2016 (II) ILR - CUT- 930 (S.C.)

SUPREME COURT OF INDIA

ANIL R. DAVE, J. & L.NAGESWARA RAO, J.

CIVIL APPEAL NO. 3253 OF 2008

NARENDRA ……..Appellant

.Vrs.

K. MEENA ……..Respondent

HINDU MARRIAGE ACT, 1955 – S.13(1)(ia)

Divorce – Cruelty – What constitutes – Wife insisting husband to get separated from his family, her unsubstantiated allegations that he had an extra-marital affair with someone, her attempt to commit suicide and her leaving the matrimonial home more than 20 years would constitute worst form of insult and mental cruelty – It would be difficult for the husband to live with such a person with tranquility and peace of mind, rather such torture would adversely affect his life and he deserves to get a decree of divorce U/s. 13(1)(ia) of the Act – The High Court had committed grave error in re-appreciating the evidence and by setting aside the decree of divorce passed by the Family Court – Held, the impugned judgment passed by the High Court is set aside and the decree of divorce passed by the Family Court is restored.

(Paras 14,15,16)

Case Laws Referred to :-

1. (2011) 12 SCC 1 : Pankaj Mahajan -V- Dimple @ Kajal
2. 2003 (6) SCC 334 : Vijaykumar Ramchandra Bhate -V- Neela Vijaykumar Bhate

Appellant : Mr. V.N.Raghupathy
Respondent : Ms. Kamakshi S. Mehlwal

Date of judgment: 06.10.2016

JUDGMENT

ANIL R. DAVE, J.

1. This appeal has been filed by the Appellant husband, whose decree for divorce passed by the trial Court has been set aside by the impugned judgment dated 8th March, 2006 passed by the High Court of Karnataka at Bangalore in Miscellaneous First Appeal No.171 of 2002 (FC).

2. The facts giving rise to the present appeal, in a nutshell, are as under :

The Respondent wife filed Miscellaneous First Appeal under Section 28(1) of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act") before the High Court as she was aggrieved by the judgment and decree dated

17th November, 2001, passed by the Principal Judge, Family Court, Bangalore in M.C. No.603 of 1995 under Section 13(1)(ia) of the Act filed by the Appellant husband seeking divorce.

3. The Appellant husband had married the Respondent wife on 26th February, 1992. Out of the wedlock, a female child named Ranjitha was born on 13th November, 1993. The case of the Appellant was that the Respondent did not live happily with the Appellant even for a month after the marriage. The reason for filing the divorce petition was that the Respondent wife had become cruel because of her highly suspicious nature and she used to level absolutely frivolous but serious allegations against him regarding his character and more particularly about his extra-marital relationship. Behaviour of the Respondent wife made life of the Appellant husband miserable and it became impossible for the Appellant to stay with the Respondent for the aforestated reasons. Moreover, the Respondent wanted the Appellant to leave his parents and other family members and to get separated from them so that the Respondent can live independently; and in that event it would become more torturous for the Appellant to stay only with the Respondent wife with her such nature and behaviour. The main ground was cruelty, as serious allegations were levelled about the moral character of the Appellant to the effect that he was having an extra-marital affair with a maid, named Kamla. Another important allegation was that the Respondent would very often threaten the Appellant that she would commit suicide. In fact, on 2th July, 1995, she picked up a quarrel with the Appellant, went to the bathroom, locked the door from inside and poured kerosene on her body and attempted to commit suicide. On getting smell of kerosene coming from the bathroom, the Appellant, his elder brother and some of the neighbours broke open the door of the bathroom and prevented the Respondent wife from committing suicide. The aforestated facts were found to be sufficient by the learned Family Court for granting the Appellant a decree of divorce dated 17th November, 2001, after considering the evidence adduced by both the parties.

4. Being aggrieved by the judgment and decree of divorce dated 17th November, 2001, the Respondent wife had filed Miscellaneous First Appeal No.171 of 2002 (FC), which has been allowed by the High Court on 8th March, 2006, whereby the decree of divorce dated 17th November, 2001 has been set aside. Being aggrieved by the judgment and order passed by the High Court, the Appellant has filed this appeal.

5. The learned counsel appearing for the Respondent was not present when the appeal was called out for hearing. The matter was kept back but for the whole day, the learned counsel for the Respondent did not appear. Even on an earlier occasion on 31st March, 2016, when the appeal was called out, the learned counsel appearing for the Respondent wife was not present and therefore, the Court had heard the learned counsel appearing for the Appellant.

6. The learned counsel appearing for the Appellant submitted that the High Court had committed a grave error in the process of re-appreciating the evidence and by setting aside the decree of divorce granted in favour of the Appellant. He submitted that there was no reason to believe that there was no cruelty on the part of the Respondent wife. He highlighted the observations made by the Family Court and took us through the evidence, which was recorded before the Family Court. He drew our attention to the depositions made by independent witnesses, neighbours of the Appellant, who had rescued the Respondent wife from committing suicide by breaking open the door of the bathroom when the Respondent was on the verge of committing suicide by pouring kerosene on herself and by lighting a match stick. Our attention was also drawn to the fact that serious allegations leveled against the character of the Appellant in relation to an extra-marital affair with a maid were absolutely baseless as no maid named Kamla had ever worked in the house of the Appellant. It was also stated that the Respondent wife was insisting the Appellant to get separated from his family members and on 12th July, 1995 i.e. the date of the attempt to commit suicide, the Respondent wife deserted the Appellant husband. According to the learned counsel, the facts recorded by the learned Family Court after appreciating the evidence were sufficient to show that the Appellant was entitled to a decree of divorce as per the provisions of Section 13(1)(ia) of the Act.

