosecutor is not expected to show the thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case.

13. In ***J.K. International*** (supra), a three-Judge Bench was adverting in detail to Section 302 CrPC. In that context, it has been opined that the private person who is permitted to conduct prosecution in the Magistrate's Court can engage a counsel to do the needful in the court in his behalf. If a private person is aggrieved by the offence committed against him or against any one in whom he is interested he can approach the Magistrate and seek permission to conduct the prosecution by himself. This Court further proceeded to state that it is open to the court to consider his request and if the court thinks that the cause of justice would be served better by granting such permission the court would generally grant such permission. Clarifying further, it has been held that the said wider amplitude is limited to Magistrate's Court, as the right of such private individual to participate in the conduct of prosecution in the sessions court is very much restricted and is made subject to the control of the public prosecutor.

14. Having carefully perused both the decisions, we do not perceive any kind of anomaly either in the analysis or ultimate conclusion arrived by the Court. We may note with profit that in ***Shiv Kumar*** (supra), the Court was dealing with the ambit and sweep of Section 301 CrPC and in that context observed that Section 302 CrPC is intended only for the Magistrate's Court. In ***J.K. International*** (supra) from the passage we have quoted hereinbefore it is evident that the Court has expressed the view that a private person can be permitted to conduct the prosecution in the Magistrate's Court and can engage a counsel to do the needful on his behalf. The further observation therein is that when permission is sought to conduct the prosecution by a private person, it is open to the court to consider his request. The Court has proceeded to state that the Court has to form an opinion that cause of justice would be best subserved and it is better to grant such permission. And, it would generally grant such permission. Thus, there is no cleavage of opinion.

15. In ***Sundeep Kumar Bafna*** (supra), the Court was dealing with rejection of an order of bail under Section 439 CrPC and what is meant by "custody". Though the context was different, it is noticeable that the Court has adverted to the role of public prosecutor and private counsel in prosecution and in that regard, has held as follows:-

> "… in *Shiv Kumar v. Hukam Chand* (supra), the question that was posed before another three- Judge Bench was whether an aggrieved has a right to engage its own counsel to conduct the prosecution despite the presence of the Public Prosecutor. This Court duly noted that the role of the Public Prosecutor was upholding the law and putting together a sound prosecution; and that the presence of a private lawyer would inexorably undermine the fairness and impartiality which must be the hallmark, attribute and distinction of every proper prosecution. In that case the advocate appointed by the aggrieved party ventured to conduct the cross-examination of the witness which was allowed by the trial court but was reversed in revision by the High Court, and the High Court permitted only the submission of written argument after the closure of evidence. Upholding the view of the High Court, this Court went on to observe that before the Magistrate any person (except a police officer below the rank of Inspector) could conduct the prosecution, but that this laxity is impermissible in the Sessions by virtue of Section 225 CrPC, which pointedly states that the prosecution shall be conducted by a Public Prosecutor. …"

16. Mr. Tulsi, learned senior counsel, has drawn inspiration from the aforesaid authority as ***Shiv Kumar*** (supra) has been referred to in the said judgment and the Court has made a distinction between the role of the public prosecutor and the role of a complainant before the two trials, namely, the sessions trial and the trial before a Magistrate's Court.

17. As the factual score of the case at hand is concerned, it is noticeable that the trial court, on the basis of an oral prayer, had permitted the appellant to be heard along with the public prosecutor. Mr. Tulsi, learned senior counsel submitted such a prayer was made before the trial Magistrate and he had no grievance at that stage but the grievance has arisen because of the interference of the High Court that he can only participate under the directions of the Assistant Public Prosecutor in charge of the case which is postulated under Section 301 CrPC.

18. We have already explained the distinction between Sections 301 and 302 CrPC. The role of the informant or the private party is limited during the prosecution of a case in a Court of Session. The counsel engaged by him is required to act under the directions of public prosecutor. As far as Section 302 CrPC is concerned, power is conferred on the Magistrate to grant permission to the complainant to conduct the prosecution independently.

19. We would have proceeded to deal with the relief prayed for by Mr. Tulsi but, no application was filed under Section 302 CrPC and, therefore, the prayer was restricted to be heard which is postulated under Section 301 CrPC. Mr. Singh, learned senior counsel appearing for the respondents would contend that an application has to be filed while seeking permission. Bestowing our anxious consideration, we are obliged to think that when a complainant wants to take the benefit as provided under Section 302 CrPC, he has to file a written application making out a case in terms of ***J.K. International*** (supra) so that the Magistrate can exercise the jurisdiction as vested in him and form the requisite opinion.

20. Mr. Tulsi, learned senior counsel appearing for the appellant submits that he intends to file an application before the learned Magistrate and hence, liberty may be granted. Mr. Singh has seriously opposed the same. Regard being had to the rivalised submissions, we only observe that it would be open to the appellant, if so advised, to file an application under Section 302 CrPC before the learned Magistrate. It may be clearly stated here that the said provision applies to every stage including the stage of framing charge inasmuch as the complainant is permitted by the Magistrate to conduct the prosecution. We have said so to clarify the position of law. If an application in this regard is filed, it shall be dealt with on its own merits. Needless to say, the order passed by the learned Magistrate or that of the High Court will not be an impediment in dealing with the application to be filed under Section 302 CrPC. It is also necessary to add that we have not expressed any opinion on the merits of the application to be filed.

21. The criminal appeal is, accordingly, disposed of.

Criminal appeal disposed of.

2017 (I) ILR - CUT- 9

VINEET SARAN, C.J. & DR. B.R.SARANGI, J.

W.P.(C) NO. 14352 OF 2016

BIJAY KUMAR MOHAPATRA .....Petitioner

.Vrs.

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

TENDER – Non-payment of "Incentive", though work completed before schedule time as per agreement – Hence the writ petition – Under clause 2.4 of the Detailed Tender call notice, the petitioner is entitled to "Bonus" i.e. "Incentive" for early completion of the contract work – State Opposite Parties could not justify as to why incentive should not be paid merely because of pendency of SLP before the Apex Court without there being any interim order – Direction issued for payment of incentive alongwith earnest money and security amount in accordance with the terms of the agreement.

(Paras 13,14)

Case Law Referred to :-

1. (2007) 11 SCC 756 : Ghaziabad Zila Sahkari Bank Ltd. -V- Labour Commissioner.

For Petitioner : M/s. B. Routray, Sr. Advocate, S. Das, K. Mohanty, R.P. Dalai, S. Jena, S.K.Samal & S.P. Nath.

For Opp. Parties : Mr. B. Bhuyan, (AGA)

Date of judgment :15.11.2016

JUDGMENT

VINEET SARAN, C.J.

The petitioner is a registered super class contractor. He was awarded a contract work for "improvement of Barikpur-Dhamnagar road from 0/0 to 9/660 km. under ACA Scheme for the year 2013-14" pursuant to the agreement dated 03.09.2014 which was completed by him before the due date. He thus claims for incentive for early completion of work, as well as refund of earnest money deposit (EMD) and security deposits in terms of the agreement.

2. The admitted facts of the case are that challenging the said award of contract in favour of the petitioner, one Suryanarayan Mohanty had filed W.P.(C) No. 16944 of 2014, in which initially interim order was passed on 06.09.2014, but finally on 25.11.2014 the writ petition was dismissed. The

petitioner thereafter commenced the work and completed the same on 15.04.2015, which was admittedly two months prior to the assigned date of completion as indicated in the agreement. On 17.04.2015, opposite party no.4-Executive Engineer issued completion certificate and the final bill of the petitioner was also released on 27.05.2015. Then on 03.07.2015, the petitioner requested the Executive Engineer to disburse the incentive in his favour for early completion of work, as was stipulated in the terms of the agreement. When the said incentive was not paid, this writ petition has been filed for a direction to the opposite parties to pay the incentive to the petitioner for early completion of work and also for refund of EMD and security deposit.

3. We have heard Sri B. Routray, learned Senior Counsel along with Sri S.K. Sahoo for the petitioner, as well as learned Addl. Govt. Advocate appearing for the State-opposite parties. Pleadings between the parties have been exchanged and with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

4. The work in question was awarded in favour of the petitioner and accordingly the work order issued in his favour on 03.09.2014. Effectively, he started the work on 10.12.2014 and completed the same on 15.04.2015, which was much prior to the assigned date of completion. The Executive Engineer issued the completion certificate on 17.04.2015 and subsequently wrote a letter to the Chief Engineer (DPI & Roads) on 03.07.2015 narrating the details regarding completion of work executed by the petitioner, in which he has admitted that the petitioner is entitled to get 10% incentive of the agreement amount and the same should have been paid along with the bill.

5. Clause 2.4 of the Detailed Tender Call Notice in Annexure-1 to the writ petition prescribes for bonus for early completion of work, which is as follows:-

> *"**Bonus for early completion***
>
> *2.4.1 Amendment to para 3.5.5 (v) Note-iii of OPWD Code Vol-I by inclusion.*
>
> *For availing incentive clause in any project which is completed before the stipulated date of completion, subject to other stipulations it is mandatory on the part of the concerned Executive Engineer to report the actual date of completion of the project as soon as possible through FAX or e-mail so that the report is received within 7 days of such completion by the concerned Superintending Engineer, Chief Engineer and the Administrative Department. The incentive for timely*

completion should be on a graduated scale of one percent to 10 percent of the contract value. Assessment of incentives may be worked out for earlier completion of work in all respect in the following scale.

- *Before 30% of the contract period=10% of the contract value*
- *Before 20% to 30% of the contract period=7.5% of the contract value*
- *Before 10% to 20% of the contract period= 5% of the contract value*
- *Before 5% to 10% of the contract period= 2.5% of the contract value*
- *Before 5% of the contract period= 1% of the contract value."*

6. The aforementioned clause contained in Detailed Tender Call Notice also forms part of the agreement in terms of the OPWD Code (Vol.4). So far as OPWD Code is concerned, which is statutory in nature and as per the conditions stipulated therein, the petitioner is entitled to get refund of the earnest money deposit and also the security amount. Due to inaction of the authorities, under the compelling circumstances, the petitioner has approached this Court by filing this writ petition. On being noticed, the opposite parties have filed counter affidavit. In paragraph-8 of the counter affidavit, it has been stated as follows:-

"That with regard to averments made in paragraph-8 of the writ petition, it is humbly submitted that one of the tenderer namely Sri Suryanarayan Mohanty was not qualified in Technical bid. So, he had filed one writ petition bearing no.16994/2014 before the Hon'ble Court to set aside the order of rejection of Technical bid. By judgment dated 25.11.2014, the Hon'ble Court has been pleased to dismiss the W.P.(C) No. 16994/2014. Challenging the judgment dated 25.11.2014, said Suryanarayan Mohanty has filed SLP (Civil) No.36506/2014 before the Hon'ble Supreme Court which is pending for adjudication. Present opposite parties have been impleaded as Rspondent no.1, 2, 3 and 5 respectively in SLP (Civil) No.36506/2014. Present petitioner has been impleaded as respondent no.6. Due to pendency of aforesaid SLP before the Hon'ble Supreme Court, the present opposite parties are not releasing incentive amount in favour of the petitioner. However, present opposite parties undertake that soon after disposal of aforesaid SLP by the Hon'ble Supreme Court of India, incentive amount will be released in favour of the petitioner. Copy of SLP as well as copy of interim application for stop payment is annexed herewith as Annexure-A series."

7. Even though in the counter affidavit the opposite parties have admitted that the petitioner is entitled to get the incentive, the reasons for non-releasing the incentive amount in favour of the petitioner has been shown to be pendency of the SLP before the apex Court. The opposite parties have, however, undertaken that soon after disposal of the aforesaid SLP the incentive amount would be released in favour of the petitioner. In view of the candid admission made by the opposite parties in their counter affidavit, nothing more remains to be considered so far as entitlement of the petitioner on the ground of clause-2.4 of the agreement is concerned.

8. The meaning of 'bonus', as contemplated under clause-2.4 in common parlance, is as follows:-

> *"A gratuity; a premium or advantage; a definite sum to be paid at one time, for a loan of money for a specified period, distinct from, and independently of, the interest; a premium for loan; a sum paid for services or upon a consideration in addition to or in excess of that which would ordinarily be given.*
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> In ***Webster Dictionary***, "bonus" has been defined to mean:
>
> "*something given in addition to what is ordinarily received by, or strictly due to, the recipient; specifically: (a) A premium given for a loan, or for a charter or other privilege granted to a company. (b) An extra dividend to the shareholders of a company, out of accumulated profits. (c) Money, or other valuable, given in addition to an agreed compensation (d) Life insurance. An addition or credit allotted to policy holders out of accumulated profits."*
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> In ***Business Encyclopaedia Caxton***, "bonus" has been construed to mean:
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> *"as a gift, reward, or premium, granted voluntarily although theoretically only in many cases, as a matter of grace and without consideration or obligation. Thus, a payment to an employee in addition to his wages is called a bonus."*
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> As per ***Great Encyclopaedia of Universal Knowledge***, "bonus" means:
>
> *"something over and above what is the usual or regular payment. In the case of joint-stock companies it is a payment to shareholders, when profits are exceptionally high or have accumulated in the form of an extra dividend or new free shares. It may also be a payment for special services rendered or as an inducement to work."*

The apex Court in ***Ghaziabad Zila Sahkari Bank Ltd. V. Labour Commissioner,*** (2007) 11 SCC 756, has held that "bonus" is a boon or gift, over and above, what is normally due as remuneration to be received.

In view of the meaning attached to the word "bonus" as contemplated in clause-2.4 of the Detailed Tender Call Notice, it is nothing but an incentive granted to a contractor, who completes the work before the assigned or schedule date of completion.

9. The claim of the petitioner rests on the basis of the agreement which stipulates that the petitioner would be entitled to certain incentives on early completion of the contract work. In paragraph-8 of the counter affidavit, it is admitted that the petitioner is entitled to the incentive amount, but the same is not being paid to the petitioner because of the pendency of S.L.P. filed by one Suryanarayan Mohanty before the apex Court after dismissal of his writ petition no.16944 of 2014. It is admitted that no interim order has been passed by the apex Court in the said S.L.P(C) No.36506 of 2014.

10. If the pendency of the SLP was to be a reason for the petitioner not being paid the incentive amount, then it is not understood as to how the petitioner was allowed to perform the contract work in pursuance of the work order dated 03.09.2014 and complete the same and thereafter have even been paid the final bill. Once, in terms of the agreement, the petitioner was permitted to perform the contract work and complete the same, for which the completion certificate was issued and he had also been paid final bill, the petitioner would also be entitled to payment of the incentive, as stipulated in the terms of the agreement.

11. Learned Addl. Govt. Advocate appearing for the State-opposite parties could not justify as to why the incentive should not be paid merely because of the pendency of the SLP, without there being any interim order granted in the said petition.

12. Though the learned counsel for the petitioner has submitted that after the petitioner completed the work in terms of the contract awarded in his favour, the said SLP pending before the apex Court has become infructuous, but we would not be inclined to go into such an issue as it is for the apex Court to consider the same.

13. However, considering the fact that the work has already been completed and the petitioner has already been paid the final bill, the incentive, to which the petitioner is admittedly entitled to as stipulated in the agreement (as has been accepted by the opposite parties in paragraph-8 of the

counter affidavit) we would be of the opinion that the petitioner would be entitled to payment of the same. Besides this, since the contract has already been completed and the final bill has also been paid, the petitioner would also be entitled to refund of the Earnest Money and security amount deposited by him in terms of the contract agreement.

14. Accordingly, the writ petition stands allowed. The incentive, to which the petitioner is found entitled, shall be paid to him within four weeks from the date of filing of a certified copy of this order before opposite party no.4-Executive Engineer. The earnest money and security amount deposited shall also be paid to the petitioner, in accordance with the terms of the agreement. No order to cost.

Writ petition allowed.

2017 (I) ILR - CUT- 14

VINEET SARAN, C.J. & DR. B.R.SARANGI, J.

W.P.(C) NO. 2954 OF 2016

STATE OF ODISHA ……..Petitioner

.Vrs.

GOVERNMENT OF INDIA & ANR. .....Opp.Parties

MINES AND MINERALS(DEVELOPMENT AND REGULATION)ACT,1957 – S.30
R/w Rule 55 of the Mineral concession Rules, 1960

Revisional Power of the Central Government – Scope – Power of "revision" is limited to the act of examining again in order to remove any defect or grant relief against the irregular or improper exercise or non-exercise of jurisdiction by the subordinate authority or the lower Court – The revisional authority is not bound to examine facts for itself but is entitled to give its decision on points of law alone.

In this case the revisional authority has not dealt with the reasons given by the state Government relating to undue delay in execution of the lease except saying that the revisionist had "actively pursued their endeavour", which is also without any basis as there is no factual foundation to substantiate the same – Held, the impugned order Dt. 08.06.2015 passed by the revisional authority is quashed and the order passed by the state Government Dt. 20.07.2012 being a well reasoned order is affirmed. (Paras 15 to 18)

For the petitioner : Mr. R.K .Mohapatra, Govt. Adv.
For the opp. parties : M/s. P. Mishra and S.K. Padhi, Sr. Adv.
M/s. Naveen Kumar, R.K. Mohanta,
R.R. Mohapatra, Mr. D.K. Sahoo-1,
Central Govt. Counsel,

Date of judgment: 19.12.2016

JUDGEMNT

VINEET SARAN, C.J.

Dharam Chand Jain, husband of opp. party no.2-Smt. Sobha Jain, had on 15.06.1970 applied for grant of mining lease for iron and manganese ores over an area of 1277.50 acres in Sidhamath Reserve Forest of Keonjhar district. On 05.06.1984, an order for granting mining lease over an area of 637 acres was issued in favour of the applicant-Dharam Chand Jain for a period of twenty years subject to the mining lease deed being executed within a period of six months of the order or within such further period as the State Government may allow, as provided under Rule 31(1) of the Mineral Concession Rules, 1960.

2. Without going into further details, we may mention on 12.05.1989, the applicant himself gave a proposal to reduce the grant area to 70.39 acres. While the matter remained pending, on 25.03.1995, the Collector, Keonjhar demarcated an area of 72.70 acres to be granted for lease in favour of the applicant, instead of 70.30 acres, and recommended to allow execution of the mining lease deed, subject to approval under the Forest (Conservation) Act, 1980 and the Mineral Rules, 1960. Then on 30.05.1995, the power of attorney of the applicant submitted a draft mining plan. In response thereto, on 20.06.1995, notice under Rule 26(3) of the M.C. Rules, 1960 was issued to the applicant to comply with the deficiency latest by 30.07.1995. Then on 06.05.1997, Avin Jain, the power of attorney holder of the allottee-Dharam Chand Jain was requested to take all possible steps to obtain the approval of the Government of India within three months. On 26.09.1997, the allottee-Dharam Chand Jain was given reminder, as a last chance, to obtain prior approval of the Central Government under Section 2 of the Forest (Conservation) Act, 1980, failing which action to revoke the grant order dated 05.06.1984 would be initiated.

3. In the meanwhile, on 09.12.1995, the applicant- Dharam Chand Jain had expired, but the power of attorney continued to negotiate and correspond with the authority even after the death of the applicant. It was only on 25.06.2009, which was after 14 years of the death of Dharam Chand Jain and

12 years after the communication dated 26.09.1997, that the power of attorney of the applicant intimated the State Government about processing of the application for prior approval of the Central Government and also about the death of the allottee-Dharam Chand Jain on 09.12.1995. In the meantime, it was on 12.09.2006 that a probate was granted in favour of opp. party no.2-Smt. Sobha Jain-widow of late Dharam Chand Jain. Then a power of attorney is said to have been issued on 19.10.2006 by opp. party no.2 in favour her son Avin Jain. The said Avin Jain as power of attorney of opp. party no.2 requested for further time for completing the formalities and certain communications were also received by him from the Ministry of Forest & Environment, Government of Odisha. On 22.01.2010, the Addl. Secretary, Department of Steel & Mines, Government of Odisha, wrote to the Conservator of Forests that, after the demise of the grantee on 09.12.1995, there was no substitution in favour of any legal heir, as nobody had applied for the same, and that the grant of mining lease which was ordered on 05.06.1984 was not executed till that date, as the grantee had not furnished the statutory clearances as were required under the provisions of law. However, the Ministry of Forest & Environment, Government of Odisha, continued with the process and completed the formalities during pendency of this writ petition. On 13.01.2012, a notice was issued to the power of attorney holder of legal heir of the grantee by the Mines Department to show cause as to why the grant order be not revoked for non-execution of the mining lease deed within the stipulated period of six months, as provided under Rule 31(1) of the Minor Mineral Concession Rules, 1960.

4. The Deputy Director of Mines, Keonjhar then wrote to the Director of Mines, Odisha on 03.04.2012 that the grantee had obtained certain clearances for execution of the mining lease and that the Government may be moved to recommend the case of the grantee to the Chief Conservator of Forests for final disposal of diversion proposal and for allowing extension of time for execution of the mining lease deed. Pursuant thereto on 09.04.2012, the Director of Mines forwarded the case of the applicant to the Addl. Secretary, Government of Odisha, Department of Steel & Mines. The matter was thereafter taken up by the State Government for consideration of grant of mining lease in pursuance of the order for granting lease dated 05.06.1984 in favour of Dharam Chand Jain. Vide order dated 20.07.2012, the State Government revoked the grant order dated 05.05.1984 and thereby refused to grant lease in favour of opp. party no.2. Challenging the said order, opp.

party no.2 filed a revision under Section 30 of the Mines and Minerals (Development and Regulation) Act, 1957, which has been allowed by the Central Government vide order dated 08.06.2015. Challenging the same, this writ petition has been filed by the State Government.

5. We have heard Shri R.K. Mohapatra, learned Government Advocate for the State-petitioner; Shri Sahoo, learned counsel appearing for opp. party no.1-Government of India; and Shri Pinaki Mishra, Senior Counsel, Shri S.K. Padhi, Senior Counsel appearing along with Shri Naveen Kumar and Shri R.R. Mohapatra, learned counsel for the contesting opp. party no.2 and perused the record.

6. The submission of the learned Government Advocate appearing for the petitioner-State of Odisha is that the order of the State Government was a well-reasoned order, which had been accepted to be so by the Central Government while passing the order dated 08.06.2015 and, as such, there was no reason for the Central Government to have set aside the order of the State Government and allowed the revision.

It is further submitted that revisional authority has limited powers and when facts are not disputed, the finding recorded on the basis of the undisputed facts could not have been upset by the revisional authority. It is also submitted that the power of attorney of late Dharam Chand Jain continued to correspond with the State Government, even after his death on 09.12.1995 and intimation of the death of the grantee-Dharam Chand Jain was given to the State authorities by the power of attorney only on 25.06.2009. It is contended that during the period from 1995 to 2009, all actions of the power of attorney were invalid. It is contended that the delay is attributable to the grantee and not to the State Government.

Learned Government Advocate also contended that Rule 31(1) of the Mineral Concession Rules, 1960 requires lease deed to be executed within six months and when no further extension was granted by the State Government and the grantee remained silent for over a decade, the revocation of the grant order dated 05.06.1984 was perfectly justified, for which valid reasons have been given by the State Government vide order dated 20.07.2012. It is also submitted that while allowing the revision, no reason has been given with regard to explanation for delay and, as such, the Central Government has wrongly condoned the same, without assigning any reason. In the alternative, learned Government Advocate has submitted that if at all the case of the petitioner can be considered, it can only be done now under Rule 8 of *"The Minerals (Other than Atomic and Hydro Carbon*

Energy Minerals) Concession Rules, 2016", which have now come into force with effect from 4th March, 2016.

7. *Per contra*, Shri Pinaki Mishra, learned Senior Counsel appearing for the contesting opp. party no.2 has submitted that the revisional authority has nowhere accepted in the order dated 08.06,2015 that the impugned order gave detailed reasons or that the same was a reasoned order. All that is stated in the revisional order is that the order of the State Government was a detailed one and self-explanatory and, as such, it cannot be construed that the revisional authority had accepted the order of the State Government as a reasoned order.

It is contended that the revisional authority can re-appreciate the facts and pass appropriate orders by substituting its findings. The contention is that the revisional authority had accepted the explanation given in the rejoinder affidavit with regard to cause of delay, and thus rightly held that the delay could not be attributed to any omission or lapse of opp. party no.2. Learned Senior Counsel has placed reliance on the communications dated 22.01.2010, 03.04.2012 and 09.04.2012, which are all by the Department of Steel & Mines of the State Government and it is wrong to state that the matter remained alive for consideration only in the Forest & Environment Department of the State Government, but had remained in consideration of the Mines Department also. Learned Senior Counsel submitted that when the Steel & Mines Department of the State Government had considered the matter to be alive as late as in the year 2010, then the question of explaining the delay from 1997 till 2010 would not arise. He thus contended that no interference is called for with the order of the Central Government passed in the revision.

Shri Pinaki Mishra, learned Senior Counsel has submitted that Avin Jain, who was the son of grantee-Dharam Chand Jain (as well as opp. party no.2-Smt. Sobha Jain) was the earlier power of attorney holder of the grantee-Dharam Chand Jain and after the probate was granted in favour of opp. party no.2 on 12.09.2006, he was given power of attorney by opp. party no.2 on 19.10.2006. The contention of Shri Mishra thus is that the power of attorney continued to act on behalf of the grantee as legal representative of the deceased grantee-Dharam Chand Jain, which, according to Shri Mishra, he was entitled to do so under Rule 25-A of the Mineral Concession Rules, 1960.

It is also contended by Shri Mishra, learned Senior Counsel that the State Government has condoned the delay by issuing communication after 2010 and the manner in which they proceeded thereafter.

8. We have carefully considered the submission of learned counsel for the parties and perused the record.

9. It is not disputed that the grant of mining lease, passed on 05.06.1984, was in favour of the applicant-Dharam Chand Jain. It is also not disputed that the grantee-Dharam Chand Jain expired on 09.12.1995. Though it is contended that intimation of the death of the grantee-Dharam Chand Jain was given to the State Government immediately after his death, but there is no document to support the said contention. The first document on record regarding intimation of death of the grantee-Dharam Chand Jain is one dated 25.06.2009. It is also not disputed that after the death of grantee-Dharam Chand Jain, on 09.12.1995, the power of attorney of Dharam Chand Jain continued to correspond with the State Government with regard to grant of mining lease.

10. Rule 25-A of the Mineral Concession Rules, 1960 reads as follows;

> ***"25A. Status of the grant on the death of applicant for mining lease****:-*
>
> *(1) Where an applicant for a grant or renewal of mining lease dies before the order granting him a mining lease or its renewal is passed, the application for the grant or renewal of a mining lease shall be deemed to have been made by his legal representative.*
>
> *(2) In the case of an applicant in respect of whom an order granting or renewing a mining lease is passed, but who dies before the deed referred to in sub-rule (1) of rule 31 is executed, the order shall be deemed to have been passed in the name of the legal representative of the deceased."*

The aforementioned rules, as it appears, deals with the status of the grantee on the date of application for mining lease. It provides that where an applicant for grant or renewal of mining lease dies before the order granting him mining lease, the application for grant of mining lease shall be deemed to have been made by his legal representatives. The question of the power of attorney acting on behalf of the grantee as legal representative would arise only when intimation of the death of the grantee is given to the State Government. Without such intimation having been given, it would be presumed that the power of attorney-Avin Jain continued to act as power of

attorney on behalf of a deceased person. A power of attorney can act on behalf of a living person, be it a natural person or juristic person. Once a person, who has given power of attorney, is no more there, the question of power of attorney continuing to act on behalf of such deceased person, would not arise. Had it been a case of the legal representative of the grantee having informed the State Government of the death of the grantee, and then proceeded with the matter as legal representative of the grantee, then the position would have been different. Such is not the case in hand.

11. In letter dated 26.09.1997 of the Steel and Mines Department of the Government of Odisha, the representative of the grantee was clearly intimated to obtain approval of Ministry of Environment and Forest within a period of one month from the date thereof, failing which action would be initiated to revoke the grant order. The representative/legal heir of the grantee neither obtained the approval of the Ministry of Environment and Forest nor intimated the reason, for not getting the same, to the State Government. As such, there was no request for extension of the time stipulated for compliance. The fact of death of the grantee-D.C. Jain, who died on 09.12.1995, was also not intimated by his legal heir to the State Government within a reasonable time. Consequentially, neither the grantee nor his legal representative was able to get clearance from the appropriate authority within the period of lease approved under the grant order. Between 26.09.1997 and 07.07.2009, there was even no communication between the legal heir of the grantee and the Government regarding compliance with the terms and conditions of the grant/statutory provisions. There was no request for extension of time for ensuring compliance. On 11.11.2009, almost 25 years after the date of grant order, there was a request for grant of further time of one more year to complete the process of execution of mining lease deed. The inaction between the period from 26.09.1997 to 07.07.2009 has not been explained either before the authority or before the revisional authority.

12. As per the clarification issued by Ministry of Environment of Forest in office memorandum dated 14th July, 2010, two years of time may ordinarily be considered sufficient for the purpose of obtaining forest clearance. As such, the grantee has failed to furnish approval from the Ministry of Environment and Forest, even after expiry of the period of the lease mentioned in the grant order. As it appears, no cogent reason has been advanced on behalf of the grantee for the unusual long delay in achieving compliance with the prescribed terms and conditions, and for more than ten years there was no communication from the legal heir of the grantee

regarding fulfillment of the conditions precedent for execution of the lease deed. On failure of the grantee, the granted area remained idle. As a result, the State Government lost revenue, which could have fetched from the mining lease.

13. In addition to the above, it is made clear that a mining lease is a State largesse over which no individual can have monopoly. There ought to be transparency and equal opportunity in distribution of State largesse with the paramount objective being to further community and State interest. Within the last 25 years, ever since issuance of the grant order, competition has increased and there is increased need of raw material for the manufacturing facilities that have been established within the State. Idling of State largesse is not in public interest. Neither the grantee nor his legal representative has done anything to indicate sincerity on his part. It would be in public interest to notify the granted area so that opportunity is accorded to all interested for grant of mining lease.

14. In view of the reasons described above, the State Government, considering the materials on record, came to a conclusion that there was no merit in the case of legal heir of the grantee for grant of additional time for fulfillment of statutory compliance, as the period of lease had already expired. Consequentially, it revoked the grant of mining lease for iron and manganese ore over an area of 637.00 acres in Sidhamath reserve forest of Keonjhar district in favour of original grantee, namely, D.C. Jain pursuant to proceeding dated 05.06.1984.

15. Section 30 of the Mines and Minerals (Development and Regulation) Act, 1957 reads as follows:

> "***30. Power of revision of Central Government***.:- *The Central Government may, of its own motion or on application made within the prescribed time by an aggrieved party, revise any order made by a State Government or other authority in exercise of the powers conferred on it by or under this Act with respect to any mineral other than a minor mineral."*

Similarly, Rule 55 of the Mineral Concession Rules, 1960 reads as follows:

> *"**55. Orders on revision application** : - (1) On receipt of an application for revision under rule 54, copies thereof shall be sent to the State Government or other authority and to all the impleaded parties calling upon them to make such comments as they may like to make within three months from the date of issue of the*

communication, and the State Government or other authority and the impleaded parties, while furnishing comments to the Central Government shall simultaneously endorse a copy of the comments to the other parties.

(2) Comments received from any party under sub-rule (1) shall be sent to the other parties for making such further comments as they may like to make within one month from the date of issue of the communication and the parties making further comments shall send them to all the other parties.

(3) The revision application, the communications containing comments and counter-comments referred to in sub-rule (1) and (2) shall constitute the records of the case.

(4) After considering the records referred to in sub-rule (3), the Central Government may confirm, modify or set aside the order or pass such other order in relation thereto as the Central Government may deem just and proper.

(5) Pending the final disposal of an application for revision, the Central Government may, for sufficient cause, stay the execution of the order against which any revision application has been made."

A combined reading of aforesaid provisions would indicate that statute empowers to prefer revision against the order passed by the State Government before the Central Government. Invoking such power, wife of the original grantee preferred revision against the order passed by the State Government dated 20.07.2012. The power of "revision" is limited to the act of examining again in order to remove any defect or grant relief against the irregular or improper exercise or non-exercise of jurisdiction by the subordinate authority or the lower Court, as the case may be.

16. In ***Sri Raja Lakshmi Dyeing Works v. Rangaswamy*** (1980) 4 SCC 259, the apex Court held:

> "Ordinarily, revisional jurisdiction is analogous to a power of superintendence and may sometimes be exercised ever without it being invoked by a party. The conferment of revisional jurisdiction is generally for the purpose of keeping tribunals subordinate to revisional tribunal within the bounds of their authority to make them act according to well defined principles of justice.

Therefore, it follows that in a revision the revising authority is not bound to examine the facts for itself but is entitled to give its decision on points of law

alone. As such, in a revision the person seeking revision has more restricted rights.

17. Applying the above well settled principle to the present context, we find that the revisional authority has not dealt with the detailed reasons given by the State Government with regard to undue delay in execution of lease after the order of grant was issued on 05.06.1984. The period of 12 years from 1997 to 2009 dealt with by the State Government has been cursorily considered by the revisional authority and brushed aside by merely stating that "*the revisionist in his RA has indicated the circumstances which caused the delay and he has been able to establish that the delay cannot be attributed to any omission or lapse on the part of the revisionist*". Nowhere, the revisional authority has considered as to what was stated in the rejoinder affidavit filed before it, which could establish that the delay could not be attributed to the revisionist (opp. party no.2 herein). Even otherwise, an explanation given before the revisional authority in the rejoinder affidavit could not be considered by the revisional authority until the said explanation was on record before the State Government. As such, the finding that the delay could not be attributed to opp. party no.2 or the grantee cannot be justified in law. It has also been stated by the revisional authority that the revisionist (opp. party no.2 herein) had "*actively pursued their endeavour*", which is also without any basis, as there is no factual foundation to substantiate the same.

18. In view of the aforesaid, we are of the opinion that the order dated 08.06.2015 passed by the revisional authority cannot be justified in law and the order of the State Government dated 20.07.2012 is a well reasoned order. The revisional authority, having limited jurisdiction, in exercise of such power, could not have interfered with the order so passed by the State Government. Certainly, the revisional authority is not discharging the jurisdiction of an appellate authority and we are of the opinion that within the limited compass of its jurisdiction, in the facts of this case, it ought not to have interfered with the order dated 20.07.2012 passed by the State Government.

The writ petition is accordingly allowed by quashing the order dated 08.06.2015 passed by the revisional authority. There shall be no order as to cost.

Writ petition allowed.

2017 (I) ILR - CUT-24

VINEET SARAN, C.J. & DR. B.R.SARANGI, J.

W.A. NO. 323 OF 2012

ANANDA MAHAPATRA …….Appellant

.Vrs.

BIJAY MAHAPATRA & ORS. ……..Respondents

LETTERS PATENT APPEAL – Maintainability – It depends upon the pleadings in the writ petition and the nature and character of the order passed by the learned single Judge – Jurisdiction under Article 227 is distinct from Jurisdiction under Article 226 of the constitution of India, so no L.P.A is maintainable if the order is exclusively assailable under Article 227 of the Constitution of India, like orders passed out of a proceeding from a civil Court – However where the Court gives ancillary directions pertaining to Article 227, that will not deprive a party the right of L.P.A if substantial part of the order sought to be appealed against is under Article 226 – Some times, a party while invoking the jurisdiction of the High Court under Article 226 also mentioned Article 227, so principally, if the judgment appealed against falls under Article 226, the L.P.A would be maintainable – Even a statement by a learned single Judge that he has exercised power under Article 227, cannot takeaway the right of appeal against such judgment if power is other wise found to have been exercised under Article 226 – Held, the vital factor for determination of maintainability of L.P.A or intra Court appeal is the nature of jurisdiction invoked by the party and the true nature of the principal order passed by the learned single Judge. (Paras 13,14,15)

Case Law Referred to :-

1. AIR 1971 SC 2355 : Mathura Prasad Sarjoo Jaiswal & Ors v. Dossibai N.B. Jeejeebhoy,
2. 1988 (II) OLR 420 : Satyabhama Pandey v. Bhagirathi Jaipuria & Ors,
3. 1996 (I) OLR 422 (SC) : Union of India v. Ranchi Municipal Corporation, Ranchi & Ors.
4. (2015) 9 SCC 1 : Jogendrasinhji Vijaysinghji v. State of Gujarat.
5. 2016 (II) OLR 3 : Saswati Patras v. Saraswati Biswal
6. 2016 (II) ILR –CUT-28 : Rabindranath @ Rabindranath Jena v. Bijaya Kumar Bhuyan & ors.
7. (2015) 5 SCC 423 : Radhey Shyam v. Chhabi Nath.

For Appellant : M/s. S.N.Satpathy, B.K. Parida & M.B. Swain

For Respondents : M/s. B.Mishra, B.L.Tripathy.
M/s.G.N.Mishra, D.N.Pattnaik, S.C.Sahoo & J.K.Pradhan

Date of hearing : 16.12.2016
Date of Judgment : 22.12.2016

JUDGMENT

DR. B.R.SARANGI, J.

This intra-Court appeal has been preferred by the appellant challenging judgment dated 31.08.2012 passed in W.P.(C) No. 25031 of 2011, whereby the learned Single Judge has, while declining to entertain the writ petition, dismissed the same by applying the principle underlying under Rule 1 Order XXIII of the Code of Civil Procedure, 1908 (for short 'CPC').

2. The factual matrix of the case, as is borne out from the records, is that"Sri Ladukesh Mohesh Bije", Sarankul is managed by the Nayagarh Debottar. Banchanidhi Mohapatra was the recorded hereditary 'Mali Sebasee' (priest) of the said deity and in that capacity he was enjoying some properties of the deity in lieu of rendering 'sevapuja'. Banchanidhi Mohapatra had a daughter, namely, Dukhi, who married to the present appellant. Respondent no.1 is the adopted son of Banchanidhi Mohapatra. In Title Appeal No.2 of 1989 {arising out of O.S. No.35 of 1974 (1)} the status of respondent no.1, as adopted son, was declared and the same was confirmed by this Court in Second Appeal.

3. On the basis of an application filed by respondent no.1 before the Executive Officer, Debottar, Nayagarh, which was registered as D. Misc. Case No. 14 of 1991 to appoint him as 'Mali Sebasee' of the deity "Sri Ladukesh Mohesh Bije" by order dated 19.12.1992 the Sub-Collector-cum-Executive Officer allowed 50% sevayati right in favour of respondent no.1 and the rest 50% in favour of Dukhi, the daughter of Banchanidhi Mohapatra.

4. Challenging the said order dated 19.12.1992, the present appellant filed Misc. Appeal No.1 of 1993 whereas respondent no.1 filed Misc. Appeal No.2 of 1993 before the Assistant Commissioner of Endowments, Orissa Bhubaneswar. The appellant's claim in his appeal was twofold; firstly on the strength of an unregistered agreement dated 07.04.1956 whereby Banchanidhi Mohapatra purportedly transferred his sevayati right in favour of the present appellant, and secondly, through his wife, Dukhi. respondent no.1 in his appeal claimed full sevayati right being the adopted son of Banchanidhi Mohapatra, as admittedly the sevayati right was hereditary right. The Assistant Commissioner of Endowments heard the appeals analogously and by order dated 25.09.1996 (Annexure-5) disposed of both

the appeals appointing respondent no.1 as 'Mali Sebasee' of the deity in place of deceased-Banchanidhi Mohapatra and conceded him the right to enjoy all the properties of the deity which Banchanidhi Mohapatra was possessing in lieu of 'sevapuja' of the deity and rejected the claim of the appellant.

5. The appellant's wife, Dukhi, challenged the said order dated 25.09.1996 passed by the Assistant Commissioner of Endowments by filing Revision Case No. 24 of 1996 before the Commissioner of Endowments, Orissa Bhubaneswar. The appellant never challenged the order passed by the said Assistant Commissioner of Endowments before the Commissioner of Endowments. The revision filed by Dukhi was disposed of by the Commissioner of Endowments by order dated 10.04.1997 (Annexure-6) confirming the order passed by the Assistant Commissioner of Endowments. The Commissioner gave a clear finding on the basis of evidence on record that Banchanidhi Mohapatra died in the year 1955 and hence his daughter had no right of succession.