7. We have carefully gone through the evidence adduced by the parties before the trial Court and we tried to find out as to why the appellate Court had taken a different view than the one taken by the Family Court i.e. the trial Court.

8. The High Court came to the conclusion that there was no cruelty meted out to the Appellant, which would enable him to get a decree of divorce, as per the provisions of the Act. The allegations with regard to the character of the Appellant and the extra-marital affair with a maid were taken very seriously by the Family Court, but the High Court did not give much importance to the false allegations made. The constant persuasion by

the Respondent for getting separated from the family members of the Appellant and constraining the Appellant to live separately and only with her was also not considered to be of any importance by the High Court. No importance was given to the incident with regard to an attempt to commit suicide made by the Respondent wife. On the contrary, it appears that the High Court found some justification in the request made by the Respondent to live separately from the family of the Appellant husband. According to the High Court, the trial Court did not appreciate the evidence properly. For the aforestated reasons, the High Court reversed the findings arrived at by the learned Family Court and set aside the decree of divorce.

9. We do not agree with the manner in which the High Court has re-appreciated the evidence and has come to a different conclusion.

10. With regard to the allegations of cruelty levelled by the Appellant, we are in agreement with the findings of the trial Court. First of all, let us look at the incident with regard to an attempt to commit suicide by the Respondent. Upon perusal of the evidence of the witnesses, the findings arrived at by the trial Court to the effect that the Respondent wife had locked herself in the bathroom and had poured kerosene on herself so as to commit suicide, are not in dispute. Fortunately for the Appellant, because of the noise and disturbance, even the neighbours of the Appellant rushed to help and the door of the bathroom was broken open and the Respondent was saved. Had she been successful in her attempt to commit suicide, then one can foresee the consequences and the plight of the Appellant because in that event the Appellant would have been put to immense difficulties because of the legal provisions. We feel that there was no fault on the part of the Appellant nor was there any reason for the Respondent wife to make an attempt to commit suicide. No husband would ever be comfortable with or tolerate such an act by his wife and if the wife succeeds in committing suicide, then one can imagine how a poor husband would get entangled into the clutches of law, which would virtually ruin his sanity, peace of mind, career and probably his entire life. The mere idea with regard to facing legal consequences would put a husband under tremendous stress. The thought itself is distressing. Such a mental cruelty could not have been taken lightly by the High Court. In our opinion, only this one event was sufficient for the Appellant husband to get a decree of divorce on the ground of cruelty. It is needless to add that such threats or acts constitute cruelty. Our aforesaid view is fortified by a decision of this Court in the case of ***Pankaj Mahajan v. Dimple @ Kajal (2011) 12***

SCC 1, wherein it has been held that giving repeated threats to commit suicide amounts to cruelty.

11. The Respondent wife wanted the Appellant to get separated from his family. The evidence shows that the family was virtually maintained from the income of the Appellant husband. It is not a common practice or desirable culture for a Hindu son in India to get separated from the parents upon getting married at the instance of the wife, especially when the son is the only earning member in the family. A son, brought up and given education by his parents, has a moral and legal obligation to take care and maintain the parents, when they become old and when they have either no income or have a meagre income. In India, generally people do not subscribe to the western thought, where, upon getting married or attaining majority, the son gets separated from the family. In normal circumstances, a wife is expected to be with the family of the husband after the marriage. She becomes integral to and forms part of the family of the husband and normally without any justifiable strong reason, she would never insist that her husband should get separated from the family and live only with her. In the instant case, upon appreciation of the evidence, the trial Court came to the conclusion that merely for monetary considerations, the Respondent wife wanted to get her husband separated from his family. The averment of the Respondent was to the effect that the income of the Appellant was also spent for maintaining his family. The said grievance of the Respondent is absolutely unjustified. A son maintaining his parents is absolutely normal in Indian culture and ethos. There is no other reason for which the Respondent wanted the Appellant to be separated from the family - the sole reason was to enjoy the income of the Appellant. Unfortunately, the High Court considered this to be a justifiable reason. In the opinion of the High Court, the wife had a legitimate expectation to see that the income of her husband is used for her and not for the family members of the Respondent husband. We do not see any reason to justify the said view of the High Court. As stated hereinabove, in a Hindu society, it is a pious obligation of the son to maintain the parents. If a wife makes an attempt to deviate from the normal practice and normal custom of the society, she must have some justifiable reason for that and in this case, we do not find any justifiable reason, except monetary consideration of the Respondent wife. In our opinion, normally, no husband would tolerate this and no son would like to be separated from his old parents and other family members, who are also dependent upon his income. The persistent effort of the Respondent wife to constrain the Appellant to be separated from the

family would be torturous for the husband and in our opinion, the trial Court was right when it came to the conclusion that this constitutes an act of 'cruelty'.