6. Assailing the order dated 25.09.1996 (Annexure-5) passed by the Assistant Commissioner of Endowments and its confirming order dated 10.04.1997 (Annexure-6) passed by the Commissioner of Endowments, Dukhi filed OJC No.7203 of 1997 before this Court. The said writ application, in which the present appellant was opposite party no.1, was ultimately dismissed on 22.09.2004, against which a review petition is stated to be pending before this Court for adjudication.

7. Challenging the very same orders dated 25.09.1996 (Annexure-5) and dated 10.04.1997 (Annexure-6) respectively passed by the Assistant Commissioner of Endowments and Commissioner of Endowments, the appellant had filed a belated writ application before this Court in the year 2008 bearing W.P.(C) No.5075 of 2008, but the said writ application was dismissed, as withdrawn, vide order dated 02.08.2011.

8. Again, challenging the very same orders dated 25.09.1996 (Annexure-5) and dated 10.04.1997 (Annexure-6) respectively passed by the Assistant Commissioner of Endowments and Commissioner of Endowments, the appellant filed W.P.(C) No.25031 of 2011 and the learned Single Judge by the impugned judgment dated 31.08.2012 dismissed the same by holding that, in view of the principle underlying Rule 1 of Order XXIII of CPC, the appellant cannot be allowed to institute the writ application for the very same cause of action, and that the appellant, having abandoned his right in the earlier writ application by withdrawing it without permission of the Court, he

cannot be permitted to file a fresh one in respect of selfsame subject matter. Hence, this appeal.

9. Mr. B. Mishra, learned counsel appearing for respondent no.1 raised a preliminary objection with regard to maintainability of the writ appeal against the judgment and order dated 31.08.2012 passed in W.P.(C) No.25031 of 2011, in view of the fact that the learned Single Judge, while dismissing the said writ petition, has exercised the jurisdiction under Article 227 of the Constitution of India.

10. Mr. S.N. Satpathy, learned counsel for the appellant states that the impugned judgment passed by the learned Single Judge dismissing the writ application cannot sustain in the eye of law. The present appeal, having been preferred against such unsustainable order, is maintainable. In support of his contention, he has relied upon the judgment passed by the apex Court in ***Mathura Prasad Sarjoo Jaiswal & others v. Dossibai N.B. Jeejeebhoy***, AIR 1971 SC 2355, ***Satyabhama Pandey v. Bhagirathi Jaipuria & others***, 1988 (II) OLR 420 and ***Union of India v. Ranchi Municipal Corporation, Ranchi & others***, 1996 (I) OLR 422 (SC) stating that the erroneous decision cannot stand on the way and it cannot operate as *res judicata*.

11. In reply, Mr. B. Mishra, learned counsel appearing for respondent no.1 strenuously urged that if the writ appeal is not maintainable, question of going into the merits of the case does not arise. He, however, contended that the order dated 25.09.1996 passed by the Assistant Commissioner of Endowments was confirmed by the Commissioner of Endowments vide order dated 10.04.1997 passed in Revision Case No.24 of 1996. Both the orders were assailed by Dukhi in OJC No.7203 of 1997 and the said writ application was dismissed on 22.09.2004. Challenging the very same orders, after a long lapse of more than 11 years, the appellant filed W.P.(C) No.5075 of 2008 and the same was dismissed as withdrawn vide order dated 02.08.2011. Once again, challenging the said orders, the appellant having filed W.P.(C) NO.25031 of 2011, learned Single Judge rightly dismissed the said writ petition by applying the principle underlying Rule 1 of Order XXIII of CPC. Therefore, the learned Single Judge has not committed any illegality or irregularity in dismissing the writ petition preferred by the present appellant.

12. We have heard learned counsel for the parties and perused the records. In the facts and circumstances of the case, we deem it proper to take up first the preliminary objection raised by learned counsel for respondent

no.1 with regard to maintainability of the writ appeal against the judgment and order dated 31.08.2012 passed by the learned Single Judge in W.P.(C) No.25031 of 2011 dismissing the writ application.

13. The question with regard to maintainability of the intra-Court appeal has been considered by the apex Court in ***Jogendrasinhji Vijaysinghji v. State of Gujarat*****,** (2015) 9 SCC 1 and the apex Court, relying upon the various judgments, held that Article 226 of the Constitution of India confers a power on a High Court to issue writs, orders, or directions mentioned therein for enforcement of any of the rights conferred by Part III or for any other purpose. This is neither an appellate nor a revisional jurisdiction of the High Court. The High Court in exercise of its power under Article 226 of the Constitution exercises original jurisdiction, though the said jurisdiction shall not be confused with the ordinary civil jurisdiction of the High Court. This jurisdiction, though original in character as contrasted with its appellate and revisional jurisdictions, is exercisable throughout the territories in relation to which it exercises jurisdiction and may, for convenience, be described as extraordinary original jurisdiction. If that be so, it cannot be contended that a petition under Article 226 of the Constitution is a continuation of the proceedings under the Act concerned. The order passed by the Civil Court is only amenable to be scrutinized by the High Court in exercise of jurisdiction under Article 227 of the Constitution. Once it is exclusively assailable under Article 227 of the Constitution of India, no intra-Court appeal is maintainable. Jurisdiction under Article 227 is distinct from jurisdiction under Article 226 of the Constitution and, therefore, a letters patent appeal or an intra-Court appeal in respect of an order passed by the learned Single Judge dealing with an order arising out of a proceeding from a civil court would not lie before the Division Bench. No writ can be issued against the order passed by the civil court and, therefore, no letters patent appeal would be maintainable.

14. Where the facts justify a party in filing an application either under Article 226 or 227 of the Constitution, and the party chooses to file his application under both these Articles, in fairness and justice to such party and in order not to deprive him of the valuable right of appeal, the Court ought to treat the application as being made under Article 226, and if in deciding the matter, in the final order, the Court gives ancillary directions which may pertain to Article 227, this ought not to be held to deprive a party of the right of appeal under Clause 15 of the Letters Patent where the substantial part of the order sought to be appealed against is under Article

226. If the judgment under appeal falls squarely within four corners of Article 227, it goes without saying that intra-Court appeal from such judgment would not be maintainable. On the other hand, if the petitioner has invoked the jurisdiction of the High Court for issuance of certain writ under Article 226, although Article 227 is also mentioned, and principally the judgment appealed against falls under Article 226, the appeal would be maintainable. What is important to be ascertained is the true nature of order passed by the learned Single Judge and not what provision he mentions while exercising such powers. A statement by a learned Single Judge that he has exercised power under Article 227, cannot take away the right of appeal against such judgment if power is otherwise found to have been exercised under Article 226. The vital factor for determination of maintainability of intra Court appeal is the nature of jurisdiction invoked by the party and the true nature of principal order passed by the learned Single Judge.

15. Consequently, maintainability of the Letters Patent Appeal would depend upon the pleadings in the writ petition, the nature and character of the order passed by the learned Single Judge, and the type of directions issued, regard being had to the jurisdictional perspectives in the constitutional context. Whether a Letters Patent Appeal would lie against the order passed by the learned Single Judge that has travelled to him from the other tribunals or authorities, would depend upon many a facet. It is clarified that in certain enactments, the District Judges function as Election Tribunals from whose orders a revision or a writ may lie depending upon the provisions in the Act. In such a situation, the superior court, that is, the High Court, even if required to call for the records, the District Judge need not be a party. But how the jurisdiction under the letters patent appeal is to be exercised cannot exhaustively be stated. It will depend upon the Bench adjudicating the lis how it understands and appreciates the order passed by the learned Single Judge and as such, there cannot be a straitjacket formula for the same. But the High Court while exercising jurisdiction under Article 227 of the Constitution has to be guided by the parameters laid down by the Supreme Court. The apex Court in ***Jogendrasinhji Vijaysinghji*** (supra) summarised the guidelines in paragrtaph-45, which reads as follows:

> *"45. In view of the aforesaid analysis, we proceed to summarise our conclusions as follows:*
>
> *45.1. Whether a letters patent appeal would lie against the order passed by the learned Single Judge that has travelled to him from the other tribunals or authorities, would depend upon many a facet. The*

court fee payable on a petition to make it under Article 226 or Article 227 or both, would depend upon the rules framed by the High Court.

45.2. The order passed by the civil court is only amenable to be scrutinised by the High Court in exercise of jurisdiction under Article 227 of the Constitution of India which is different from Article 226 of the Constitution and as per the pronouncement in ***Radhey Shyam v. Chhabi Nath****, (2015) 5 SCC 423, no writ can be issued against the order passed by the civil court and, therefore, no letters patent appeal would be maintainable.*

45.3. The writ petition can be held to be not maintainable if a tribunal or authority that is required to defend the impugned order has not been arrayed as a party, as it is a necessary party.

45.4. The tribunal being or not being party in a writ petition is not determinative of the maintainability of a letters patent appeal."

16. This Court had got an occasion to deal with the similar question in ***Saswati Patras v. Saraswati Biswal*****,** 2016 (II) OLR 3, in which the election to a Member of Zilla Parishad, Puri was under challenge. The question was as to whether under Section 32 of the Zilla Parishad Act, the District Judge has got jurisdiction to try the election petition. While considering the same, this Court held that in an intra-Court appeal, order passed by the Civil Judge is only amenable to be scrutinized by the High Court in exercise of jurisdiction under Article 227 of the Constitution of India. Once it is exclusively assailable under Article 227 of the constitution of India, no intra-Court appeal is maintainable. As such, jurisdiction under Article 227 is distinct from the jurisdiction under Article 226 of the Constitution. A letters patent appeal or an intra-Court appeal in respect of an order passed by the learned Single Judge dealing with the order arising out of proceeding from the civil court would not lie before the Division Bench. No writ can be issued against the order passed by the civil court, and therefore, no letters patent appeal will be maintainable.

17. In ***Rabindranath @ Rabindranath Jena v. Bijaya Kumar Bhuyan & ors*****.** 2016 (II) ILR –CUT-28, this Court has already taken into consideration the maintainability of the writ appeal while considering the provisions contained under Section 31 of the Odisha Grama Panchayat Act, 1964 and this Court has taken similar view as has been held by the apex Court in ***Jogendrasinhji Vijaysinghji*** (supra) which has also been taken note of judgment of the apex Court in ***Radhey Shyam v. Chhabi Nath***, (2015) 5

SCC 423 and this Court has also taken similar view in ***Smt. Swarnaprava Pattnaik @ Das v. Dibakara Satpathy (Dead) through L.Rs. Lilly Satpathy @ Panda and others*** (Writ Appeal No.346 of 2012) dismissed on 08.12.2016 since the order passed by the learned Single Judge by exercising power under Article 227 of Constitution of India, the writ appeal is not maintainable.

18. Considering the law laid down by the apex Court as well as this Court, as discussed above, we are of the considered view that, as the learned Single Judge, while deciding W.P.(C) No. 25031 of 2011, has exercised the jurisdiction under Article 227 of the Constitution of India, the present writ appeal is not maintainable. The preliminary objection raised on behalf of respondent no.1 is thus answered in his favour. Since we have held that the writ appeal is not maintainable, we are not inclined to enter into the merits of the case.

19. The writ appeal is accordingly dismissed as not maintainability. No order as to cost.

Writ appeal is dismissed.

2017 (I) ILR - CUT-31

VINEET SARAN, C.J. & DR. B.R.SARANGI, J.

W.P.(C) NO.18679 OF 2015

HOMOGENOMICS PRIVATE LTD. .....Petitioner

.Vrs.

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

TENDER – Installation of maintenance free fully automated NAT facility for screening of HIV, HBV and HCV for maximizing the blood safety – Petitioner submitted both technical and price bid – Technical bid of the petitioner was rejected though he offered suitable equipments of latest version of 2012 without testing the same and without giving him an opportunity – Hence the writ petition – This court considering prima facie case in favour of the petitioner issued notice to the opposite parties to file affidavit – However, when the matter is subjudice the authorities have shown undue haste and allowed O.P.No.3 to install its equipments which has started functioning in June 2016 – Action is hit by the doctrine of "lispendens" – Held, since work has already been started which is for the public good, so applying the principle of equity this court thinks it just and proper to allow O.P.No.3 to continue till Oct.2016 and issued directions to O.P.Nos. 1 &

2 to reconsider the tender documents submitted by the petitioner vis-à-vis O.P.No.3 afresh and allow the petitioner to participate in the financial bid and taking into consideration the latest version of the petitioner's equipment, reassess the tender documents both technical and financial bids in conformity with the conditions stipulated in tender documents. (Para 31)

Case Laws Referred to :-

1. (2009) 1 SCC 150= AIR 2009 SC 684 : Karnataka State Forest Industries Corporation v. Indian Rocks
2. (2000) 2 SCC 617 : Air India Ltd. v. Cochin International Airport Ltd. & Ors.
3. (2007) 14 SCC 517 : Jagdish Mandal v. State of Orissa & Ors.
4. (1996) 8 SCALE 687 : Nivarti Govind Ingale v. Ravangouda Bhimana Gouda Patil
5. (2004) 2 SCC 601 : Raj Kumar v. Sardari Lal .
6. (2005) 4 SCC 488 : Tek Chand v. Deep Chand.
7. AIR 2007 SC 1332 : Sanjay Verma v. Manik Roy.
8. (2008) 5 SCC 796 : Guruswamy Nadar v. P. Lakshmi Ammal.

For Petitioner : M/s. Pradipta Ku. Mohanty, D.N.Mohapatra, J.Mohanty, P.K.Nayak, S.N.Dash.

For Opp. Parties : Mr. B.P.Pradhan, Addl. Govt. Adv.
M/s. B.M.Pattnaik, Sr. Advocate.
M/s. Rakesh Sharma, P.R.Pattnaik, S.R.Singh Samanta,K.C.Mishra, S.N.Barik.

Date of hearing : 03.08.2016
Date of judgment :18 .08.2016

JUDGMENT

DR. B.R. SARANGI,J.

The petitioner company, which is stated to be the single authorized distributor/dealer of GRIFOLS (formerly NOVARTIS Diagnostics), having Transfusion diagnostic business dealing with manufacturing and delivering high quality products of NAT (Nucleic Acid Testing) Proclex PANTHER system, participated in the tender process pursuant to the advertisement vide Annexure-1 dated 20.02.2014, i.e., Request for Proposal (in short "RFP") issued by the Director, State Blood Transfusion Council, Department of Health & Family Welfare for supply and installation of maintenance free fully automated NAT facility for screening of HIV, HBV, HCV (all variants)

for maximizing the blood safety along with opposite party no.3. Pursuant to such advertisement, the petitioner submitted its offer on 26.03.2014 with two bids, both technical and price bids, valid for 365 days. In technical evaluation, the petitioner being disqualified, its price bid was not opened. Consequentially, opposite party no.3 was selected and issued with work order vide Annexure-9 dated 10.06.2015 and asked to sign the rate contract, i.e., beyond 365 days from the date of submission of tender. The petitioner, being not satisfied with the process of tender conducted by the State opposite parties and attributing unfairness and favourtism in decision making process, has approached this Court by filing the present writ petition seeking to quash the work order Annexure-9 issued in favour of opposite party no.3.

2. Heard Mr. P.K. Mohanty, learned Senior Counsel for the petitioner, Mr. B.P. Pradhan, learned Addl. Govt. Advocate for the State-opposite parties and Mr. B.M. Pattnaik, learned Senior Counsel for opposite party no.3. Since pleadings between the parties have been exchanged, with consent of learned counsel for the parties, this writ petition is being finally disposed of at the stage of admission.

3. Mr. P.K. Mohanty, learned Senior Counsel appearing for the petitioner strenuously urged that the work order issued in favour of opposite party no.3 is contrary to the conditions stipulated in the tender documents, inasmuch as the equipment of latest version, i.e., of 2012 was not offered by opposite party no.3 and was not having approval of USFDA & CEIVD and Drug Controller General of India (in short "DCGI"), but offered the older version of 2006 having no facilities of testing all variants of HIV and also no DCGI approval as on the date of submission of bid, which was illegally accepted. Per contra, the offer of the petitioner being latest version of 2012 having CEIVD approval as equivalent to USFDA and also having DCGI approval with facilities of testing all variants of HIV was rejected. It is also urged that the technical committee has been constituted comprising members of no user of petitioner's equipment, whereas the users of opposite party no.3 equipment, the interested members were taken. Consequentially, alleged mala fide against the constitution of the committee.

4. Mr. B.P. Pradhan, learned Addl. Govt. Advocate appearing for the State opposite parties refuted the allegations made by the petitioner and vehemently urged that there is no illegality committed by the authority in the process of selection of opposite party no.3 and issuing the work order. Though some irregularities have been committed, but that is not fatal to the process of selection, and the same have been rectified subsequently. As such,

opposite party no.3 having received work order and installed the equipment in June, 2016, which already started its functioning, interference at this stage by this Court will cause great prejudice to the State opposite parties. Therefore, prays that the writ petition should be dismissed as devoid of any merit.

5. Mr. B.M. Pattnaik, learned Senior Counsel appearing for the opposite party no.3 supported the stand taken by the State and also urged that the contentions raised by learned Senior Counsel for the petitioner have no legs to stand and, as such, by following due procedure of selection in consonance with the terms of the tender if the work order has been issued and in the tender process since no illegality and irregularity has been committed, this Court should refrain from interfering with the decision taken by the expert body in selecting opposite party no.3 for issuance of work order, more particularly, while exercising power under judicial review in contractual matters, the scope of this Court being limited and the opposite party no.3, on receipt of the work order, having started its functioning, this Court should not entertain the writ petition and the same should be dismissed.

6. With the above pleadings of the parties, it is to be examined whether the technical committee has acted bonafidely in decision making process by selecting opposite party no.3 and issuing work order in its favour.

7. An advertisement no.0113 dated 20.02.2014, i.e., Request For Proposal (RFP) for establishment of NAT testing facility at the identified centers of State of Odisha in first phase was issued inviting sealed offers through reputed manufactures or any single authorized dealer/importer (i.e., manufacturer of NAT equipment or any single authorized dealer/importer by the Principal Equipment Manufacturer) for supply and installation of maintenance free fully automated NAT facility for screening of HIV, HBV and HCV for maximizing the blood safety. As per the description of goods indicated in serial no.1, the date of downloading of RFP was 24.3.2014 up to 5.00 P.M., date of submission of RFP was 28.03.2014 upto 1.00 P.M., date of opening of RFP was 28.03.2014 at 4.00 P.M., RFP paper cost Rs.2000/- and EMD of Rs.5,00,000/-. The relevant conditions stipulated in the tender document are as follows:-

"(*i*) *Submission of RFP document at the office of opposite party no.2;*

(ii) opening of RFP document date and time -28.03.2014 at 4.00 P.M.

(iii) offered RFP validity period -365 days from date of opening.

(iv) initial contract period with the selective organization-5 years.

(v) price bids shall have to be submitted in duplicate."

8. Besides the above terms, the procedure for submitting RFP also provided that sealed RFPs should reach on or before the date and time as specified in the RFP inviting notice and which will contain both sealed covers, one for technical documents and the other for price related documents. Before submission of bids in the manner provided in the aforesaid tender notice, a pre-bid meeting was held on 21.03.2014 and certain clarification was also given by opposite party no.2. Accordingly, the petitioner participated in the bid as a single authorized distributor and dealer of the equipment in question manufactured by the GRIFOLS of Spain, formerly known as "NOVARTIS Diagnostics" having maintained its reputation worldwide in different countries with regard to its most guaranteed method of technology of testing blood, being more sensitive than conventional test by significant impact on the efficacy of NAT screening by offering individual donor-NAT (ID-NAT), which tests each sample individually and, as such, is totally different from the methodology adopted by the other bidders.

9. Pursuant to the said tender call notice, two bidders participated, namely, the petitioner and opposite party no.3. As per the date fixed, the technical bids, which were in sealed cover, were opened in presence of the representatives of the petitioner and the other bidder, and it was found that the bids of both the bidders, i.e., petitioner and opposite party no.3 to have been submitted in conformity with the requirements of the tender call notice and were valid. When the petitioner was waiting for the occasion to be intimated for opening of price bid for NAT, as submitted with duplicate copy as per the tender call notice and subsequent clarification issued pursuant to pre-meeting held on 21.03.2014, after expiry of the valid period, no intimation was received from the State opposite parties. The petitioner had a legitimate expectation that it would be called upon to participate in the final bid. But, at that point of time, the petitioner was shocked and surprised, when it came across a news item published in the newspaper issued by the Health Department with regard to implementation of NAT-PCR test facility (Nucleic Acid Amplification and Polymerase Chain Reaction Test) in the State instead of issuance of letter of intent. Therefore, finding no other way out, the petitioner has approached this Court by filing the present writ petition. In order to justify the claim, it relies upon certain conditions of the tender documents, which are as follows:-

*"**Technical Documents for RFP:***

xxx xxx xxx xxx

4. DCG (I) and USFDA approval certificate should be enclosed."

Technical Specifications for Nucleic Acid Amplification Testing:

"xxx xxx xxx xxx

All equipment/components of the system supplied shall be the latest version, consist of all compatible equipment, hardware and software designated and set up to perform the protocol as per instructions by the manufacturer for NAT assay purpose.

xxx xxx xxx xxx

NAT screening system must have minimum facility to detect HIV (all variants) and all known genotypes of HBV and HCV."

He also relies upon the following clarifications which were made in the pre-proposal Request for Proposal (RFP) meeting held on 21st March 2014:

"Sl No.	*Advertisement made in the RFP*	*Clarification on RFP No:0113 for NAT*
xxx	*xxx*	*xxx*
05.	***Under Head :*** *Technical Documents for RFP.*	*It has changed as Assay Protocols and Platform all need to be approved by US FDA and CE IVD and simultaneously to be approved by Drugs Controller General (India) through out the RFP document where ever it is mentioned.*
06.	***Under Head : Rate/Price related documents for RFP:*** *The EMD of the successor will be returned after commissioning and successfully running of the NAT-PCR screening at the identified centres.*	*Instated of NAT-PCR the same should be read as NAT.*
07.	***Under Head : Key terms & Conditions for the installation of maintenance free Equipment :*** *Those equipments are approved from US FDA "/" DCG(I) will only be considered for RC.*	*The symbol "/" should be the Assay Protocols and Platform all need to be approved by US FDA and CE-IVD and simultaneously to be approved by Drugs Controller General (India).*
xxx	*xxx*	*xxx*
10.	***US FDA approved assay and platform.*** *Why US FDA only why not USFDA or CE*	*Instead of approved assay and platform US FDA and DCG (I) this has changed as the Assay Protocols and Platform all need to be approved by US FDA and CE IVD and simultaneously to be approved by Drugs Controller General (India)."*

10. Considering the materials available on record, the technical evaluation committee for NAT held on 10th and 11th June, 2014 at OSACS Conference Hall recommended as follows:

*"**Recommendation :***

1. The members recommended unanimously that M/s. Roche (Cobas 201) is technically qualified for the following reasons.

(a) The systems and Assay meets all the specification and requirements as per the tender's terms and conditions.

2. The members observed that M/s Hemogenomics Pvt. Ltd. (Panther) are not technically qualified for the following reasons.

(a) As per the terms and conditions of the tender bid should be from the principal manufacturer/sales distributor/agent in India. This is not fulfilled in the quoted document.

(b) There is no approval from USFDA and DCGI for testing platform for the systems and kits quoted in the tender.

(c) There is only one installation report for the system at AIIMS, New Delhi. However, there is no supporting document in the form of award contract, their proforma invoice/supply order & user report/customer feedback report for the system quoted in the tender.

(d) There is no clarity on the number of supporting staff and service engineer, IT expert as well as no. of accessories such as server, computers, barcode reader, printer, UPS etc.

(e) There is no supporting document related to performance effective such as HIV2 detection by the system quoted in the system. There are no user report publication to support their claim for HIV2 detection from India.

(f) In case of M/s. Hemogenomics Pvt. Ltd. it reveals from its documents there are total 3 engineers for the country where as in case of Roche 187 engineers throughout the country. Further the company assured that they will recruit dedicated engineers in the state of Odisha.

The meeting ended with vote of thanks."

11. The technical committee recommended unanimously opposite party no.3 as qualified, whereas the petitioner is not qualified for reasons mentioned above. It appears that the reasons assigned by the technical

evaluation committee in disqualifying the petitioner in technical bid mostly there was no approval from USFDA and DCGI for testing platform for the systems and kits "quoted in the tender". But to that extent, it appears that the pre-bid meeting held on 21.03.2014, clarification was given by the Director, SBTC as quoted above and on that basis there was no reason to reject the technical bid of the petitioner on the said ground amongst the other grounds, whereas opposite party no.3 has got CE-IVD certification. Even otherwise, unless either of the certificate of USFDA or CE-IVD, no approval can be granted by the DCGI. At the time of submitting the RFP, the technical bid in response to the advertisement dated 20.02.2014 in Annexure-1 in clause-4 under the heading of "technical documents for RFP", it is specifically stated that DCGI & USFDA approval certificates were to be enclosed and in consonance with that the petitioner had submitted the DCGI certificate and also CE-IVD certificate and its DCGI certificate was valid till 31.03.2014. But, the DCGI certificate submitted by opposite party no.3 was valid upto 31.07.2013 on the date of submission of RFP on 26.03.2014. The DCGI certificate of the petitioner was also renewed and valid till 31.07.2017. But non-submission of valid DCGI certificate by opposite party no.3, he should have incurred disqualification, to be considered for technical bid.

12. As it appears from the documents available on record, the DCGI certificate submitted by opposite party no.3 was valid upto 31.07.2013. On the date of submission of RFP on 26.03.2014, opposite party no.3 has not possessed the valid DCGI certificate, whereas the petitioner had got the valid DCGI certificate, which was valid till 31.03.2014. The proposed date of opening of RFP was at 4.00 P.M. on 28.03.2014. Therefore, till the date of opening of RFP, i.e., 28.03.2014, opposite party no.3 had not produced valid DCGI certificate for technical evaluation of the committee. The opposite party no.2 vide letters dated 10.06.2014 and 11.06.2014 sought for clarification vide Annexure-D to the counter affidavit filed by opposite party no.3 regarding validity of DCGI certificate from opposite party no.3. In response to the same, on 10.06.2014, opposite party no.3 submitted its reply to opposite party no.2 vide Annexure-H. Even on the date of opening of price bid by the opposite party no.2 on 15.07.2014, opposite party no.3 has no valid DCGI certificate. The minutes of meeting on opening of the offered price held in the conference hall of Health and Family Welfare Department does not indicate with regard to the production of valid DCGI certificate by the opposite party no.3. Thereby, opposite party no.3 having not satisfied the requirement of production of valid DCGI certificate, he had incurred a

disqualification to be considered for both technical bid as well as financial bid. But, subsequently on 13.08.2014, the DCGI certificate of opposite party no.3 was renewed from 31.7.2013 to 31.07.2017 by the time such renewal was granted, opposite party no.3 had already incurred disqualification as per the terms and conditions of the tender document itself. But, on 10.10.2014, opposite party no.2 communicated opposite party no.3 regarding acceptance of price bid. It is urged by learned Addl. Govt. Advocate that by the time the technical bid as well as price bid was considered/opened, even though opposite party no.3 does not possess the valid DCGI certificate, subsequently by virtue of renewal thereof on 13.08.2014, from 31.07.2013 to 31.07.2017, he possessed a valid DCGI certificate and accordingly his price bid was accepted. Non-possession of DCGI certificate at the time of consideration of technical bid and price bid by opposite party no.3, may be an irregularity, but it cannot be construed as illegality. Subsequently, when renewal was granted, that irregularity has been rectified. Thereby, the authority have not committed any illegality in accepting the price bid of the opposite party no.3.

13. When the condition of the contract is clear or when the question is only purely of construction of an agreement and the intention has to be primarily gathered from the terms and conditions agreed upon by the parties. Therefore, the parties to the agreement has to act in terms of the conditions stipulated in the agreement itself. Any non-compliance and deviation thereof, cannot be construed that there is a valid agreement between the parties.

On the basis of the admitted facts, when the opposite party no.3 had no valid DCGI certificate at the time of opening of technical bid and price bid, this Court is of the considered view that the contention raised that subsequent renewal made, cannot validate the invalid contract. Thereby, opposite party no.2 has acted in excess of its jurisdiction.

14. As per the advertisement Annexure-1, proposals were invited from reputed manufacturers or single authorized dealer/importer etc. The technical bid of the petitioner has been rejected on the ground that, as per the terms and conditions of the tender, bids should be from the principal manufacturer/sole distributors/agents in India, this was not fulfilled in the quoted document. But, the petitioner submitted the documents in support of the condition stipulated in the tender being a distributor, single/sole authorized distributor of GRIFOLS (erstwhile NOVARTIS Diagnostics), the same has not been considered by the technical committee. As it appears, the GRIFOLS owns the global rights of this product and is the sole licensee of the said blood screening product and, therefore, deemed to be the

manufacturer. The letter dated 24.03.2014 of the petitioner to the Director, SBTC enclosing the letters of authority of GRIFOLS dated 12.03.2014 and 13.03.2014 and also attestation of GRIFOLS clearly indicates that the petitioner is an authorized distributor of GRIFOLS, who is the sole global licensee of the product.

15. The grounds further taken under Clause-(c) by technical evaluation committee that there was only one installation report for the system at AIIMS, New Delhi, but there was no supporting documents in the form of award contract, their proforma invoice/supply order and user report/customer feedback report for the system quoted in the tender. The petitioner furnishes a list of reputed institutions of the country having the product ID-NAT USER LIST in Annexure-6. On perusal of such document, it appears that most of the reputed and important hospitals of the country having in possession of the product of the present petitioner and more particularly the petitioner having offered the most suitable equipment of the latest version of 2012 on its installation, the authority could not have opted for an old installation of 2006. But in course of hearing it is stated that the opposite party no.3 has already installed its equipment of 2011 version.

16. The grounds of rejection of the technical bid of the petitioner, as mentioned in clauses-(d), (e) and (f) cannot sustain in view of the fact that the petitioner's equipment being of the latest version without testing the same or without examining the same or without giving any opportunity to the petitioner the conclusion arrived at by the technical committee seems there was non-application of mind and arbitrary exercise of powers.

17. If the brochures of the respective products of the petitioner vis-à-vis opposite party no.3 are examined, it would appear that the equipment provided by the petitioner is having some additional features. Since the Court is not a technical authority to evaluate the same, this Court expresses no opinion with regard to the assessment made by the technical committee. Such power of the Court to test the suitability of the particular equipment is beyond the scope of judicial review and that is within the complete domain of the technical committee, which is the expert in the field. As such, this Court is refrained from making any comments thereon. But, certainly this Court has got jurisdiction in exercise of power of judicial review to enter into the contractual matters, when the authority acts arbitrarily at its sweet will and every activity of the authority must have public element in it and it must, therefore, be informed with reasons and guided by public interest and such activity will be liable to be tested for its validity on the touchstone of

reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid. The authority cannot act arbitrarily even though the matter arises out of a contractual obligation.

18. *In* **Karnataka State Forest Industries Corporation v. Indian Rocks,** (2009) 1 SCC 150= AIR 2009 SC 684, the Apex Court held that when action of the State is arbitrary or discriminatory and also violative of Article 14 of the Constitution, writ application is maintainable for enforcement of the terms of the contract.

19. *In* ***Air India Ltd. v. Cochin International Airport Ltd. and others,*** (2000) 2 SCC 617, *the Apex Court held as follows:*

> *"The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."*

20. *In* ***Jagdish Mandal v. State of Orissa and others,*** (2007) 14 SCC 517, *considering the scope of the Court to interfere in tender and contractual*

matters in exercise of powers of judicial review, the Apex Court held as follows :

> *(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;*
>
> *OR*
>
> *Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";*
>
> *(ii) Whether public interest is affected.*
>
> *If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."*

21. Taking into consideration the law laid down by the Apex Court in ***Air India Ltd.*** **(supra)** as well as ***Jagdish Mandal*** **(supra),** this Court is conscious of the fact that its jurisdiction to interfere with the decision making process in exercise of powers under judicial review is very very limited in nature. But certainly this Court is of the considered view that when in a decision making process, there is arbitrary and unreasonable exercise of power, this Court has got jurisdiction to interfere with the same under Article 226 of the Constitution of India.

22. Applying the principles as enunciated by the Apex Court in the judgments discussed above, it appears that the technical committee, while taking a decision, has not given any opportunity to the petitioner to explain the shortcomings, which had been pointed out in declaring it as disqualified in the technical bid. This clearly indicates that the authorities have acted arbitrarily and unreasonably and, therefore, have violated Article 14 of the Constitution of India. Therefore, the writ application is maintainable for enforcement of terms of the contract.

23. If the conduct of the State opposite parties is taken into consideration, it would appear that the petitioner challenging such arbitrary and unreasonable action has approached this Court by filing the writ application on 14.11.2015. This Court issued notice considering there is a prima facie case in favour of the petitioner, calling upon the opposite parties to file their affidavits. When the matter is *subjudice* before this Court, even though no

interim order was passed, the authorities have shown undue haste allowing opposite party no.3 to install its equipment, which has started functioning in June, 2016. This clearly indicates that during *lis pendens* the action has been taken by the opposite parties 1 and 2 by permitting opposite party no.3 to install its equipment, which is not permissible in law. The meaning of "*lis pendens"* has been mentioned in P. Ramanatha Aiyar's Advanced Law Lexicon, 4th Edition as follows:

> *"Lis means a suit, action, controversy, or dispute, and lis pendens means a pending suit. The doctrine denotes those principles and rules of law which define and limit the operation of the common-law maxim pendent lite nihil innovetur, that is, pending the suit nothing should be changed."*

24. In Wharton's Law Dictionary "*lis pendens"* has been defined as pending suit. "*Lis"* means a suit, action, controversy, or dispute, and dispute is a conflict or contest, while controversy is a disputed question, a suit at law; and the pendens of the *lis* is not disturbed on in any manner affected by the fact of an appeal taken from one Court to another. The litigation or contest still goes on.

25. In **Nivarti Govind Ingale v. Ravangouda Bhimana Gouda Patil**, (1996) 8 SCALE 687 the Apex Court applying the doctrine of '*lis pendens*' held that in re-sale of property in suit during pendency of a suit of specific performance of contract, the subsequent purchaser is bound by the decree of specific performance of contract.

26. In ***Raj Kumar v. Sardari Lal,*** (2004) 2 SCC 601, the Apex Court came to hold that the doctrine of 'lis pendens' expressed in the maxim *ut lite pendent nihil innoveture* (during a litigation nothing new should be introduced) has been statutorily incorporated in Section 52 of the Act. Though not brought on record the *lis pendens* transferee remains bound by the decree as he is treated in the eye of law as a representative in interest of the judgment-debtor.

27. In ***Tek Chand v. Deep Chand,*** (2005) 4 SCC 488, the Apex Court observed that the alienation of property during pendency of suit by a party would be hit by the doctrine of '*lis pendens'*.

28. In ***Sanjay Verma v. Manik Roy,*** AIR 2007 SC 1332, the Apex Court held that the doctrine of *'lis pendens'* as envisaged in Section 52 of the Act is based on equity, good conscience and justice because it will be impossible to bring an action or suit to a successful termination if alienations are permitted

to prevail. A transferee *pendent lite* is bound by the decree just as much as he was a party to the suit.

29. In ***Guruswamy Nadar v. P. Lakshmi Ammal,*** (2008) 5 SCC 796 it has been held by the Apex Court that the doctrine of '*lis pendens'* would be applicable in a case where second sale of the property had taken place after the filing of the suit for specific performance of the contract.

30. Considering the above principles laid down, so far as '*lis pendens'* is concerned, when the matter was subjudice before this Court for consideration allowing opposite party no.3 to install its equipment is hit by doctrine of *'lis pendens'*.

31. Since opposite party no.3 has already installed its equipments pursuant to the work order issued in Annexure-9 and it is for the public good, though the petitioner has got the latest version and it satisfies the requirements of tender conditions and otherwise eligible to install the same, applying the principle of equity, this Court thinks it just and proper to allow opposite party no.3 to continue till the end of October, 2016 and opposite parties 1 and 2 are directed to reconsider the tender documents submitted by the petitioner vis-à-vis opposite party no.3 afresh and allow the petitioner to participate in the financial bid and taking into consideration the latest version of the petitioner's equipment by affording opportunity to re-assess the tender documents both technical and financial bids in conformity with the conditions stipulated in tender documents and the entire exercise shall be completed as expeditiously as possible, but not later than October, 2016.

32. With the above observations and directions, the writ petition stands disposed of.

Writ petition disposed of.

2017 (I) ILR - CUT- 44

VINOD PRASAD, J. & K.R. MOHAPATRA, J.

W.A. NO. 364 OF 2014

O.F.D.C. LTD, BHUBANESWAR ……..Appellant

.Vrs.

DEBARCHAN PRADHAN ……..Respondent

SERVICE LAW – Respondent was an employee of Forest Development Corporation Ltd, Bhubaneswar – He was dismissed from

service and punishment confirmed in appeal – In writ petition learned single Judge set aside the order of dismissal with a direction to re-instate him in service with 60% back wages – Hence the Appeal – The Corporation has its own set of Rules i.e. Odisha Forest Development Corporation Service Rules, 1986, which does not provide any provision for payment of back wages, and the same is different from Industrial law – Held, the impugned judgement directing re-instatement and de-nevo enquiry is confirmed – However, direction for payment of 60% back wages is set aside. (Paras 7,8, 9)

Appellant : M/s. S.K.Pattnaik, P.K.Pattnaik, S.P.Das & S.Das
Respondent : M/s. J.Katikia, A.Mohanty, P.Mohanty & S.Swain

Date of Judgment : 24.11.2016

JUDGMENT

VINOD PRASAD, J.

This writ appeal has been filed assailing the judgment dated 24.9.2014 passed by the learned Single Judge of this Court in W.P.(C) No. 22037 of 2013 setting aside the order dated 30.4.2012, dismissing the respondent from service in a disciplinary proceeding as well as order dated 06.08.2013 passed by the appellate authority confirming the order of such dismissal. Learned Single Judge consequently remitted the matter back to the disciplinary authority for further enquiry and directed for reinstatement of respondent with 60% back-wages.

2. W.P.(C) No. 22037 of 2013 was filed by the respondent, namely, Sri Debarchan Pradhan, assailing the order dated 30.4.2014 passed by the Divisional Manager (C-KL), Deogarh dismissing the respondent from service on the charges of doubtful integrity and misconduct. In the said writ petition, the respondent also challenged the order dated 6.8.2013 passed by the Managing Director, Orissa Forest Development Corporation Ltd., Bhubaneswar dismissing the appeal and thereby confirming the order of dismissal passed by the Divisional Manager, Deogarh.

3. Learned Single Judge vide order dated 24.9.2014 while quashing the aforesaid orders directed the disciplinary authority to probe into the genuineness of the School Leaving Certificate furnished by the respondent at the time of his entry into the service and thereafter, proceed with the disciplinary proceeding depending upon the outcome of the said enquiry. Consequently, learned Single Judge directed the authorities (appellant herein) to reinstate the respondent in service forthwith and pay 60% of the

back-wages to respondent treating the period the respondent remained unemployment as service for the purpose of his promotion and retiral benefits.

4. Mr. S.K. Pattnaik, leaned Senior Counsel for the appellant-Corporation vehemently objected to the direction of reinstatement of respondent with 60% back-wages as directed by leaned Single Judge. However, in course of argument, he submitted that the Corporation has no difficulty in proceeding with the disciplinary enquiry after taking a decision with regard to the genuineness of the School Leaving Certificate submitted by respondent at the time of entry into the service, but he objected to the direction of reinstatement as well as payment of back-wages. He submits that further direction for reinstatement of service and payment of 60% back-wages has no legal basis and thus, the same is liable to be set aside.

5. Mr. J. Katikia, learned counsel for the respondent refuted such submission of Mr. Pattnaik and contended that initiation of disciplinary enquiry against the respondent is pre-mature as the authorities before arriving at a definite conclusion with regard to the genuineness of School Leaving Certificate produced by respondent at the time of entry into the service most hastily proceeded with the disciplinary enquiry and imposed the punishment. Further, initiation of disciplinary enquiry was not justified, more particularly when a probe with regard to the genuineness of the School Leaving Certificate was going on and such enquiry was not completed either at the time of initiation of the disciplinary proceeding or when the order of termination was passed holding the respondent guilty of charges and doubtful integrity and misconduct. Hence, he prayed for dismissal of the appeal.

6. Heard learned counsel for the parties and perused the materials available on record meticulously.

7. On assessment of materials on record, we find that in the midst of probe into the genuineness of the School Leaving Certificate produced by the respondent in support of his date of birth at the time of entry into the service, a disciplinary proceeding was initiated against the delinquent-respondent and he was slapped with a punishment of dismissal from service with stigma of doubtful integrity and misconduct. Hence, learned Single Judge is justified in setting aside such enquiry and directing the Disciplinary Authority to proceed with the matter after taking a definite decision with regard to the genuineness of the School Leaving Certificate in question. We do not find any infirmity with the said finding of the learned Single Judge.

Consequently, direction of the learned Single Judge for reinstatement of respondent in service is also justified and the same needs no interference. The writ appeal to this extent stands dismissed.

Learned Single Judge further directed the appellant to pay 60% of back-wages to the respondent. Such a direction of learned Single Judge is based on the pre-text that termination of respondent was illegal and unjust and he was compelled to remain out of job for not fault of him.

8. Mr. Katikia, learned counsel for respondent though supported the said finding of learned Single Judge but could not produce any material in support to this aspect. The service conditions of the employees of the Corporation are guided by a set of Rules, namely, Orissa Forest Development Corporation Service Rules, 1986. Said set of Rules does not contain any such provision for payment of back-wages etc. in event of reinstatement of an employee in service. The Service Jurisprudence is quite different from the Industrial Law and they cannot be equated with each other. Industrial Law provides for back-wages in the event of reinstatement of an employee or a workman in service. In that view of the matter, we are not in agreement with the learned Single Judge in this aspect. Thus, we have no hesitation in setting aside the direction for payment of 60% of back-wages to the respondent.

9. In view of the discussions made above, we allow the writ appeal in part to the extent stated above, confirm the direction of learned Single Judge, so far as *de novo* enquiry and reinstatement of respondent is concerned and set aside the direction of learned Single Judge with regard to payment of 60% back-wages to the respondent-employee. We also confirm the rest part of the impugned judgment. In the circumstances, no order as to costs.

Writ appeal allowed in part.

2017 (I) ILR - CUT- 48

INDRAJIT MAHANTY,J. & D.P. CHOUDHURY,J.

W.P.(C).NO. 3529 OF 2016

SARITA KHARSEL & ORS. …….Petitioners

.Vrs.

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

EDUCATION – Admission into ANM course – Petitioners admission beyond the increased strength not approved under the relevant provisions of law – O.P. No 7- institution failed to get approval of the petitioners in the increased strength – Consequently their admission is illegal and their appearance in the examination is equally unjustified – Held, petitioners are not entitled to continue in the ANM course and each of the petitioners is entitled to get compensation of Rs 1,00,000/- payable by O.P. No 7 due to their loss of career.

(Para 15,16)

Case Law Referred to :-

1. 2016 (I) ILR-CUT-1102 (W.P. (C) No.20765 of 2015) : Satyanarayan GNM Training College v. State of Odisha & Ors.
2. (2014) 10 SCC 767 : Bonnie Anna George v. Medical Council of India & anr.

For Petitioners : M/s. D.K. Mohapatra, S.R. Pati, A.K. Parida, A.K. Sahoo & J. Patel

For Opp. Parties : Mr. D.K. Sahoo-1 Central Government Counsel
Additional Government Advocate
Mr. Aurovinda Mohanty
M/s. R.C. Mohanty, K.C.Swain & S. Pattnaik
Mr. A. Mohanty,

Date of hearing : 03.08.2016
Date of Judgment: 07.09.2016

JUDGMENT

DR. D.P. CHOUDHURY, J.

The captioned writ petition is filed for a direction to the opposite parties to issue pass certificate in favour of the petitioners for the ANM Examination 2016 and to protect their future careers.

FACTS

2. The factual matrix leading to the case is that the petitioners took admission during the session 2014-2015 being persuaded by the advertisement in the official website of the Directorate of Medical Education

& Training, Odisha, Bhubaneswar (hereinafter called 'DMET') in Maa Bauti ANM Training School, Sankara, Sundargarh which is a Government approved private Nursing School to undergo Nursing training for two years by depositing proper course fees pursuant to which identity cards have been issued by the authority specifying their respective roll numbers. At the end of 1st year, opposite party No.7, the concerned School published the time table for annual examination to be held at DIET, Sundargarh for the period from 2.2.2016 to 23.2.2016. The petitioners deposited examination fees before the School authority and the School authority issued admit cards. It is stated that out of 57 students of ANM stream only 40 students were allowed to appear at proposed venue, i.e., DIET, Sundargarh but rest 17 students including the present petitioners were asked to undergo examination at the School and were provided with Xerox question papers. Due to non-appearance in the proper venue and non-distribution of the original question papers, doubt raised in the mind of the petitioners and they asked the Centre in-charge of the School about the factual aspect but the Centre in-charge could not answer properly. So, the petitioners lodged F.I.R. before the I.I.C. Town P.S., Sundargarh who registered the case and investigation continued. The Director of the School was arrested and it was revealed from the investigation that Indian Nursing Council has approved 40 seats for ANM students and 35 seats for GNM students but the School authority has admitted 69 students for GNM and 57 students for ANM in spite of the fact that their proposal for enhancement of seats was not considered by the Indian Nursing Council (hereinafter called 'INC') for which the School authorities who are accused persons in the criminal case filed by the petitioners conducted examination of the extra students of both the streams in an arbitrary manner as per their convenience.

3. It is stated that the opposite party No.7 School is duly affiliated by the INC and approved by the Government of Orissa, Health & Family Welfare Department, Bhubaneswar and the DMET. It is alleged, inter alia, that when the seats were enhanced by the provisions of the Indian Nursing Council Act, 1947, the opposite party No.7 School authority gave admission to petitioners who took admission under the believe and hope of getting recognized qualifications to stand in future. Since the career of the petitioners at the verge of destruction with no fault of their and they appeared in the examination with true spirit and best effort, the apprehension of not getting pass certificate to prosecute their higher studies have been jeopardized and at the same time it has violated the principles of natural justice. It is, therefore, stated that when petitioners have no any direction may be issued to adjust

them in any other Government recognized Schools of Nursing in the district of Sundargarh and to direct the concerned authority to issue proper certificate of passing the examination in the event of their pass in the examination to safeguard the career and future of the petitioners.

4. Opposite Party No.7 filed counter affidavit in pursuance of the order of this Court dated 28.7.2016 whereas other opposite parties did not file their counter. In the counter affidavit the Secretary of the opposite party No.7-School submitted that due to heavy demand and pressure of the prospective students and their guardians for admission in ANM course for the academic session 2014-2015, the Management conditionally conceded to give admission beyond approved seats for 17 students to the effect that the management would take care to move the concerned authorities for due approval of the increased seats. Accordingly, the Management gave admission and also at the same time moved the INC for grant of No Objection Certificate (NOC) after depositing the required fees. Opposite party No.7 institution also asked the petitioners to wait till NOC is received for increasing strength. It is stated that examination of approved students was conducted as per the direction of the Board at the Centre in the office of DIET, Sankara, Sundargarh but no examination was conducted in the School premises and no Admit Card was issued to any student beyond the permitted students as per the list by the Board. She also stated in the affidavit that the examination was conducted for the petitioners in the School is a false fact because nothing has been seized by the Police during investigation and no such answer papers of said petitioners have been submitted to the Board. It is further stated that some vested interested persons instigated the guardians of the students to lodge the false case by manipulating documents including the Admit Cards. It is stated in the counter affidavit to pass any appropriate order for the written and practical examination of the students.

SUBMISSIONS

5. Mr. D.K. Mohapatra, learned counsel for the petitioners submitted that application form for admission into ANM course was published in the website, they downloaded the same and Rs.35,000/- has been also received from each of the students as admission fee and the Admit Cards have also been issued from the opposite party No.7 institution. He further submitted that tuition fees have also been received from each of the petitioners. He also submitted that Admit Cards for ANM Examination, 2016 have been also issued by the Secretary, Odisha Nurses and Midwives Examination Board, Bhubaneswar (hereinafter called 'Board') in the name of the petitioners who

had taken training in the opposite party No.7-School. He further submitted that in spite of issuance of the Admit Cards, they are not allowed to appear in the Examination Centre, i.e., DIET, Sundargarh for which their suspicion raised. He submitted that the contention of the opposite party No.7 that no Admit Card was issued is a false fact but of course that is a subject of investigation as the petitioners believe the same to be the Admit Card. It is submitted by Mr. Mohapatra, learned counsel for the petitioners that the opposite party No.7 has committed illegality by giving admission to these students when there is no increased seats approved by the concerned authority. According to him, once the admission has been given by accepting the fees, there is no reason to deny the petitioners to appear in the Examination by the authorities. If at all the authorities have not approved the examination, opposite party No.7 ought not to have received the admission fee or the tuition fee. So, he submitted to consider the future of the petitioners and allow their papers to be evaluated and issue pass certificate by the Board in alternative adequate compensation to be paid to the petitioners for their pecuniary and other losses caused due to act of the opposite party No.7.

6. It is submitted by Mr. D.K. Sahoo-I, learned Central Government Counsel for opposite party No.1, Mr. A. Mohanty, learned counsel for opposite party No.3 and Mr. R.C. Mohanty, learned counsel for opposite party No.6 that the opposite party No.7- School is an approved School duly recognized by the State Government, the Board and INC but the School has been only authorized to give training to 40 students. But the School authority on its own gave admission to 57 students in ANM stream. They also submitted that no Admit Card was issued by the Board for the increased strength as same has not been approved by the concerned authority. They, therefore, submitted that the future of the students has been jeopardized by the opposite party No.7 and these opposite parties are not responsible for any act, omission or commission by the opposite party No.7. They also submitted that the Director of the School and other persons involved for such admission have been already arrested in pursuance of the F.I.R. lodged by the petitioners. Since the future of the students are not protected by law, these opposite parties are no way responsible and accordingly appropriate order may be passed as the Hon'ble Court decides.

7. Mr. A. Mohanty, learned Senior Advocate appearing for the opposite party No.7, who is present in Court, submits that admission was given to the petitioners on the condition that they would be allowed to appear in the Examination if the appropriate NOC is received from the concerned authority

and when the NOC is not received the condition for admission of the petitioners is actually the choice of the petitioners. He also submitted that the opposite party No.7 is ready to return the admission and tuition fees to the respective petitioners. He further submitted that in spite of the application by the opposite party No.7, the opposite party Nos.1 to 6 did not approve the increased seats for which the opposite party No.7 is duty bound to return the fees collected from the respective students. He also submitted that the petitioners even if aware that only 40 seats in ANM have been sanctioned by the Board and the INC but they took admission on their own in spite of the fact that there was no NOC for such increased strength. So, he submitted to pass appropriate order for the safeguard of the institution and the petitioners.

8. The points for consideration:-

(i) Whether the petitioners are entitled to appear in the Examination and issue of pass certificate in the event of their passing Examination.

(ii) Whether the petitioners are entitled to any other relief.

DISCUSSIONS

POINT NO.(i) :

9. It is not disputed that the petitioners being persuaded by the prospectus issued by the DMET applied for admission and the opposite party No.7 after considering their eligibility gave admission to the ANM course. It is also not in dispute that the opposite party No.7 has received the admission fee and tuition fee for their admission in two year degree ANM course for the year 2014-2015. It is not in dispute that the opposite party No.7 is a recognized institution having received the NOC from the State Government, INC and has got 40 seats approved for giving admission to the persons desirous for taking admission for two years ANM course.

10. It is submitted by the learned counsel for the opposite party No.7 that at the time of admission the petitioners have been informed that their admission is subject to approval of the increased strength by the authorities whereas the petitioners do not share the said fact. No document is filed by the opposite party No.7 to show that they have taken undertaking from these petitioners that their admission is subject to necessary approval of the Board and the INC. At the same time the documents under Annexure-2 series disclose that Rs.35,000/- admission fee and also tuition fee have been received by the opposite party No.7 from the petitioners and accordingly has also issued the Admit Cards. Petitioners have also filed Annexure-3 series to show that the opposite party No.7 has issued Admit Cards to the petitioners

to appear in the Examination for the academic session 2014-2015 whereas the opposite party No.7 denies about issue of the Admit Cards. Of course on this issue investigation is kept pending. There is reason to believe the documents to be the Admit Cards because the stamp of the Odisha Nurses and Midwives Examination Board has been affixed on the Admit Cards and such documents also not denied to have been issued by the Odisha Nurses & Midwives Examination Board by the opposite party Nos.1 to 6. But the crux lies on the fact that the petitioners were not allowed to enter into the Examination Centre but were allowed to sit in the School premises with copies of the question papers but not the original question papers.

11. By going through Sections 10, 11 and 14 of the INC Act, Orissa Nurses and Midwives Examination Rules and Orissa Nurses and Midwives Registration Act, 1938 (State Act), it is the prerogative of the Board to conduct the Examination but the curriculum for teaching is the domain of the INC. This view has been taken in our judgment in ***Satyanarayan GNM Training College v. State of Odisha & others*** (W.P. (C) No.20765 of 2015) reported in ***2016 (I) ILR-CUT-1102***. So, the issuance of Admit Cards by the Board vide Annexure-3 series cannot be disbelieved at present as Board has not denied to have issued same even if the genuineness of the documents is subject to investigation in criminal case. But when the question papers were not provided because of the admitted fact that the petitioners being given admission beyond the increased strength of the necessary approved strength issued by the competent authority to the opposite party No.7, appearance of the petitioners in the Examination for ANM course cannot be taken as a valid Examination duly conducted by the Board.

12. It may not be out of place to mention that for the Examination original question paper is always supplied to the candidates who appear in the approved venue of any Examination. It is also stated by the petitioners that they have suspected the conduct of the opposite parties for not allowing them to the Centre declared by the Board and for not giving original question paper to attend the same. Thus, the School authorities, i.e., opposite party No.7 in order to cover up their lapses have allowed the petitioners to appear in the School and distributed the copies of the question papers. When the admission of the petitioners beyond the increased strength is not approved by the concerned authority under the above provisions of law, the petitioners cannot avail the benefit of the result yet to be declared on such papers of the ANM course. On the other hand, the Examination conducted for the petitioners is illegal. So, we are of the considered view that the petitioners are not entitled

to appear in the Examination for ANM course and consequently are not entitled to be issued with the pass certificate. Point No.(i) is answered accordingly.

POINT NO.(ii)

13. It is the contention of the learned counsel for the petitioners that because of overt act of the opposite party No.7 and the prospectus issued by the opposite party Nos.1 to 6 they took admission in the concerned School on payment of required admission fees and tuition fees. Thus, the petitioners became prey to the ultimate design of opposite party No.7. It is also found from the writ petition and the counter affidavit filed by the opposite party No.7 that the application for approval of the admission in the increased strength to the ANM course has been rejected since long and opposite party No.7 has active role for continuance of the petitioners in the increased strength. When increased strength is not approved, there should have been settlement of the dues of the petitioners by opposite party No.7. Instead opposite party No.7 allowed petitioners to deposit Examination fees but petitioners failed to appear valid ANM course Examination. Now the question arises that how the petitioners' future can be taken care of when they are on the cross road of the necessary decision taken by the concerned authority to increase the strength. On the other hand, their admission being illegal but being persuaded by the opposite party No.7 have taken admission and allowed to appear pseudo Examination, the acceptance of tuition fees and Examination fees becomes improper and illegal.

14. It is reported in ***Bonnie Anna George v. Medical Council of India & another;(2014) 10 SCC 767*** where Their Lordships observed at para-32:

> **"32.** Having regard to our above conclusions, we are convinced that depriving the Petitioner of the opportunity to opt for the available N.R.I. seat in M.D. General Medicine during the third counselling was wholly unjustified. Having reached the above conclusion when we come to the question of grant of relief as prayed for by the Petitioner in this Writ Petition, the Petitioner seeks for Mandamus to direct the second Respondent to permit her to shift her P.G. Course from M.D. Pathology to M.D. General Medicine in the available vacant seat. Though, we have found that the second Respondent was wholly unjustified in not making available the said vacant seat to the Petitioner, as the admission schedule fixed by Medical Council of India and this Court is being scrupulously followed, we do not find any extraordinary situation to violate the said schedule fixed by us.

> We have held in various decisions that the time schedule should be strictly adhered to and no mid stream admission should be allowed. We are, therefore, not inclined to give such a direction as prayed for by the Petitioner. However, taking into account the grave injustice caused to the Petitioner for which the entire responsibility lies on the second Respondent, we are convinced that second Respondent should be mulcted with the liability of payment of appropriate compensation to the Petitioner for having snatched away her valuable right. Though, we would have been fully justified in directing exemplary amount by way of compensation, we feel it appropriate to fix it in a sum of Rs.5,00,000/-(Rupees five lakhs only). The second Respondent is, therefore, directed to pay the said sum of Rs.5,00,000/- apart from refunding the sum of Rs.13,000/- which the Petitioner had to pay for her readmission to the very same P.G. course of M.D. Pathology. We are confident that since the Petitioner was only fighting for her lawful rights, the same should not have any reflection in the approach of the second Respondent either directly or indirectly which would cause any disruption in her studies or in the completion of her course. It will always be open for the Petitioner to approach the appropriate forum or for that matter even this Court to seek for the redressal of her grievances, if any on that score. The compensation of Rs.5,00,000/- shall be paid to the Petitioner within two weeks from the date of production of copy of this order".

The aforesaid decision relates to the admission by the petitioner in P.G. course, i.e., M.D. Pathology but the petitioner had applied for admission in M.D. General Medicine under N.R.I. quota and in that case also she took admission basing on the prospectus issued by the respondents. Even if seats are lying vacant in General Medicine under N.R.I. category, the petitioner was not given admission in the said course. In that case the petitioner was deprived of the opportunity to undergo study in N.R.I. seat in M.D. General Medicine for the fact that the admission date was over and no time was left for filling up of the vacant seats. The Hon'ble Supreme Court categorically held that for the unjustifiable act of the opposite party No.2's institution, the petitioner could not get admission in the desired seat under N.R.I. quota by the schedule date fixed by the Hon'ble Supreme Court of India and Medical Council of India. So, the Hon'ble Apex Court allowed appropriate compensation to the petitioner for having snatched away her valuable right to prosecute study M.D. in General Medicine.

15. Now adverting to the present case and applying the above principle as enunciated by Their Lordships, we are of the considered view that in the present case when petitioners have paid the admission fee and necessary other fees, the opposite party No.7 having failed to get approval for continuance of the petitioners in the increased strength, the petitioners are entitled to compensation in view of the decision of the Hon'ble Supreme Court in ***Bonnie Anna George's case*** (supra). We, therefore, are of the view that since each of the petitioners has paid admission fee, tuition fee and examination fees and lost their one year study in ANM course and there is no way to go out at the midst of the career for sole fault of the opposite party No.7, the opposite party No.7 should pay Rs.1,00,000/- as compensation to each of the petitioners. We are aware that the loss of career cannot be compensated in terms of money but in view of the fact and circumstances of the case and relying upon the aforesaid decision, it is just and appropriate to award such amount of compensation. Issue No.(ii) is answered accordingly.

CONCLUSION

16. From the foregoing discussions, we are of the view that the petitioners being persuaded by the opposite party No.7 to take admission in the unapproved seats for ANM course with the knowledge of the opposite party No.2, the admission is illegal and consequently the appearance of the petitioners in the Examination is equally unjustified. We also held that each of the petitioners is entitled for compensation from the opposite party No.7 because of the latter's conduct the petitioners suffered a lot. So, we are of the considered view that the petitioners are not entitled to continue in ANM course in the opposite party No.7 institution but each of the petitioners is entitled to get payment of compensation of Rs.1,00,000/- payable by opposite party No.7 within a period of two months from today. The writ petition is disposed of accordingly.

Writ petition disposed of.

2017 (I) ILR - CUT- 57

SANJU PANDA, J. & S.N. PRASAD, J.

O.J.C. NO. 4019 OF 2002

STATE OF ORISSA & ORS. ……..Petitioners

.Vrs.

RABINDRANATH SAMAL & ANR. ……Opp. Parties

SERVICE LAW – Appointment on Compassionate ground – No provision in Odisha Civil service (Rehabilitation Assistance) Rules, 1990 to maintain a live roster, keeping one post reserved for the dependent of the deceased employee awaiting his majority – Object is to provide succor from the "immediate distress" due to the death of the sole bread earner – The word "immediate distress" should be the paramount consideration.

In this case father of O.P.No1 died on 18.11.1984 and O.P.No1 who was a minor then, applied for compassionate appointment in August, 1998 after lapse of 14 years – Learned Tribunal passed the order without considering the settled position of law – Held, the impugned order passed by the learned Tribunal is setaside. (Paras 10,11)

Case Laws Referred to :-

1. (1994)4 SCC 138 : Umesh Kumar Nagpal -v- State of Haryana & Ors.
2. (1994)2 SCC 718 : Life Insurance Corporation of India -vs- Asha Ramchandra Ambekar (Mrs) & Anr.
3. (2004)7 SCC 271 : General Manager (D&PB) and others -vs- Kunti Tiwary & Anr.
4. (2012) 11 SCC 307 : Union of India and another -vs- Shashank Goswami & Anr.

For Petitioners : Addl. Government Advocate
For Opp.Party : M/s.S.K.Das-2, P.K.Deo, D.Dash, S.P.Mohanty, M.R.Behera

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Date of hearing : 01.12.2016
Date of judgment : 01.12.2016

JUDGMENT

S. N. PRASAD, J.

The order dated 17.06.1999 passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in Original Application No. 1200(C) of

1989 has been assailed by the State of Orissa, whereby and whereunder the learned Tribunal while allowing the Original Application directed the authorities to provide appointment to opposite party no.1 on compassionate ground.

2. The brief fact of the case, in brief, is that his father Late Sudhansu Sekhar Samal, who was working as a Peon in the office of the Block Development Officer, Nuapada, petitioner no.3 herein, expired on 18.11.1984 while in service and at that time, opposite party no.1 was only 7 year old. Opposite party no.1 after attaining majority in the year 1995 submitted an application before the Block Development Officer, Nuagaon for giving him appointment in Class-IV post on compassionate ground under the provisions of the Rehabilitation Assistance Scheme floated by the State Government.

3. The main ground taken by the petitioner, State of Orissa is that under the Scheme there is no provision to maintain a live roster, i.e. no appointment can be provided to the dependent of the deceased employee if he is minor at the time of his death and further no appointment on compassionate ground can also be given after lapse of a fairly long period, which is contrary to the spirit of providing appointment on compassionate ground, but without taking into consideration these aspects of the matter, the learned Tribunal has passed an order directing the State authorities to provide him appointment on compassionate ground.

4. Opposite party no.1 has appeared and filed a detailed counter affidavit stating therein that he is entitled to get appointment on compassionate ground under the provisions of Rehabilitation Assistance Scheme. The competent authorities had recommended his case but the same has not been given effect to and as such, he has filed an application before the learned Tribunal. Taking into consideration his grievance, the learned Tribunal has passed the impugned order directing the authorities to engage him on compassionate ground.

5. We have heard the learned counsel for the parties and perused the documents available on record.

6. Before appreciating the argument advanced on behalf of the parties, it is relevant to have a discussion regarding the provision of Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 and on a bare perusal, we find that there is no provision to maintain a live roster. Keeping one post reserved for the dependent of the deceased employee awaiting his majority. We have further found from the Rehabilitation Assistance Rules that the

State has formulated a scheme to provide appointment on compassionate ground taking into consideration the objective to provide succor from the immediate distress due to death of the sole bread earner. The word "immediate distress" is of paramount consideration and that is the spirit of providing appointment on compassionate ground under the Rehabilitation Assistance Scheme, meaning thereby if the immediate relief will not be provided, the whole purpose of providing appointment on compassionate ground will be frustrated for the simple reason that when the dependents of the deceased employee could be able to sustain their live fairly for a long period, then after sustaining for substantial period providing appointment on compassionate ground would have got no meaning. In this respect, it is relevant to refer to the judgment rendered by the Hon"ble Supreme Court in the case of **Umesh Kumar Nagpal –v- State of Haryana and others**, reported in (1994)4 SCC 138 wherein their Lordships have been pleased to observe as follows:

> "As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment,

the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family."

7. In the case of **Life Insurance Corporation of India –vs- Asha Ramchandra Ambekar(Mrs) and another**, reported in (1994)2 SCC 718 it has been held that courts cannot order appointment on compassionate grounds dehors the provisions of statutory regulations and instructions.

8. Further in the case of **General Manager(D&PB) and others –vs- Kunti Tiwary and another**, reported in (2004)7 SCC 271 the Hon'ble Supreme Court has held that criteria of penury is to be applied only in case of condition of the petitioner who is without any means of livelihood and living hand to mouth that compassionate appointment was required to be accorded.

9. In another judgment of the Hon"ble Supreme Court in the case of **Union of India and another –vs- Shashank Goswami and another**, reported in (2012) 11 SCC 307 it has been held at paragraphs 9,10 and 13 which are being quoted herein below for ready reference.

> "9. There can be no quarrel to the settled legal proposition that the claim for appointment on compassionate ground is based on the premises that the applicant was dependent on the deceased employee. Strictly, such a claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and 10 dies while in service. Appointment on compassionate ground cannot be claimed as a matter of right.
>
> 10. As a rule public service appointment should be made strictly on the basis of open invitation of applications and merit. The appointment on compassionate ground is not another source of recruitment but merely an exception to the aforesaid requirement taking into consideration the fact of the death of the employee while in service leaving his family without any means of livelihood. In such cases the object is to enable the family to get over sudden financial crisis and not to confer a status on the family. Thus, applicant cannot claim appointment in a particular class/group of post. Appointments on compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased.

> 13. In Mumtaz YunusMulani (Smt.) v. State of Maharashtra & Ors., (2008) 11 SCC 384, this Court examined the scope of employment on compassionate ground in a similar scheme making the dependant of an employee ineligible for the post in case the family receives terminal/ retiral benefits above the sealing limit and held that the judgment in Govind Prakash (supra) had been decided without considering earlier judgments which were binding on the Bench. The Court further held that that the appointment has to be made considering the terms of the scheme and in case the scheme lays down a criterion that if the family of the deceased employee gets a particular amount as retiral/terminal benefits, dependent of the deceased employee would not be eligible for employment on compassionate grounds."

10. It is evident from the aforesaid judgments that the principle of granting appointment on compassionate ground is to provide immediate succor to the bereaved family in order to able to sustain their life. In the instant case, the admitted position is that the father of opposite party no.1 has died while in service on 18.11.1984 and at that time opposite party no.1 was only 7 years old. Further, the age of opposite party no.1 has been disputed by the petitioner stating that he was only one year old at that time. Be that as it may, the admitted position is that at the time of death of his father, he was minor. Opposite party no.1 made an application for getting appointment on compassionate appointment in August, 1998, i.e. after lapse of 14 years from the date of death of his father. His application was forwarded for conducting inquiry. Taking into consideration this aspect of the matter, the learned Tribunal has directed to complete the exercise in order to provide him appointment. Learned Tribunal while passing the order has not taken into consideration the settled position of law for providing appointment on compassionate ground, which is admittedly in the teeth of Article 16 of the Constitution of India and directed the authorities to complete the exercise in order to provide appointment. As has been settled that appointment on compassionate ground is to be given immediately for the simple reason that the bereaved family requires monetary help immediately due to the sudden demise of the bread earner and if during the relevant time it has not been provided and the family has survived, then there is no purpose of providing appointment on compassionate ground by snatching a right of the legitimate candidate. This aspect of the matter has not been taken into consideration by the learned Tribunal as also the Tribunal has also not taken note that there is

no provision in the Rehabilitation Assistance Rules regarding a provision for live roster.

11. In the entirety of the facts and circumstances and as per the discussions made hereinabove, we are of the conscious opinion that the learned Tribunal has passed the impugned order contrary to the settled proposition of law. Accordingly, the same is not sustainable. Hence, the impugned order dated 17.06.1999 passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in Original Application No.1200(C) of 1989 is set aside.

12. The writ application is accordingly allowed.

Writ application allowed.

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SANJU PANDA, J. & S.N. PRASAD, J.

O.J.C. NOS. 6952, 4720 & 3799 OF 1994

MAHANADI COALFIELDS LTD., TALCHER AREA .....Petitioner

.Vrs.

PRESIDING OFFICER, INDUSTRIAL TRIBUNAL & ORS. .....Opp. Parties

CONTRACT LABOUR (REGULATION AND ABOLITION) ACT, 1970 – S.10

Contract Labours – Continuance of – Requirements to determine – Whether Contract Labours should continue or not ? Contract Labour is necessary if the nature of work is permanent or perennial in nature and the operation carried on by them is necessary for the industry.

In this case contract labours engaged for drilling of wholes, preparation of blasting and to extract coal from underground mines – So it can not be said that the work performed by them is not permanent or perennial in nature and the Tribunal overlooked the same while passing the impugned award – Held, the impugned award in I.D. case No. 43 of 1987 (C) is quashed – Direction issued to the management for payment of entire back wages in favour of the workmen in that case.

(Paras 9 to 12)

Case Laws Referred to :-

1. (2001) 7 Sec. 1 : Steel Authorities Steel Authority of India Ltd. and others Vs. National Union Waterfront Workers &Ors.
2. 2004 Law Suit (SC) 142 : Workmen Nilgiri Co-opMarketing Society Ltd Vs. State of Tamilnadu.
3. AIR 1964 SC 477 : Syed Yakoob Vrs. K. S. Radhakrishnan &Ors.
4. (2015) 4 SCC 270 : M/s.Pepsico India Holding Pvt. Ltd. Vrs. Krishna Kant Pandey.
5. (1986) 4 SCC 447 : Chandavarkar Sita Ratna Rao Vrs. Ashalata S. Guram.
6. (2013) 10 SCC 324 : Deepali Gundu Surwase Vrs. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) &Ors.
7. (227) 2 SCC 433 : J.K. Synthetics Ltd. Vrs. K.P. Agarwal .
8. (2009) 4 Mah. L.J. 628 : Zilla Parishad, Gadchiroli Vrs. Prakash.
9. (1979) 2 SCC 80 : Hindustan Tin Works Pvt. Ltd., Vrs. Employees.
10. (1980) 4 SCC 443 : Surendra Kumar Verma Vrs. Central Govt. Industrial Tribunal-cum-Labour Court.
11. (1981) 3 SCC 478 : Mohan lal Vrs. Bharat Electronics Ltd.
12. 2014 4 SCR 875 : Tapas Kumar Paul Vrs. BSNL and another.

For Petitioner : M/s. S. Mohanty, N.K.Mishra & B.Dasmohapatra.
M/s. J.Patnaik & H.M.Dhal & A.A.Das.

For Opp. Parties :M/s. Sanjit Mohanty, S.C.Samantaray, N.C.Sahoo & S.P.Panda
M/s. J.Patnaik & H.M.Dhal & A.A.Das.

Date of hearing : 12.09.2016
Date of judgment : 12.09.2016

JUDGMENT

S. N. PRASAD, J.

In all these three writ petitions the award passed in I.D. case Nos.19 of 1987, 50 of 1987 and 43 of 1987 are under challenge both by the side of Management and the workmen and also for issuance of direction upon the Management to release the back wages, hence all the three writ petitions are taken up together for their final disposal.

O.J.C. No.6952 of 1994:

This writ petition has been preferred by the Management of Mahanadi Coalfields Ltd., Talcher assailing part of the award passed by Industrial Tribunal in I.D. case No.43 of 1987(C) holding therein the action of the

Management in retrenching the employees illegal and unjustified and as such they have been directed to be re-instatement forthwith but without back wage.

O.J.C. No.4720 of 1994:

This writ petition has been filed by Talcher Coal Mines Employees' Union assailing the part of the award passed in I.D. case Nos.19 and 50 of 1987 whereby and where under the demand of the Union to treat the workmen as the employees of the Management of Talcher Colliery of Central Coalfield Ltd., Talcher is held not to be legal and justifiable.

O.J.C. No.3799 of 1994:

This writ petition has been filed by the Talcher Coal Mines Employees' Union assailing part of the award passed in I.D. case Nos.19, 50 and 43 of 1987 whereby and where under the back wages have been denied.

2. The brief fact of the case of the Management is that its Talcher Colliery runs an underground mine in which coal is extracted through its regular and permanent employees for certain ancillary and incidental jobs which are of casual and temporary in nature, some contractors are also engaged who in turn deploy their own employees for such work. Most of the contractor's jobs are of short duration and are not permanent and / or perennial in nature. These workers are being provided by the contractors to meet out the intermittent jobs and as such there is no employer – employee relationship in between the workmen and the petitioner – management.

3. While on the other hand the case of the workmen is that they are discharging the job which is permanent and perennial in nature such as drilling of wholes and preparation of blasting, etc. and are paid low wages @ Rs.8/- to Rs.10/- per day. Their grievance is that they be paid at par with the regular employee.

The grievance having not been redressed, they have raised dispute through its Union, conciliation having failed, the appropriate Government has made a reference to the effect that:

> "Whether the demand of the Union that Sri Antaryami Garnaik and 129 others should be treated to be the workmen employed by the management of Talcher Colliery of Central Coalfields ltd., Talcher and be paid wages and other benefits in accordance to NCWA – III is justified? If so, from what date?"

The reference has been referred before the Tribunal which was registered as I.D. case No.19 of 1987(C). The second copy of the said reference having been received by the Tribunal the same was registered as I.D. case No.50 of 1987, hence I.D. case Nos.19 and 50 of 1987(C) are based upon one reference. The second reference was made by order dtd.20th April, 1987 and the same is as follows:

> "Whether the action of the Management of CCL, Talcher in retrenching Sri Dinabandhu Sahoo and 46 others w.e.f. December, 1985 and Sri Pabitra Pradhan and 13 other workmen w.e.f. March, 1986 is legal and justified? If not, to what relief the workmen are entitled?"

4. The Tribunal in order to adjudicate and answer the reference heard the parties, evidence have been laid and thereafter award has been passed on 16th December, 1993 whereby and where under the reference in connection with I.D. case Nos.19 and 50 of 1987 (C) has been answered against the workmen, while the reference in I.D. case No.43 of 1987 has been answered in favour of the workmen.

The Tribunal while answering the reference in I.D. case Nos.19 and 50 of 1987 (C) has passed an award holding therein that the demand of the Union to treat the workmen as the employees of the Management of Talcher Colliery, Central Coal Field, Talcher is not legal and justified. The tribunal has answered the reference in I.D. case No.43 of 1987 (C) by holding therein that the workmen involved in I.D. case No.43 of 1987(C) being the employees of management have been illegally and unjustifiably denied of their job and so they be re-instead forthwith but without back-wages. In the light of these backgrounds these writ petitions have been filed and both the parties, i.e the Management and the Workmen through its Union has assailed the award by filing these three writ petitions.

5. The contention raised by the Management that there is no relationship of employer – employee in between the management and the workmen, hence there should not have been award in favour of the workmen in I.D. case No.43 of 1987(C).

It has been contended that when the Tribunal has answered the award against the workmen in I.D. case Nos.19 and 50 of 1987(C) holding therein that there is no relationship of employer – employee, then the different view should not have been taken by the Tribunal while answering the reference in favour of the workmen in I.D. case No.43 of 1987(C).

It has been contended that the Tribunal after going through various aspects of the matter has answered the reference in I.D. case Nos.19 and 50 of 1987(C) and the finding given therein suffers from no infirmity as because there is no relationship of employer and employee in between the management and the workmen, but this finding has not been made applicable in respect of the workmen who are party to the I.D. case No.43 of 1987(C).

6. While on the other hand the learned counsel representing the workmen has contended that there is no infirmity in the finding given by the Tribunal while answering the reference in I.D. case No.43 of 1987(C) because the Tribunal has taken note of the National Coal Wage Agreement – III (NCWA-III) which has been marked as Ext.3 wherein agreement has been arrived to the effect that the industry shall not employ employer through contractors or engage contractor labours on jobs of permanent and perennial nature and since the management is not disputing the fact that the workmen are not discharging their duties, as such they cannot say that they are the employees of the contractors after abolition of Contract Labour (Regulation and Abolition) Act in pursuance to the clause 11.5 contained in NCWA-III.

It has been contended by rebutting the stand of learned counsel for the management that the workmen are not working in the job which is of permanent and perennial in nature and as such there is no question of applicability of clause 11.5 of NCWA-III.

It has been contended that the Tribunal after taking into consideration the fact that there is abolition of contract labours in pursuance to the Contract Labour (Regulation and Abolition) Act 1971 wherein as per the provision as contained in Section 10(1) specific agreement has been arrived as contained in NCWA-III not to employ labour through contractors or engage contractor's labour on work which is of permanent and perennial nature and as such it goes without saying that these workmen since are working will be said to be the employees of the Central Coal Field Ltd. and not of the contractors.

It has been contended that the nature of the work which is being performed by the workmen is of permanent and perennial in nature and if these works will be stopped, the entire business of the coalfield will go.

In the light of these rival submissions, the respective parties have defended and opposed the finding given by the Tribunal which is impugned in this writ petition.

7. Before examining the issue raised, it is important to have a discussion on the provision of Contract Labour (Regulation and Abolition) Act, 1970 (in short C.L.R.A. Act). The C.L.R.A. Act deals, inter alia, with its extent and application. The relevant is Sec.1 which is being reproduced herein below:-

> ***"1. Short title, extent, commencement and application****. – This Act may be called the Contract Labour (Regulation and Abolition) Act, 1970.*
>
> *(2) It extends to the whole of India.*
>
> *(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act.*
>
> *(4) - It applies --*
>
> *(a) to every establishment in which twenty or more workmen are employed or were employed on any day of the preceding twelve months as contract labour;*
>
> *(b) to every contractor who employs or who employed on any day of the preceding twelve months twenty or more workmen :*
>
> *Provided that the appropriate Government may, after giving not less than two months notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any establishment or contractor employing such number of workmen less than twenty as may be specified in the notification.*
>
> *(5) (a) It shall not apply to establishments in which work only of an intermittent or casual nature is performed.*
>
> *(b) If a question arises whether work performed in an establishment is of an intermittent or casual nature, the appropriate Government shall decide the question after consultation with the Central Board or, as the case may be, a State Board, and its decision shall be final.*
>
> *Explanation : For the purpose of this sub-section, work performed in an establishment shall not be deemed to be of an intermittent nature –*
>
> *(i) if it was performed for more than one hundred and twenty days in the preceding twelve months, Or*
>
> *(ii) if it is of a seasonal character and is performed for more than sixty days in a year."*

This section provides that this section provides that the CLRA Act applied to every establishment and every contractor of the specific description. However, the establishment in which work of an intermittent or casual nature is performed are excluded from the purview of the Act.

Section 10 is also relevant for the present case which speaks as follows:-

"10. Prohibition of employment of contract labour -(1) Notwithstanding anything contained in this Act, the appropriate Government may, after consultation with the Central Board or, as the case may be, a State Board, prohibit, by notification in the Official Gazette, employment of contract labour in any process, operation or other work in any establishment.

(2) Before issuing any notification under sub-section (1) in relation to an establishment, the appropriate Government shall have regard to the conditions of work and benefits provided for the contract labour in that establishment and other relevant factors, such as –

(a) whether the process, operation or other work is incidental to, or necessary for the industry, trade, business, manufacture or occupation that is carried on in the establishment;

(b) whether it is of perennial nature, that is to say, it is of sufficient duration having regard to the nature of industry, trade, business, manufacture or occupation carried on in that establishment;

(c) whether it is done ordinarily through regular workmen in that establishment or an establishment similar thereto;

(d) whether it is sufficient to employ considerable number of whole-time workmen.

Explanation : If a question arises whether any process or operation or other work is of perennial nature, the decision of the appropriate Government thereon shall be final."