12. With regard to the allegations about an extra-marital affair with maid named Kamla, the re-appreciation of the evidence by the High Court does not appear to be correct. There is sufficient evidence to the effect that there was no maid named Kamla working at the residence of the Appellant. Some averment with regard to some relative has been relied upon by the High Court to come to a conclusion that there was a lady named Kamla but the High Court has ignored the fact that the Respondent wife had leveled allegations with regard to an extra-marital affair of the Appellant with the maid and not with someone else. Even if there was some relative named Kamla, who might have visited the Appellant, there is nothing to substantiate the allegations levelled by the Respondent with regard to an extra-marital affair. True, it is very difficult to establish such allegations but at the same time, it is equally true that to suffer an allegation pertaining to one's character of having an extra-marital affair is quite torturous for any person – be it a husband or a wife. We have carefully gone through the evidence but we could not find any reliable evidence to show that the Appellant had an extra-marital affair with someone. Except for the baseless and reckless allegations, there is not even the slightest evidence that would suggest that there was something like an affair of the Appellant with the maid named by the Respondent. We consider levelling of absolutely false allegations and that too, with regard to an extra-marital life to be quite serious and that can surely be a cause for metal cruelty.

13. This Court, in the case of ***Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate, 2003 (6) SCC 334*** has held as under:-

> "7. The question that requires to be answered first is as to whether the averments, accusations and character assassination of the wife by the appellant husband in the written statement constitutes mental cruelty for sustaining the claim for divorce under Section 13(1)(*i-a*) of the Act. The position of law in this regard has come to be well settled and declared that leveling disgusting accusations of unchastity and indecent familiarity with a person outside wedlock and allegations of extramarital relationship is a grave assault on the character, honour, reputation, status as well as the health of the wife. Such aspersions of perfidiousness attributed to the wife, viewed in the context of an

> educated Indian wife and judged by Indian conditions and standards would amount to worst form of insult and cruelty, sufficient by itself to substantiate cruelty in law, warranting the claim of the wife being allowed. That such allegations made in the written statement or suggested in the course of examination and by way of cross-examination satisfy the requirement of law has also come to be firmly laid down by this Court. On going through the relevant portions of such allegations, we find that no exception could be taken to the findings recorded by the Family Court as well as the High Court. We find that they are of such quality, magnitude and consequence as to cause mental pain, agony and suffering amounting to the reformulated concept of cruelty in matrimonial law causing profound and lasting disruption and driving the wife to feel deeply hurt and reasonably apprehend that it would be dangerous for her to live with a husband who was taunting her like that and rendered the maintenance of matrimonial home impossible."

14. Applying the said ratio to the facts of this case, we are inclined to hold that the unsubstantiated allegations levelled by the Respondent wife and the threats and attempt to commit suicide by her amounted to mental cruelty and therefore, the marriage deserves to be dissolved by a decree of divorce on the ground stated in Section 13(1)(ia) of the Act.

15. Taking an overall view of the entire evidence and the judgment delivered by the trial Court, we firmly believe that there was no need to take a different view than the one taken by the trial Court. The behaviour of the Respondent wife appears to be terrifying and horrible. One would find it difficult to live with such a person with tranquility and peace of mind. Such torture would adversely affect the life of the husband. It is also not in dispute that the Respondent wife had left the matrimonial house on 12th July, 1995 i.e. more than 20 years back. Though not on record, the learned counsel submitted that till today, the Respondent wife is not staying with the Appellant. The daughter of the Appellant and Respondent has also grown up and according to the learned counsel, she is working in an IT company. We have no reason to disbelieve the aforestated facts because with the passage of time, the daughter must have grown up and the separation of the Appellant and the wife must have also become normal for her and therefore, at this juncture it would not be proper to bring them together, especially when the Appellant husband was treated so cruelly by the Respondent wife.

16. We, therefore, quash and set aside the impugned judgment delivered by the High Court. The decree of divorce dated 17th November, 2001 passed by the Principal Judge, Family Court, Bangalore in M.C. No.603 of 1995 is hereby restored.

17. The appeal is, accordingly, allowed with no order as to costs.

Appeal allowed.

2016 (II) ILR - CUT- 937

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

W.P.(C) NO. 10224 OF 2016

KAILASH CHANDRA LENKA ……..Petitioner

.Vrs.

MANAGING DIRECTOR, IDCO & ORS. ……...Opp.parties

TENDER – Rejection of technical bid of the petitioner without assigning any reason – Order can not sustain in the eye of law – Held, impugned order is quashed – Since the contract has been awarded in favour of O.P.No. 4, direction issued to IDCO to cancel such contract and issue fresh tender call notice in accordance with law.

(Para 12)

Case Laws Referred to :-

1. AIR 1978 SC 851 : Mohinder Singh Gill & Anr. -V- The Chief Election Commissioner,New Delhi & Ors.
2. 2016 (II) OLR 237 : M/s. Shree Ganesh Construction -V- State of Orissa & Ors.
3. AIR 1967 SC 1269 : State of Orissa -V- Dr. (Miss) Binapanai Dei & Ors.
4. AIR 1973 SC 855 : Sirsi Municipality -V- Cecelia Kom Francis
5. AIR 1973 SC 239 : Sayeedur Rehman -V- The State of Bihar & Ors.
6. AIR 1978 sc 597 : Smt. Maneka Gandhi -V- Union of India & Ors.