A careful reading of Section 10 makes it evident that sub-section (1) commences with a non obstante clause and over-rides the other provisions of the CLRA Act in empowering the appropriate Government to prohibit by notification in the Official Gazette, after consultation with Central Advisory Board, as the case may be, employment of contract labour in any process, operation or other work in any establishment. Before issuing notification under sub-section (1) in respect of an establishment the appropriate Government is enjoined to have regard to : (i) the conditions of work; (ii) the

benefits provided for the contract labour; and (iii) other relevant factors like those specified in clauses (a) to (d) of sub-section (2). Under clause (a) the appropriate Government has to ascertain whether the process, operation or other work proposed to be prohibited is incidental to, or necessary for the industry, trade, business, manufacture or occupation that is carried on in the establishment; clause (b) requires the appropriate Government to determine whether it is of perennial nature, that is to say, it is of sufficient duration having regard to the nature of industry, trade, business, manufacture or occupation carried on in that establishment; clause (c) contemplates a verification by the appropriate Government as to whether that type of work is done ordinarily through regular workmen in that establishment or an establishment similar thereto; and clause (d) requires verification as to whether the work in that establishment is sufficient to employ considerable number of whole-time workmen. The appropriate Government may also take into consideration other relevant factors of the nature enumerated in sub-section (2) of Section 10 before issuing notification under Section 10(1) of the CLRA Act.

The establishment has been defined under Section 2(e) of the CLRA Act which is as follows:-

*"**2(e) "establishment**" means-*

(i) any office or department of the Government or a local authority; or

(ii) *any place where any industry, trade, business, manufacture or occupation is carried on*;"

In clause (e) (i) any office or department of the Government or a local authority, or (ii) any place where any industry, trade, business, manufacture or occupation is carried on. The whole purpose of incorporating the CLRA Act is to regulate and improve the condition of service of contract labours and as such the Act is an important piece of social legislation and it seeks to regulate the employment of contract labours and where necessary to abolish the same.

From perusal of the provision as contained in Sec.2 of the CLRA Act it is evident that there are two requirements for determining whether contract labours should be continue or not, i.e. (i) the nature of work operated by the Contract Labour must be of perennial in nature, i.e. to say it must be of sufficient long period; and (ii) the operation carried on by the contract labours must be necessary for the industry.

In this respect it needs to refer the judgment of the Constitution Bench of the Hon'ble Supreme Court in the case of **Steel Authorities Steel Authority of India Ltd. and others Vs. National Union Waterfront Workers and others reported in (2001) 7 Sec. 1**. In the said decision, it is observed that on issuance of prohibition notification under Section 10(1) of the CLRA Act prohibiting employment of contract labour or otherwise, in an industrial dispute brought before it by any contract labour in regard to conditions of service, the industrial adjudicator will have to consider the question whether the contractor has been interposed either on the ground of having undertaken to produce any given result for the establishment or for supply of contract labour for work of the establishment under a genuine contract or is a mere ruse / camouflage to evade compliance with various beneficial legislations so as to deprive the workers of the benefit thereunder. If the contract is found to be not genuine but a mere camouflage, the so-called contract labour will have to be treated as employees of the principal employer who shall be directed to regularize the services of the contract labour in the establishment concerned subject to the conditions as may be specified by it for that purpose. If the contract is found to be genuine and prohibition notification under Section 10(1) of the CLRA Act in respect of the establishment concerned has been issued by the appropriate Government, prohibiting employment of contract labour in any process, operation or other work of any establishment and where in such process, operation or other work of the establishment the principal employer intends to employ regular workmen, he shall give preference to the erstwhile contract labour, if otherwise found suitable and, if necessary, by relaxing the condition.

In the case of **Workmen Nilgiri Co-opMarketing Society Ltd Vs. State of Tamilnadu 2004 Law Suit (SC) 142**, it is observed that while considering the relevant factors for reaching the conclusion that the contract is a sham and bogus contract, the principle which emerges is that the prima facie test for the determination is the right in the master to supervise and control the work done by the servant not only in the matter of directing work the servant is to do but also the manner in which he shall do his work.....

The proper test is whether or not the hirer had authority to control the manner of execution of the act in question. Further it is observed that, the correct method of approach, therefore, would be to consider whether having regard to the nature of the work there was due control and supervision by the employer.

In the light of this statutory provision as well as authoritative pronouncements as referred herein above, it is now to be seen the nature of work before coming to a logical conclusion regarding the issue involved in this case.

8. Indisputably the nature of work involved in this writ petition is that the workmen were working as Loaders, Tyndals and Dressers, drilling of wholes, preparation of blasting, etc. so far as it relates to I.D. case No.19 and 50 of 1987 (C) and they were paid low wages @ Rs.8/- to Rs.10/- per day. While the nature of work of the workmen with respect to I.D. case No.43 of 1987(C) is that they are Loaders, Tyndals and Dressers. It is further evident that a condition has been enshrined in NCWA-III in clause 11.5 regarding abolition of contract labour, i.e. clause 11.5.1 : industry shall not employ labour through contractor or engage contractor's labour on jobs of permanent and perennial nature. In clause 11.5.2 : Jobs of permanent and perennial nature which are at present being done departmentally will continue to be done by regular employees.

In the light of this situation it is to be assessed as to whether the nature of work performed by the set of workmen, subject matter of I.D. case No.43 of 1987(C) and I.D. case Nos.19 and 50 of 1987(C) are same and are they governed by the terms of agreement as contained in clause 11.5, contained in NCWA-III.

9. The Tribunal has taken note of ocular as well as documentary evidence and relied upon NCWA-III. The NCWA-III is an agreement which is binding upon across the country with respect to regulating the service condition of workers working under the subsidiaries of the Coal India Ltd. The Mahanadi Coalfield Ltd. being one of the subsidiaries under the Coal India Ltd. having came into existence on 3.4.1992 is also governed by the settlement known as NCWA-III. In the said settlement the agreement has been arrived that the contract labours shall be abolished so far as it relates to the job of permanent and perennial nature, meaning thereby the jobs pertaining to permanent and perennial nature has been made subject matter of notification U/s.10(1) of the CLRA Act, 1970.

10. There is no dispute about the fact that in extracting coal from underground mines, if there will be no work of loading, blasting and storing, the entire coal industry will be stopped and as such from the nature of the work it cannot be said that the work which were / are performed by the workers in question is not perennial and permanent in nature and as such taking into consideration the nature of work, we hold that the workmen were

are performing the work which is permanent and perennial in nature. Since in pursuance to the provision as contained in Clause 11.5.1 of NCWA-III whereby and where under the Coal Industries shall not employ labour through contractors or engage contractor's labour on jobs of permanent and perennial nature and if after that condition contained in the said agreement, since the work was being taken from the workmen concerned with I.D. case Nos.19 and 50 of 1987(C), hence it cannot be said that there is no violation of the provision of CLRA Act and further in view of the condition contained in Clause 11.5.1 of the NCWA-III since it is prohibited to engage workers through contractors for the job of permanent and perennial nature and even then the work are being taken from the workmen who are subjected to I.D. case Nos.19 and 50 of 1987(C), as such we are not hesitant in holding that the management has used the works of the workers even in the work which is permanent and perennial in nature and as such they will be said to be flouting the provision of CLRA Act, 1970.

The Tribunal has given a finding regarding the workmen who are related to I.D. case No.43 of 1987(C) since they have been retrenched from service and as such reference has been answered in their favour by directing for re-instatement but without any back wages but giving a contrary finding while answering the reference in connection with I.D. case Nos.19 and 50 of 1987(C) by holding therein that these workmen are not the workmen of the principal employer, meaning thereby according to the Tribunal they were not engaged in a work in the nature of permanent and perennial but this finding is erroneous and perverse for the reason that when no document has been produced before the Tribunal disputing the claim of workmen of I.D. case No.19 and 50 of 1987(C) for denial of their claim to the effect that they are not the employees of the principal employer since they are not working in a job which is in the nature of permanent and perennial, but the Tribunal has forgotten to consider the fact that these workmen are also part of NCWA-III since nothing contrary has been produced by the Management before the Tribunal to disprove this aspect of the matter and as such on these grounds the finding given by the Tribunal by answering reference against the workmen in I.D. case Nos.19 and 50 of 1987(C) is not based upon the facts and the documents which were available before it.

We after examining the fact in detail and also after going through the lower court record have found that the workmen has given substantive evidence that they are working in work which is of permanent in nature and without their work the whole industry will be stopped. Even W.W.2 has deposed that they have been engaged by the contractors as an underground

driller who was making payment of their wages daily, while W.W.4 has deposed that he was although supplied by the contractor to work in the colliery but his work was supervised and payment of wages was paid by the management in presence of his employer, however in cross-examination he has given contradictory statement and perhaps basing upon this the Tribunal has made out its mind by holding that the workmen of I.D. case Nos.19 and 50 of 1987(C) are the employers of the contractor, but while affirming this opinion the Tribunal has not taken into consideration the nature of work which these workmen were performing, i.e. of drilling and blasting in the underground coal mines and the same ought to have been considered by the Tribunal before holding that these workmen are not doing the work which is permanent and perennial in nature, the nature of work and operation carried on by the contract labour is necessary for the industry which is of the paramount consideration for deciding the nature of work as to whether it is permanent or perennial in nature.

Since we are dealing with the case of coal mines, as such without drilling, there cannot be extraction of coal, hence from the nature of work we find that the work is permanent and perennial in nature, but this aspect of the matter has been overlooked by the Tribunal by passing the award in I.D. case Nos.19 and 50 of 1987(C).

Further the Tribunal is erred in passing award in I.D. case Nos.19 and 50 of 1987(C) by holding that the nature of work performed by them is not permanent and perennial in nature is very peculiar considering the contrary finding given in I.D. case No.43 of 1987(C) wherein the Tribunal has came to finding that the nature of work is permanent and perennial in nature and as such their retrenchment has been held to be illegal and accordingly order of re-instatement was passed. While passing the award the Tribunal has taken into consideration the provision of NCWA-III and the nature of work performed by the concerned workmen in I.D. case No.43 of 1987(C) but the same parameter has not been adopted while answering reference in I.D. case Nos.19 and 50 of 1987(C).

12. So far as scope of High Court sitting under Article 226 of the Constitution in making judicial review of the finding given by the Labour Court or the Tribunal the authoritative pronouncement in this regard worth to be seen, i.e. in the case of **Syed Yakoob Vrs. K. S. Radhakrishnan and others, AIR 1964 SC 477** wherein it has been held that the High Court sitting under Article 226 of the Constitution of India may not exercise its power to review the fact finding giving by the Tribunal after appreciation of

the factual aspect produced before it, otherwise also it will be said that the High Court has acted as appellate court.

The proposition laid down by the Hon'ble Apex Court in the case of Syed Yakoob (supra) still holds good and in this respect reference may be made to the judgment rendered by Hon'ble Apex Court in the case of **M/s.Pepsico India Holding Pvt. Ltd. Vrs. Krishna Kant Pandey, (2015) 4 SCC 270** wherein their Lordships while discussing the scope of Article 226 of the Constitution of India in the matter of showing interference with the finding of the Tribunal has been pleased to hold after placing reliance upon the judgment rendered in the case of **Chandavarkar Sita Ratna Rao Vrs. Ashalata S. Guram, (1986) 4 SCC 447** as follows:

> "*17. In case of finding of facts, the court should not interfere in exercise of its jurisdiction under Article 227 of the Constitution. Reference may be made to the observations of his Court in Bathutmal Raichand Oswal v. Laxmibai R. Tarta where this Court observed that the High Court could not in the guise of exercising its jurisdiction under Article 227 convert itself into a court of appeal when the legislature has not conferred a right of appeal. The High Court was not competent to correct errors of facts by examining the evidence and reappreciating. Speaking for the Court, Bhagwati, J. as the learned Chief Justice then was, observed at p. 1301 of the report as follows: (SCC p. 864, para 7)*
>
> *"The special civil application preferred by the appellant was admittedly an application under Article 227 and it is, therefore, material only to consider the scope and ambit of the jurisdiction of the High Court under that article. Did the High Court have jurisdiction in an application under Article 227 to disturb the findings of fact reached by the District Court? It is well settled by the decision of this Court in Waryam Singh v. Amarnath that the ... power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in Dalmia Jain Airways v. Sukumar Mukherjee to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors.*
>
> *This statement of law was quoted with approval in the subsequent decision of this Court in Nagendra Nath Bose v. Commr. of Hills Division and it was pointed out by Sinha, J., as he then was, speaking on behalf of the court in that case:*

It is thus, clear that the powers of judicial interference under Article 227 of the Constitution with orders of judicial or quasi-judicial nature, are not greater than the power under Article 226 of the Constitution. Under Article 226 the power of interference may extend to quashing an impugned order on the ground of a mistake apparent on the face of the record. But under Article 227 of the Constitution, the power of interference is limited to seeing that the tribunal functions within the limits of its authority."

From the proposition as has been laid down by Hon'ble Apex Court referred herein above, if there is perverse finding or error apparent on the face of record, the High Court is to review the finding. We exercising that power and considering the fact that the Tribunal has not appreciated the facts in connection with I.D. case Nos.19 and 50 of 1987(C) regarding nature of work which were / are performed by the workmen in question and without examining the same the reference has been answered against the workmen which according to us is a perverse finding, since the reference has been answered without appreciating the nature of work of the workmen.

So far as the award passed in I.D. case No.43 of 1987(C) is concerned, according to us there is no perversity in the finding or error in the face of record since the reference has been answered taking into consideration all aspect of the matter, hence there is no scope to interfere with the finding given by the Tribunal in this case.

Applying the principles laid down by Hon'ble Apex Court as discussed herein above we though it proper to pass following directions:-

(i) The finding given by the Tribunal in I.D. case Nos.43 of 1987(C) is in consonance with the statutory provision based upon the materials produced before it, hence we have got no hesitation in approving the award passed in I.D. case No.43 of 1987(C), accordingly the award passed in I.D. case No.43 of 1987(C) does not warrant any interference by this court.

(ii) The finding given in the I.D. case nos.19 and 50 of 1987(C) is based on wrong notion and as discussed in detail herein above and the same is perverse and accordingly we thought it proper to reverse the same, accordingly the award passed in I.D. Case Nos.19 and 50 of 1987(C) is not sustainable in the eye of law, hence set aside.

Since the reference is of the year 1987 and since then 29 years have already elapsed and the subject matter of I.D. case nos.19 and 50 of 1987(C)

is for regulating the service condition, the purpose of enacting CLRA Act is to deal with the contract labour system, it appears that Parliament adopted twin measures to grab the basis of employment of contract labours; first is to employ considerable number of whole time workmen and the second is to abolish it in certain circumstances.

A perusal of the objects and reasons of the Act shows that in respect of such category as may be notified by the appropriate government, in the light of the prescribed criteria, the contract labour will be abolished and in respect of other category the service condition of the contract labours will be regulated. Keeping the purpose of enactment of the Contract Labour Regulation and Abolition Act and also keeping the fact into consideration the nature of work performed by the workmen related to I.D. case Nos.19 and 50 of 1987(C) we have thoughtful consideration of the fact that instead of remitting the matter before the Tribunal for fresh adjudication, we thought it proper to pass an order in this regard taking into consideration the discussion having been made by us in detail above directing the management to treat these workmen as the workmen of the principal employer and be paid the wages and other benefits in accordance with the agreement.

Accordingly O.J.C. No.6952 of 1994 preferred by Mahanadi Coalfields Ltd. is dismissed and O.J.C. No.4720 of 1994 is allowed.

13. So far as O.J.C. No.3799 of 1994 the same having been preferred by the Union whereby and where under the part of the award by which the back wages have been denied has been challenged on the ground that the back wages cannot be denied.

We after appreciating the argument advanced by the parties in this regard and after thoughtful consideration of the judgment rendered by Hon'ble Apex Court in the case of **Deepali Gundu Surwase Vrs. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) and others, reported in (2013) 10 SCC 324** which has been delivered by Hon'ble Apex Court after dealing with the previous judgments rendered in the case of **J.K. Synthetics Ltd. Vrs. K.P. Agarwal, (227) 2 SCC 433** and **Zilla Parishad, Gadchiroli Vrs. Prakash, (2009) 4 Mah. L.J. 628, Hindustan Tin Works Pvt. Ltd., Vrs. Employees, (1979) 2 SCC 80, Surendra Kumar Verma Vrs. Central Govt. Industrial Tribunal-cum-Labour Court, (1980) 4 SCC 443, Mohan lal Vrs. Bharat Electronics Ltd., (1981) 3 SCC 478** has given its verdict whereby and where under it has been held that the order directing the management to pay full back wages and to that effect the proposition laid down at paragraph 38 is being reproduced here under as:-

"35. In ***Jagbir Singh v. Haryana State Agriculture Marketing Board****, reported in (2009) 15 SCC 327, this Court noted that as on the date of retrenchment, respondent No.1 had worked for less than 11 months and held: (SCC p.335, paras 14-15)*

"14. It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-Falthough may be set aside but an award of reinstatement should not, however, be automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee.

15. Therefore, the view of the High Court that the Labour Court erred in granting reinstatement and back wages in the facts and circumstances of the present case cannot be said to suffer from any legal flaw. However, in our view, the High Court erred in not awarding compensation to the appellant while upsetting the award of reinstatement and back wages."

In another judgment rendered by Hon'ble Apex Court in **Tapas Kumar Paul Vrs. BSNL and another, 2014 4 SCR 875** wherein also the order of re-instatement with full back-wages has been directed to be paid and this order has been passed taking into consideration the fact that "True occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted" and after taking into consideration the pronouncement of the Hon'ble Apex Court in the case of Deepali Gundu (supra) in which reliance has been placed in the case of Surendra Kumar Verma (supra) and Hindustan Tin Workers Pvt. Ltd. (supra) the order of re-instatement has been passed.

In view of the proposition as discussed herein above, we allow this writ petition by directing the management to pay entire back wages in favour of the workmen of I.D. case No.43 of 1987(C). Accordingly all the writ petitions are disposed of.

Writ petitions disposed of.

2017 (I) ILR - CUT- 78

B.K. NAYAK, J.

CRLMC NO. 3780 OF 2014

ATUL KUMAR MOHANTY .....Petitioner

.Vrs.

STATE OF ODISHA .....Opp. Party

PREVENTION OF CORRUPTION ACT, 1988 – S.2(C)(xii)

Whether the petitioner can be treated as a public servant while working as a Clerk in Mayurbhanj Law College, a private un-aided College, who alleged to have demanded bribe of Rs. 2000/- from the informant, a Post Graduate Student of the College for issuance of mark sheet ? – Held, yes.

On a plain reading of section 2(c)(xii) of P.C.Act, 1988, it shows that if any educational institution in whatever manner established, received or had received any financial assistance from the Central Government or State Government or Local or other Public Authority, every employee or office bearer of such institution shall be treated to be a "public servant" – Since the definition does not indicate that the financial assistance received must be towards the salary component of the employee concerned, the contention of the petitioner that he can not be treated to be a public servant, has no force.

(Paras 7,8)

Case Law Referred to :-

1. (2009) 43 OCR (SC)-497 : State of M.P. -V- Virendra Ku. Tripathi

For Petitioner : M/s. Samir Ku. Mishra
For Opp. Party : S.C.(Vigilance)

Date of Order: 04.11.2016

ORDER

B.K. NAYAK, J.

Heard learned counsel for the petitioner and the learned Additional Standing Counsel for the Vigilance Department. Perused the records.

2. Petitioner challenges the order dated 19.07.2014 passed by the learned Special Judge (Vigilance), Mayurbhanj, Baripad in VGR No.47 of 2011 (T.C. No.135 of 2013), corresponding to Balasore Vigilance P.S. Case No.52 of 2011, rejecting the petition filed by the petitioner for discharge from offence under Section 13(2) read with 13(1)(d) and Section 7 of the Prevention of Corruption Act(in short "P.C. Act").

3. It is alleged that the petitioner while working as a Clerk in Mayurbhanj Law College, demanded bribe of Rs.2000/- for issuing the first, second and third semester mark-sheets to the informant, who was a Post Graduate student of the said college. F.I.R. being lodged, a trap was laid and the petitioner was caught red-handed and the tainted money was recovered from him.

4. Learned counsel for the petitioner urged two points. First, that the Mayurbhanj Law College being purely a private un-aided college, the petitioner cannot be treated to be a public servant within the meaning of the P.C. Act, and, therefore, no prosecution lies against him under the said Act. Secondly, it is urged that the sanction order for prosecution was invalid as the sanctioning authority was not competent to pass the sanction order.

5. Learned Additional Standing Counsel for the Vigilance Department submits that in view of the materials on record that Mayurbhanj Law College, though purely a private college, received some grants from the University Grants Commission, the petitioner being an employee of the said college can be treated to be a public servant within the meaning of Section 2(c)(xii) of the P.C. Act read with explanation-1, under the said section. It is also submitted by him that the question of validity of sanction cannot be gone into at the stage of framing of charge in view of sub-section (3) of section 19 read with the Explanation attached to the section.

6. Sub-section (3) of section 19 provides as under:-

> " (3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--
>
> (a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby;
>
> (4) --------
>
> *Explanation*.—For the purposes of this section—
>
> (a) error includes competency of the authority to grant sanction;"

7. Section 2(c) of the Act which defines "public servant" of different categories enumerated under the said clause reads as under:-

> " **Section 2(c)** "public servant" means,--
>
> x x x x x x x x x x x x
>
> (xii) any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the Central Government or any State Government, or local or other public authority.

Explanation 1.—Persons falling under any of the above sub-clauses are public servants, whether appointed by the Government or not.

Explanation 2.—Wherever the words "Public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation."

8. On a plain reading of Section 2(c)(xii) of the P.C. Act goes to show that if any educational institution in whatever manner established receives or had received any financial assistance from the Central Government or any State Government, or local or other Public Authority, every employee or office bearer of such institution shall be treated to be a "public servant" within the meaning of the expression.

The definition does not indicate that financial assistance received from the Government or the local or other Public Authority must be towards the salary component of the employee concerned. No such interpretation is deducible from the language used in the definition. Therefore, the contention of the learned counsel for the petitioner that the grant given by University Grants Commission was not towards the salary component of the petitioner for which the petitioner cannot be treated to be a public servant, has no force.

9. With regard to the second contention, it has been held by the Hon'ble Supreme Court in the case of **State of M.P. Vs. Virendra Kumar Tripathi (2009) 43 OCR (SC)—497** in para-6 of the judgment as under:-

" **Para 6**.-----Further the High court has failed to consider the effect of Section 19(3) of the Act. The said provision makes it clear that no finding, sentence or order passed by a Special Judge shall be reversed or altered by a Court of appeal on the ground of absence of/or any error, omission or irregularity in sanction required under Sub-section (1) of Section 19 unless in the opinion of the Court a failure of justice has in fact been occasioned thereby. In the instant case there was not even a whisper or pleading about any failure of justice. The stage when this failure is to be established is yet to be reached since the case is at the stage of framing of charge whether or not failure has in fact been occasioned was to be determined once the trial commenced and evidence was led."

10. It is crystal clear from the aforesaid observation of the Hon'ble Supreme Court that the question of validity of sanction and failure of justice for invalidity or error in the sanction order can be determined only during trial on the basis of evidence to be led by the parties.

11. In the instant case, undisputedly the Additional District Magistrate was the President of the Governing Body of the Mayurbhanj Law College and he has issued the sanction order stating that he is competent to issue such order. Whether the President of the Governing Body was competent to grant the sanction order for

prosecution or he was only communicating the decision of the Governing Body of the college concerned or whether the sanction order is irregular for any reason and whether it has resulted in failure of justice, is to be considered only on the basis of evidence to be led during trial and not at the stage of framing of charge.

Therefore, the second contention of the learned counsel for the petitioner also fails. Learned Special Judge (Vigilance) has given good reasons for rejecting petition of the petitioner.

12. For the reasons stated above, there is no merit in this application. Accordingly the CRLMC stands dismissed.

CRLMC dismissed.

2017 (I) ILR - CUT- 81

B.K. NAYAK, J.

CRLMC NO. 4226 OF 2015

DR. SUREN PRASAD DASH .....Petitioner

.Vrs.

STATE OF ODISHA & ANR. .....Opp. Parties

PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) RULES, 1996 – Rules 13

Dysfunctional of Ultra Sound machine of the petitioner since last two years – No information given to the Appropriate Authority – Prosecution against the petitioner U/ss 22 (3), 23 (1) of PC & PNDT Act 1994 for violation of Rule 13 of the PC & PNDT Rules 1996 – Cognizance taken under PC & PNDT, Act 1994 – Order challenged.

A plain reading of Rules 13 suggests that where a "change" of machine is proposed for which re-issuance of certificate of registration would be necessary, the appropriate authority should be intimated about such proposed "change" at least 30 days before the actual change taken place – The object of that rule is to intimate the authority about change of equipment either wholly or partly but it cannot be said to mean that a dysfunction, defect or disorder that would arise in the machine should be intimated to the authority in advance – Since it is not possible on the part of the person to foresee when machine would go out of order – So the word "change" used in the Rule would not mean any error, defect or disorder in the machine – Held, since the machine in question has been seized only for violation of Rule 13 of the Rules 1996 and there is no other allegation, the said machine be released in favour of the petitioner. (Paras 5,6)

For Petitioner : M/s. U.C. Mishra
For Opp. Party : A.S.C.

Date of Order : 11.11.2016

ORDER

B.K. NAYAK, J.

Heard learned counsel for the petitioner and learned Additional Standing Counsel.

2. The petitioner challenges the order of cognizance dated 20.07.2015 passed by the learned S.D.J.M., Berhampur in 2(c) C.C.Case No.963 of 2015 under Sections 22(3),23(1),23(2),23(3) and 25 of the Pre-Conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 and also prays for quashing the entire proceeding on the ground that no offence has been made out as per the allegations made in the complaint filed by the authorities.

3. The complaint petition in the aforesaid case filed under Annexure-1 reveals that surprise inspection of Ultra Sound Clinic of the petitioner was made on 12.06.2015 by a team along with the Executive Magistrate and the local Police and it was found that petitioner's ultra sound machine having model No.RT 3200 was dysfunctional since last two years and no information was given to the District Appropriate Authority under PC & PNDT Act and therefore, it was alleged to be a violation of Rule 13 of the PC & PNDT Rules, 1996, which is punishable under the sections of the Act for which cognizance has been taken.

4. Rule 13 of Pre-Conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 as amended since 04.06.2012 runs as under:

> "**13 Intimation of changes in employees, place or equipment** – Every Genetic Counseling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centre shall intimate every change of employee, place, address and equipment installed, to the Appropriate Authority at least thirty days in advance of the expected date of such change, and seek re-issuance of certificate of registration from the Appropriate Authority, with the changes duly incorporated"

5. A plain reading of Rule 13 suggests that where a change of machine is proposed for which reissuance of certificate of registration would be necessary, the appropriate authority should be intimated about such proposed

change at least 30 days before the actual change takes place. The object of the Rule is to intimate the authority about change of equipment either wholly or partly, but it cannot be said to mean that a dysfunction, defect, or disorder that would arise in the machine should be intimated to the authority in advance, since it is not possible on the part of the person to foresee when the machine would go out of order. Therefore, the word, 'change' used in the Rule would not mean any error, defect, or disorder in the machine.

6. It is the admitted case of the prosecution that the machine of the petitioner has totally become dysfunctional since two years prior to the date of inspection i.e., sometime in July, 2013. Therefore, no violation of Rule-13 has been committed for failure of the petitioner to intimate about non-functioning of the machine, and hence no offence is made out and the order of cognizance dated 20.07.2015 is bad. Hence the criminal proceeding in 2(C) C.C.Case No.963 of 2015 is quashed.

If the machine in question has been seized only for violation of Rule 13 of PC & PNDT Act and there is no other allegation, the same be released forthwith in favour of the petitioner. CRLMC is accordingly disposed of.

CRLMC disposed of.

2017 (I) ILR - CUT- 83

S.K.MISHRA, J.

W.P.(C). NO. 13881&15473 OF 1995

M/S. HI-TECH ESTATES & PROMOTERS (P) LTD .....Petitioner

.Vrs.

STATE OF ODISHA & ORS. .....Opposite Parties.

CONSTITUTION OF INDIA, 1950 – Articles 300-A, 226.

Notice issued by superintendent of police, EOW, CBI Crime Branch to the Sub-Registrar, Jatani prohibiting him to register any sale or transfer of properties by the petitioners or its Directors without its permission – Hence the writ petition – Sub-Registrar is duty bound to effect registration of sale deed validly executed unless prevented by order of Court or provision of law – Power U/s 102 Cr.P.C. is not exercised in this case as the property in question has no direct link with the commission of offence – Article 300-A of the constitution of India provides that no person shall be deprived of his property save by

authority of law – Held, since the impugned notice is not by any authority of law the same is liable to be quashed – However, there is no bar for the Investigating Agency to approach the appropriate Court under the provisions of Criminal Law Amendment Ordinance, 1944 or the OPID Act, 2011. (Paras 8 to 10)

Case Law Referred to :-

1. (1999) 7 SCC 685 : State of Maharashtra versus Tapas D.Neogy

For the petitioner : M/s Amitav Bagchi, D.Nanda
For the opposite parties : Addl. Government Advocate

Date of Judgment :14.12.2016

JUDGMENT

S.K.MISHRA, J.

This judgment arises out of two writ petitions, bearing W.P.(C) No.13881 of 2015 by the M/s Hi-Tech Estates and Promoters (P) Ltd. and W.P.(C) No.15473/2015 by the M/s. Rajdhani Systems & Estate (P) Ltd., represented through its Managing Director Tirupati Panigrahi for quashing of the letters issued by the Superintendent of Police, Economic Offences Wing, CID, Crime Branch, Bhubaneswar, i.e. Opposite Party No.1 to the Sub-Registrar, Jatni in the district of Khurda, i.e. Opposite Party No.4 not to register any sale or transfer of the properties of the aforesaid two companies or its Directors without clearance of the Opposite Party no.1.

2. It is submitted by the learned counsel for the petitioners and it is borne out from the pleadings that the petitioners are dealers in estate and are also involved in construction of buildings and flats. The business in usual course involves activities like purchase of land, obtaining permission for conversation from agriculture land to homestead, development of same and make layout of roads and set back arrangements so as to render the land to be plotted in different sizes to be sold to intending buyers by way of outright purchase or by way of payment in instalments. While continuing such business, the Directors of both the companies were arrested on 25.12.2012 by the Crime Branch (E.O.Ws.), Bhubaneswar upon receipt of allegation from a complaint, who has invested huge amount of money to purchase plot from the petitioners company.

3. In course of investigation, the Investigating Officer seized the documents, such as agreement, books of account and land records from the corporate office of the petitioners. However, Annexures-4, issued by the Investigating Officer are the letter of request to the Sub-Registrar, Jatni. The

said letter required the Sub-Registrar not to allow registration to sale or purchase. It is proposed to be made by the petitioners company or its Directors. The registering authorities were directed to obtain permission from the Crime Branch to effect and allow registration. The petitioners-counsel submitted that five cases have been registered against the petitioners but the plots, which are described in the schedules to the writ petitions, are not subject matter of any of the criminal cases. It is also borne out from the record that the Hon'ble Supreme Court has granted bail to the petitioners on their depositing crores of rupees in the Registry of Apex Court. In a similar case, in W.P.(C) No.17313/2014 filed by this two companies, a Bench of this Court has held that the Sub-Registrar, Jatni, without any impediment, has refrained from registering the sale deed executed by the petitioners in spite of the judicial order passed by the learned Addl. Sessions Judge, Bhubaneswar. It is further held that the Sub-Registrar is duty bound to effect of registration of sale deed validly executed unless prevented by order of Court or provision of law. In such factual backdrop, the petitioners prayed that Annexures-4 be quashed and they may be allowed to deal with the properties to carry on their day to day business affairs.

4. The opposite party no.1 in essence challenges the writ petitions treating it as not maintainable as the letter dated 22.05.2013 had early been challenged in W.P.(C) No.17556/2013, W.P.(C) No.17313/2014 and CRLMC No.3751/2014. The W.P.(C) No.17556/2013 and CRLMC No.3751 of 2014 were disposed of withdrawn but the W.P.(C) No.17313/2014 has been disposed of on 30.09.2014 granting some relief to the petitioners but the Hon'ble Court did not quash the letter dated 22.05.2013. Hence, it is submitted that the principles of *res judicata* will apply and the relief sought for in the present writ petitions cannot be granted. It is further stated that the petitioners have approached this Court after lapse of two years and there is delay and latches on the part of the petitioners. Therefore, the writ petitions should be dismissed.

Secondly, it is contended by the learned Addl. Government Advocate that as per the provision of Section 102 of the Cr.P.C., a police officer may pass such orders if the property in question has a direct link with the commission of offence. In support of such contention, the learned Addl. Government Advocate relies upon the reported case of ***State of Maharashtra versus Tapas D. Neogy***, (1999) 7 SCC 685, wherein the Hon'ble Supreme Court has held that seizure of bank accounts comes within the meaning of property under Section 102 of the Cr.P.C. and the ' said document can be

seized by the police if it is found to be related or connected of the offence allegedly committed by the petitioners.

5. As regards the first contention, it is appropriate on the part of this Court to examine the records of W.P.(C) No.17313/2014. In that case, the petitioners filed an application to quash Annexure-1 and Annexure-3. Annexure-1 is similar letter written by the Superintendent of Police, EOW, CID, Crime Branch, Bhubaneswar to the Sub-Registrar Jatni. Moreover, it is seen from the aforesaid records that the earlier writ petition, bearing no.17313/2014 was filed seeking relief in pursuance of the orders passed by the Hon'ble Supreme Court in SLP (Criminal) Nos. 6749-51, 6961-63, 6942-44, 6983-85 and 6986-88, all of 2013, in which a request was made by the petitioners to permit sale of flats in the projects of Hi-tech Plaza and Hi-tech Heaven. Upon hearing the Hon'ble Supreme Court by order dated 21.02.2014 made the following observations.

> " xxx…..Insofar as the request of the petitioners for permission to effect sale of flats in projects of Hi-tech Plaza, Kalyan Plaza Annex, Hi-tech Plaza Annex and Hi-tech Heaven is concerned we are not prepared to pass any order at this stage. However, we permit the petitioners to make an appropriate application(s) in this regard before the Additional Sessions Judge, Khurda, Bhubaneswar in connection with FIR No.11 of 2012, 4 of 2013, 1 of 2013, 12 of 2012 and 2 (2) of 2013.
>
> If and when such an application is filed we direct the Learned Additional sessions Judge to consider the same in accordance of law without being influenced by any one of the observations made by us in the course of this Order.
>
> The special leave petitions are disposed of accordingly."

In pursuance of the said order, the petitioners approached the learned Addl. Sessions Judge, Bhubaneswar and as per the order dated 16.07.2014 in Criminal Revision No.4/21 of 2014, he allowed the application. The operative portion of the combined orders passed in the aforesaid revision applications reads as follows:

> " 5. After going through the documents filed by the petitioners and after hearing from both the sides, it appears that the petitioners have purchased the land in question and constructed flats thereupon with approval of the competent authority. They have also mutated the land in the name of their company and make conversion of the land to the

> status of "Gharabari". As the plan is approved by the Government, it appears the flats are constructed within the norms of Orissa Apartment Ownership Act, 1982. Taking into consideration the above facts, the petitioners are permitted to effect the sale of plats in projects of Hi-Tech Plaza, Kalyan Plaza Annex, Hi-Tech Plaza Annex and Hi-Tech Heaven. The petitioners are further directed to transfer only the flats approved by the competent authority and any flat if unauthorisedly constructed deviating the approved plan shall not be alienated in any manner to the customers. Accordingly, the petition is disposed of."

6. Assailing that order, the State of Orissa preferred Criminal Revisions, bearing Nos.734, 742, 743, 744 and 745 of 2014, which were disposed of by this Court on 25.02.2015. After dealing with each and every contention raised by the learned counsel for the State, this Court came to the conclusion that there is hardly scope of interfering with the orders passed by the learned Addl. Sessions Judge, Bhubaneswar and hence all the Criminal Revisions were dismissed being devoid of merit. In the interregnum, after the orders passed by the learned Addl. Sessions Judge, Bhubaneswar, the petitioners sold some flats in the aforesaid complexes but the Sub-Registrar, Jatni refused to register those sale deeds citing Annexure-1 of writ petition No.17313/2014. Therefore, the petitioners filed writ petition before this Court, which was disposed of on 30.09.2015. The exact words used by the Hon'ble Single Judge are quoted below:

> " From the rival submission and the averments made on behalf of the parties, it is apparent that it is not disputed that permission has been granted by the learned Additional Sessions Judge, Bhubaneswar to the petitioners for effect of sale of flats of the projects of Hi-Tech Plaza, Kalyan Plaza Annex, Hi-Tech Plaza Annex and Hi-Tech Heaven which is a judicial order. Counter-affidavit filed by the Sub-registrar does not indicate any impediment against implementation of such judicial order passed. Learned counsel for the State fairly conceded that the order of the learned Additional Sessions Judge, Bhubaneswar permitting to effect sale of flats has not been stayed, altered or modified by any competent court. This statement is being made by the learned counsel for the State on instruction made by the Deputy Superintendent of Police, Economic Offences Wing, CID, Crime Branch, Odisha who is present in court.

> In the above view of the matter, it is abundantly clear that without any impediment the Sub-Registrar, Jatni has refrained from registering the sale-deeds executed by the petitioners in spite of judicial order passed by the learned Additional Sessions Judge, Bhubaneswar. The Sub-Registrar is duty bound to effect registration of the sale-deeds validly executed unless prevented by any order of Court or under any provision of law.
>
> In such view of the matter, the writ petition is disposed of directing the opposite party no.5-Sub-Registrar, Jatni to effect registration of the sale-deeds executed by the petitioners in accordance with the permission granted by the learned Additional Sessions Judge, Bhubaneswar in case there is no other legal impediment."

7. The earlier applications like revision application, the order passed by the learned Addl. Sessions Judge confirmed by this Court and the orders in W.P.(C) No.17313/2014 has been passed in pursuance of the liberty granted to petitioners by the Hon'ble Supreme Court. Moreover, other writ petitions and CRLMCs, preferred above, have been allowed to be withdrawn and liberty has been granted to the petitioners to file fresh petition. The 2nd contention raised by the learned Addl. Government Advocate is regarding the power of police under Section 102 of the Cr.P.C. It is argued that Section 102 of the Cr.P.C. provides for police officer's power to seize property. In the case of ***State of Maharashtra versus Tapas D. Neogy*** (supra), the Hon'ble Supreme Court held that the bank accounts are properties of the accused and if circumstances exist creating suspicion of commission of any offence in relation to those bank accounts, Section 102 of the Cr.P.C. is attracted empowering the police officer to seize the bank account and issuing further orders prohibiting the accounts for being operated upon.

8. It is not disputed that the lands that are sought to be sold and registered in the office of the Sub-Registrar, Jatni are properties. However, it is seen from Annexures-4, which are sought to be quashed in the case that the properties have not been seized, rather a notice has been given to the opposite party no.4, i.e. Sub-Registrar not to register any sale deed executed by these petitioners or any of their Directors without permission of the Superintendent of Police, E.O.W., CID, Crime Branch, Bhubaneswar. Hence, this Court is of the opinion that power under Section 102 Cr.P.C. has not been exercised in this case and the ratio decided in the case of ***State of Maharashtra versus Tapas D. Neogy*** (supra) is not applicable to the present case. The 2nd contention is that the petitioners have come to this Court after a lapse of two

years. Hence, they are guilty of latches and application is delayed. However, it is borne out from the records that the Directors of the aforesaid companies were incarcerated for a long period and only by the order of the Hon'ble Supreme Court they have been released on bail after depositing certain amounts as required by the Hon'ble Supreme Court. Moreover, they have been approaching this Court and because of formal defects or other such reasons, the writ petition filed earlier has been withdrawn. So, it cannot be said that the petitioners action can be termed as latches or their application filed after lapse of unreasonably long period of time. Thus, all the contentions raised by the learned Addl. Government Advocate for the State are not acceptable by this Court. The petitioners' case is that they are in the business of development, sale and purchase of estates and for that purpose they have to purchase and sale of the land and to develop the same. There is allegation against them that they promised certain persons and they have defaulted to sale land and in doing so, criminal case has been initiated against them. If the same situation is allowed to prevail, then there will be further criminal cases against them and they will not be able to carry on their business. Also they are required to deposit sums before the Hon'ble Supreme Court, which will not be possible unless they carry out their development activity.

9. Article 300-A of the Constitution of India provides that no personal shall be deprived of his property save by authority of law. Deprivation of property comes in various ways, such as destruction or confiscation or revocation of a proprietary right granted by the proprietor, seizure of goods and immovable property from the possession of individual or assumption of control of a business, in exercise of the police power of a State. Under the Constitution, the Executive cannot deprive a person of his property (any kind) without specific legal authority which can be established in a court of law, however, laudable the motive behind may be such deprivation. The expression of authority of law means by or under any law made by the competent legislature. Admittedly, in the present case, no seizure has been effected under Section 102 of the Cr.P.C. The Superintendent of Police, E.O.W., CBI, Crime Branch has issued a notice to the Sub-Registrar, Jatni for prohibiting him from registering any sale executed by the petitioners or its Directors. Writing of such a letter is not by authority of law. It was open for the Investigating Agency, prosecuting or the executing agency to proceed under the provisions of Criminal Law Amendment Ordinance, 1944 or the provisions of the Odisha Protection of Interests of Depositors (In Finance Establishments) Act, 2011.

So, instead of taking appropriate action against the petitioners, as the authority of law, they have simply issued a letter to the registering authority, which accordingly to this Court, is not sustainable.

10. In the result, on the basis of the aforesaid discussions, this Court is of the opinion that Annexues-4 of both the writ petitions cannot be upheld by this Court and the same have to be quashed. Accordingly, the Annexures 4, i.e. letter no. 1912/CID-EOW, dated 22.05.2013 issued by the Superintendent of Police, E.O.W.,CID, Crime Branch, Odisha, Bhubaneswar in both the writ petitions are quashed. However, this order should not be taken to be mean that the investigating agency or the prosecuting agency or the State Government has any bar to approach the appropriate court under the aforesaid provisions of the Criminal Law Amendment Ordinance, 1994 or the OPID Act, With such observations, the writ petitions are allowed.

Writ petitions allowed.

2017 (I) ILR - CUT- 90

DR. A.K. RATH, J.

CMP NO. 1278 OF 2016

BANCHHANIDHI PATRA & ORS. .....Petitioners

.Vrs.

BHAGABAT PRASAD PANDA & ORS. .....Opp. Parties

MAXIM - "Dominus litis" – Meaning of – It means, the plaintiff is the master of his suit and he can not be compelled to fight against a person against whom he does not wish to fight and against whom he does not claim any relief. (Para 7)

CIVIL PROCEDURE CODE, 1908 – O-1, R-10 (2)

Addition of parties – Whether, the Court can implead a party as defendant against the wishes of the plaintiff, who is a "dominus litis" ?

Rule of "dominus litis" is subject to the powers of the Court under Order 1 Rule 10(2) C.P.C., which authorizes the court to direct addition of further parties to the suit even suo motu, where it appears that such impletion is just and the party who has not been joined in the litigation by the plaintiff is either a necessary party or a proper party – It is the judicial discretion of the court which is to be exercised in the facts and circumstances of a particular case.

In this case, the plaintiffs have alleged that the suit land has been wrongly recorded in the name of the defendant in Raghupati settlement – The intervenors assert that the disputed land is a public road and admittedly the suit schedule land has been recorded as village road in the ROR – So the intervenors are proper parties to the suit – Held, the Court can implead the intervenors as parties to the suit against the wishes of the plaintiff. (Paras 6,7,8)

Case Laws Referred to :-

1. AIR 1958 SC 886 : Razia Begum -V- Sahebzadi Anwar Begum & Ors.
2. 57 (1984) CLT 31 : Indrajit Dandasena & Ors. -V- Mangal Charan Dandasena & Ors.

For Petitioners : Mr. Maheswar Mohanty.
For Opp. Parties : Mr. Alok Kumar Mohanty.
Addl. Govt. Advocate

Date of hearing : 08.11. 2016
Date of judgment: 16.11. 2016

JUDGMENT

DR. A.K.RATH, J.

This petition challenges the order dated 4.8.2016 passed by the learned Civil Judge (Senior Division), Nilgiri in C.S. No.1 of 2016. By the said order, learned trial court rejected the application of the petitioners under Order 1 Rule 10 CPC for impleadment.

2. Opposite party nos.1 and 2 as plaintiffs instituted the suit for declaration that the suit property is the exclusive property of the plaintiffs and permanent injunction impleading the State of Orissa-opposite party no.3 as sole defendant. Case of the plaintiffs is that due to wrong preparation of ROR and the map in the major settlement, the suit land has been recorded as public road. When the defendant threatened to demolish the boundary wall, they instituted the suit. While the matter stood thus, the petitioners, who are the villagers, filed an application under Order 1 Rule 10 CPC for impleadment. It is stated that they are the permanent inhabitants of village Rajnagar and Sankhua. They came to know that the plaintiffs have instituted the suit against the defendant without complying the provisions under Order 1 Rule 8 CPC by suppressing the material facts. The suit land is a public road and, as such, they have direct interest over the same. The plaintiffs filed an objection to the same contending, inter alia, that most of the intervenors are not the

villagers where the suit land is situated. They have no interest over the suit schedule land and, as such, they are not necessary parties to the suit. The intervenors are neither necessary parties nor proper parties to the suit. In the event the intervenors are added, the same will cause delay in disposal of the suit. Learned trial court came to hold that the plaintiff is the dominus litis. The intervenors are neither necessary nor proper parties to the suit. Held so, learned trial court rejected the application.

3. Heard Mr. Maheswar Mohanty, learned counsel for the petitioners, Mr. Alok Kumar Mohanty, learned counsel for the opposite parties 1 and 2 and learned Addl. Government Advocate for opposite party no.3.

4. The distinction between a necessary party and a proper party is well known. In Udit Narain Singh Malpaharia v. Additional Member Board of Revenue, Bihar and another, AIR 1963 SC 786, the apex Court held that a necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.

5. In Razia Begum v. Sahebzadi Anwar Begum and others, AIR 1958 SC 886, the apex Court held that it is firmly established as a result of judicial decisions that in order that a person may be added as a party to a suit, he should have a direct interest in the subject matter of the litigation whether it raises questions relating to moveable or immoveable property.

6. Really two points arise for consideration of this Court;

(I) Whether the intervenors are necessary or proper parties to the suit ?
(II) Whether the court can implead a party as defendant against the wish of the plaintiff ?

7. An identical question came up for consideration before this Court in Indrajit Dandasena and others v. Mangal Charan Dandasena and others, 57 (1984) CLT 31. Learned Single Judge, before whom the revision came up for hearing, has observed that there are cleavage of decisions of this Court on the point. The matter was referred to a larger Bench. This Court went in-depth into the matter and held that the maxim “dominus litis” means the plaintiffis the master of suit. It was further that the rule of dominus litis is subject to the powers of the Court under Order 1, Rule 10(2) of the Code inasmuch as the said rule authorises the Court to direct addition of further parties to the suit even suo motu where it appears that such impletion is just and the party who has not been joined in the litigation by the plaintiff is either a necessary

or a proper party. The exercise of discretion by the Court in cases where it satisfies the requirements of the rule would be made nugatory if the controlling authority would be the plaintiff by application of the rule of dominus litis. As a matter of fact, while considering as to whether impletion of a party is necessary to pass an effective and executable decree, or to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit the Court is required to go into the question as to whether the discretion is to be exercised by it in the facts and circumstances of the case.

8. The plaintiffs have alleged in the plaint that the suit land has been wrongly recorded in the name of the defendant in Raghupati Settlement. The intervenors assert that the disputed land is a public road. Admittedly, the suit schedule land has been recorded as village road in the ROR. Every public has a vital interest over the properties of the Government. In the event the suit is decreed, the same would affect the rights of the public. Their presence would enable the court to effectually and completely adjudicate the lis. Thus the intervenors are proper parties to the suit.

9. In the result, the order dated 4.8.2016 passed by the learned Civil Judge (Senior Division), Nilgiri in C.S. No.1 of 2016 is quashed. The petition is allowed. Learned trial court shall implead the petitioners as defendants and proceed with the suit.

C.M.P. allowed.

2017 (I) ILR - CUT-93

DR. A.K. RATH, J.

C.M.P. NO. 619 OF 2015

ASHOK KUMAR RAY .....Petitioner

.Vrs.

SMT.REBA BISWAS & ORS. .....Opp. Parties

CIVIL PROCEDURE CODE, 1908 – S.10

Whether the suit for partition shall remain stayed till disposed of the probate proceeding ?

The jural relationship amongst the parties inter se is finally decided in the preliminary decree – The decision in the probate proceeding on the question of proof of "will" will have a direct impact on the suit – The decision in the partition suit would also operate as resjudicata in the probate proceeding – Held, since both the proceedings are pending, the suit for partition shall remain stayed till disposal of the probate proceeding. (para 9)

Case Laws Referred to :-

1. (2005) 12 SCC 503 : Balbir Singh Wasu v. Lakhbir Singh & Ors.
2. (2005) 12 SCC 505 : Nirmala Devi Vrs. Arun Kumar Gupta & Ors.
3. AIR 1970 Orissa 28 : Jagojoti Bose and another v. Baruruchi Bose & Ors.

For Petitioner : Mr.Ashok Mohanty, Sr.Adv.
For Opp. Parties : Ms.Pratyusha Naidu,

Date of Hearing : 04. 01.2017
Date of Judgment: 04.01.2017

JUDGMENT

DR.A.K.RATH, J.

The instant petition is to laciniate the orders dated 15.1.2015 and 21.3.2015 passed by the learned Civil Judge (Sr.Division), Puri in C.S.No.464 of 2008. By order dated 15.1.2015, the learned trial court vacated the order of stay whereas, by order dated 21.3.2015, it held that partition suit shall continue till the stage of carrying out of a preliminary decree.

2. The opposite parties 1 to 5 as plaintiffs instituted C.S.No.464 of 2008 for partition of the properties left by common ancestor Atul Krishna Roy in the court of the learned Civil Judge (Sr.Division), Puri impleading the petitioner as well as proforma opposite parties 6 and 7 as defendants. Pursuant to issuance of summons, defendant no.1-petitioner entered appearance and filed a written statement. During pendency of the suit, defendant no.1 filed an application under Section 276 of the Indian Succession Act before the learned District Judge, Puri for grant of Pobate of Will said to have been executed by late Atul Krishna Roy bequeathing the properties in his favour, which is registered as Test Case No.7 of 2012. Thereafter defendant no.1 filed an application to stay the further proceeding of the suit till disposal of Test Case No.7 of 2012. The plaintiffs filed objection to the same. The said application having been allowed, the plaintiffs approached this Court in W.P.(C) No.22464 of 2013. A Bench of this Court disposed of the said writ petition on 12.12.2014 directing the

learned District Judge, Puri to dispose of Test Case No.7 of 2012 within a period of six months and to proceed with the suit for partition in accordance with law. On 15.1.2015, the learned trial court vacated the order of stay. On 21.3.2015, the learned trial court came to hold that fate of the suit depends on the probate case, since position of the probate case is not known. There is no reason to grant stay. It further held that the suit shall continue till the stage of carrying out of a preliminary decree.

3. Heard Mr.Ashok Mohanty, learned Sr.Advocate for the petitioner and Ms.Pratyusha Naidu, learned Advocate for the opposite parties 1, 2, 4 and 5.

4. Mr.Mohanty, learned Sr.Advocate for the petitioner submits that the properties involved in testamentary case and the suit for partition is same. The fate of the suit depends upon the Pobate of Will. In view of the same, further proceeding of the suit may be stayed till disposal of the probate proceedings.

5. Per contra, Ms.Naidu, learned Advocate for the opposite parties 1, 2, 4 and 5 submits that this Court in W.P.(C) No.22464 of 2013 directed the learned District Judge, Puri to dispose of Test Case No.7 of 2012 within a period of six months and to proceed with the suit for partition in accordance with law. In view of the same, the suit for partition may continue till passing of final decree. She relies on a decision of the apex Court in the case of Nirmala Devi Vrs. Arun Kumar Gupta and others (2005) 12 SCC 505.

6. The sole question that hinges as to whether the suit for partition shall remain stayed till disposal of the probate proceeding.

7. Before proceeding further, it is apt to refer to the decision of this Court in the case of Jagojoti Bose and another v. Baruruchi Bose and others, AIR 1970 Orisa 28. In Jagojoti Bose (supra), the disputed property belongs to one Haricharan Bose. He had three sons. On 10.10.1946, he executed a Will in respect of the disputed property in favour of defendant nos.4 and 5. Thus he divested the plaintiff-another son from inheritance under the Will. On 30.10.1958, the plaintiff instituted a suit for partition claiming 1/3rd interest. Defendants 4 and 5 filed written statement claiming the entire property to themselves on the strength of the Will. On 12.9.1960, defendants 4 and 5 filed an application for Probate of Will in the court of the learned District Judge, Cuttack. On 28.6.1961, a preliminary decree for partition was passed in favour of the plaintiff. On 28.11.1962, Probate of Will was granted after contest by the plaintiff. On 10.7.1964, the plaintiff filed an application for making final the preliminary decree for partition. Defendants 4 and 5

filed an objection to the same contending, inter alia, that the plaintiff had no title in the disputed property after probate was granted. The contention was negatived by the trial court. The same was challenged before this Court. This Court held that by preliminary decree the jural relationship amongst the parties inter se was finally decided and it was declared that the plaintiff had a one third interest in the disputed property. If the Probate of Will is allowed to vary the rights, a conclusion must be reached to the effect that the plaintiff is not entitled to the property. This would affect the very basis of the preliminary decree and the rights carved out. The juristic theory underlying the reason why this cannot be done is that defendants 4 and 5 could have pressed into service the Probate if they had been vigilant in time. They had taken the defence under the Will in the written statement. Thus their claim on the strength of the Will and the Probate subsequent to the preliminary decree is barred by the principle of res judicata, actual and constructive. It was open to the defendants 4 and 5 to get the partition suit stayed, proceed with the Probate proceeding pending in the court of the District Judge and, after obtaining the Probate, to set it up in defence in the partition suit. This was the only course available to them. When they failed to do so, they abandoned their right based on the Probate. By the time the Probate was granted, the rights of the parties on the basis of inheritance had already been worked out and the stage of setting up the Probate in defence had passed off. (Emphasis laid)

8. In Nirmala Devi (supra), the question arose whether the probate proceeding could be clubbed with the suit. The apex Court held that in the probate proceedings on the question of proof of the Will will have a direct impact on the suit. Only on this short ground and without expressing any opinion on the merits of the controversy between the parties, the apex Court directed the learned District Judge to make it convenient to dispose of the probate proceeding as well as suit. The same view was reiterated in Balbir Singh Wasu v. Lakhbir Singh and others (2005) 12 SCC 503.

9. Reverting to the facts of the case and keeping in view the aforesaid principles, this Court finds that the suit schedule property is the subject-matter of dispute in the partition suit as well as probate proceeding. The jural relationship amongst the parties inter se is finally decided in the preliminary decree. The decision in the probate proceeding on the question of proof of 'Will' will have a direct impact on the suit. The decision in the partition suit would also operate as res judicata in the probate proceeding. In such contingency, when both the proceedings are pending, the suit for partition shall remain stayed till disposal of probate proceeding.

10. In the wake of aforesaid, the orders dated 15.1.2015 and 21.3.2015 passed by the learned Civil Judge (Sr.Division), Puri are quashed. This Court directs that further proceedings of C.S.No.464 of 2008 pending before learned Civil Judge (Sr.Division), Puri shall remain stayed till disposal of Test Case No.7 of 2012 pending before the learned District Judge, Puri. Learned District Judge shall conclude the hearing of Test Case No.7 of 2012 within a period of six months from today. The petition is allowed. No costs.

C.M.P allowed.

2017 (I) ILR - CUT- 97

DR. A.K. RATH, J.

S. A. NO. 202 OF 1994

DHOBANI BEHERANI & ORS. ……..Appellants

.Vrs.

LAXMI BEHERANI & ORS. …….Respondents

EVIDENCE ACT, 1872 – Sc 107, 108

Death – Presumption of – There is no presumption that a person not heard of for seven years was dead at the end of seven years – The issue as to the date and time of death has to be determined on evidence, direct or circumstantial and not by presumption – The burden of proof would lay on the person who asserts that death having taken place at a given date or time, inorder to succeed the claim.

In this case, after remand of the suit, defendant No.2 was examined her self as P.W.2 and the learned appellate Court failed to consider the same – There is no presumption that defendant No.2 died on any particular date or on the expiry of seven years – So the findings of the learned appellate Court that defendant No.2 has ceased to exercise any right over the suit property since 1950 and was not heard and therefore defendant Nos. 4 to 7 were perfectly within their rights to treat her as Civil dead and sell the suit properties to defendant No.1 is perverse – Held, the judgment and decree of the learned lower appellate Court are setaside and the judgment and decree of the trial Court is affirmed. (Paras 15 to 19)

For Appellants : Mr.P.K.Das
For Respondents : Mr.Siddhartha Mishra

Date of Hearing :21.10.2016
Date of Judgment :28.10.2016

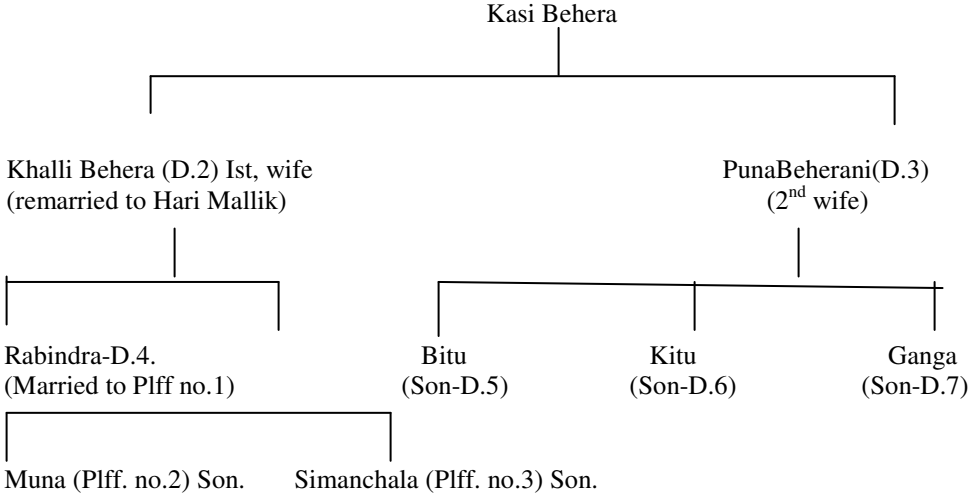
JUDGMENT

DR.A.K.RATH, J.

Plaintiffs are the appellants against a reversing judgment.

2. The plaintiffs instituted the suit for a declaration that the sale deed executed by defendant nos.4 and 3 in favour of defendant no.1 in the year 1976 as null and void, they are the absolute owners of the suit site by virtue of the deed of gift executed in the year 1987, for a direction to defendant no.8 to pay an amount of Rs.200/- per month till delivery of vacant possession, permanent injunction and in the alternative for recovery of possession of the property.

3. The following genealogy would show the relationship of the parties.



4. The case of the plaintiffs is that defendant no.1 is the sister of late Kasi Behera. Defendant no.2 was the first wife of Kasi. In the year 1946, defendant no.2 purchased the suit land by means of a registered sale deed out of her 'stridhan' property. Defendant no.4 was born to defendant no.2 through her first husband, Kasi Behera. After his birth, defendant no.2 deserted her husband and remarried one Hari Mallik. Thereafter, Kasi Behera remarried defendant no.3. Defendant nos.5, 6 and 7 were born out of their wedlock. Defendant no.2 gave up her possession over the suit land in favour

of the later. There was misunderstanding between plaintiff no.1 and defendant no.4. To deprive the plaintiffs from their share in the suit property, defendants 3 to 7 created a nominal sale deed in favour of defendant no.1 in respect of the suit land in the year 1976. The same was not binding on them. The further case of the plaintiffs is that the marriage between defendant no.4 and plaintiff no.1 was dissolved. In order to escape his liability from maintaining the plaintiff no.1, defendant no.4 created a benami sale deed in favour of defendant no.1. Thereafter the defendant no.1 asserted title over the suit land. During pendency of the suit, defendant no.2, Khalli Beherani executed a registered gift deed in respect of the suit land in favour of the plaintiffs on 7.2.1987.

5. Pursuant to issuance of summons, defendant no.1 entered appearance and filed a written statement denying the assertions made in the plaint. According to her, the suit house was purchased benami in the name of defendant no.2, but the same belongs to Kasi Behera. When the defendant no.4 was about 10 years of age, his mother Khalli Beherani, defendant no.2 deserted Kasi and her whereabouts were not known till date. The family regarded her as dead. Accordingly, defendant no.4 along with defendant nos.3, 5 to 7 succeeded the suit property. They sold the same to defendant no.1. The defendant no.2 had not gifted the suit property in favour of the plaintiffs. It is further pleaded that Kasi had executed a simple mortgage deed in favour of Y.Purushottam in respect of the suit property. He could not discharge the loan. Y.Purushottam filed a suit bearing no.T.M.S.68/74 against defendant nos.3 to 6 and obtained a decree. The said decree was executed in E.P.27/76 against defendant nos.3 to 6. Defendant nos.3 to 6 in order to discharge the decreetal dues, sold the suit property to defendant no.1. She paid the decreetal dues to the decree-holder through her brother Radha Kurshna Behera. The balance amount was paid at the time of execution of sale deed on 24.12.1976. Thereafter possession of the land was delivered to defendant no.1. She used to pay the tax to the Municipality as well as rent to the Government. The plaintiffs have no semblance of right over the suit property. It is further stated that the defendant no.2 is civil dead and her whereabouts is not known. She had not executed any gift deed in favour of the plaintiffs. The plaintiffs have created the gift deed for the purpose of the suit and, as such, the same is void. The plaintiffs have no right to claim for any rent from defendant no.8 and, as such, not entitled to damages from defendant no.8. Other defendants had been set ex parte.

6. On the inter se pleadings of the parties, the learned court below framed nine issues. The same are as follows:-

"1. Whether the plaintiffs have got right, title and interest over the suit house ?

2. Whether the document no.3389 of 1976 (the sale deed) is null and void and not binding on the plaintiffs?

3. Whether the defendant no.1has no manner of right, title and interest over the suit house and is liable to be restrained from transferring the suit house to any one ?

4. Whether defendant no.2 as at any time executed any gift deed in favour of the plaintiffs ?

5. Whether defendant no.2 has right to make a gift of the house to the plaintiffs ?

6. Whether defendant no.8 is the trespasser and is liable to pay compensation by way of damages from the date of the registered notice dated 20.3.87 ?

7. Whether the suit is maintainable ?

8. If there is any cause of action for filing the present suit ?

9. To what other relief ?"

7. To prove the case, the plaintiffs had examined three witnesses and on their behalf, three documents were exhibited. Defendant no.1 was herself examined as D.W.1 and on her behalf, eight documents had been exhibited.

8. The suit was dismissed. Assailing the judgment and decree passed by the learned trial court, the plaintiffs filed appeal before the learned District Judge, Berhampur. The appellate court set aside the judgment and decree passed by the learned trial court and remanded the suit back to the learned trial court with a direction to the learned trial court to examine Khalli, defendant no.2 as a witness and dispose of the suit afresh. After remand, summons was issued to defendant no.2. She was examined as P.W.2. The learned trial court came to hold that defendant no.2 is the owner of the suit land. She executed a registered gift deed on 7.2.1987 in favour of the plaintiffs. Thus, the plaintiffs have right, title and interest over the land. It further held that the sale deed, vide Ext.A is null and void and not binding on the plaintiffs. Held so, the learned trial court decreed the suit.

9. Assailing the judgment and decree passed by the learned trial court, defendant no.1 filed Title Appeal No.33 of 1991 (GDC) before the learned

District Judge, Berhampur, which was subsequently transferred to the learned Additional District Judge, Berhampur and re-numbered as T.A.No.15 of 1992. The learned appellate court held that the gift deed was executed on 7.2.1987. The suit was filed on 20.10.1986. Thus, on the date of filing of the suit, the gift deed was nonexistence. The plaintiffs had no cause of action to file the suit. The plaintiffs had no right, title and interest over the suit schedule property. Institution of the suit was misconceived. The defendant nos. 3 to 7 executed the sale deed, vide Ext.A, in favour of defendant no.1 for a valid consideration. It was further held that defendant no.2 was not heard of since her re-marriage with Hari Mallick and ceased to exercise any right over the suit property since 1950. She did not object to mortgage the land by Kasi Behera, her first husband. She also did not raise any objection from the year 1976 till the date of filing of the suit to possession of the suit property by defendant no.2. The defendant nos.4 to 7 were perfectly within their rights to treat her as civil dead and sell the suit properties of defendant no.2. Held so, the learned appellate court allowed the appeal and set aside the judgment of the trial court.

10. This Second Appeal was admitted on the following substantial question of law:-

> "Whether the lower appellate court erred in holding that defendant no.2 had suffered civil death when the said defendant has been examined as a witness (P.W.2) in the suit ?"

11. Mr. P.K.Das, learned Advocate for the appellants submitted that findings of the learned appellate court that defendant no.2 had civil dead is perverse. Defendant no.2 was examined herself as P.W.2 in the court below. The learned appellate court proceeded on the premises that defendant no.2 is dead. Thus, the judgment of the appellate court is vitiated.

12. Per contra, Mr. Siddhartha Mishra, learned counsel for respondent no.1 submitted that defendant no.2 remarried to Hari Mallik. Her whereabouts was not known. She is civil dead. The defendant no.4 along with defendant nos.3 and 5 to 7 to press their legal necessity, sold the land to defendant no.1 for a valid consideration.

13. Before adverting to the contentions raised by the counsel for both parties, it will be necessary to set out some of the provisions of the Evidence Act.

14. Sections 107 and 108 of the Evidence Act read as under:-

"**107. Burden of proving death of person known to have been alive within thirty years**.—When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it."

"**108. Burden of proving that person is alive who has not been heard of for seven years.**—[Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is [shifted to] the person who affirms it."

15. The decision of the Privy Council in the case of Lal Chand Marwari vrs. Mahant Ramrup Gir and another, A.I.R.1926 Privy Council 9, which stood the test of time over three quarters of a century by now is the locus classicus on the subject. It was held :

"There is only one presumption, and that is that when these suits were instituted in 1916 Bhawan Gir was no longer alive. There is no presumption at all as to when he died. That, like any other fact, is a matter of proof. And their lordships would here observe that it strikes them as not a little remarkable that the theory on this point, on which the plaintiff's pleader hazards his whole case, is still so widely held, although it has so often been shown to be mistaken. The learned Judges of the High Court have in these suits pointed out the plaintiff's error. Yet, in another part of their judgment, if their lordships are not mistaken, they have themselves unconsciously fallen into it. They have made a decree in the plaintiff's favour because they had, as they thought, no reliable evidence as to the date of Bhawan Gir's death, and because in their judgment it was for the defendants to prove that date if they relied on it. Yet at the same time they have acceded to the plaintiff's claim for mesne profits which, at all events as claimed, are those profits accruing three years prior to the institution of the suits. This imports that Bhawan Gir was dead at that date. But if he was, then the same evidence showed that he had died many years before. The evidence, indeed, if regarded at all, required the Court not to allow mesne profits but to dismiss the suits altogether.

Now upon this question there is, their Lordships are satisfied, no difference between the law of India as declared in the Evidence Act and the law of England, [*Rango Balaji v. Mudiyeppa (1)*] and, searching for an explanation of this very persistent heresy their

> lordships find it in the words in which the rule both in India and in England is usually expressed. These words taken originally from *In re Phene'a Trusts* (2) run as follows :-
> "If a person has not been heard of for seven years, there is a presumption of law that he is dead; but at what time within that period be died is not a matter of presumption, but of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential."
>
> Following these words, it is constantly assumed-not perhaps unnaturally-that where the period of disappearance exceeds seven years, death, which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. This, of course, is not so. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true rule would be less liable to be missed, and would itself be stated more accurately, if, instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one "of not less than seven years."

16. The apex Court in the case of N.Jayalakshmi Ammal Vrs. R.Gopala Pathar and another, AIR 1995 SC 995 went in-depth into the jurisprudential concept underlying Sections 107 and 108 of the Evidence Act and reiterated the same view.

17. Thus, the issue as to the date and time of death has to be determined on evidence; direct or circumstantial and not by presumption. The burden of proof would lay on the person who asserts that death having taken place at a given date or time in order to succeed the claim.

18. The case may be examined on the anvil of the decision cited (supra). The burden of proof lies on the defendant no.1 and defendant nos.3 to 7 to prove that Khalli Beherani, defendant no.2 is dead. This fact has not been proved by the defendants. They solely rely on the presumption under Section 108 of the Evidence Act. There is no presumption that defendant no.2 died on any particular date or on the expiry of seven years. After remand of the suit, defendant no.2 was examined herself as P.W.2. The learned appellate court failed to consider the fact that defendant no.2 was examined P.W.2. Thus the findings of the learned appellate court that defendant no.2 has ceased to exercise any right over the suit property since 1950 and was no heard and,

therefore, defendant nos.4 to 7 were perfectly within their rights to treat her as civil dead and sell the suit properties to defendant no.1 is perverse.

19. In the wake of the aforesaid, the judgment and decree of the learned lower appellate court are set aside. The judgment and decree of the learned trial court are affirmed. The appeal is allowed. There shall be no order as to costs.

Appeal allowed.

2017 (I) ILR - CUT-104

DR. B.R.SARANGI, J.

W.P.(C) NO. 4180 OF 2003

SARAT KUMAR SAMAL .....Petitioner

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ARTs. 14, 16

Excess payment made to petitioner-employee – Direction to recover – Action challenged – Petitioner had not automatically discharged the duty in the upgraded post of Sr. Asst. at his own accord but in view of the decision made by the syndicate – No fraud or misrepresentation alleged – It can be construed that the petitioner while working as Jr. Asst. in class III or Group 'C' service has been wrongfully discharged the duties of a higher post i.e. Sr. Asst. and paid accordingly – Moreover this Court is of the opinion that if recovery is made it would be iniquitous, harsh and arbitrary – Held, the impugned order directing recovery of the amount paid to the petitioner by the University in the upgraded post is quashed.

(Paras 9 to 12)

Case Law Relied on :-

1. (2015) 4 SCC 334 : AIR 2015 SC 696 : State of Punjab -V- Rafiq Masih

Case Law Referred to :-

1. 2016 (I) OLR 627 : Akshaya Ku. Patra -V- Managing Director, Andhra Pradesh Power Generation Corporation Ltd.

For Petitioner : Mr. B.Routray, Senior Counsel
M/s.A.K.Baral, B.Singh, P.K.Dash,
D.K.Mohapatra & B.N.Satapathy.

For Opp. Parties : Mr. B.Bhuyan, Addl.Govt. Adv.
M/s.K.P.Nanda, P.K.Ray, R.P.Kar & A.N.Ray.

Decided on : 09.12.2016

JUDGMENT

DR. B.R. SARANGI, J.

The petitioner, who is working as Senior Assistant under Utkal University, Vani Vihar, Bhubaneswar, files this application to quash order dated 03.12.2012 under Annexure-5, by which direction has been given for effecting recovery of excess payment made to 24 employees of the University through the III contemplated upgradation scheme devised during the year 1984-85.

2. The factual matrix of the case, in brief, is that the petitioner having requisite qualification was appointed as Junior Assistant by following due procedure against a substantive vacancy on 18.12.1987. Due to increase of workload and keeping in view the yardstick, the syndicate of the University made a proposal to upgrade certain posts of Junior Assistant to that of Senior Assistant in the post-graduate department of Utkal University. Accordingly, the high power committee, known as syndicate sub-committee, which was constituted by virtue of the resolution of the syndicate dated 17.11.1994 gave a proposal for upgradation of 22 posts of Junior Assistant to that of Senior Assistant in the post-graduate teaching department of the Utkal University. Pursuant to such resolution dated 17.11.1994, the University recommended for upgradation of 22 posts of Junior Assistant to that of Senior Assistant. Accordingly, on the basis of the recommendation made by the syndicate sub-committee, the syndicate in its meeting dated 14.12.1994 unanimously resolved that 22 posts of Junior Assistant working in different teaching departments were being upgraded to Senior Assistant without creating cadre post either on higher or lower level.

3. The petitioner, who was appointed against a substantive post of Junior Assistant, the said post having been upgraded as Senior Assistant, he was promoted vide office order dated 19.04.1995. Consequentially, he joined the said post and allowed to draw salary in the higher scale admissible to the post by the University. While substantive vacancies were created in the post of Senior Assistant, the petitioner was adjusted against regular vacancy in the scale of pay of Rs.4750-7500/- vide office order dated 05.05.2000 and from that date he had been continuing as a regular Senior Assistant having promoted from the post of Junior Assistant.

4. On 03.12.2002 vide Annexure-5 an office order was issued by opposite party no.2 to the following effect:

> *"The Hon'ble Chancellor wanted to know the progress of recovery of unentitled benefits given to 24 employees of the University through the III contemplated upgradation scheme devised by Utkal University during the year 1984-85. The Registrar apprised that the University has sought a clarification from the Chancellor's Secretariate/Government regarding the pattern of recovery. The Hon'ble Chancellor expressed displeasure over such dilatory measures and opined that the upgradation post its own scheme for effecting recovery of the excess payment and report recovery of the total amount of Rs.4,00,720/- by (sic)."*

Consequent upon issuance of above office order, opposite party no.2 had withdrawn the Senior Assistant scale of pay for the period from 14.09.1995 to 04.05.2002. As the petitioner, having been allowed by the University, had discharged his duty in the upgraded post of Senior Assistant with effect from 19.04.1995 till 04.05.2000, when steps were taken for recovery of the excess amount paid in the scale of pay of Senior Assistant, i.e., in the upgraded post, he approached this Court by filing the present writ application.

5. Mr. K. Mohanty appearing on behalf of Mr.B.Routrary, learned Senior Counsel for the petitioner states that pursuant to office order dated 03.12.2002 opposite party no.2 has withdrawn the Senior Assistant scale of pay of Rs.1400-2300/- for the period from 14.09.1995 to 04.05.2000 and allowed the petitioner to draw the scale of pay of the Junior Assistant, which is absolutely a misconceived one, in as much as since the post of Junior Assistant had been upgraded to the post of Senior Assistant on 19.04.1995 the petitioner discharged the responsibility of the post of Senior Assistant and subsequently against substantive post of Senior Assistant he had been promoted with effect from 05.05.2000, the direction given for recovery of the differential amount for the period from 19.04.1995 to 04.05.2000, during which the petitioner had discharged the duty of Senior Assistant, cannot sustain in the eye of law. To substantiate his contention, he has relied upon ***State of Punjab v. Rafiq Masih (white washer)***, (2015) 4 SCC 334 : AIR 2015 SC 696.

6. Mr. B.Bhuyan, learned Addl. Government Advocate states that it is a matter between the University and its employees and, therefore, the State Government has nothing to do with the same and, as such, no counter affidavit has been filed on behalf of the State opposite party.

7. Mr. K.P.Nanda, learned counsel appearing on behalf of opposite party no.2, while supporting the action of the University, states that upgradation of posts of Junior Assistant to Senior Assistant, being not in conformity with the provisions of law, direction for recovery of the differential salary from the petitioner for the period from 19.04.1995 to 04.05.2000 cannot be faulted. He, however, admits that even though the order impugned has been passed, by virtue of the interim order passed by this Court on 30.07.2003, the differential salary already paid to the petitioner for the post of Senior Assistant has not been recovered.

8. This Court heard learned counsel for the parties. As it is a year old case of 2003, on the basis of the pleading available on record, with the consent of the parties the matter has been disposed of at the stage of admission.

9. As is borne out from records, the petitioner was appointed as Junior Assistant and had been discharging his duty with effect from the date of his initial appointment, i.e., 18.12.1987. Due to resolution passed by the syndicate, since the post was upgraded to Senior Assistant, the petitioner was allowed to discharge the duty w.e.f 19.04.1995 against the upgraded post of Senior Assistant. Subsequently, on creation of regular vacancy in the cadre of Senior Assistant, the petitioner was promoted on regular basis to the said post w.e.f. 05.05.2000. The chancellor having reviewed the decision of the syndicate came to a conclusion that the upgradation of 24 posts of Junior Assistant to Senior Assistant, being not in conformity with the provisions of law, direction was made to recover the differential amount from such upgraded employees holding the post of Senior Assistant. But, fact remains, the petitioner had not automatically discharged the duty in upgraded post of Senior Assistant at his own accord, rather on the basis of the decision made by the syndicate. If the post had been upgraded by the authority and the petitioner had discharged his duty against the said upgraded post of Senior Assistant and was allowed to receive salary, the direction given for recovery of the amount cannot be held to be justified. When the petitioner has undisputedly discharged his duty in the upgraded post of Senior Assistant and paid with the salary admissible to the said post, at best, it can be construed that the petitioner, who is an employee of the university, is a beneficiary of the wrongful monetary gain at the hands of the employer. Thereby, he cannot be compelled to refund the same, as no fraud or misrepresentation is attributed to the petitioner at any stage.

10. In the case of ***State of Punjab v. Rafiq Masih (white washer)***, (2015) 4 SCC 334 : AIR 2015 SC 696, cited on behalf of the petitioner, the apex Court in paragraphs-7, 8, 9 and 10 held as follows:

> *7. Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by the employer seeking recovery of monetary benefits wrongly extended to employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this Court exempted employees from such recovery, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, "for doing complete justice in any cause" would establish that the recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the hands of this Court.*
>
> *8. As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the concerned employee. If the effect of the recovery from the concerned employee would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.*
>
> *9. The doctrine of equality is a dynamic and evolving concept having many dimensions. The embodiment of the doctrine of equality, can be found in Articles 14 to 18, contained in Part III of the Constitution of India, dealing with "Fundamental Rights". These Articles of the Constitution, besides assuring equality before the law and equal*

protection of the laws; also disallow, discrimination with the object of achieving equality, in matters of employment; abolish untouchability, to upgrade the social status of an ostracized section of the society; and extinguish titles, to scale down the status of a section of the society, with such appellations. The embodiment of the doctrine of equality, can also be found in Articles 38, 39, 39A, 43 and 46 contained in Part IV of the Constitution of India, dealing with the "Directive Principles of State Policy". These Articles of the Constitution of India contain a mandate to the State requiring it to assure a social order providing justice - social, economic and political, by inter alia minimizing monetary inequalities, and by securing the right to adequate means of livelihood, and by providing for adequate wages so as to ensure, an appropriate standard of life, and by promoting economic interests of the weaker sections.

10. In view of the afore-stated constitutional mandate, equity and good conscience, in the matter of livelihood of the people of this country, has to be the basis of all governmental actions. An action of the State, ordering a recovery from an employee, would be in order, so long as it is not rendered iniquitous to the extent, that the action of recovery would be more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer, to recover the amount. Or in other words, till such time as the recovery would have a harsh and arbitrary effect on the employee, it would be permissible in law. Orders passed in given situations repeatedly, even in exercise of the power vested in this Court under Article 142 of the Constitution of India, will disclose the parameters of the realm of an action of recovery (of an excess amount paid to an employee) which would breach the obligations of the State, to citizens of this country, and render the action arbitrary, and therefore, violative of the mandate contained in Article 14 of the Constitution of India."

Finally, in paragraph-18 the apex Court laid down the principles where the amount paid in excess can be recovered, which runs as follows:

"18. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following

few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

In view of the law laid down by the apex Court, as mentioned supra, the petitioner's case is squarely covered under clause-(i), (iv) and (v) Para 18.

11. Similar question had come up for consideration before this Court in ***Akshaya Kumar Patra v. Managing Diector, Andhra Pradesh Power Generation Corporation Ltd.*** 2016 (I) OLR 627 and this Court was of the considered view that for direction given re-fixation of pay and refund of salary after lapse of ten years period cannot sustain in the eye of law taking into consideration the law laid down by the apex Court in ***Rafiq Masih*** mentioned supra.

20. Applying the aforesaid principle to the present context, as the case of the petitioner falls within the parameters of clause (i), (iv) and (v) of paragraph-18 of ***Rafiq Masih*** (supra), the order impugned dated 03.12.2012 in Annexue-5 cannot be sustained and, accordingly, the same is hereby quashed. Consequentially, the amount, which has already been paid to the petitioner in upgraded post of Senior Assistant, cannot be recovered, as it is stated that the same has not yet been recovered.

21. The writ petition is accordingly allowed. No order to cost.

Writ petition allowed.

2017 (I) ILR - CUT-111

DR. B. R. SARANGI, J.