For Petitioner : M/s. N.K.Sahu, B.Swain & P.Swain

For Opp.parties : M/s. Pradipta K. Mohanty, Sr. Advocate
D.N.Mohapatra, Smt. J.Mohanty, P.K,Nayak, A.Das & P.K.Pasayat
M/s. B.K.Biswal, S.K.Sarangi & M.Das

Decided on : 13.09.2016

JUDGMENT

VINEET SARAN, CJ.

The opposite party-IDCO had, vide E-Tender Call Notice dated 16.04.2016, invited tenders for construction of approach road from Mania village to OCL Junction to village Bisuali for Auto Park at Mania, Tangi, Dist-Cuttack within the estimated cost of Rs.34.22 lakh. The petitioner as well as opposite party No.4 had participated in the tender process and submitted their tenders within time. As per the tender call notice, the technical bids of the petitioner, as well as that of the opposite party No.4, were opened on 11.05.2016. Then on 07.06.2016, the order rejecting the technical bid of the petitioner was uploaded in the website, wherein, it was stated that the Technical Committee had decided to qualify opposite party No.4 alone and opened his price bid on the next date, i.e., 08.06.2016. Challenging the said order, this writ petition has been filed.

2. We have heard Sri N.K. Sahu, learned counsel for the petitioner as well as Sri A. Das, learned counsel for opposite parties No.1 to 3-IDCO and Sri B.K. Biswal, learned counsel for opposite party No.4 and perused the record.

3. Pleadings have been exchanged and with consent of learned counsel for the parties, this petition is being disposed of at the admission stage.

4. The submission of the learned counsel for the petitioner is that though the petitioner was fully qualified and eligible for being considered for awarding of contract, but, without assigning any reason, by order dated 07.06.2016 under Annexure-3 to the writ petition, the technical bid of the petitioner has been rejected by merely saying that "*after opening of the technical bids, the documents downloaded from the e-procurement site were placed before the tender committee. The tender committee examined and discussed the matter and committee decided to qualify Sri Chinmay Kumar Routray (opposite party No.4 herein) and opened his price bid on 08.06.2016 by 3.30 P.M.*"

It is submitted that no reason whatsoever for rejecting the technical bid of the petitioner has been assigned in the said order, wherein it was directed that the price bid of the opposite party no.4 was to be opened on the very next date.

It is also submitted that no reason can be substituted or supplemented by the opposite parties in the counter affidavit, as the order has to be seen and evaluated on the grounds and reasons stated therein, and not on the basis of what is stated in the counter affidavit.

It is further submitted by the learned counsel for the petitioner that though in the counter affidavit it has been stated that the Service Tax Registration Certificate was submitted by the petitioner in the name of the Firm M/s. Jagannath Fabricator and not in his own name, but such reason was never communicated to the petitioner. It has been categorically stated in the rejoinder affidavit that, in the past also, with regard to three contracts, which were awarded in the name of the petitioner, the Service Tax Registration Certificate furnished by the petitioner with regard to M/s. Jagannath Fabricator were duly accepted by the opposite parties, and the opposite parties cannot now turn around and reject the tender bid of the petitioner, merely on the ground that the Service Tax Registration Certificate was that of the firm of which the petitioner is the sole proprietor. It is submitted that such explanation has been given in the rejoinder affidavit for the first time, as the petitioner was earlier not communicated the reason for rejection, and such ground has been taken only in the counter affidavit.

5. Per contra, Sri A. Das, learned counsel for the opposite parties-IDCO has submitted that the communication uploaded in the website on 07.06.2016 did not require to contain reasons and, if the petitioner was aggrieved, he ought to have asked for the reasons for rejection of the technical bid, which he did not do, and rushed to this Court on 09.06.2016 by filing this writ petition.

6. Sri Biswal, learned counsel for the opposite party no.4 has submitted that though the petitioner possesses Service Tax Registration Certificate in his own name, he did not furnish it and the one which he has furnished was that of his firm, which is not permissible in law and thus his tender papers were rightly rejected. He has also raised the question of eligibility of the petitioner for grant of such tender as, according to opposite party no.4, the petitioner is an 'A' Class Contractor whereas the contract in question could have been issued only to 'B' Class Contractors and not to 'A' Class Contractors.

7. It is submitted that with regard to such grievance, the petitioner had raised an objection in March, 2016 which ought to have been considered by the opposite party-IDCO. However, what we notice is that the tender call notice was issued by the opposite party-IDCO only on 16.04.2016 and thus, any objection which may have been raised in March, 2016 could not have

been with regard to the present tender call notice. As such, the objection of the petitioner in this regard does not merit consideration.