O.J.C. NO. 2821 OF 1997

NAKULA NAIK .....Petitioner

.Vrs.

EXECUTIVE OFFICER, B.M.C., BHUBANESWAR & ANR. .....Opp. Parties

SERVICE LAW – Petitioner has been discharging his duty as market Fee Collector for quite a long period and completed more than 26 years of service – No specific denial in the counter affidavit that the petitioner is not discharging the duty – Specific stand taken by the opposite parties is non-availability of vacancy for the post – Such contention can not be accepted as in the meantime 26 years have elapsed and many persons must have retired and consequential vacancies must have occurred to consider the claim of the petitioner – Held, there is need of post and the opposite parties availed the benefit of work performed by the petitioner as Market fee Collector so his services against the said post be regularized and he is entitled to get the scale of pay as admissible to the post – Direction issued to the opposite parties to extend such benefits to the petitioner.

Case Laws Referred to :-

1. 1982 SC 879 : (1982) 1 SCC 618 : Randhir Singh v. Union of India.
2. (1996) 11 SCC 348 : UT, Chandigarh v. Krishan Bhandari
3. (2006) 9 SCC 82 : U.P. State Sugar Corpn. Ltd. V. Sant Raj Singh.

For Petitioners : M/s. S.Mishra, G.Tripathy & S.K.Swain.
For Opp. Parties : M/s. P.K.Jena & N.Panda.

Date of Judgment : 08.12.2016

JUDGMENT

DR. B.R. SARANGI, J.

The petitioner, who was substantively appointed as Sweeper under Bhubaneswar Municipal Corporation, filed this writ application seeking for a direction to the opposite parties to regularize his services as a Market Fee Collector/Rent Collector with effect from 01.05.1989 and grant consequential benefits as due and admissible to him in accordance with law.

2. The factual matrix of the case in hand is that the petitioner was appointed as Sweeper by the Executive Officer, Bhubaneswar Municipal Corporation vide office order dated 23.12.1980 in the scale of pay of Rs.200-

250/- pursuant to which he joined on 27.12.1980. Though he joined in the post of Sweeper, he worked as a Zamadar under Health Officer, Bhubaneswar Municipality since his joining. Subsequently, he was directed to work as Gate Attendant/Watchman at Saheed Nagar Daily Market to assist the police at Gate No.1 from 2 P.M. to 10 P.M vide letter dated 08.05.1987. He was again directed by opposite party no.1 vide memo dated 01.05.1989 to work as a Market Fee Collector/Rent Collector at Unit-IV daily market. Consequentially, the petitioner is discharging his duty as Market Fee Collector/Rent Collector with effect from 01.05.1989. Though he was allowed to discharge the duty with higher responsibility as a Market Fee Collector/Rent Collector, he was allowed to draw the salary as a Sweeper. By the time the petitioner filed this writ application in the year 1997, he had already gained experience for more than 8 years and as such when query was made in this regard by this Court, it is stated that till date he has been discharging his duty against the post of Market Fee Collector/Rent Collector. By this process, the petitioner has already gained experience for more than 26 years. The petitioner, being a Scheduled Caste employee, made grievance before the Orissa Scheduled Castes and Scheduled Tribe Employees Co-ordination Council, which forwarded his representation to the Commissioner-cum-Secretary to Government, Urban Development Department for a direction to the opposite parties to absorb him as a Market Fee Collector/Rent Collector vide letter dated 27.04.1992, but no action was taken by opposite party no.1. Consequence thereof, the petitioner again submitted his representation on 10.04.1996. In response to same, Government directed to opposite party no.1 vide letter dated 14.05.1996 to take immediate action and consider the case of the petitioner for regularisation of his services as a Market Fee Collector/Rent Collector. Even then, no action was taken by opposite party no.1. Hence this application.

3. Mr. S. Mishra, learned counsel for the petitioner urged that as the petitioner is discharging his duty as a Market Fee Collector/Rent Collector, he should be absorbed against the said post on regular basis and granted all consequential benefits as due and admissible to him in accordance with law.

4. Mr. P.K. Jena, learned counsel for opposite parties no.1 and 2 submitted that the petitioner, having been appointed against the substantive post of Sweeper, has been receiving the scale of pay as admissible to the said post. As such, he is not entitled to be absorbed as a Market Fee Collector/Rent Collector, since no vacancy is available. Consequentially, the claim made by the petitioner for his absorption against the post of Market Fee

Collector/Rent Collector cannot be sustained. Hence, the writ application should be dismissed.

5. This Court heard learned counsel for the parties and perused the records. Since the pleadings have been exchanged, the writ application is being disposed of at the stage of admission.

6. The undisputed fact is that the petitioner has been appointed as Sweeper against the substantive vacancy and is discharging his duty under opposite parties no.1 and 2 as Market Fee Collector/Rent Collector with effect from 01.05.1989 and continuing as such till date. On a review of Saheed Nagar market held on 22.12.1993, it was specifically mentioned in its proceeding as follows:

> *"Sri Nakul Naik, who is a Sweeper (Regular) by designation, works in fact as a Market Fee Collector as per one office order No. 5688/dt.1.5.89 as the Market is too big for one Market Fee Collector to make collection."*

From the above, it appears that though the petitioner was appointed as a Sweeper (Regular) by designation, he has been assigned to work as Market Fee Collector/Rent Collector as per office order no.5688 dated 01.05.1989 and he has been discharging his duty till date.

7. A counter affidavit has been filed by opposite parties no.1 and 2, paragraph-6 whereof states as follows:

> "*That, in reply to the para-6 of the writ application, it is submitted that the petitioner is discharging the duties of market fee Collector from 01.05.1989 but he was drawing salary as a Class-IV employees against the post of Sweeper. The Selection Committee could not consider the case of the petitioner for the post of Market Fees Collector in 1989 as there was no vacancy."*
>
> Similarly, paragraph-8 of the counter affidavit states as follows:
>
> *"That, in reply to averments made in paragraph(1) of the writ application, it is stated here that as there was no vacancy of market fee collector/rent collector at the time of allowing the petitioner to collect market fees as such any payment of higher pay to the applicant does not arise."*

8. From the pleadings available on record, it is evident that admittedly the petitioner has been discharging his duty as Market Fee Collector/Rent Collector for quite a long period, i.e., from 1989 and, by this process, he has

completed for more than 26 years of service. There is no specific denial made in the counter affidavit that the petitioner is not discharging the duty of Market Fee Collector. But only stand has been taken that due to non-availability of vacancy for the post of Market Fee Collector/Rent Collector, the benefit admissible to the petitioner has not been extended. The said contention cannot be accepted as in the meantime 26 years have elapsed and many persons must have retired from service and consequential vacancies must have occurred to consider the claim of the petitioner for absorption against the post of Market Fee Collector/Rent Collector. But, as a matter of fact, due to inaction of the authority, the petitioner has not been adjusted till date nor has been extended the benefit, as claimed by him. The petitioner has been discharging his duty against the post of Market Fee Collector/Rent Collector for a quite long time, for which it can be safely said that there is need of post and the opposite parties availed the benefit of work performed by the petitioner and, therefore, he cannot be denied salary as due and admissible to the said post on some pretext or other.

9. In ***Randhir Singh v. Union of India***, 1982 SC 879 : (1982) 1 SCC 618, the apex Court held as follows:

> *"The principle of 'equal pay for equal work' is expressly recognized by all socialist systems of law, e.g., s. 59 of the Hungarian Labour Code, Para 2 of s. 111 of the Czechoslovak Code, s.67 of the Bulgarian Code, s.40 of the Code of the German Democratic Republic, para 2 of s.33 of Rumanian Code. Indeed this principle has been incorporated in several western Labour Codes too. Under provisions in s.31 (g. No.2d) of Book 1 of the French Code du Travail, and according to Argentinian law, this principle must be applied to female workers in all collective bargaining agreements. In accordance with s.3 of the Grundgesetz of the German Federal Republic, and Clause 7, s.1243 of the Mexican Constitution, the principle is given universal significance" (vide International Labour Law by Istvan Szaszy p.265). The Preamble to the Constitution of the International Labour Organisation recognizes the principle of equal remuneration for work of equal value as constituting one of the means of achieving the improvement of conditions "involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled". The principle equal pay for equal work is deducible from Articles 14 and 16 and may be properly applied to cases of unequal*

scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer."

10. In ***UT, Chandigarh v. Krishan Bhandari***, (1996) 11 SCC 348, 351 the apex Court held as follows:

"The principle of "equal pay for equal work" is a facet of the principle of equality in the matter of employment guaranteed under Articles 14 and 16 of the Constitution of India. The right to equality can only be claimed when there is discrimination by the State between two persons who are similarly situate."

11. In ***U.P. State Sugar Corpn. Ltd. V. Sant Raj Singh***, (2006) 9 SCC 82 the apex Court held as follows:

"The doctrine of 'equal pay for equal work' as adumbrated under Article 39(d) of the Constitution of India read with Article 14 thereof cannot be applied in a vacuum. The constitutional scheme postulates 'equal pay for equal work' for those who are equally placed in all respect."

12. In ***State of Pubjab & Ors. v. Jagjit Singh & Ors.*** (Civil Appeal No.213 of 2013 disposed of on 26.10.2016) considering the principle of equal pay for equal work at length the apex Court in para-55 and 56 held as follows:

"55. In our considered view, it is fallacious to determine artificial parameters to deny fruits of labour. An employee engaged for the same work, cannot be paid less than another, who performs the same duties and responsibilities. Certainly not, in a welfare state. Such an action besides being demeaning, strikes at the very foundation of human dignity. Any one, who is compelled to work at a lesser wage, does not do so voluntarily. He does so, to provide food and shelter to his family, at the cost of his self respect and dignity, at the cost of his self worth, and at the cost of his integrity. For he knows, that his dependents would suffer immensely, if he does not accept the lesser wage. Any act, of paying less wages, as compared to others similarly situate, constitutes an act of exploitative enslavement, emerging out of a domineering position. Undoubtedly, the action is oppressive, suppressive and coercive, as it compels involuntary subjugation.

56. We would also like to extract herein Article 7, of the International Covenant on Economic, Social and Cultural Rights, 1966. The same is reproduced below:-

"**Article-7**

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays."

India is a signatory to the above covenant, having ratified the same on 10.04.1979. There is no escape from the above obligation, in view of different provisions of the Constitution referred to above, and in view of the law declared by this Court under Article 141 of the Constitution of India, the principle of 'equal pay for equal work' constitutes a clear and unambiguous right and is vested in every employee-whether engaged on regular or temporary basis."

13. Applying the aforesaid analogy to the present context, when the admitted position is that the petitioner is discharging his duty and responsibility as Market Fee Collector/Rent Collector for more than 26 years, his services against the said post should be regularized and consequentially also he is entitled to get the scale of pay, as admissible to the post. Therefore, this Court directs the opposite parties to extend such benefits, as admissible to the petitioner, as expeditiously as possible, preferably within a period of four months from the date of communication of this order. The writ petition is allowed accordingly. No order to cost.

Writ petition allowed.

2017 (I) ILR - CUT- 117

D. DASH, J.

O.J.C. NO. 12880 OF 2001

P.S.VENKATESWARALU .....…Petitioner

.Vrs.

A. BHANU & ORS. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – ART. 227
R/w Section 115 C.P.C. 1908

Whether, judicial order of the Civil Court once challenged in revision before the learned District Judge U/s 115 C.P.C can again be challenged under Article 227 of the constitution of India before this Court under its supervisory jurisdiction ? Held, No

(para10)

For Petitioner : M/s. S.S. Rao & N. Patnaik
For Opp. Parties : M/s. C.A. Rao & A.Tripathy

Date of hearing : 08.11.2016
Date of Judgment :02.01.2017

JUDGMENT

D. DASH, J.

This application under Article -227 of the Constitution has been filed seeking quashment of order dated 04.02.2000 passed by learned Civil Judge (Sr. Division), Berhampur in Title Suit No. 161 of 1993 and the order of learned District Judge, Berhampur in Civil Revision No. 23 of 2000 under Annexure -5. By the above order, the trial court has allowed the opposite party no. 1 to 7, the defendants in the said suit for being transposed as plaintiffs in place of deceased original plaintiff no. 2 being the legal representatives. The present petitioner who had earlier been transposed as plaintiff had carried Civil Revision No. 23 of 2000 in knocking the revisional jurisdiction of the learned District Judge under section 115 of the Code of Civil Procedure complaining the jurisdictional error committed by the trial court in the matter as above and seeking its rectificatiion. The revisional court having refused to interfere with the said order finding no such jurisdictional error to have committed by the trial court in passing the same, the matter has now been placed before this Court in a proceeding under Article 227 of the Constitution seeking quashment of those orders.

2. I have heard learned counsel for the petitioners and learned counsel for the opposite parties at length on the question of maintainability as per the earlier order.

3. The question is to the maintainability of the present application under Article -227 of the Constitution in seeking quashment of an order passed by the trial court in seisin of a suit before it with which the revisional court in exercise of its jurisdiction under section 115 of the Code of Civil Procedure has refused to interfere finding the same to have not been so passed either in exercise of jurisdiction not vested in it by law or that in passing it, there has been exercise of jurisdiction illegally or with material irregularity.

It is necessary to state here that the revisional order with which we are concerned had been passed when the provision of section 115 of the Code was not visited with the amendment by Act no. 46 of 1999 coming into force with effect from 01.07.2002 introducing the proviso bringing in the concept that the order sought to be revised has to be one that the same if would have been so passed in favour of the revisionist-petitioner, the same would have entailed the effect of a 'case decided'.

In the instant case, after the revisional court has found the order of the trial court sought to be revised therein to be in order and as not amenable to revision, that every order is now again placed for being tested by this Court in exercise of its supervisory jurisdiction as enjoined under Article 227 of the Constitution.

4. By Orissa Amendment Act no. 26 of 1991, the forum of revision had been changed that in cases arising out of original suits or other proceedings of the value in which the appeals against the final order, judgment and decree lie to the High Court, the jurisdiction of High Court would remain to exercise the power of revision. But, in cases arising out of the original suit or other proceedings of the value upto which the appeals against the final order, judgment and decree lie to the District court, the revisional power is exercisable by the District court. This change of forum has been made by the Orissa Amendment in the matter of above division of the revisional jurisdiction under section 115 of the Code upon the court, keeping in view the court's competency to hear the appeals against final orders, judgments and decrees arising out of the suits or proceedings in disposing the suits or proceedings.

5. The Code nowhere permits further revision and its thus not permissible for even the superior court to exercise that power of revision again once it has been so exercised and as such its not so available. Therefore, once the District court has exercised its revisional jurisdiction, the High Court is not competent to assume the jurisdiction to sit upon to revise that very order. That necessarily leads to a view that any such move tantamounting to second revision and in its garb has to be declined.

5. The revisional jurisdiction is exercisable only in cases where the subordinate court passing the order sought to be revised (1) has exercised jurisdiction not vested in it by law; (2) has failed to exercise jurisdiction so vested; and (3) has acted in exercise of its jurisdiction illegally or with material irregularity.

6. Undeniably, the scope of a revision application is narrower than the scope of an appeal. However, when the revisional jurisdiction of the superior court is invoked, it is so done as the superior court is in position to interfere with the said order for the purpose of rectifying the jurisdictional errors if any committed by the court below. Although section 115 of the Code circumscribes the limitation of the jurisdiction but still the jurisdiction which is being exercised is a part of general appellate jurisdiction as a superior court. It is only one of the modes of exercising power conferred by the statute. Basically and fundamentally it is the appellate jurisdiction of the Code which is being invoked and exercised although its not as a matter of right conferred upon the party nonetheless, a remedy. If the order is not challenged by carrying revision undoubtedly as provided in section 105 of the Code, its correctness and sustainability still remain open for examination in the appeal filed against the final order, judgment and decree to the extent as stated therein when the same is taken as a ground to attack the final order, judgment and decree in the appeal. Once such a remedy of revision has been availed of within the scope, it assumes finality and their correctness and sustainability are no more open to challenge again in the appeal banking upon the provision of section 105 of the Code which has not been engrafted in the Code to be taken further aid of in that eventuality.

7. In the case of *Radhey Shyam & another vrs. Chhabi Nath and others*, (Civil Appeal No. 2548 of 2009 decided on 26.02.2015), the Apex Court while answering the question referred to as to whether the judicial order of the civil court is amenable to writ jurisdiction under Article 226 of the Constitution, while overruling the contrary view taken in the case of ***Surya Dev Rai vrs. Ram Chander Rai and others***, 2004(1) SCC 675 has clearly said that the order of the civil court could be challenged under Article 227 and not Article 226 of the Constitution. In course of discussion in the said case, it has been held that the power under Article 227 has to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate courts and the Tribunals within the bounds of their authority and not for correcting the mere errors. (Reliance has been placed in case of ***Rupa Ashok Hurra v. Ashok Hurra;*** 2002(4) SCC 388.)

It has been accepted that the exercise of supervisory jurisdiction under Article 227 is not an original jurisdiction and in this sense it is akin to appellate, revisional or corrective jurisdiction. In appropriate cases, the High Court, while exercising supervisory jurisdiction, may not only quash or set aside the proceedings, judgment or order of the inferior court or tribunal but it may also substitute a decision on its own in place of the impugned decision, as the inferior court or tribunal should have made, and that jurisdiction is exercisable even suo motu.

8. Now,therefore, it needs to be placed here that under what circumstance there can be interference with the impugned order of a civil court in exercising of the supervisory jurisdiction by this court under Article 227 of the Constitution.

Before that let me place the following paras which are important for the purpose as noted in the case of ***Shalini Shyam Shetty vrs. Rajendra Shankar Patil***, (2010) 8 SCC 329:-

> "64. However, this Court unfortunately discerns that of late there is a growing trend amongst several High Courts to entertain writ petition in cases of pure property disputes. Disputes relating to partition suits, matters relating to execution of a decree, in cases of dispute between landlord and tenant and also in a case of money decree and in various other cases where disputed questions of property are involved, writ courts are entertaining such disputes. In some cases the High Courts, in a routine manner, entertain petitions under Article 227 over such disputes and such petitions are treated as writ petitions.
>
> 65. We would like to make it clear that in view of the law referred to above in cases of property rights and in disputes between private individuals writ court should not interfere unless there is any infraction of statute or it can be shown that a private individual is acting in collusion with a statutory authority.
>
> 66. We may also observe that in some High Courts there is a tendency of entertaining petitions under Article 227 of the Constitution by terming them as writ petitions. This is sought to be justified on an erroneous appreciation of the ratio in Surya Dev and in view of the recent amendment to Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999. It is urged that as a result of the amendment, scope of Section 115 CPC has been curtailed. In our view, even if the scope of Section 115 CPC is curtailed that has not resulted in expending the High Court's power

> of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow the regime of law.
>
> 67. As a result of frequent interference by the Hon'ble High Court either under Article 226 or 227 of the Constitution with pending civil and at times criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problem in the administration of justice. This Court hopes and trusts that in exercising its power either under Article 226 or 227, the Hon'ble High Court will follow the time honoured principles discussed above. Those principles have been formulated by this Court for ends of justice and the High Courts as the highest courts of justice within their jurisdiction will adhere to them strictly."

9. The settled law is that the supervisory jurisdiction is basically to keep the tribunals and courts within the bounds of their authority and their orders would stand for examination in exceptional cases when manifest miscarriage of justice has been caused or that there has been flagrant violation of justice or the order is completely in breach of the provision of law. Such power is not even exercisable to correct a mistake of fact and law.

10. All these above aspects touch ordwell upon the jurisdictional error, if any to have been committed by the court below in passing the said judicial order which stands for examination in any proceeding in exercise of the supervisory jurisdiction under Article 227.

The power may be exercised in cases occasioning grave injustice or failure of justice such as (i) when the court or tribunal has assumed a jurisdiction which it does not have, (ii)such failure occasioning a failure of justice, and (iii) the jurisdiction though available is being exercised in a manner which tentamounts to overstepping the limits of jurisdiction.

Therefore in my considered view, the scope of a proceeding under Article 227 has been the same as in case of a revision under section 115 of the Code in so far as the examination of said judicial orders having any jurisdictional errors are concerned which of course now been curtailed after the amendment to the extent as aforesaid as regards the entertainment.

Thus, in a case where the judicial order of the civil court once having been tested in a revision when has been found to be in order holding the court below to have committed no such jurisdictional error, the entertainment of the petition under Article 227 of the Constitution again to examine all those very aspects would tentamount to sit over the said order in revision again. Therefore, the application under Article 227 of the Constitution in my

considered view is not entertainable in the eye of law and thus the supervisory jurisdiction of this Curt is not exercisable in the instant case.

11. In the wake of aforesaid, the application under Article 227 of the Constitution thus stands dismissed. No order as to cost.

Writ petition dismissed.

2017 (I) ILR - CUT-122

S. PUJAHARI, J.

CRLLP NO. 55 OF 1995

STATE OF ORISSA (G.A DEPARTMENT) ……..Appellant

.Vrs.

DR. DEBANANDA TUDU ……Respondent

CRIMINAL PROCEDURE CODE, 1973 –S. 378 (3)

Leave to appeal against order of acquittal – Trap case – Though the tainted money was recovered, the complainant and the accompanying witness did not support the prosecution case and turned hostile, resulting acquittal of the accused – Hence the appeal – Law is well settled that mere recovery of the tainted money is not sufficient to record a conviction since demand of illegal gratification is sine qua non for constituting an offence under the P.C. Act, 1988.

In this case even though money was recovered but demand and acceptance of bribe having not been proved, the impugned judgment of acquittal can not be said to be contrary to law – Appeal being devoid of merit is dismissed.

Case Laws Referred to :-

1. AIR 2004 SC 960 : State of Andhra Pradesh v. Vasudeva Rao.
2. AIR 2003 SC 2169 : Subash Parbat Sonvane v. State of Gujarat.
3. AIR 1980 SC 873 : Hazari Lal v. The State (Delhi Admn.).
4. AIR 2003 SC 2169 : Subash Parbat Sonvane v. State of Gujarat .
5. AIR 2012 SC 2263 : Narendra Champaklal Trivedi v. State of Gujarat.
6. AIR 2012 SC 2270 : Mukut Bihari & Anr. v. State of Rajasthan.
7. CBI AIR 2014 SC 3798 : Satvir Singh v. State of Delhi thru.
8. AIR 2012 SC 2263 : Narendra Champakalal Trivedy v. State of Gujarat.

For Appellant : M/s. Sangram Das (Standing Counsel)
For Respondents : M/s. Bibhu Prasad Das

Date of Order : 4.11.2016

ORDER

S. PUJAHARI, J.

Heard Mr.Sangram Das, learned Standing Counsel for the State-Vigilance Department and Mr. B.P. Das, learned counsel for the opposite party.

The State-Vigilance has preferred this appeal seeking leave to appeal against the judgment of acquittal dated 22.01.2015 passed by the learned Special Judge (Vigilance), Berhampur in G.R.Case No. 04 of 2010(V) (T.R.No. 65 of 2011).

It appears that the opposite party faced his trial in connection with the aforesaid case before the court of learned Special Judge (Vigilance), Berhampur as he allegedly demanded illegal gratification as a public servant to discharge his official duty i.e. for surgery of breast cancer of wife of the complainant-decoy. A trap was laid by the Vigilance Police on the complaint of the complainant-decoy and the opposite party was caught for accepting the bribe. But, in the conclusion of trial, since the complainant-decoy and the accompanying witnesses did not support the case of the prosecution and turned hostile even though the tainted money was recovered in the trap laid by the Vigilance Police, the trial court acquitted the opposite party vide the impugned judgment and order.

Challenging the aforesaid, this petition seeking leave to appeal has been preferred by the petitioner-State (Vigilance) with the submission that since the tainted money was recovered in the trap laid by the Vigilance Police and in such a case presumption, though rebuttable, is there under Section 20 of the Prevention of Corruption Act, 1988 (hereinafter referred to as "the Act'') with regard to illegal gratification and the opposite party could not rebut such presumption, the trial court should not have acquitted the opposite party, more particularly, in view of the law laid down by the Apex Court in the case of **State of Andhra Pradesh v. Vasudeva Rao**, AIR 2004 SC 960. Therefore, he submits that the propriety of the impugned judgment of acquittal requires a detailed scrutiny by this Court, hence, the leave sought for challenging the same in a criminal appeal be allowed.

Per contra, learned counsel for the opposite party placing reliance in the case of **Subash Parbat Sonvane v. State of Gujarat**, *AIR 2003 SC 2169*

& **Narendra Champakalal Trivedy v. State of Gujarat**, *AIR 2012 SC 2263* submits that since in this case neither any demand or acceptance of bribe has been proved, mere recovery of tainted money being not sufficient enough to presume that the opposite party had accepted the same as a illegal gratification, the impugned judgment of acquittal needs no interference.

Needless to say that in the year 1980, Hon'ble Apex Court in the case of **Hazari Lal v. The State (Delhi Admn.)**, AIR 1980 SC 873 have held that recovery of money from the accused is not sufficient to prove acceptance of bribe. Placing reliance on the same, a three Judge Bench of the Apex Court in the case of **Subash Parbat Sonvane v. State of Gujarat,** *reported in AIR 2003 SC 2169* have held that mere acceptance of money without there being any other evidence would not be sufficient for convicting the accused under Section 13(1)(d)(i) of the Prevention of Corruption Act, 1988. Subsequently, also placing reliance on such decisions, the Apex Court in the case of **Narendra Champaklal Trivedi v. State of Gujarat**, *AIR 2012 SC 2263,* in paragraph-12 have held that it is the settled principle of law that mere recovery of the tainted money is not sufficient to record a conviction unless there is evidence that bribe had been demanded or money was paid voluntarily as a bribe and in the absence of any evidence of demand and acceptance of the amount as illegal gratification, recovery would not alone be a ground to convict the accused.

Again in the case of **Mukut Bihari & Anr. v. State of Rajasthan**, reported in AIR 2012 SC 2270, it has been held that "demand of illegal gratification is sine qua non for constituting an offence under the Act 1988. Mere recovery of tainted money is not sufficient to convict the accused, when the substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as bribe. Mere receipt of amount by the accused is not sufficient to fasten the guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification, but the burden rests on the accused to displace the statutory presumption raised under Section 20 of the Act 1988, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the Act, 1988."

The aforesaid is also the view of the Apex Court in the case of **Satvir Singh v. State of Delhi thru. CBI,** AIR 2014 SC 3798 wherein it has been held that failure on part of prosecution to prove demand and acceptance of illegal gratification by appellant from complainant, appellate jurisdiction

exercised by High Court to reverse the judgment and order of acquittal is not only erroneous but also suffers from error of law.

No doubt in the case of **Vasudeva Rao** *(supra)* , the Apex Court have held as follows:

> "Illustration (a) to Section 114 of the Evidence Act says that the Court may presume that "a man who is in the possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. That illustration can profitably be used in the present context as well when prosecution brought reliable materials that there was recovery of money from the accused. In fact the receipt and recovery is accepted. The other factor is the acceptability of the plea of loan, which the High Court itself has not held cogent or credible."

However, in the case of **Vasudeva Rao** *(supra),* the law laid down in the case of **Subash Parbat Sonvane** *(supra)* having not been taken note of, this Court is of the view that the case of **Vasudeva Rao** *(supra)* is of no assistance to the petitioner. Since in this case even though money was recovered, but demand and acceptance of bribe having not been proved, the impugned judgment of acquittal, therefore, cannot be said to be contrary to law. Hence, this Court is of the view that the petitioner has made out no case for a detailed scrutiny of the impugned judgment of acquittal in the appeal. Accordingly, this CRLLP being devoid of merit stands dismissed.

CRLLP dismissed.

2017 (I) ILR - CUT-125

BISWANATH RATH, J.

O.J.C. NO. 7155 OF 1992

GOLAP SINGH & ANR. .....Petitioners

.Vrs.

REVENUE OFFICER-CUM-TAHASILDAR, KALAHANDI & ORS. .....Opp. Parties

ODISHA LAND REFORMS ACT, 1960 – S. 37 (b)

"Family" – Meaning of – Major and married son separated by partition prior to the appointed date i.e. 26.07.1970 – Not included in "family".

In this case there is no dispute that petitioner No 2 got married thirty years prior to initiation of the ceiling proceeding, which is prior to the appointed date i.e. 26.07.1970 – Moreover evidence of the witnesses and spot visit report submitted by the Revenue Inspector shows that petitioner No1-father and the petitioner No 2- son are not only staying in separate mess but also possessing the disputed lands separately prior to the appointed date – Learned member, Board of Revenue failed to appreciate the meaning of "separate possession" – Held, the impugned order passed by the member, Board of Revenue is setaside and the order passed by the Revenue officer in ceiling case No 19 of 1987 is restored. (paras 6,7)

Case Laws Referred to :-

1. 56 (1983) CLT : Sankarsan Misra & Ors. State of Orissa & Ors.
2. 71 (1991)CLT 843 : Ramnarayan Ram & Ors. -V- Revenue Officer-cum-Tahasildar, Darpan & Ors.

For Petitioners : M/s. N.C. Panigrahi, S.C.Das & N.K.Bhera.
For Opp. Parties : Addl. Standing Counsel

Date of hearing : 22.08.2016
Date of judgment : 22.08.2016

JUDGMENT

BISWANATH RATH, J.

This writ petition has been filed assailing the impugned order dated 17.8.1992 passed by the Member, Board of Revenue, Cuttack in O.L.R. Revision Case No.10/1989, vide Annexure-8 in a proceeding following Section 59(2) of the O.L.R. Act,1960.

2. The short background of this case is that the petitioners are the father and son and residents of Kalahandi District. A suo motu ceiling proceeding bearing Ceiling Case No.19/1987 was initiated under Section 42 of the O.L.R. Act, 1960 against them. During continuance of the said proceeding, the Revenue Officer, Kalahandi, O.P.1 published a draft statement showing some surplus land occupied by the petitioners. The petitioners filed their objection making a clear statement that petitioner no.2 has married and is a major son being stayed separately and he is in occupation of separate shares of the joint family property, consequently, both the petitioners are entitled to certain shares pending adjudication of the Ceiling Case No.19/1987. Local investigation was made and after recording the statements of at least five witnesses as appearing at Annexure-2 series, a report was submitted by the

Revenue Officer on 15.1.1988 (Annexure-3) supporting the claim of the petitioners and establishing a case of complete separation between petitioner nos.1 & 2 so also observing that both of them are occupying the disputed land in different shares. Based on the submissions of the parties and considering the report of the Revenue Inspector, Ceiling Case No.19/1987 was disposed of by the Revenue Officer & Tahasildar, Kalahandi allowing it in favour of the petitioners. Considering the judgment passed in O.L.R. Case No.19/1987, the District Magistrate, Kalahandi made a reference of the dispute under Section 59(2) of the O.L.R. Act, which was registered as O.L.R. Revision Case No.10/1989 and the Member, Board of Revenue by order dated 5.2.1990 appearing at Annexure-5 allowed the reference. This proceeding was decided on contest delivering a judgment against the petitioners.

3. Being aggrieved, the petitioners approached this Court in O.J.C. No.1763/1991. This writ petition was decided by a Division Bench of this Court after observing that the Board of Revenue before initiating the proceeding required to be satisfied with the case to the effect that the case requires its interference and expresses that interference in the original orders will be where there is flagrant misconception of law apparent from the order or palpably erroneous assessment of evidence or misreading and misconstruction of the statutory provisions etc. In allowing the writ petition this Court however ultimately directed as follows :-

> "Accordingly, the writ application is allowed, the order dated 5.2.90 of the Member, Board of Revenue in O.L.R. Revision Case No.10 of 1989 (Annexure-6) is quashed and the case is remitted to the said authority for fresh consideration and disposal in accordance with law. There will be no order for costs of this proceeding."

Consequent upon remittance of this proceeding, the Member, Board of Revenue, upon fresh hearing of the matter concluded the proceeding in O.L.R. Revision Case No.10/1989 by order dated 17.8.1992, vide Annexure-8, thereby allowing the case holding that the petitioners are in occupation of ceiling surplus land.

4. Assailing the impugned order dated 17.8.1992, Mr.N.C.Panigrahi, learned senior counsel for the petitioner, contended first of all that the Member, Board of Revenue has not considered the matter keeping in mind the direction given by this Court in disposal of the earlier writ petition. Secondly, looking at the clear and cogent evidence recorded during enquiry at the original stage and for the observation made in the report of the competent authority at the initial stage, the findings of the Member, Board of

Revenue, remain in opposite. Further, the Member, Board of Revenue has construed the meaning of holding property separately by the parties and misconstrued it to be by way of an effective partition. In the above premises, while opposing the findings of the Member, Board of Revenue, Mr.Panigrahi, learned senior counsel, taking reliance on paragraph-7 of a decision of this Court in ***Sankarsan Misra & others vrs. State of Orissa & Others,*** reported in 56(1983) CLT 463, justifying his submission contended that the findings of the Member, Board of Revenue on the question of partition/separation being contrary to law is liable to be interfered with and set aside. Mr.Panigrahi, learned Senior Counsel, taking reliance of paragraph-13 of another decision of this Court in ***Ramnarayan Ram & Others vrs. Revenue Officer-cum- Tahasildar, Darpan & Others,*** **reported in 71(1991) CLT 843,** justified his contention with regard to the scope of holding the properties separately and contended that his contention is well founded by the above two decisions.

5. Mr.Pani, learned Additional Standing Counsel for the opposite parties, supporting the judgment passed by the Member, Board of Revenue under Annexure-8 contended that in view of the clear statement of at least two of the witnesses available under Annexure-2 series disclosing that petitioner no.2 is staying separately for last 10-12 years, contended that the petitioners remained unable to satisfy their separate possession in respect of petitioner no.2, and therefore, there is no illegality committed by the Member, Board of Revenue.

6. Considering the submissions of the learned counsel for the respective parties, this Court finds from Annexure-2 series that there is no dispute with regard to marriage of petitioner no.2 taking place thirty years prior to initiation of the proceeding, which is again prior to the appointed date, i.e., 26.7.1970 under the O.L.R. Act. There is also no dispute with regard to the separate staying of petitioners no.1 & 2 and further they are possessing lands separately with separate mess. Be that as it may, looking at the provision contained in Section 37(b) of the O.L.R. Act, it is now to be seen as to whether the petitioners have satisfied the separate possession of holding the disputed property prior to the appointed date under the O.L.R. Act having a separate mess. Looking at the statement recorded during preliminary stage of the proceeding in O.L.R. Case No.19/1987, this Court finds no inconsistency among all the witnesses with regard to separate staying of petitioner no.2 after his marriage and separate holding of the land. Even going through the statements available at Annexure-2 series, this Court also finds from the

statements of all the five witnesses that there is no inconsistency with regard to each of the witnesses stating that there is a difference between the parties, particularly, petitioner no.2 resulting separate maintenance and staying of petitioner nos.1 & 2. Except two of the witnesses having a very minor deviation to the effect that to their knowledge the separation between the parties appearing to be 10-12 years behind the initiation of the proceeding.

These witnesses being outsiders the discrepancy in their statements may be minor discrepancy and cannot weigh much. Further since the matter is decided on the basis of the statement of the local persons, three witnesses have categorically stated that there is a complete separation between the parties prior to the appointed date. Besides the State Authority had also no material or information from their source to disprove the contention with regard to petitioner no.2 possessing the land separately and in his exclusive possession prior to the appointed date. Looking at the memorandum of enquiry submitted by the Revenue Inspector under Annexure-3, this Court also finds that in appreciation of the entire materials available on record and the information gathered from his spot visit, the Revenue Inspector has given the final observation in favour of the petitioners specifically recording not only their separate staying but also separately possessing the land prior to the appointed date. Annexure-3 being a public document has to benefit the petitioners.

Looking at the observations of this Court made in the earlier writ petition, this Court finds the following categoric observation :-

> "The Member, Board of Revenue before initiating the proceeding should be satisfied that the case requires its interference without intending to be exhaustive, such cases, in our view, will be where there is flagrant misconception of law apparent from the order or palpably erroneous assessment of evidence or misreading and misconstruction of the statutory provisions etc."

From the observations made in the aforesaid two decisions and from reading of the evidence as well as the report in favour of the petitioners by a public officer, this Court finds that the observation of the Member, Board of Revenue with regard to separate status of petitioner nos.1 & 2 is not only contrary to the materials available on record but also erroneous and illegal being contrary to the spirit of observation of this Court in **56(1983) CLT 463,** where this Court held as follows :-

"7. Separation is not synonymous with partition. Partition conceptually may be either partition of status or partition of property. Separation means separation in status. Separation in status may be accompanied or followed by partition of property but partition of property is not essential for separation in status. There can be separation in status by a mere unequivocal declaration to separate. The expression "partition" in section 37(b) denotes partition of property, i.e., division of property by metes and bounds. The revenue authorities, under section 37(b) of the Act are required to determine separation in status.

And in **71(1991) CLT 843,** where this Court has held as follows :-

"13. Section 37(b) of the O.L.R. Act defines 'family' thus :

"37(b) "Family" in relation to an individual, means the individual, the husband or wife, as the case may be of such individual and their children, whether major or, minor, but does not include a major married son who as such had separated by partition or otherwise before the 26th day of September, 1970."

The word separation that occurs in 37(b) of the Act is not synonymous with partition. Separation means separation in status. It may be accompanied or followed by partition of property, but in some cases that is not essential for separation in status. There can be separation in status by a mere unequivocal declaration to separate. This view has been taken in a decision of this Court reported in 56(1983) CLT 463 (Sankarsan Misra & Others v. State of Orissa and others). Separation may be either by partition or otherwise because under the law severance of status can be made not only by partition, but by conduct, arbitration, conversion of religion, declaration of intention collectively or universally by a suit or renounciation."

7. Consequently, this Court observes that the learned Member, Board of Revenue failed in appreciating the meaning of "separate possession". Findings and the observations of the authority remaining contrary to law as well as materials available on record, this Court in interfering in the impugned order, vide Annexure-8 sets aside the same and restores the order passed in O.L.R. Case No.19/1987 appearing at Annexure-4.

8. The writ application accordingly stands allowed. The parties are to bear their own cost.

Writ application allowed.

2017 (I) ILR - CUT- 131

BISWANATH RATH, J.

O.J.C. NO. 4257 OF 1989

PANA GANDA & ANR. .....Petitioners

.Vrs.

THE SUB-DIVISIONAL OFFICER, TITILAGARH & ORS. .....Opp. Parties

ODISHA LAND REFORMS ACT, 1960 – Ss. 22, 23

Transfer of land from a tribe to non-tribe – Transfer made on 13.01.1995 which is before the OLR Act came into force i.e on 01.10.1965 – Whether provisions under the Orissa Merged States (Laws) Act, 1950 and the OLR Act, 1960 apply to the present circumstances ? – The Orissa Merged States (Laws) Act 1950 stood repealed in view of the coming into force of Regulation 2 of 1956 – Held, since the transfer took place on 13.01.1965 the same is not hit either under the provisions of the OLR Act, 1960 nor under the provisions of the Orissa Merged States (Laws) Act 1950 – Held, the impugned orders passed under annexures 1, 2 & 3 are set aside.

(Para 9)

Case Law Relied on :-

1. 1989 (II) OLR 115 : Anadi Mohanta (dead) & after him Kointa Mohanta & Ors. -V- State of Orissa & Ors.

For Petitioners : Mr. Alekha Ch. Mohanty, S.Bhaga.

For Opp. Parties: Addl. Govt. Advocate.

Date of hearing : 22.08.2016

Date of Judgment : 22.08.2016

JUDGMENT

BISWANATH RATH, J.

This writ petition has been filed by the petitioners assailing the impugned orders vide Annexures-1 to 3 passed by the Authorities under the O.L.R Act.

2. In assailing the impugned orders, Sri Mohanty, learned counsel for the petitioner raised the following legal points:

Firstly, since the transaction involved in the dispute relates to purchase of a land by a non-tribe from a tribe on 13.1.1965, the O.L.R. Act having come into force on 1.10.1965, the requirement of prior permission under the O.L.R. Act has no application. The second limb of submission of

Sri Mohanty, learned counsel for the petitioner is that in view of the earlier proceedings involving the same transaction and having reached its finality, the subsequent proceedings were all hit by principle of res-judicata.