8. The question of reasons not being assigned in the order and thereafter being provided in the counter affidavit has been decided by the Apex Court as well as this Court in a series of decisions and it has been held that reasons cannot be substituted by way of filing counter affidavit. Relying on the decision of the Apex Court in the case of ***Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi and others****, AIR 1978 SC 851* as well as several other decisions of the Apex Court, our Division Bench in the case of ***M/s. Shree Ganesh Construction vs. State of Orissa and others****, 2016 (II) OLR –237,* has held that when a cryptic order of cancellation of tender is made without assigning any reason and is subsequently explained in the counter affidavit, the same would not be permissible in law.

9. As such, providing reasons for rejecting the technical bid of the petitioner in the counter affidavit would not suffice, when no such reason has been assigned by the opposite party in the order rejecting technical bid of the petitioner. Even otherwise, the question that the petitioner having furnished the Service Tax Registration Certificate in the name of M/s. Jagannath Fabricator, of which he himself is the sole proprietor, is not a question which could have been raised by the opposite party when the opposite party itself had accepted the same Service Tax Registration Certificate of the firm while awarding three earlier contracts in the name of the petitioner. Such averments have been specifically made in paragraph-5 of the rejoinder affidavit, to which reply has been given in paragraph-10 of the further affidavit filed by the opposite parties No.1 to 3, wherein it has been stated that the earlier contracts were awarded to the petitioner on the basis of the Service Tax Registration Certificate of M/s. Jagannath Fabricators, but subsequently the opposite party-IDCO had received objections from certain persons and after considering the said objections, the petitioner was found to be technically disqualified. It is not stated as to when and from whom such objections were received by the opposite party-IDCO. Even if, the same is taken as correct, it is settled law in view of law laid down in ***State of Orissa v. Dr. (Miss) Binapani Dei & others****, AIR 1967 SC 1269;* ***Sirsi Municipality v. Cecelia Kom Francis****, AIR 1973 SC 855;* ***Sayeedur Rehman v. The State of Bihar & others****, AIR 1973 SC 239; and* ***Smt. Maneka Gandhi v. Union of India & others****, AIR 1978 SC 597*; and, subsequently, in a plethora of decisions the Apex Court has held that before passing any order which may adversely

affect a party, the party is entitled to be given an opportunity especially when on the basis of the Service Tax Registration Certificate of the firm, the opposite party-IDCO thus had been consistently awarding contracts in favour of the petitioner.

10. As regards the question of the petitioner possessing separate Service Tax Registration Certificate in his own name, it has been submitted by the learned counsel for the petitioner that the same has been obtained subsequently after the petitioner surrendered such certificate which was in the name of the firm. We need not go into this question as the same is not an issue before us in this petition.

11. Learned counsel for the opposite party-IDCO has relied on the proceedings of the Tender Committee dated 31.05.2016 in which the reason for rejecting the technical bid of the petitioner has been given that the petitioner did not submit the requisite documents in support of Service Tax Registration. Copy of the resolution of the said proceedings of the Technical Committee dated 31.05.2016, admittedly, has not been furnished to the petitioner. Even otherwise, the order was uploaded in the website on 07.06.2016 and the price bid was to be opened on the very next date, i.e., 08.06.2016. As such, there was no occasion for the petitioner to ask the opposite party-IDCO to furnish the reasons, if any, for rejecting his bid. The petitioner immediately approached this Court on 09.06.2016. From this, we find that the petitioner has been vigilant about his rights and has not delayed in any manner in enforcing his rights.

12. In view of the aforesaid, we are of the opinion that the order dated 07.06.2016 rejecting the technical bid of the petitioner cannot be sustainable in the eye of law and the same is hereby quashed. We are informed that during pendency of the writ petition, the contract has been awarded to the sole remaining bidder, i.e., opposite party No.4. If that be so, then keeping in view that the order dated 07.06.2016 has been quashed, the opposite party-IDCO is directed to pass order for cancelling the contract and, if so required, issue a fresh tender call notice in accordance with law.

13. At this stage, Sri Biswal, learned counsel for the opposite party No.4 has submitted that the work which the opposite party No.4 has completed in terms of the contract awarded on 10.08.2016 may be excluded for future contract and he may be paid for the work already done. Such request can be looked into by the opposite party-IDCO, if opposite party No.4 files any such claim before the opposite party-IDCO. The writ petition stands allowed to the extent indicated above. No order as to costs. Writ petition allowed.

2016 (II) ILR - CUT- 942

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

O.J.C. NO. 6274 OF 1998

M/S. HOTEL RAJ KAMAL ……..Petitioner

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.226

Policy decision Dt 31.05.1996 to grant subsidy to the petitioner – Change in the policy with effect from 30.11.1996 – Subsidy granted infavour of the petitioner was withdrawn – Hence the writ petition – Government failed to justify that the change in the policy has retrospective effect – Held, impugned order canceling the grant of subsidy is quashed – The petitioner is entitled to subsidy alongwith interest at the rate which the OSFC charges for late payment of its dues. (Paras 7,8)

For petitioner : Mr. L.Pradhan,
For opp. Parties : Mr. N.C.Mishra & Mr.R.N.Sahoo (Govt. Adv.)

Date of Judgment : 16.09.2016

JUDGMENT

VINEET SARAN, C.J.