3. In opposition, learned State Counsel defending the impugned orders submitted that even though the provisions of Section 22 &23 of the O.L.R. Act have no application to the present case but the provisions of Orissa Merge States (Laws) Act prevailing at the relevant time having a provision for permission before transfer of land from Tribe to Non-Tribe is very much applicable to the case and therefore, the Courts below have not committed any illegality and the impugned orders are therefore, very much sustained.

4. Short background involved in this case is that, one Pandru Ganda purchased the land from the ancestors of the petitioners as well as opposite party Nos.6 & 7. All of them are 'Kandha' by caste but looking to the date of transaction, a claim was made by the petitioner that there was no permission required at the relevant point of time. Hence, the sale transaction entered in between the parties without obtaining any permission from any of the authority becomes bad.

5. It is at this point of time, a proceeding under Section 23 of the O.L.R. Act by the predecessor interest of opposite party Nos.4 & 5 seeking eviction against the father of the petitioner, who was then alive and in possession of the disputed land was initiated. The case was registered as Land Revenue Case No.8/74 of 1973. This case was dismissed. Consequently, the unsuccessful petitioners filed appeal in the Court of the A.D.M., Bolangir, which was registered as O.L.R. Appeal No.11 of 1974. This Appeal was dismissed. No revision was filed as against the same and the order passed by the Original Authority remains final.

6. From the pleadings, it further appears that one Hema Majhimother of the opposite party Nos.4 & 5, the person initiated the above proceeding, also filed a Suit before the Munsif, Titilagarh for declaration of her right, title and interest over the case land with a prayer for recovery of possession, which was registered as T.S. No.11 of 1976 and was also decreed on contest. The defendants therein preferred an Appeal. The appeal was decreed by reversing the judgment and decree passed in T.S. No.11 of 1976 and the judgment and decree attained its finality for not being challenged any further by the aggrieved parties. The mother of the opposite party Nos.4 & 5 after long lapse of time and after the amended provisions under Section 23-A came into force, initiated a fresh proceeding before the Sub-Collector on the selfsame reason and requested for recovery of the land from the petitioner to their

possession. This Case was registered as Revenue Misc. Case No.8/A/1 of 1977. This Case was contested by the petitioner and the Revenue Misc. Case numbered above was ultimately allowed on contest on 9.2.1978.

7. Being aggrieved by the said order, an appeal was preferred and registered as O.L.R. Appeal No.52 of 1978. The appellate Authority the A.D.M., Bolangir confirmed the order passed by the lower Court. A revision was also preferred which was registered as Revision No.14/79/38 of 1983. The revision was also dismissed. The present writ petition has been filed against the above orders. Sole question involved here to be decided that since the purchase of the land had taken effect on 13.1.1965 taking into consideration the submission made by the respective counsel it is to be seen whether the provisions contained in Orissa Merge States' (Laws) Act and the provisions under the OLR Act are applicable to the present circumstances. There is no dispute that the sale of the land had taken place on 13.1.1965. The O.L.R. Act came into effect from 1.10.1965 even though coming to effect on receiving the assent of Hon'ble President on 17th October, 1960 but the provisions contained in Sections 22 & 23 have all come into effect on 1.10.1965 by virtue of Orissa Act 13 of 1965 thereby restricting transfer of land from Scheduled Tribe to Non-Scheduled Tribe without permission from competent authority after 1.10.1965.

8. Considering the submissions made by the State Counsel that even though the O.L.R. Act had no application to the present case but the sale taking effect on 13.1.1965 was hit by the provisions contained in Orissa Merge States' (Laws) Act. This Court observes that the Orissa Merge State' (Laws) Act stood repealed in view of the coming into force of the Regulation 2 of 1956 the provision if any, contained under the Orissa Merge State' (Laws) Act consequently, stood repealed since 1956.

9. In view of the legal position indicated hereinabove and the prohibition of sale without permission of competent authority having came into effect on 1.10.1965 and the transaction having taken place on 13.1.1965, this transaction is not hit by either of the provisions under the Orissa Merge States' (Laws) Act or the provision contained under the O.L.R. Act, 1960. A similar situation also arose for consideration of this Court and this Court in a Division Bench in a Case in between *Anadi Mohanta (deed) and after him Kointa Mohanta and others Versus State of Orissa and others* as reported in 1989 (II) OLR 115 observed that the amended Act have no applications to the transactions taken place prior to the OLR Act came into force. Under the circumstances, this Court finds all the proceedings vide Annexures-1, 2 & 3

are bad in law. Consequently, this Court sets aside the impugned orders vide Annexures-1, 2 & 3 and allows the writ petition. Parties to bear their own cost.

Writ petition allowed.

2017 (I) ILR - CUT-134

S.K. SAHOO, J.

CRLMC NO. 2676 OF 2009

ASHOK KUMAR BEHERA ……..Petitioner

.Vrs.

STATE OF ORISSA ……..Opposite party

CRIMINAL PROCEDURE CODE, 1973 – S. 319.

Power of trial Court U/s 319 Cr.P.C. – When can be exercised – Main consideration for exercise of jurisdiction U/s 319 Cr.P.C. is existence of reasonable prospect of conviction of the newly arrayed accused – Such power should not be exercised mechanically on the ground that some evidence has come on record against the person who is not facing trial – The jurisdiction should be used very sparingly only if there are compelling reasons.

In the present case there were sufficient grounds before the learned trial Court for proceeding against the petitioner in exercise of power U/s 319 Cr.P.C. and to add the petitioner as an accused to come to a logical end in the trial – Hence there is no illegality or infirmity in the impugned order for interference by this Court.

(Parties 6,7)

Case Laws Referred to :-

1. (2014) 57 OCR (SC) 455 : Hardeep Singh -Vrs.- State of Punjab
2. (2009) 42 OCR 645 : Ramakanta Behera @ Sahu & others -Vrs.- State of Orissa
3. (2016) 64 OCR (SC) 57 : Hardei -Vrs.- State of Utter Pradesh

For Petitioner : Mr. P. K. Paikaray A.K.Pradhan ,S.K. Swain, Jitendra Paikaray ,M.R.Behera & H.K.Barik

For Opposite Party : Mr. Deepak Kumar (ASC.)

Date of Hearing : 28.09.2016
Date of Judgment: 21.12.2016

JUDGMENT

S. K. SAHOO, J.

The petitioner Ashok Kumar Behera who is a Stipendiary Engineer has filed this application under section 482 of the Code of Criminal Procedure to quash the impugned order dated 10.12.2007 passed by the learned Chief Judicial Magistrate, Sundargarh in G.R. Case No.201 of 2000 in allowing the application under section 319 of Cr.P.C. filed by the prosecution and thereby adding the petitioner as an accused in the case and directing for issuance of summons against him. The said case arises out of Lephripada P.S. Case No.30 of 2000 in which charge sheet has been submitted under section 409 of the Indian Penal Code against one Durga Charan Choudhury.

2. On 18.04.2000 on the basis of the First Information Report submitted by Gayaprasad Satpathy, Additional Block Development Officer, Lephripada Block before the Officer in charge, Lephripada Police Station, Lephripada P.S. Case No. 30 of 2000 was registered under section 409 of the Indian Penal Code wherein it is alleged that as per the special audit report no. 14/1999-2000 communicated in Government letter no.14840 dated 17.11.1999, a sum of Rs.4,70,397/- was outstanding as advance against accused Durga Charan Choudhury, Ex-Fishery Extension Officer of Lephripada Block. As per instruction of Additional Secretary to Government P.R. Department communicated in letter no.56/P.R. dated 03.01.2000, accused Shri D.C. Choudhury was issued with one month's notice to recoup the outstanding advance vide office letter no.207 dated 19.01.2000 but he failed to recoup the outstanding advance to the tune of Rs.4,70,397/-.

The Officer in charge himself took up investigation of the case and on completion of investigation, finding prima facie case against accused Durga Charan Choudhury under section 409 of the Indian Penal Code submitted charge sheet on 03.01.2006.

3. During course of trial of accused Durga Charan Choudhury before the learned Chief Judicial Magistrate, Sundargarh, the prosecution examined six witnesses and then an application under section 319 of Cr.P.C. was filed by the prosecution to proceed against the petitioner and other co-accused persons under section 409 of the Indian Penal Code which was allowed vide impugned order dated 10.12.2007.

Out of the six witnesses examined by the prosecution, P.W.1 Anantaram Nayak has stated about the seizure of a file by police from his office under seizure list Ext.1 which he received in zima by executing zimanama Ext.2. He further stated about the seizure of the report of

Additional Project Director and some letters totaling 41 pages under seizure list Ext.3.

P.W.2 Jenamani Mohanadia who was the gramarakhi of Lephripada Police Station stated about the seizure of some papers under seizure list Ext.4.

P.W.3 Surendra Kumar Patel was the cashier of Lephripada Block who stated about the seizure of the cash books of the years 1995-1996 and 1996-1997 from the Block Office as per seizure list Ext.5 which were given in his zima as per zimanama Ext.6.

P.W.4 Bijaya Kumar Pradhan was the Senior Clerk of Lephripada Block who stated about the seizure of special audit report from the Head Clerk under seizure list Ext.7 and also seizure of some cash books from the Block Office under seizure list Ext.5 so also seizure of the report of Addl. Project Director, DRDA under seizure list Ext.3 and three letters under seizure list Ext.1.

P.W.5 Pradeep Patel was the Senior Clerk attached to Lephripada Block who is a witness to the seizure of special audit report under seizure list Ext.7, cash books from the Block Office under seizure list Ext.5 and report of Addl. Project Director, DRDA under seizure list Ext.3.

P.W.6 Madhusudan Padhi conducted audit of the accounts section of the office of BDO, Lephripada as auditor, Panchayatraj Department, Odisha, Secretariat, Bhubaneswar and he proved his special audit report under Ext.8.

4. After examination of the aforesaid six witnesses, an application under section 319 of Cr.P.C. was filed by the prosecution to implead the petitioner and others as accused mainly relying upon the evidence of P.W.6 and the special audit report (Ext.8) which has been proved by P.W.6.

P.W.6 has stated that audit was confined to the outstanding advance against accused Durga Charan Choudhury and it was found to be Rs.4,70,397/-. He further stated that one Chiru Bhoi, B.D.O. had given irregular and excess advance of Rs.8,89,000/- and the B.D.O., J.E. K.P. Choudhury, the petitioner who was the Stipendiary Engineer and Asst. P.D. (T) Arjun Patra had made fictitious measurement and check measurement and tried to make adjustment but on complaints, Addl. P.D. (Tech.), Sundargarh made re-check measurement of the works executed by accused Durga Charan Choudhury and found that fictitious measurement was made for adjustment. It is further stated by P.W.6 that the first measurement was made for Rs.1,04,000/- whereas the re-check measurement revealed that the

work done was for Rs.55,000/- for which advance was not actually shown. He further stated that in the report, he has reflected joint liability.

The learned counsel for the accused Durga Ch. Choudhury in the Trial Court supported the petition filed by the prosecution.

The learned Trial Court relying upon the audit report and the evidence of P.W.6 held that audit report adduced as Ext.8 is not only predominant and prima facie substantiates the charge but crucial to the logical end of the trial. While making indictment, PDDO No.1376 dated 10.02.1999 referred to in the exhibit ascribed the alleged misappropriation to improper re-check measurement and huge advance payment. P.W.6 stated about irregular advances made by the Ex-BDO and the audit report indicted others for their involvement in the re-check measurement and consequential non-adjustment of advance payments. The learned Trial Court further held that the persons noted in the petition appeared to be involved in the commission of the offence and accordingly allowed the petition filed by the prosecution and issued summons against the petitioner.

5. The learned counsel for the petitioner Mr. P.K. Paikaray challenging the impugned order contended that the learned Trial Court erred in invoking its power under section 319 of Cr.P.C. which is an extraordinary one conferred on the Court to be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. He further contended that the audit report prepared by P.W.6 is self-contradictory and it does not reasonably lead to the conviction of the petitioner and moreover P.W.6 has not stated anything against the petitioner before the Investigating Officer and the audit is confined to accused D.C. Choudhury and accordingly sanction was accorded against him for prosecution by the District Magistrate, Sundargarh. He further contended that no new material has come during trial to entangle the petitioner and therefore, the impugned order amounts to abuse of process of law and therefore, invoking power under section 482 of Cr.P.C., this Court should quash the impugned order.

Learned counsel for the State Mr. Deepak Kumar on the other hand contended that in the audit report, it is specifically mentioned that in pre-planned attempt to misappropriate the Government money, the petitioner in connivance with other officials committed number of irregularities. The petitioner helped the B.D.O. in the preparation of fictitious bills without actual work being done and the measurement certificate issued by the petitioner was ultimately passed by Arjun Patra, Ex Project Director

(Technical), D.R.D.A, Sundargarh. On the recommendation of the petitioner, an advance amount of Rs.2,30,000/- was paid to accused D.C. Choudhury for the work for which no check measurement was made till completion of the work. It is further contended that the audit report indicates that at three instances, advances were granted on the recommendation of the petitioner without any check measurement and therefore, no illegality has been committed by the learned Trial Court in invoking the power under section 319 of Cr.P.C.

6. Law is well settled that the inherent jurisdiction under section 482 of Cr.P.C. has to be exercised sparingly, carefully and with caution only when it is brought to the notice of the Court that grave miscarriage of justice would be done, if the inherent power is not exercised.

Law is also well settled that the power of summoning an additional accused under section 319 of Cr.P.C. can be exercised at any stage of the case but it should be used very sparingly only when compelling reasons exist as it is an extraordinary one. Unless the Court is hopeful that there is reasonable prospect of the case as against the newly brought accused ending in conviction of the concerned offence, the Court should not invoke such power.

In case of **Hardeep Singh -Vrs.- State of Punjab reported (2014) 57 Orissa Criminal Reports (SC) 455,** a five Judge Bench framed the following questions to be answered by the Bench

(i) What is the stage at which power under section 319 Cr.P.C. can be exercised?

(ii) Whether the word "evidence" used in section 319(1) Cr.P.C. could only mean evidence tested by cross-examination or the Court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

(iii) Whether the word "evidence" used in section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

(iv) What is the nature of the satisfaction required to invoke the power under section 319 Cr.P.C. to arraign an accused? Whether the power under section 319(1) Cr.P.C. can be exercised only if the Court is satisfied that the accused summoned will in all likelihood convicted?

(v) Does the power under section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?

The answers were given as follows:-

Question Nos. (i) & (iii)

A. In ***Dharam Pal's*** **case reported in (2004) 13 Supreme Court Cases 9**, the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of investigation. Such cognizance can be taken under Section 193 Cr.P.C. and the Sessions Judge need not wait till 'evidence' under section 319 Cr.P.C. becomes available for summoning an additional accused.

Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) Inquiry (2) Trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under sections 200, 201, 202 Cr.P.C.; and under section 398 Cr.P.C. are species of the inquiry contemplated by section 319 Cr.P.C. Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the Court after the trial commences, for the exercise of power under section 319 Cr.P.C., and also to add an accused whose name has been shown in Column 2 of the charge sheet.

In view of the above position, the word 'evidence' in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.

Question No. (ii)

A. Considering the fact that under section 319 Cr.P.C., a person against whom material is disclosed is only summoned to face the trial and in such an event under section 319(4) Cr.P.C. the proceeding against such person is to commence from the stage of taking of cognizance, the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

Question No. (iv)

A. Though under section 319(4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original

accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial – therefore, the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

Question No. (v)

A. A Person not named in the F.I.R. or a person though named in the F.I.R. but has not been charge sheeted or a person who has been discharged can be summoned under section 319 Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in so far as an accused who has been discharged is concerned, the requirement of sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh.

In case of **Ramakanta Behera @ Sahu & others -Vrs.- State of Orissa reported in (2009) 42 Orissa Criminal Reports 645**, it has been held as follows:-

"11. Provision under Section 319 of the Cr.P.C. as well as the judicial pronouncements referred to above make it evident that the Trial Court has the jurisdiction to array any person not being the accused before it to face the trial along with other accused persons, if the Court is satisfied, in course of enquiry or trial, on the basis of the evidence adduced before it, that such person should face trial and that the Trial Court may resort to the provision of section 319 of the Cr.P.C. only on the basis of the evidence adduced before it and not on the basis of the materials available in the charge sheet or the case diary. As recourse to section 319 of the Cr.P.C. postulates de novo trial, the extraordinary power conferred there under should be used very sparingly and only if compelling reasons exist. Also the power should be exercised at the earliest when the evidence necessitating the exercise of jurisdiction under section 319 of the Cr.P.C. appears. An order under section 319 of the Cr.P.C. is not required to be mechanically passed merely on the ground that some evidence had come on record implicating the person sought to be added as an accused. Also unless the Court is hopeful that there is reasonable prospect of the case against newly brought accused ending in

conviction of the offence concerned, it should refrain from exercising the jurisdiction.

12. What the provision under section 319 of the Cr.P.C. contemplates and what has been stated by the Hon'ble Supreme Court and this Court in the decisions relied upon on behalf of the informant is that power under section 319 of the Cr.P.C. can be exercised by a Court in course of trial if it appears from the 'evidence' before it that any offence has been committed by person or persons not facing trial as accused along with the accused facing trial. There has to be some 'evidence' adduced before the Court to indicate complicity of person who is not facing trial. There is no scope to array a person as accused in a trial unless incriminating circumstance appears against him in the evidence. That does not mean that whenever there is evidence implicating a person as accused, the Court shall exercise jurisdiction under section 319 of the Cr.P.C. without considering other materials available on record.

xx xx xx xx xx

17. Thus, it is clear that one of the foremost considerations for exercise of the jurisdiction under section 319 of the Cr.P.C. is existence of reasonable prospect of conviction of the newly arrayed accused persons. The power should not be exercised mechanically on the ground that some evidence has come on record against the person who is not facing trial. The jurisdiction should be used very sparingly only if compelling reasons exists. The Court has to consider the conspectus of the case before exercising of jurisdiction under section 319 of the Cr.P.C. While evidence appearing in course of trial implicating the persons who are not facing trial is the basis for exercise of jurisdiction under section 319 of the Cr.P.C., the Court has to take into account other materials on record including the materials placed by the investigating agency in order to assess the prospect of conviction and desirability of exercise of the judicial discretion under section 319 of the Cr.P.C. There is no basis to sustain the contention that the Trial Court is precluded from taking into account materials collected in course of investigation for considering the desirability for exercise of the extraordinary discretion."

In case of **Hardei -Vrs.- State of Utter Pradesh reported in (2016) 64 Orissa Criminal Reports (SC) 57**, it has been held as follows:-

> "9. It is well accepted in criminal jurisprudence that F.I.R. may not contain all the details of the occurrence or even the names of all the accused. It is not expected to be an encyclopedia even of facts already known. There are varieties of crimes and by their very nature, details of some crimes can be unfolded only by a detailed and expert investigation. This is more true in crimes involving conspiracy, economic offences or cases not founded on eye witness accounts. The fact that Police choose not to send up a suspect to face trial does not affect power of the Trial Court under Section 319 of the Cr.P.C. to summon such a person on account of evidence recorded during trial".

7. Considering the submissions made by the learned counsels for the respective parties and on perusal of the audit report which has been proved by the prosecution, it reveals that under the heading of irregular sanction of advances, it is mentioned that huge advances were granted by Sri Chihira Bhoi, Ex-Block Development Officer. Sri D.C. Choudhury, Ex-F.E.O., was granted huge advances for execution of different developmental works and in course of such execution of works, irregularities were committed in a pre-planned manner in order to misappropriate Government money by the petitioner and other co-accused persons. It is further mentioned that all the J.Es and Stipendiary Engineer (petitioner) prepared fictitious bills without actual work and Ex-Asst. P.D. (Tech.), DRDA, Sundargarh indulged himself in passing check measurement certificates. Huge payment of advance as well as re-check measurement of works were the reasons for non-adjustment of advances. The auditors suggested for penal action or administrative action to be initiated against the petitioner, accused Durga Charan Choudhury and others. The audit report indicates irregularities are under three headings i.e., (i) irregular sanction of advances, (ii) outstanding advances against Sri D.C. Choudhury, Ex-F.E.O. and (iii) excess adjustment of advance and loss of Government money. The misappropriation of Government money has been done in connection with three Project works executed under Lephripada Block i.e., Ghat cutting from Luhakami to Ushakothi under E.A.S. 96-97, C.D. on Gundiadih-Bhurisidand with metalling under E.A.S. 96-97 and Improvement of Bursidand to Sunajore Mahasimna under E.A.S. 96-97 and improvement of Nuadihi-Sahajbahal Road under E.A.S. 96-97 as per the letter dated 29.03.1998 of the Addl. P.D. (Tech.), D.R.D.A., Sundargarh addressed to the Project Director, D.R.D.A., Sundargarh which has been seized in the case in which the specific role played by the petitioner in the alleged misappropriation of Government money has been mentioned.

Therefore, not only the documentary evidence like audit report, letter dated Addl. P.D. (Tech.) D.R.D.A., Sundargarh but also the evidence of P.W.6 substantiates the allegations against the petitioner. The materials collected during course of investigation also corroborate the evidence of P.W.6 recorded during the trial. Therefore in my humble view, there were sufficient grounds before the learned Trial Court for proceeding against the petitioner in exercise of power under section 319 of Cr.P.C. and to add the petitioner as an accused to come to a logical end in the trial.

In the result, I do not find any illegality or infirmity in the impugned order so as to interfere with the same invoking inherent jurisdiction under section 482 of Cr.P.C. Accordingly, CRLMC application being devoid of merits stands dismissed.

CRLMC dismissed.

2017 (I) ILR - CUT- 143

K. R. MOHAPATRA, J.

M.A.C.A. NO. 600 OF 2012

BIJAYLAXMI MOHARANA & ORS. .....Appellants

.Vrs.

SANJUKTA SATPATHY & ANR. .....Respondents

MOTOR VEHICLES ACT, 1988 – S.128 (1)

Whether, violation of section 128(1) M.V. Act, 1988, amounts to contributory negligence on the part of the pillion riders ? – Held, No – Neither the deceased driver of the motor cycle nor the pillion riders can be held to be guilty of contributory negligence for violation of section 128(1) of the Act – Finding of the learned Tribunal assessing contributory negligence of the claimants to be 25% is set aside.

(Para 7)

Case Law Relied on :-

1. AIR 2008 MP 18 (F.B.) : Devisingh Vs. Vikramsingh & Ors.

Case Law Referred to :-

1. 2015 (3) T.A.C. 621 (Cal.) : Menoka Mondal and others Vs. Oriental Insurance Co. Ltd. & Ors.
2. 2009 (3) Supreme 487 : Sarla Verma Vs. Delhi Tranport Corporation

For Appellant : M/s A.K.Choudhury, S.Das, K.K.Das & B.Dash
For Respondents: M/s.Brundaban Rout.
M/s Surath Roy, R.Pati & S.Das.

Date of Judgment: 23.12.2016

JUDGMENT

K.R. MOHAPATRA, J.

This Appeal has been filed by the claimants assailing the award dated 12.03.2012 passed by the learned 2nd Additional District Judge-cum-Motor Accident Claim Tribunal, Cuttack in MAC Case No.444 of 2009 awarding compensation of Rs.7,59,500/- together with interest @ of 6% with effect from date of filing of the claim petition and also a cost of Rs.1,000/-, payable by the Insurance Company, namely, National Insurance Company Limited (respondent No. 2 herein).

2. Case of the Claimant before the learned Tribunal was that on 26.02.2009 when one Somanath Moharana (the deceased) along with his wife and minor son were returning from Puri to Jatni in a Hero Honda Motorcycle, Tipper bearing registration No.OR-02-C-6282 being driven in rash and negligent manner dashed against the motorcycle. Due to the accident, the deceased along with the pillion riders fell down and sustained severe injuries. The deceased and his wife were immediately shifted to District Headquarters Hospital, Puri. As the condition of the deceased deteriorated, he was shifted to Capital Hospital, Bhubaneswar, where he succumbed to the injuries. On the basis of the report, the Police took up investigation and submitted charge sheet under Section 279, 337,338, 304-A of IPC. The Claim Petition further revealed that at the time of death, the deceased was 37 years old having sound physique. He was doing business in Jewellery and gold ornaments at Jatni market in the name and style "Somanath Jewellery". He had a monthly income of Rs.20,000/- and was contributing more than Rs.15,000/- to his family. Due to the untimely death, the family members lost their sole earning member. Hence, the claimants claimed a sum of Rs.25,00,000/- towards compensation together with interest and cost.

3. The owner of the offending vehicle (Tipper) did not contest before the learned Tribunal. However, the Insurance Company resisted the claim by filing written statement denying the contentions made in the Claim Petition, the Insurance Company contended that the offending vehicle had no contribution to the accidental injury and death of the deceased. The accident took place due to rash and negligent driving of the deceased motorcyclist.

The Insurance Company had also resisted the claim on other grounds. Hence, it denied its liability to pay any compensation.

4 Learned Tribunal on assessment of pleadings and materials available on record, came to a conclusion that the deceased was driving the motorcycle carrying two pillion riders, namely, his wife-appellant No.1 and minor son-appellant No.2. The appellant No.2 was aged about six years on the date of accident. Thus, there was violation of provisions of Section 128 of the Motor Vehicles Act, 1988 (for short, 'the Act'). As such, learned Tribunal held that the deceased had some contribution to the accident and assessed the same at 25%. Accordingly, assessing the liability of the Insurance Company at 75%, learned Tribunal held the Insurance Company liable to pay a sum of Rs.7,50,000/- towards compensation and Rs.9,500/- towards funeral expenses. Accordingly, learned Tribunal directed the Insurance Company to pay a compensation of Rs.7,59,500/- along with interest @ 6% per annum payable by the Insurance Company.

5. Mr.A.K.Choudhury, learned Counsel for the Claimants-Appellants, assailing the award contended that the burden lies on the owner of the vehicle or the person who takes the plea of contributory negligence to prove that due to the contributory negligence of the victim, the accident took place. Violation of provisions of Section 128 of the Act cannot *ipso facto* prove the allegation of contributory negligence. In the instant case, the Insurance Company has to plead and prove by leading cogent evidence that the motorcyclist was guilty of contributory negligence. He further submitted that the assessment of compensation is also not in consonance with the loss sustained. Learned Tribunal committed error in deducting 1/3rd towards personal and living expenses of the deceased from out of his monthly income. Learned Tribunal has also not awarded any amount towards loss of estate, love and affection as well as loss of consortium. Hence, he prayed for enhancement of the compensation and saddling the liability for payment of compensation on the Insurance Company.

6. Mr.Suarth Roy, learned counsel for the Insurance Company, per contra, supported the impugned award and submitted that the deceased had violated the provisions of Section 128 of the Act in carrying two pillion riders in his motorcycle. That might have been the cause of the accident. Further, learned Tribunal, has rightly deducted 1/3rd towards personal expenses of the deceased from his income. As such, no error, both on fact and law, can be found with the impugned award and prayed for dismissal of the appeal.

7. Taking into consideration the rival contentions of the parties, the pivotal issue that arises for consideration is that whether violation of provisions of Section 128 of the Act by the deceased motorcyclist can be held to be his contributory negligence. Section 128 (1) of the Act provides that no driver of a two wheeled motorcycle shall carry more than one person as pillion rider. In the instant case, the wife and minor son of the deceased were admittedly the pillion riders in the ill-fated motorcycle. The statutory provision of Section 128 of the Act does not spell out anything from which it can be inferred that violation of said provision would amount to contributory negligence. The party (Insurance Company) who pleads that there was contributory negligence of the deceased to the accident, has to prove the same by adducing cogent and convincing evidence. In the instant case, there is no pleading in the written statement of the Insurance company (O.P. No.2 before the learned Tribunal) to the effect that the accident took place due to violation of the provisions of Section 128 (1) of the Act on the part of the deceased or the claimants. On the other hand, police papers in PS Case No.37 dated 27.02.2009 relating to the accident in question reveal that the charge sheet was submitted under Sections 279, 337, 338 and 304-A of IPC only against the driver of the offending vehicle (Tipper). The Insurance Company neither examined any witness nor produced any document in support of their plea. However, while cross-examining PW-1 (appellant No.1 herein), learned counsel for the Insurance Company suggested that the motorcycle dashed against a standing Tipper, which was never the plea of the Insurance Company in its written statement. He tried to develop such a plea at the stage of trial, which is not permissible in law. Learned Tribunal also rightly discarded the same. Further, discussing the evidence on record, learned Tribunal came to a conclusion that there was positive finding that the driver of the offending vehicle while driving the same in rash and negligent manner dashed against the ill-fated motorcycle. However, learned Tribunal held that the deceased had contributory negligence to the accident as there was violation of provisions of Section 128 of the Act. Mr.Choudhury, learned counsel for the claimants in support of his case relied upon a decision of Madhya Pradesh High Court in the case of ***Devisingh Vs. Vikramsingh & Ors.,*** reported in AIR 2008 MP 18 (F.B.), in which it is held that violation of provision of Section 128 of the MV Act *per se* does not amount to contributory negligence on the part of the pillion riders. On the other hand, Mr.Roy, learned counsel for the Insurance Company relied upon a decision of the Calcutta High Court in the case of ***Menoka Mondal and others Vs.***

Oriental Insurance Co. Ltd. and others, reported in 2015 (3) T.A.C. 621 (Cal.), in which it is held as follows:-

> "8. Since the motor cyclist had violated the provisions contained in Section 128 of the statute, the learned Tribunal had rightly dismissed the claim petition. It is to be borne in mind that if we accede to the prayer of the appellants, we would be ignoring not only the provisions contained in the statute but would also amount to approving an illegal act committed by the motor cyclist. Therefore, there is no merit in the appeal. Hence, the appeal is dismissed. The Application, being CAN 282 OF 2015, is disposed of without any order as to costs."

Both the decisions relied upon by learned counsel for the parties are having persuasive value. In the decision of *Devisingh (supra)*, the Full Bench of Madhya Pradesh High Court discussing in detail the meaning of 'contributory negligence' vis-a-vis Section 128 of Act came to a conclusion, which is as follows:-

> "12. A plain reading of Section 128 of the Act quoted above, would show that sub-section (1) casts a duty on the driver of a two wheeled motor cycle not to carry more than one person in addition to himself on the motor cycle. Similarly, Rule 123 of the Rules quoted above mentions the safety devices to be provided while manufacturing a motor cycle. These provisions obviously are safety measures for the driver and pillion rider and breach of such safety measures may amount to "negligence" but such negligence will not amount to "contributory negligence: on the part of the pillion rider or "composite negligence" on the part of the driver of the motor cycle, unless such negligence was partly the immediate cause of the accident or damage suffered by the pillion rider as would be clear from the authorities discussed above.
>
> 13. Thus, we are of the considered opinion that if the damage is the accident has not been caused partly on the account of violation of Section 128 of the Act by the pillion rider of the motor cycle, the pillion rider is not guilty of contributory negligence. Similarly, if the damage suffered by the pillion rider has not been caused partly on account of violation of Section 128 of the Act by the driver, the pillion rider cannot put up a plea of composite negligence by the driver. In other words, if breach of Section 128 of the Act, does not have a casual connection with the damage caused to the pillion rider,

such breach would not amount to contributory negligence on the part of the pillion rider of the motor cycle or composite negligence on the part of the driver of the motor cycle."

Thus, following the principles laid down in the decision in the case of *Devisingh (supra)*, I hold that neither the deceased nor the pillion riders can be held to be guilty of contributory negligence for violation of Section 128 (1) of Act. There is no other material on record to hold that there was contributory negligence either on the part of the deceased motorcyclist or the pillion riders (claimants herein). As such, finding of the learned Tribunal assessing the contributory negligence of the claimants to be 25% is hereby set aside. I hold that the Insurance Company is liable to pay the compensation.

8. The next contention of Mr.Choudhury with regard to quantum of compensation is well taken care of by the ratio decided by the Hon'ble Supreme Court in the case of ***Sarla Verma Vs. Delhi Tranport Corporation***, reported in 2009 (3) Supreme 487, since the dependant family members of the deceased is 5 in number, learned Tribunal ought to have deducted 1/4th towards personal and living expenses of the deceased. Deduction of 1/3rd towards personal and living expenses of the deceased is thus not sustainable.

9. Since the claimants-appellants did not raise any dispute with regard to assessment of income of the deceased at Rs.1.00 lakh per annum, I need not delve into the same. However, on perusal of the impugned award, it evinces that learned Tribunal has only awarded Rs.9,500/- towards funeral expenses. It has not awarded any amount on the heads of loss of estate, loss of love and affection as well as loss of consortium. Taking into consideration the ratio decided in the 2015 (2) TAC 337 (SC), 2015 (1) TAC 340 (SC) and 2015 (3) TAC 369 (SC), I hold that a consolidated amount of Rs.1,50,000/- towards loss of estate, loss of love and affection as well as loss of consortium would be just and adequate to meet the ends of justice. Application of multiplayer 15 is also just and proper. Hence, I modify the impugned award as follows:

(i) the claimants shall be entitled to Rs.1.00 lakh x 15 x 3/4, i.e., Rs.11,25,000/-; in addition to that the claimants are also entitled to Rs.1.50 lakh towards loss of estate, loss of love and affection and consortium;

(ii) Further, they are entitled to Rs.9,500/- twards funeral expenses;

Thus, the total amount payable to the claimants is Rs.11,25,000/- + Rs.1,50,000/- + Rs.9,500/- = Rs.12,84,500/-.

The rate of interest as awarded by the learned tribunal shall remain un-changed. Hence, I direct the Insurance Company (Respondent No.2) to deposit the aforesaid amount of Rs.12,84,500/- together with 6% interest per annum from the date of filing of the claim petition before the learned Tribunal, within a period of six weeks hence, which shall be released in favour of the claimants proportionately in terms of the impugned award.

10. This Court vide order dated 09.01.2013 passed in Misc. Case No.897 of 2012 had exempted the claimants from payment of Court fee for the time being. Hence, learned Tribunal is directed to realize a sum of Rs.5,000/- towards fee payable on the memorandum of appeal at the time of release of compensation amount in favour of the claimants.

11. With the aforesaid modification in the impugned award, the appeal is allowed in part.

Appeal allowed in part.

2017 (I) ILR - CUT-149

K. R. MOHAPATRA, J.

MACA NO. 891 OF 2013

CHARULATA MALLIK & ORS. ……..Appellants

.Vrs.

PRAKASH KU. MOHANTY & ANR. ……..Respondents

MOTOR VEHICLES ACT, 1988 – S.147

Whether the Insurance Company is liable to pay compensation for the death of a gratuitous passenger in a goods carriage vehicle which is a fundamental breach of condition ? Held, in order to ensure prompt payment of compensation to the family members of the deceased, the Insurance Company is directed to deposit the awarded amount alongwith accrued interest before the learned Tribunal with a liberty to recover the compensation amount from the owner taking recourse to law.

(Paras 9,10,12)

Case Laws Relied on :-

1. 2004(I) TAC (SC) 366 : National Insurance Company Ltd. -V- Baljit Kaur & Ors.
2. 2016 (II) OLR 448 : Manguli Juanga & Ors. -V- Dinabandhu Sahoo & Anr.
3. (2013) 2 SCC 41 : Manager, National Insurance Co. Ltd. –v- Saju P. Paul

Case Laws Referred to :-

1. 2006 (2) T.A.C. 312 (S.C.) : United India Insurance Co. Ltd –v- Tilak Singh & Ors.
2. AIR 2008 SC 2252 :National Insurance Co. Ltd. -v- Kaushalya Devi & Ors.
3. (2005) 12 SCC 243 : National Insurance Co. Ltd. –v- Bommithi Subbhayamma & Ors.

Appellants : M/s. Pradeep Ku. Mishra, P.P.Mishra & N.Parida
Respondents : M/s. S.S.Rao & B.K.Mohanty
M/s. K.Gaya, B.B.Swain & S.C.Sahoo

Date of Judgment: 23.12.2016

JUDGMENT

K.R. MOHAPATRA, J.

The claimants in MAC Case No. 98 of 2013/913 of 2007 before learned 3rd Addl. District Judge-cum-M.A.C.T., Cuttack have filed this appeal assailing the judgment and award dated 31.8.2013 passed therein holding that the claimants-appellants are entitled to compensation of Rs.4,58,056/- together with interest at the rate of 6% per annum from the date of filing of the claim application payable by the owner of the vehicle (respondent no.1) with certain conditions.

2. Facts in brevity relevant for proper adjudication of the appeal are that on 11.7.2007 at about 6.30 P.M., while one Gangadhar Mallik (deceased) was returning to his village along with other associates in a Truck bearing Registration No. OR-09-E-9868 along with their musical instruments, the Truck capsized near village Gopanagar in the district of Jajpur, as a result of which the deceased succumbed to the injuries at the spot. Accordingly, Dharmasala P.S. Case No. 268 of 2007 was registered and on completion of investigation, charge-sheet was submitted against the driver of the offending Truck to face the trial under Sections 279/337/338/304 (A) I.P.C. It was contended in the claim application that the deceased was a Musician by profession and was earning about Rs.4500/- per month from his profession. Accordingly, the claimants, who are legal heirs and dependants of the deceased, claimed compensation of Rs.3,00,000/-. The owner of the vehicle (respondent no. 1) did not contest the case and was set ex parte.

3. The Insurance Company-respondent no.2 filed written statement denying its liability. It was specifically contended in the written statement that the deceased was travelling in the Truck as a gratuitous passenger. The Insurance Company also assailed the income of the deceased and denied other contentions made in the claim petition.

4. Learned Tribunal on analysis of the materials on record came to the conclusion that the deceased was a gratuitous passenger in the offending Truck. Relying upon the case of ***United India Insurance Co. Ltd –v- Tilak Singh and others***, reported in 2006 (2) T.A.C. 312 (S.C.), learned Tribunal held that Insurance policy being statutory in nature does not cover the risk of death or bodily injury of a gratuitous passenger. Accordingly, learned Tribunal held that the insurer was not liable to indemnify the owner of the the offending vehicle and saddled the liability on the owner-respondent no.1 to pay compensation.

5. Mr. Mishra, learned counsel for the petitioner contended that the deceased was travelling in the offending Truck with musical instruments as the owner of the goods. Hence, the insurer should be held liable to pay compensation to the claimants as per provisions under Section 147(1) of the Motor Vehicles Act, 1988 (for sort 'the Act'). In the alternative, if it is held that the deceased was a gratuitous passenger, then also the Insurance Company is liable to pay compensation with a right of recovery from the owner as it would amount to breach of policy conditions by the owner. Relying upon the cases of ***National Insurance Company Ltd. –v- Baljit Kaur and others***, reported in 2004 (I) TAC (SC) 366 and ***Manguli Juanga and others –v- Dinabandhu Sahoo and another***, reported in 2016 (II) OLR 448 as well as unreported decision of this Court in M.A.C.A. No. 485 of 2011 disposed of on 03.05.2013 ***(Bajaj Allianze General Insurance Company Ltd. –vrs- Sadhabi Dharei and others),*** he submitted that the Insurance Company should be held liable to pay the compensation. He also prayed for enhancement of the compensation as well as rate of interest as awarded by learned Tribunal.

6. Mr. K. Gaya, learned counsel for the owner-respondent no.1 supported the case of the claimants-appellants. Mr. S.S. Rao, learned counsel for the Insurance Company-respondent no.2, on the other hand, relying upon the case of ***National Insurance Co. Ltd. –v- Kaushalya Devi and others,*** reported in AIR 2008 SC 2252, contended that insurer is not liable to pay compensation as the deceased was travelling in the Truck as a gratuitous passenger and not as an owner of the goods. Thus, supporting the findings

arrived at by learned Tribunal, Mr. Rao submitted that the appeal is liable to be dismissed.

7. In the instance case, it is not disputed that the accident took place on 11.07.2007 and the deceased was travelling in the offending vehicle. Although it was contended by the claimants-appellants that the deceased was the owner of the musical instruments carried in the offending Truck, the appellant-claimant no.1 (P.W.1) in her cross-examination categorically deposed that one Rabindra Mallick was the owner of the Band Party and possessed the musical instruments carried in the offending Truck. P.Ws. 2 and 3, who examined on behalf of the claimants also in their cross-examination deposed that musical instruments along with equipments belonged to one Rabindra Nath Mallick. Thus, it is apparent that the deceased was not travelling in the offending vehicle as the owner of the goods. Hence, provision of Section 147 (1) of the Act has no application to the case at hand. The only conclusion that can be drawn in this case is that the deceased was travelling in the offending vehicle as a gratuitous passenger. Thus, the only question that remains for consideration in this case is, whether the Insurance Company (respondent no.2) is liable to pay the compensation for the death of a gratuitous passenger (deceased) of the offending vehicle.