The petitioner is a proprietorship firm and running a hotel. For construction of a hotel, the petitioner took a loan from the Orissa State Financial Corporation. Prior to approaching the Orissa State Financial Corporation, the petitioner had approached the State Bank of India and was advanced an initial amount of loan, but then on 3.5.1995 the Tourism Department of the State Government had certified that *"as per the procedure and guidelines for establishment of hotels and other tourism related activities under Industrial Policy Resolution, 1992, Pr. 11 the Hotel Rajkamal comes under Janata Hotel category as per the specifications and facilities available for the visitors."*

2. Pursuant thereto, the petitioner applied for loan from Orissa State Financial Corporation, and subsidy of 30% as per the policy of the Corporation. By order dated 31.5.1996, the Orissa State Financial Corporation sanctioned a loan of Rs. 18,78,883/- and categorically mentioned in the sanction letter that *"on the basis of the above, the amount of 30% subsidy to which you are entitled to is determined at Rs.5,63,665/-"*.

Then by the impugned order dated 23.2.1998, the petitioner was informed that as per the decision of the Government of Orissa in its meeting dated 30.11.1996, the petitioner would not be eligible to get capital investment subsidy under IPR-1992. It was thus informed to the petitioner that the subsidy granted by the Corporation has been cancelled.

3. Challenging the said order, this writ petition has been filed.

4. We have heard Mr. L.Pradhan, learned counsel for the petitioner, Mr. N.C.Mishra, learned counsel for the contesting opposite parties no. 4 and 5-OSFC as well as learned Government Advocate for the State opposite parties.

5. The sequence of events leading to the grant of subsidy of 30% vide sanction letter dated 31.5.1996 would make it clear that the project relating to construction of hotel comes within the purview of tourism related activities and hence the petitioner was found entitled to the grant of subsidy. Consequently, as per the policy as it existed at the time of sanction of loan on 31.5.1996, the petitioner was granted subsidy of Rs. 5,63,665/- after categorically mentioning in the letter that the petitioner was entitled to such subsidy.

6. In the counter affidavit, it has been stated that in the meeting of the State Level Committee on 30.11.1996, it was held that the hotel related activities would not be covered under the tourism related activities and as such, they would not be entitled to grant of subsidy.

7. Learned Government Advocate has stated that since there was change in the policy, hence the subsidy, which was granted in favour of the petitioner on 31.5.1996 was withdrawn. He, however, could not justify as to how the change in the policy, which had come into effect on 30.11.1996, could be given effect retrospectively. Such loans which were granted by the OSFC after 30.11.1996 alone could be effected by the decision of the State Level Committee, but the subsidy which was already granted on 31.5.1996 (i.e. prior to 30.11.1996 as in the case of the petitioner) could not be effected by the subsequent decision/change in policy.

8. It is not disputed that the tourism department of the State Government itself had categorically certified that the hotel of the petitioner would be covered under the tourism related activities as provided under Industrial Policy Resolution-1992 (IPR-1992). Such being the position, we are of the clear view that the order dated 23.2.1998 canceling the grant of subsidy, which was by order dated 31.5.1996, cannot be justified in law. The same is

accordingly quashed. The petitioner would be entitled to the subsidy, along with interest at the rate which the OSFC charges for late payment of its dues. The petition stands allowed to the extent indicated above. No order as to cost.

Writ petition allowed.

2016 (II) ILR - CUT-944

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

W.P.(C). NO. 16294 OF 2016

DR. DILLIP KUMAR MOHANTY ……..Petitioner

.Vrs.

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

EDUCATION – Admission to Superspeciality (DM & M.Ch.) courses for the year 2016-17 – Whether, at the time of counseling, production of Original College Leaving Certificate as per Clause 13.3 of the relevant prospectus and bank draft infavour of the convener as per subsequent notice of counseling Dt. 09.09.2016 was mandatory ? – Held, yes

Such being the position, this court finds no fault with the authority in denying admission to the petitioner who has not produced the above documents at the time of admission, even if he is higher in merit than O.P. No. 5. (Paras 17,18)

Case Laws Relied on :-

1. 2005,101 (2006) CLT 625 : (Dr. Susant Moharana and others v. Convener, P.G. (Medical) Selection Committee.
2. W.P.(C) No. 12476 of 2014 : Dr. Sunanda Priyadarshini Mohanty v. State of Orissa.

Case Laws Referred to :-

1. AIR 2004 SC 5043 : Dolly Chhanda v. Chairman, JEE & Ors
2. AIR 2012 SC 3396 : Asha v. Pt. B.D. Sharma University of Health Science & Ors.,
3. 2014(Supp.-I) OLR- 866 : Snehalata Jagati v. Convenor, PG (Medical/Dental) Selection Committee, Odisha & Ors.

For petitioner : Mr. Pradeep Ku. Sahoo
For opp. parties : Mr. B.P.Pradhan, Addl. Government Advocate
Mr. R.C.Mohanty.

Decided on : 22.09.2016

JUDGMENT

VINEET SARAN, C.J.