8. In the decision in the case of Baljit Kaur (supra), the Hon'ble Supreme Court held as follows.

> "21. The upshot of the aforementioned discussions is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping in view the fact that the law was not clear so long such a direction would be fair and equitable (?). We do not think so. We, therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decisions of this Court in Satpal Singh (supra). The said decision has been overruled only in Asha Rani's (supra). We, therefore, are of the opinion that the interest of justice will be sub-served if the appellant herein is directed to satisfy the awarded amount in favour of the claimant if not already satisfied and recover the same from the owner of the vehicle".

9. This Court in the case of Manguli Juanga (supra) and in an unreported decision in Sahabi Dharei (supra), placing reliance on the case of *Manager, National Insurance Co. Ltd. –v- Saju P. Paul*, reported in (2013) 2 SCC 41

held that in order to ensure prompt payment of compensation to the family members of the deceased, the Insurance Company should be directed to pay compensation amount to the claimants with a right of recovery from the owner of the offending vehicle in due process of law.

There cannot be any quarrel over the ratio decided in *Kaushalya Devi as well as Tilak Singh's case* (supra) so also in the case of ***National Insurance Co. Ltd. –v- Bommithi Subbhayamma and others***, reported in (2005) 12 SCC 243, wherein it has been held that carrying a gratuitous passenger in a goods carriage vehicle is a fundamental breach of condition. Thus, the owner of the vehicle is liable to pay compensation amount as awarded and therefore, the insurer cannot be asked to pay the awarded compensation amount to the claimants and thereafter, the same shall be recovered from the owner of the vehicle. The Hon'ble Apex Court while arriving at this conclusion has also taken into consideration the observation made at para-20 of a larger Bench in *Baljit Kaur's* case (supra), which reads as follows:

> "20. It is therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in Section 147 with respect to persons other than the owner of the goods or his authorized representative remains the same. Although the owner of the goods or his authorized representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor any premium was paid to the extent of the benefit of insurance to such category of people."

However, the conclusion arrived at para-21 of the said case (quoted above) was neither discussed nor disturbed.

10. It is not only the duty of the Tribunal to see that just and adequate compensation is awarded to the claimants for the loss suffered by the deceased due to the accident, but also to see that there is hassle free payment of compensation with promptitude in order to save the claimants from distress. In that view of the matter, I am persuaded to rely upon the decision of Hon'ble Apex Court in the case of Baljit Kaur (supra) and Saju P. Paul (supra) and followed in the decision reported in 2016 (II) OLR 448 as well as unreported decision in M.A.C.A No. 485 of 2007 (supra).

11. So far as the quantum of compensation is concerned, although it is contended by the claimants that the deceased was earning about Rs.4,500/- per month, there is overwhelming material to come to a conclusion that the deceased was a BPL Card holder. As such, I do not find fault with the Tribunal in assessing the income of the deceased at Rs.4,000/- per month. The other parameters for computation of the compensation also appear to be just and proper. Hence, I feel that learned Tribunal cannot be faulted with the assessment of the income of the deceased at Rs. 4,58,056/-.

12. In that view of the matter, the appeal is allowed in part to the extent stated above and the Insurance Company-respondent no.2 is directed to deposit the compensation awarded along with interest accrued thereon before learned Tribunal within a period of six weeks hence. On such deposit being made, the same shall be disbursed/released in favour of the claimants proportionately in terms of the impugned award on proper identification. The Insurance Company is at liberty to prosecute the owner of the offending vehicle (respondent no.1) to recover the compensation amount taking recourse to law.

13. This Court vide order dated 10.07.2015 passed in Misc. Case No. 1569 of 2013 exempted the claimants from payment of Court fee for the time being. Hence, learned Tribunal is directed to realize a sum of Rs.1,000/- from the claimants at the time of disbursement of the awarded amount towards fee payable on the memorandum of the appeal.

Appeal allowed in part.

2017 (I) ILR - CUT- 154

J.P. DAS, J.

CRLA NO. 256 OF 2016

PRASANTA KU. DAS ……..Appellant

.Vrs.

STATE OF ODISHA & ORS. ……..Respondents

ODISHA PROTECTION OF INTERESTS OF DEPOSITORS (in Financial Establishments) ACT, 2011 – S.9 (6)

Whether the provision U/s 9 (6) of the O.P.I.D. Act, 2011 for disposal of the proceeding within one hundred eighty days is mandatory in nature so that in case of its non-compliance the proceeding should be dropped automatically releasing the properties from attachment ? – Held, No (Para 14)

Case Laws Referred to :-

1. (2011) 9 SCC 354 : M/s Delhi Airtech Services Pvt. Ltd. And anr. vrs State of U.P. & anr.
2. AIR 1980 SC 303 : Sharif-ud-din Vs. Abdul Gani Lone.
3. (2011) 9 SCC 354 : M/s Delhi Airtech Services Pvt. Ltd. vrs. State of U.P. & anr.
4. (2016) 3 SCC 183 : Yogendra Kumar Jaiswal and others Vrs. State of Bihar & Ors
5. AIR 1968 SC 224 : Remington Rand of India Ltd. Vrs. The Workmen

For Appellant : M/s. S. Tripathy, R.Roy, K.Pradhan S.K.Singh & S.Sourav

For Respondents: Addl. Govt. Advocate & Addl. Standing Counsel

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Date of Hearing: 04.10.2016
Date of Judgment:08.11.2016

JUDGMENT

J.P.DAS, J.

This appeal under Section 13 of the Odisha Protection of Interests of Depositors (In Financial Establishments) Act, 2011, (hereinafter referred to as O.P.I.D. Act) is directed against the order dated 10.02.2016 passed by the learned Presiding Officer of the Designated Court under the O.P.I.D. Act Cuttack rejecting the prayer of the petitioner to drop the proceeding and to release the properties from attachment since the enquiry could not be completed within the prescribed period of one hundred eighty days as provided in Section 9(6) of the O.P.I.D. Act.

2. The backdrop of the case in brief is that the prosecution was lodged against one M/s Seashore Group of Companies with the allegation that the company was collecting deposits from the public unauthorizedly promising high returns, but the money so collected was misappropriated for the own benefit of the Directors and other office bearers of the company without repaying to the depositors and investors. The matter was first investigated into by the CID CB (Economic Offence Wing), Bhubaneswar and subsequently, it was taken over by the Central Bureau of Investigation (in short 'C.B.I.') as per direction of the Hon'ble Apex Court. In course of investigation, properties and other assets of the said company were seized along with other properties and accounts having relation with the said company in order to secure that the general public, who had invested their

money in the company, would get back their amounts. On promulgation of the O.P.I.D Act, the Competent Authority was notified and the Designated Court under the said Act was established. The Competent Authority on receipt of the orders of the Government made an application to the Designated Court on 28.12.2013 for making an ad interim order of attachment absolute along with direction to sell the properties so attached by public auction as per Section 4(3) of the O.P.I.D. Act.

3. The present appellant was the Managing Director of the Seashore Group of Companies. The Designated Court issued show-cause notice to all concerned including the appellant and the appellant appearing before the said court on 09.10.2014 submitted his show-cause. Since the enquiry was not completed within one hundred eighty days from the receipt of application from the Competent Authority, the present appellant filed an application before the Designated Court on 06.01.2016 with a prayer to release the attached properties and to drop the proceeding. The learned Designated Court by its order dated 10.02.2016 rejected the prayer of the appellant holding it as not maintainable mainly on the grounds that mere expiry of one hundred eighty days does not vitiate the proceeding automatically and further the applicant himself had consumed several adjournments thereby delaying the proceeding.

4. It has been submitted in the appeal that the impugned order has been passed without proper application of judicial mind which has put the appellant to unnecessary harassment. It is submitted that the prescribed period for disposal of the proceeding having been mandated as one hundred eighty days from the date of receipt of application from the competent authority, the present enquiry before the learned Designated Court, having not been completed even after lapse of a period of three years, was definitely against the provision of law and hence it should be dropped and the properties attached in course of investigation, should be released from such attachment. It was submitted that since the period has been specifically prescribed, the continuation of the proceeding thereafter is obviously illegal and not permissible under law.

5. Per contra, it was submitted by the learned counsel for the State that Section 9(6) of the O.P.I.D. Act does not mandate for completion of the proceeding within one hundred eighty days and the said period of one hundred eighty days is prescribed for pronouncing the final order after completion of enquiry into different claims and objections raised on behalf of the parties having interest in the properties so attached and hence, since

the said enquiry has not been completed, the period of one hundred eighty days is yet to start. It was further contended by the learned counsel for the State that the present appeal is not maintainable in its given forum since the provision of appeal as provided under Section 13 of O.P.I.D. Act relates to any order passed under Section 6 of the O.P.I.D.Act imposing punishment and the present allegation being related to attachment and sale of the properties, the appeal is not maintainable and the appellant if so advised, could have come before this Court in separate forum. It was further contended on behalf of the State that the appellant himself has consumed a lot of time and adjournments in course of the proceeding before the learned Designated Court and he cannot be permitted to take benefit of his own laches by alleging that the proceeding could not be disposed of during the specified period.

6. At the outset, as regards the submissions made on behalf of the State regarding the maintenance of appeal, the contention as raised on behalf of the State is not correct since Section 13 of the O.P.I.D. Act provides-

> "Any person including the Competent Authority, if aggrieved by an order of the Designated Court, may prefer an appeal to the High Court within thirty days from the date of the order".

In view of such clear wordings that the forum of appeal is also available to the competent authority in case of any order passed affecting its interest, the contention that the provision is limited to any order passed only under Section 6 of the O.P.I.D. Act is not correct. That apart there is no other provision in the O.P.I.D. Act for the affected party to assail the order by which it has been aggrieved.

7. Now coming to the other contention raised on behalf of the State that the period of one hundred eighty days for passing the final order is to be calculated after completion of enquiry is also not acceptable in view of the specific words mentioned under Section 9(6) of the O.P.I.D. Act which is quoted below:

> "9(6): After investigation under sub-section(5), the Designated Court shall pass an order, within a period of one hundred and eighty days from the date of receipt of an application under sub-section(3) of section 4, either making the ad-interim order of attachment absolute or varying it by releasing a portion of the property from attachment or cancelling the ad-interim order of attachment and then direct the Competent Authority to sell the property so attached by public auction and realize the sale proceeds:

> Provided that the Designated Court shall not release from attachment any interest, which it is satisfied that the Financial Establishment or the person referred to in sub-section (1) has in the property, unless it is also satisfied that there will remain under attachment an amount or property of a value not less than the value that is required for repayment to the depositors of such Financial Establishment."

The aforesaid provision specifies that the Designated Court shall pass an order within a period of one hundred eighty days from the date of receipt of an application under Sub-section 3 of Section-4 from the competent authority. Thus it is absolutely clear that the period of one hundred eighty days for passing the order is to be calculated from the date of receipt of the application submitted by the competent authority.

8. Thus, remains the question to be decided as to whether such provision for disposal of the proceeding within one hundred eighty days is directory or mandatory in nature so that in case of its non-compliance, the proceeding should be dropped releasing the properties from attachment. In this respect, it was contended by the learned counsel for the appellant that the wordings of Section 9(6) of the O.P.I.D. Act are unambiguous and clear that the proceeding should be disposed of within one hundred eighty days, and hence, there can be no deviation taking recourse to any plea to justify the delay. The learned counsel for the appellant relied upon certain observations of the Hon'ble Apex Court that if the precise words used are plain and unambiguous, those are bound to be construed in their ordinary sense and the argument of inconvenience or hardship is a dangerous one and is only admissible in construction where the meaning of the statute, is obscure or there are alternative methods of construction. It was submitted that there can be no scope for presumption in respect of meaning of a statute and it should be literally interpreted as per its given words. The learned counsel for the appellant mostly relied upon the decisions of the Hon'ble Apex Court in the case of ***M/s Delhi Airtech Services Pvt. Ltd. And another vrs State of U.P. & another*** in Civil Appeal No.24 of 2009 reported in (**2011) 9 SCC 354** wherein it has been observed that:

> "Statutes which encroach upon rights, whether as regards person or property, are subject to strict construction in the same way as penal Acts."
>
> It was also observed in the said decision that:
>
> "It is well settled cannon of neither statutory interpretation that the courts would add nor substract from the plain language of the statutory provision."

9. Certain other case laws were also filed before the Court in respect of the said contention that when the language of the statute is plain and unambiguous, there cannot be a scope for its interpretation in a different manner. The position of law as advanced, is not in dispute. But the peculiarity of the present case for consideration is whether the period of one hundred eighty days prescribed for passing the final order under Section 9(6) of the O.P.I.D. Act is directory or mandatory in nature so as to make the continuation of the proceeding illegal if not completed within the said period.

10. It is not in dispute that the proceeding has not been completed within one hundred eighty days. But, at the same time no penal provision has been provided in the Act as to the contingency if the enquiry is not completed within the prescribed period. The learned counsel for the appellant relied on a decision of the Hon'ble Apex Court in the case of ***Sharif-ud-din Vs. Abdul Gani Lone***, reported in **AIR 1980 SC 303** wherein it has been observed that:

> "Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow."

11. As stated earlier there is no provision prescribed in the O.P.I.D. Act that any consequence would follow, if the enquiry is not completed within one hundred eighty days. It was also observed in the case of M***/s Delhi Airtech Services Pvt. Ltd. vrs. State of U.P. & another,*** reported in (**2011) 9 SCC 354,** which has been relied upon on behalf of the appellant that:

> "The doctrine of strict construction does not per se mandate that its application excludes the simultaneous application of all other principles of interpretation. It is permissible in law to apply the rule of strict construction while leading to the provisions of law contextually or even purposively. The golden rule of interpretation is the rule of plain language, while preferring the interpretation which furthers the cause of the Statute rather than that which defeats the objects or purposes of the Act."

12. The learned counsel for the appellant also relied upon the decision of the Hon'ble Apex Court in the case of ***Yogendra Kumar Jaiswal and others Vrs. State of Bihar and others*** in Civil Appeal No.6448-6452, 6460 of 2011 along with analogous matters reported in (2016) 3 SCC 183 submitting that in a similar circumstance, the Hon'ble Court has observed that such a

direction of disposal of a proceeding is not directory. But, it has been observed in the said decision that :

> "At this stage, we may note with profit that the High Court of Patna has dealt with Section 17(3) of the Bihar Act which provides that an appeal shall be disposed of preferably within a period of six months from the date it is preferred, and stay order, if any, passed in an appeal shall not remain in force beyond the prescribed period of disposal of appeal. It has been held therein that it would not be proper to construe that the prescribed period of disposal of appeal is only six months but it is only desirable that the appeal should be disposed of within six months and the stipulation that the order of stay is not to remain in force beyond the period of disposal of appeal would not mean that the order of stay will lose its force during the pendency of the appeal."

Discussing the aforesaid observations of the Hon'ble High Court of Patna, the Hon'ble Supreme Court further observed that:

> "The High Court of Patna has construed the provision by laying down stress on the word 'preferably'. We are disposed to think that the interpretation placed on the similar provision of the Orissa Act in **Kishore Chandra Patel vrs. State of Orissa 1993 (76) CLT 720** is correct and therefore, we are disposed to hold that the order of stay if passed in an appeal would not debar or prohibit the High Court to pass a fresh stay order beyond that period, if a case is made out to the satisfaction of the court."

13. The purpose of quoting the aforesaid guiding principles as laid down by the Hon'ble Apex Court is as mentioned earlier that there is no penal provision provided in O.P.I.D.Act prescribing any consequence, if the proceeding before the Designated Court is not completed within one hundred eighty days. The purpose of the proceeding is to verify the claims of different persons in the properties attached in course of investigation and to pass a final order either making the attachment absolute or releasing a portion of the properties so attached or cancelling the order of attachment and thereafter direct the competent authority to sell the properties so attached. It has also been provided in Section 9(6) of the O.P.I.D.Act that the Designated Court shall not release from attachment any interest of owners of such property unless it is also satisfied that here will remain under attachment an amount or property of a value not less than the value that is required for repayment to the depositors of such financial establishment. As

observed by the Hon'ble Apex Court, it can be mentioned in the similar line that if the proceeding is not completed within prescribed period of one hundred eighty days and is treated to be closed for the sake of argument, obviously there would be no final order in the proceeding. But, that can never be construed that the properties so attached shall automatically be released from attachment and at the same time there is no bar for the competent authority to make a fresh prayer before the Designated Court on similar line.

Learned counsel for the State also relied upon a decision in the case of The ***Remington Rand of India Ltd. Vrs. The Workmen,*** reported in **AIR 1968 SC 224**, wherein it is held that:

> " For ascertaining the real intention of the Legislature the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

14. In the aforesaid premises, I am unable to accept the contention on behalf of the appellant that the period of one hundred eighty days prescribed for disposal of proceeding is mandatory and in the event of the failure of compliance thereof, the proceeding will be dropped and the properties so attached, shall be released automatically. It would also be profitable to mention in this regard that the purpose of legislation of the O.P.I.D. Act is to secure the interest of general public who have invested their hard-earned money in a company with the belief and faith of getting high returns, but have been ultimately duped by the said company which is prosecuted for its alleged offences before a separate forum. It is worthwhile to mention that since different companies cropped up in the State of Odisha inviting funds from different depositors giving false promise of high rate of returns, even though they were not authorized for such business, and ultimately the investors found themselves to have been cheated, the matters were reported to the Police and cases were registered at different police stations. The present Seashore Group of Companies of which the appellant was Managing Director was one of such companies. While the investigation was going on

and charge sheets were submitted in some cases in P.I.L filed before the Hon'ble Apex Court vide W.P(C) No.413 of 2013, the Hon'ble Apext Court realising the importance of the cases and the gravity of the offences allegedly committed, directed the C.B.I to take up the investigation in respect of forty four companies including the present company, even in cases where the charge sheet had already been submitted. It was specifically observed by the Hon'ble Apex Court that "the Economic Offences" having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing a serious threat to the financial health of the country. In the instant case, particularly, the interest of thousands of investors is involved and the allegation of deposit of the investors amounts to more than thousands of crores of rupees. In such circumstances, to drop the proceeding and release the properties of the company closing eyes to the hopes and aspirations of thousands of bonafide investors and depositors merely resorting to literary interpretation of the statutory provision, in my humble opinion, would definitely be uncalled for and failure of justice.

15. It was contended by the learned counsel for the appellant that the learned Designated Court has mentioned in the impugned order that the present appellant consumed several adjournments and hence the delay in disposal as alleged by him, does not lie in his mouth. It was submitted that the appellant had filed his show-cause promptly, but he had taken some adjournments for filing reply to certain intervenor applications. Be that as it may, there has been delay in deciding interlocutory applications filed by different intervenors apart from some adjournments also consumed by other opposite parties. But, at the same time, those could not have been avoided since the purpose of the O.P.I.D. Act is to finally decide after due enquiry as to the interests of third persons in the attached properties of the concerned company.

16. Another contention was raised in course of hearing of the appeal on behalf of the appellant that the O.P.I.D. Act came into force in the year 2013 and the criminal proceeding against the appellant and seizure and attachment of the properties of the concerned company being much prior to that, the provisions of the O.P.I.D. Act could not have been made applicable against the present appellant. In this respect, it was submitted that the provision of O.P.I.D. Act being penal in nature could not have any retrospective effect so as to include the case of the petitioner to be taken cognizance of under its provision. In this respect, it may be mentioned that such contention was

raised before this Court for the first time only in course of hearing of the appeal apart from the fact that it was also not taken as a ground in the appeal memo filed on behalf of the appellant. In such circumstances, I am not inclined to pass any order in that respect.

17. In view of my aforesaid discussions and findings, I find no merit in the present appeal. Accordingly, it stands dismissed.

18. However, learned Designated Court would do well to dispose of the proceeding as expeditiously as possible and the parties are also directed to co-operate for early disposal of the same.

Appeal dismissed.

2017 (I) ILR - CUT- 163

DR. D.P.CHOUDHURY, J.

W.P.(C) NO. 28470 OF 2013

PRAHALLAD MOHANTY .....Petitioner

.Vrs.

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

SERVICE LAW – Petitioner entered into CRPF service on 30.04.1988 – In the year 2002 he suffered from Psychosis/Psychotic which includes Schizophrenia – Although, petitioner suffered 70% disabilities, he was denied disability pension but allowed invalidate pension – Hence the writ petition – Petitioner entered into service as a normal man but suffered thereafter – No report of the Medical Board that the petitioner has entered into service being suffered from any disease – Disability pension was refused without hearing the petitioner or his wife – Action is illegal and improper – Held, the impugned order refusing disability pension is quashed – Direction issued to the opposite parties to grant disability pension to the petitioner under C.C.S. (EOP) Rules, proportionately to his disability from the date of discharge from service in addition to his invalidate pension sanctioned by the opposite parties. (Paras 28 to 34)

Case Law Referred to :-

1. (2015) 12 SCC 264 : Union of India & Anr. -V- Rajbir Singh
2. (2009) 9 SCC 140 : Secy., Min. of Defence & Ors. -V- Damodaran A.V. (Dead) through L.Rs. & Ors.

For Petitioner : M/s.B.Senapati & M.K.Panda
For Opp. Parties : Mr. M.K.Badu, Central Govt. Counsel.

Date of hearing: 06.09.2016
Date of judgment:5.10.2016

JUDGMENT

DR. D.P.CHOUDHURY, J.

Challenge has been made to the inaction of the opposite parties in not granting disability pension to the petitioner although he has been declared permanently incapacitated with 70% disability.

FACTS

2. The factual matrix leading to the petitioner's case is that the petitioner was initially appointed as a Cook in the Central Reserve Police Force (hereinafter called as "CRPF") and subsequently he fell ill and kept under medical supervision for a long time. While he was discharged from CRPF Base/Group Hospital BH-2, he was discharged with a declaration that he was not fit for any active combat duty and was declared permanently unfit. Accordingly, the Chief Medical Officer, CRPF Base Hospital, Hyderabad recommended for invalid retirement of the petitioner.

3. Be it stated, the Additional DIGP, CRPF, Bhubaneswar, vide memo dated 3.6.2004 declared the petitioner completely and permanently incapacitated for further service of any kind in the Department because of his chronic psychiatric illness. However, an opportunity was afforded to the petitioner to make any representation within a period of one month from the date when he was proposed to be invalidated from the service under the provision of Article 455 of CSR Volume-I.

4. It is averred that the petitioner had been examined by Board of Medical Officers and was completely permanently incapacitated for further service with effect from 26.5.2004. The petitioner was suffering from chronic psychiatric illness "Schizophrenia" and the percentage of disability was 70%. So, the Additional DIGP declared the petitioner invalidated with effect from 2.7.2004 as per Rule-38 of CCS (Pension) Rules 1972. The petitioner applied for the disability pension on 20.6.2008 and on 29.7.2008, Additional DIGP,

Group Centre, CRPF, Bhubaneswar intimated the petitioner that his disability is not attributable to Government service and hence, he was not entitled to disability pension. But the wife of the petitioner claimed that mental disorder of her husband was due to irregular and hazardous duties undertaken by the petitioner.

5. It is further averred that on 4.12.2008, the wife of the petitioner submitted a representation to the Secretary to Government of India in the Ministry of Home Affairs stating therein that her husband was not suffering from Schizophrenia when he was leading happy conjugal life and the said disease was caused mainly due to the irregular and hazardous duties being undertaken by the petitioner.

6. The opposite parties 2 to 4 turned down the plea of the wife of the petitioner and reiterated that the disease of Schizophrenia of the petitioner was not attributable to the Government service and the persons suffering from the aforesaid disease are not eligible for sanction of disability pension.

7. On 19.2.2009, the wife of the petitioner made another representation to I.G. Police, CRPF Eastern Sector, Kolkata reiterating her previous claim and requested the concerned authority to examine her husband by Review Medical Board. According to her, her husband was suffering from mental depression or disorder being treated at Capital Hospital, Bhubaneswar from 7.12.2002 to 17.12.2002, subsequently being treated at SCB Medical College and Hospital, Cuttack and finally he was under the treatment of CRPF Base Hospital, Hyderabad from 31.12.2002 to 3.2.2004. The wife of the petitioner had claimed that under all these medical reports, the disease was not diagnosized to be Schizophrenia but the mental disorder occurred only due to the nature of duty and responsibility bestowed on him. Thereafter, the above authority rejected the prayer of the petitioner and his wife by reiterating the stand earlier taken. The petitioner inter alia alleged that said rejection of the prayer is illegal, improper and arbitrary. So, the petitioner prayed to direct the opposite parties to grant disability pension from the date of discharge from service till the actual payment.

8. Per contra, the opposite parties have filed counter affidavit stating therein that the petitioner was working as a Cook in CRPF being appointed in 1988.

9. It is stated that due to the illness of the petitioner, he was examined by Board of Medical Officers and declared completely and permanently incapacitated for further service with effect from 25.5.2004. The petitioner was suffering from chronic psychiatric illness "Schizophrenia" and the

percentage of disability of the disease declared by the Medical Board was 70% under Category-A. Accordingly, necessary one month notice as per Rule was served on the petitioner proposing his invalidation in service. Consequent to such notice, the petitioner submitted application on 7.6.2004 stating that he has no objection to proceed on invalidation from service due to illness. So, finally he was invalidated from service with effect from 2.7.2004 with the sanction of invalidation pension by PAO, CRPF, New Delhi with effect from 3.7.2004.

10. Be it stated, the opposite parties denied about disability pension stating that the petitioner has been sanctioned invalidation pension vide letter dated 24.8.2004, but as regards to the sanction of disability pension, the petitioner is not entitled to such disability pension because of the disease not being attributable to Government service inasmsuch as the Disability Pension Rules do not entitle him to get such disability pension, if he has got permanent disability being not attributable to Government service. The opposite parties rejected the application of the petitioner stating that the petitioner has been examined by Medical Board having 70% chronic psychiatric illness "Schizophrenia", he has been rightly declared by the Medical Board incapacitated to discharge duty and the petitioner has been given sufficient opportunity to prefer appeal. The opposite parties reiterated that since the petitioner was suffering from chronic psychiatric illness "Schizophrenia", which has been duly acknowledged by the petitioner by endorsing his signature on Form No.23 and such disease not attributable to the Government service, the claim of the petitioner is baseless and should not be allowed in the writ petition.

SUBMISSIONS

11. Learned counsel for the petitioner submitted that in view of Annexure-1 series and Annexure-2, the petitioner has been treated at Base CRPF Hospital, Hyderabad, Capital Hospital, Bhubaneswar and also at SCB Medical College & Hospital, Cuttack where he has been treated for the disease psychosis/psychotic disorder. From Annexure-2, it appears that from 3.3.2003 to 4.4.2003, he was under treatment of psychosis/psychotic disorder, from 7.4.2003 to 26.4.2003 he was treated for psychosis/psychotic disorder and from 5.8.2003 to 19.8.2003, he was treated for psychosis/psychotic disorder. In the same document, it is mentioned that from 4.11.2003 to 3.2.2004, he was treated for the disease Schizophrenia. Here, learned counsel for the petitioner submitted that for the disease psychosis/psychotic disorder

he was treated but not for Schizophrenia as the petitioner was severely ailing for psychosis/psychotic disorder.

12. Learned counsel for the petitioner submitted that in spite of the illness of the petitioner for the disease psychosis/psychotic order, the opposite parties issued a memorandum vide Annexure-3 to the writ petition stating therein that the petitioner was suffering from Chronic Psychiatric illness (Schizophrenia) and accordingly the petitioner was asked to make representation for challenging the view of the Additional DIGP. He also drew the attention of this Court to Annexure-4 to the writ petition where according to Rule 38 of CCS (Pension) Rules, 1972, the Additional DIGP, GC, CRPF, Bhubaneswar passed the order on 2.7.2004 invalidating out the petitioner from service. When the representation was made by the petitioner, the Additional DIGP, on 29.7.2008 under Annexure-6, has passed the following order:

> "xx xx xx
>
> 2. As per the certificate issued by the Board of Medical Officers, you were suffering from Chronic Psychiatric illness 'Schzophrenia', therefore, you were declared completely and permanently incapacitated for further service under Category 'A' of GOI Deptt. Of P&PW OM No.45/22/97-P & PW(C) dated 3/2/2000 (CCS (EOP) Rules). In this regard, this Officer Order No.P-III-1/04-GCBBSR-Pen dated 2/7/04 may also be referred. As per above rules, your disability is not attributable to Government service. Therefore, you are not entitled for sanction of Disability Pension".

13. Learned counsel for the petitioner has challenged the above order stating that the petitioner had suffered from psychosis/psychotic disorder because of the medical certificates all of which are showing that the petitioner was suffering from psychosis/psychotic disorder and such disease occurred as disability attributable to Government Service.

14. Mr.M.K.Badu, learned Central Government Counsel for the Union of India, supporting the counter affidavit, stated that under the EOP Rules, Schizophrenia is not a disease to be covered under such rules and moreover such disease of Schizophrenia as the petitioner was suffering was not attributable to Government service. It is also revealed from his submission read with the counter affidavit that on 25.5.2004, the Medical Board has certified that the petitioner was being suffered from Schizophrenia and such suffering was not attributable to Government service.

POINT FOR CONSIDERAITON

15. Whether the petitioner is entitled to disability pension under the Central Civil Services Extra-ordinary Pension Rules (hereinafter called "EOP Rules").

DISCUSSION

16. It is admitted fact that the petitioner was working under the opposite parties as Cook and he entered into service on 30.4.1988 against the strength of 94 Bn CRPF and he bears one identity number, i.e., 880947015. It is not in dispute that the petitioner has been sanctioned invalidation pension under Rule-38 of CCS (Pensions) Rules, 1972. It is also not in dispute that the petitioner was suffering from psychosis/psychotic disorder in the year 2002 and his percentage of disability is 70% under Category-A.

17. It is also the admitted fact that CCS (Pension) Rules, 1972 governs about invalidation pension at Rule-38 of the said Rule. As per the G.I. Department of P & PW., OM No.45/86/97-P&PW(A) dated 7.8.2001, the pensioner to whom the CCS Pension Rules applies for obtaining the invalidation pension can also avail the disability pension and such disability pension is available under the EOP Rules.

18. It is, therefore, necessary to go through the EOP Rules to find out as to whether the petitioner is entitled to disability pension.

19. The EOP Rules is extended for the disability or death of the Central Government employee and as such disability must have been caused due to disease as defined under the Rule-3-A of the appendix which is placed below for better reference:

> **"3-A-Eligibility**
>
> (1)(a)Disablement shall be accepted as due to Government service, provided that it is certified that it is due to wound, injury or disease which –
> (i) is attributable to Government service, or
> (ii) existed before or arose during Government service and has been and remains aggravated thereby."

20. The word **"DISEASE"** is also defined at Rule-3(4) which is placed as under:

> "3.(4) **'DISEASE'** means –
>
> a disease as is mentioned in Schedule I-A hereto annexed"

21. Of course, Schedule-1-A of the EOP Rules has got long list of diseases. Clause-B of the said list classifies the disease which can be contracted by service in following manners:

> **"B. Disease affected by stress and strain.**
>
> (i)Psychosis and Psychoneurosis
> (ii)Hyperpiesia.
> (iii)Hypertension (BP).
> (iv)Pulmonary Tuberculosis
> (v)Pulmonary Tuberculosis with pleural effusion.
> (vi)Tuberculosis - Non-pulmonary.
> (vii)Mitral Stenosis.
> (viii)Pericarditis and adherent pericardium.
> (ix)Endo-carditis
> (x)Sub-acute bacterialendo-carditis, including infective endocarditis.
> (xi)Nyocarditis - acute or chronic.
> (xii)Valvular disease."

22. From the aforesaid provisions, it is clear that Psychosis and Psychoneurosis being disability which is affected by stress and strain covered under the EOP Rules. The opposite parties have relied upon the Government of India decision No.1 in Appendix-3 of the CCS EOP Rules and such circular is placed below for better reference:

> "
>
> xx xx xx
>
> **Category-B**
>
> Death or disability due to causes which are accepted as attributable to or aggravated by Government service. Diseases contracted because of continued exposure to a hostile work environment, subjected to extreme weather conditions or occupational hazards resulting in death or disability would be examples.
>
> **Category-C**
>
> Death or disability due to accident in the performance of duties. Some examples are accidents while traveling on duty in Governments vehicles or public transport, a journey on duty is performed by service aircraft, mishaps at sea, electrocution while on duty, etc.
>
> xx xx xx xx

> **III. Disability Pension** - for cases covered under Categories 'B' and 'C'
>
> (1)Normal pension and gratuity admissible under the CCS (Pension) Rules, 1972, plus disability pension equal to 30% of basic pay, for 100% disability,
>
> (2)For lower percentage of disability, the monthly disability pension shall be proportionately lower as at present, provided that where permanent disability is not less than 60% , the total pension (i.e., pension or service gratuity admissible under the ordinary pension rules plus disability pension as indicated at (1) above) shall not be less than 60% of basic pay, subject to a minimum of Rs. 2500."

23. From the aforesaid provision, it is clear that in spite of receiving the normal invalidate pension under the CCS Pension Rule, 1972, the disability pension equal to 30% of basic pay for 100% disability or for lower percentage of disability, the proportionate disability pension would be made available for the disability due to the causes which are attributable or aggravated by the Government service.

24. In the case of ***Union of India & another –V- Rajbir Singh; (2015) 12 SCC 264*** the Hon'ble Supreme Court of India, at paragraph-16, has observed as under:

> "Applying the above parameters to the cases at hand, we are of the view that each one of the respondents having been discharged from service on account of medical disease/disability, the disability must be presumed to have been arisen in the course of service which must, in the absence of any reason recorded by the Medical Board, be presumed to have been attributable to or aggravated by military service. There is admittedly neither any note in the service records of the respondents at the time of their entry into service nor have any reasons been recorded by the Medical Board to suggest that the disease which the member concerned was found to be suffering from could not have been detected at the time of his entry into service. The initial presumption that the respondents were all physically fit and free from any disease and in sound physical and mental condition at the time of their entry into service thus remains unrebutted. Since the disability has in each case been assessed at more than 20%, their claim to disability pension could not have been repudiated by the appellants."

25. With due respect to the above decision, it must be observed that although the above decision relates to disability pension matters of the Army employees but the facts and circumstances of that case is similar to the facts and circumstances of the present case. So, the ratio of the above case is applicable to the present case.

26. Now, adverting to the present case, it is the case of the petitioner, while entering into the service in CRPF, was not suffering from psychosis/psychotic disorder and his ailment only started in the year 2002. As it appears, the disease psychosis/psychotic disorder only was diagnosized as per treatment records but for Schizophrenia, there is no treatment records produced by the opposite parties except a list of disease with dates for which the petitioner got treated. So, the disease of Psychosis/psychotic disorder is considered as petitioner was suffering**.** The opposite parties have taken a plea that the disease suffered by the petitioner is not attributable to the Government service. As there is no material or document placed by the opposite party to show that the petitioner was suffering from Psychoneurosis or the psychosis disorder or Schizophrenia at the time of entry into service, it must be presumed that he had entered into service as a normal man.

27. The opposite parties have issued the order vide Annexures-3 and 4 to the writ petition stating that the petitioner was suffering from Chronic Psychiatric illness (Schizophrenia) basing on the report of the Medical Board dated 25.5.2004 and the same was accepted as a final opinion towards the disease. When there are documents of treating doctor vide Annexures-1 and 2 certifying that the petitioner was suffering from psychosis/psychotic disorder**,** any change of his treatment as opined by the opposite parties, the onus lies on the opposite parties to prove the same. No document of any Medical Board dated 25.5.2004 upon which the opposite parties relied upon has been produced by the opposite parties to prove the same as the basis for issuance of the order dated 2.7.2004 to declare the petitioner invalidate from service and allowing him only the invalidation pension.

28. The disease psychosis refers to an abnormal condition of the mind described as involving a "loss of contact with reality". People with psychosis are described as psychotic. People experiencing psychosis may exhibit some personality changes and thought disorder. Psychosis is a sign of psychiatric disorder is a diagnosis of exclusion. Psychotic disorder are a group of serious illness that affect the mind. Psychosis or Psychotic disorder includes the Schizophrenia and other kinds of disorders. Thus, the psychosis or psychotic disorder is considered are genus whereas Schizophrenia is a species.

Therefore, the contention of the learned counsel for the opposite parties that the petitioner having suffered from Schizophrenia cannot be said to have suffered from psychosis and psychoneurosis and, therefore, not covered under the definition of disease to receive the disable pension is not correct. Since psychosis and psychoneurosis includes the Schizophrenia, the Court is of the considered view that the petitioner was suffering from disease psychosis and psychoneurosis as per the "disease" under EOP Rules.

29. In the case of ***Secretary, Ministry of Defence and others –V- Damodaran A.V. (Dead) through LRs and Others; (2009) 9 SCC 140*** where Their Lordships have decided the case on pension regulation of the Army and stressed on the opinion given by the doctor of the Medical Board which should be given weightage and primacy in the matter for ascertaining of illness was due to or was aggravated by military service which attributed to invalidation from the military service. In absence of any report of the Medical Board relied upon by the opposite parties that the letter of the opposite parties under Annexures-3 and 4 denying the disability pension to the petitioner because of such opinion of the Medical Board which is not produced before this Court cannot be acceptable.

30. Not only this but also it appears from the counter that the petitioner has served for 16 years while he was invalidated from the service. After serving about ten years, the petitioner suffered from psychosis/psychotic disorder and it is upon the opposite parties to prove that such disease is not attributable to Government service. No material is produced by the opposite parties that such disease was not attributable to Government service. On the other hand, when the petitioner was serving in the CRPF and managed to work continuously for ten years and then suffered from such disease, it must be observed that the petitioner was suffering from psychosis/psychotic disorder, a disease as prescribed in the Schedule-1-A of the EOP Rule by virtue of which he was invalidated from service and eligible to receive the disability pension as per Government of India Decision No.1, Appendix-3 because it is attributable to Government service as observed above.

31. In the instant case, when there is no report of the Medical Board produced by the opposite parties, there is nothing to show that the petitioner has entered into service being suffered from any disease as recorded by the Medical Board which could have been revealed at the time of entering into service, it must be observed that the disablement of the petitioner has been attributable to or aggravated by Government service in CRPF.

32. As per clause-ii of Sub-Rule-1(a) of Rule-3-A of EOP Rules, the disablement is accepted due to Government service if it is found that the disease existed before or arose during Government service and has been and remains aggravated thereby. In the instant case, as per discussion made herein, it is made clear that the petitioner has entered into service as a normal man, but in the year 2002, he suffered from psychosis/psychotic disorder which arose during the Government service. Thus, the disablement of the petitioner arose during the Government service, i.e, after entering into service. Not only this but also, such disease has remained aggravated for which he was allowed invalidate pension. Thus, the pre-conditions as required to accept the disablement of the petitioner in terms of clause-ii of Sub-Rule-1(a) of Rule-3-A of EOP Rules became satisfied. In toto, the disablement of the petitioner has been proved to be attributable to or aggravated by Government service in CRPF as per clause-(i) and his disablement shall be also accepted as due to Government service as per clause-ii of Sub-Rule-1(a) of Rule-3-A. Point No.1 is answered accordingly.

CONCLUSION

33. In the instant case, the wife of the petitioner has made representations to the authority for granting disability pension but the opposite parties after granting invalidate pension has refused to grant disability pension without hearing the petitioner or his wife when the petitioner is suffering from Psychosis and Psychoneurosis disorder and the wife of the petitioner all along has submitted that such disablement occurred due to the Government service and as per above observation that the petitioner was disable being attributable to the Government service and it occurred during Government service, the rejection of the representation by the opposite parties vide Annexure-6 is illegal and improper and the same is liable to be quashed and this Court do so.

34. The opposite parties are hereby directed to grant disability pension to the petitioner under CCS (EOP) Rules as per Government of India Decision No.1, Appendix-3 proportionately to his disability of 70% from the date of discharge from service in addition to his invalidate pension already sanctioned by the opposite parties within a period of two months from today. The writ petition is disposed of accordingly.

Writ petition disposed of.