Dispute in the present petition is with regard to admission to Superspeciality (DM & M.Ch.) courses. For admission to such courses in S.C.B.Medical College, Cuttack, process had been initiated and prospectus was issued giving the information and guidelines. As per the same, the counseling for such admission was to be done on 22.7.2016 and 23.7.2016 and selected candidates were to report for provisional admission before the Convener on 26.7.2016, and were to join the institution between 1.8.2016 to 6.8.2016. Eight seats in the said college, as provided in the Prospectus, were filled up, in which the petitioner was not selected. Subsequently, the State of Odisha had accorded permission for two additional Superspeciality seats in Cardiology, for which the matter was taken up by the Court in Special Leave to Appeal no. 19633/2016, I.A. No. 25 of 2015 (W.P.(C) No. 76 of 2015), and the Court permitted admission against two direct seats in DM & M.Ch. in Cardiology at MKCG Medical College, Berhampur for the academic session 2016-17 to be effected within one week from the date of the order which was on 8.9.2016. The seats were thus to be filled up within one week from the said date, which was to be according to the prospectus issued for filling the seats in SCB Medical College.

2. Pursuant to the said order dated 8.9.2016 of the Court, notice for counseling was issued by the Convener, Superspeciality Selection Committee 2016-17 consisting of specialist, as was constituted in terms of the Prospectus. In terms of the said notice dated 9.9.2016, the extended spot counseling for admission to the above two seats was scheduled to be held on 14.9.2016 and it was provided that the merit listed candidates for DM courses 2016 could participate in the counseling. Out of the two additional seats, one seat was meant for 'in-service' candidate and the other seat was for 'direct' candidate. The petitioner was an applicant as a direct candidate. In the said notice, it was also provided that *"the selected candidates who have not taken any previous admission shall have to deposit the original CLC and original Bank Draft of Rs. 45,520/- drawn in favour of 'Convener, Superspeciality Selection' payable at Cuttack"*.

3. The admitted facts are that five candidates including the petitioner had appeared for counseling on 14.9.2016. They were placed at Rank 8, 11, 14, 16 and 34 in the merit list. The candidate at Rank 8 in the merit list was

an 'in-service' candidate, but declined to take admission. Thus, when the only candidate from 'in-service' declined to take admission, the said seat fell in the quota of 'direct' candidate. The candidate at Rank 11 appeared and was given admission. The petitioner, who was placed at Rank 14 was considered for admission, but since he did not fulfill the criteria of producing the original College Leaving Certificate (CLC) and the bank draft of Rs. 45,520/-, was declined admission. The next candidate, who was at Rank 16 in the order of merit, also declined to take admission and thus, the candidate who was at Rank 34 in the order of merit (opp. party no.5) was offered admission and since he fulfilled the requisite conditions, he was granted admission.

4. In such circumstances, the petitioner, having been denied admission, filed this writ petition with the prayer that the order selecting opposite party no.5 for admission to Superspeciality (DM Cardiology) Courses for the year 2016-17 be quashed and the petitioner be allotted the said seat.

5. We have heard Mr. P.K.Sahoo, learned counsel for the petitioner; as well as Mr. B.P.Pradhan, learned Addl. Government Advocate appearing for State-opposite parties 1 and 2; and Mr. R.C.Mohanty, learned counsel appearing for opposite party nos. 3 and 4 i.e. Convener, Superspciality Selection Committee 2016-17 and the Medical Council of India. No notice was issued to opposite party no.5. Time was granted to Mr. B.P.Pradhan, learned Addl. Government Advocate and Mr. Mohanty to obtain instruction, which they have received and with the consent of the parties, the writ petition is disposed of at the admission stage.

6. The submission of Mr. P.K. Sahoo, learned counsel for the petitioner is that though the condition was stipulated in the notice dated 9.9.2016 for counseling that the candidate was to deposit the original College Leaving Certificate (CLC) and the bank draft at the time of counseling, but the same was only directory and not mandatory. It is contended that the counseling was for selection, and not for admission, as clause 13.3 of the Prospectus provided that the selected candidate will be required to deposit College Leaving Certificate and the conduct certificate at the time of admission. According to the petitioner, after the selection was made, the petitioner was to be given opportunity to produce the said College Leaving Certificate, as well as bank draft, at the time of admission and not at the time of counseling when the selection was to be made. Learned counsel for the petitioner has submitted that Clause 9.1 of the prospectus provides that admission would be made by showing the allotment letter in the college and by paying

requisite fees and shall abide by all the instructions as contained in the prospectus. His contention, thus, is that after the counseling was over, if the petitioner was selected for admission, admission was to be given by the college only after production of the CLC and the bank draft, which was to be produced before the college where he was to be given admission, on the date and time when the admission was to be made. To substantiate his contention he relied upon the judgments in **Dolly Chhanda v**. **Chairman, JEE and others,** AIR 2004 SC 5043, **Asha v. Pt. B.D. Sharma University of Health Science & Ors.,** AIR 2012 SC 3396, **Snehalata Jagati v. Convenor, PG (Medical/Dental) Selection Committee, Odisha and others,** 2014(Supp.-I) OLR- 866.

7. Mr. B.P.Pradhan, learned Addl. Government Advocate appearing for the State-opposite parties has submitted that after counseling, on selection, provisional admission was also to be made by the Convener, as has been provided in para 1.2 of the prospectus which deals with reporting for provisional admission before the Convener. It is also contended that since admission was to be made by the Convener, thus in the prospectus as well as the notice dated 9.9.2016, it was provided that besides the original CLC, the bank draft of Rs. 45520/- prepared in favour of 'Convener, Superspeciality Selection' and not the college which was assigned to the candidate, was to be provided by the candidate then only. He has thus submitted that the admission was to be granted at the time of counseling itself by the Convener, and only the joining was to be made at the institution, after the admission was granted.

8. Learned Addl. Government Advocate has also submitted that once the petitioner had appeared in the selection process and was aware of the conditions laid down in the prospectus as well as the notice dated 9.9.2016, he cannot be permitted to turn around and say that the conditions laid down therein were not applicable.

9. Mr. R.C.Mohanty, learned counsel appearing for the Convener and the Medical Council of India (opposite parties no. 3 and 4) has submitted that the condition of producing the original College Leaving Certificate, as well as bank daft in favour of the Convener, was mandatory and was provided for, both in the prospectus as well as the subsequent notice dated 9.9.2016. Learned counsel has relied on two Division Bench decisions of this Court (***Dr. Susant Moharana and others v. Convener, P.G. (Medical) Selection Committee, 2005*****,** 101 (2006) CLT 625 and ***Dr. Sunanda Priyadarshini Mohanty v. State of Orissa*** W.P.(C) No. 12476 of 2014 disposed of on

07.08.2014), which according to him are directly on the point, wherein it has been held that CLC would be the document required to be produced at the time of counseling itself before the Convener.

10. Government of Odisha issued a Prospectus for admission to Superspeciality courses in DM & M.Ch. at S.C.B. Medical College, Cuttack for the year 2016-17. The Prospectus itself indicates that it also applies for the seats of DM & M.Ch. courses, which were available consequentially in any Governmental Medical College of the State for the year 2016-17 and it is valid up to the academic session 2019-20. The relevant parts of the prospectus required for adjudication of the case in hand are extracted hereunder:

> *"**1. <u>GENERAL INFORMATIONS:-</u>***
>
> *1.1 Applications are invited from Post Graduate Doctors for admission to Superspeciality Courses in DM & M.Ch. The Selection of candidates is to be conducted by Superspeciality Selection committee 2016-17. The committee will consist of the following members.*
>
> *1. Director Medical Education & Training -Chairman*
> *2. HOD, Cardiology, SCB MCH", CTC -Member*
> *3. HOD, Paediatric Surgery, SCB MC, CTC -Member*
> *4. HOD, Nephrology, SCB MC, CTC -Member*
> *5. HOD, Urology, SCB MCH, CTC -Member Convener*
> *6. Joint Director, DMET, Odisha -Coordinator"*
>
> "***1.2 Tentative important dates for 2016-17 sessions would be as follows which is subject to change as per the circumstances :-***
>
> xx xx xx xx
> *Reporting for provisional admission*
> *before convener 26.07.2016(Tue)"*
> xx xx xx xx
>
> *"**9. <u>ADMISSION OF CANDIDATES:-</u>***
>
> *9.1 . Admission will be made by showing the allotment letter in the College and by paying requisite fees and shall abide by all the instructions as contained in the prospectus during prosecution of their study."*

> *"**13. MISCELLANEOUS :-***
>
> *13.3 A selected candidate shall be required to deposit college leaving certificate and conduct certificate at the time of admission and non production shall debar the candidate for admission."*

11 From the aforesaid, it is clear that admission to the Superspeciality courses in DM & M.Ch. for the session 2016-17 shall be made through a process of selection which shall be conducted by a committee constituted under clause 1.1. The candidates, who shall be selected, shall report for provisional admission before convener on the date fixed as per clause 1.2 and shall deposit the College Leaving Certificate and conduct certificate at the time of admission and non-production thereof shall debar the candidates for admission as per clause-13.3. However, admission will be made by showing the allotment letter in the college and by paying the requisite fees and shall abide by all the instructions, as contained in the prospectus, during prosecution of their study.

12. Admittedly, the admission to the Superspeciality courses in DM & M.Ch. at S.C.B. Medical college in respect of 8 seats had already been made. But, subsequently, by virtue of the order passed by the Court in I.A. No. 25 of 2015 (filed by Health and FW Department, Govt. of Odisha) arising out of W.P.(C) No. 76 of 2015, in case of **Ashish Ranjan & Ors. V. Union of India and Ors.**, admission against the two permitted seats in DM Cardiology at MKCG Medical College, Berhampur for the academic session 2016-17 was to be undertaken. As per direction of the apex Court, vide order dated 08.09.2016, counseling was to be effected within a week therefrom and seats were to be filled up accordingly. Subsequently, Annexure-5, the notice dated 09.09.2016 was issued indicating that the selected candidates who had not taken any previous admission would have to deposit the original CLC and original Bank Draft of Rs.45,520/- drawn in favour of "Convener, Superspeciality Selection", payable at Cuttack and for the said purpose the date was fixed to 14.09.2016. Undisputedly, the petitioner appeared before the selection committee for counseling on the date fixed, but he did not deposit the original CLC and original Bank Draft of Rs.45,520/-, as required pursuant to notice of counseling dated 09.09.2016. Furthermore, as per clause-1.2 the petitioner had reported for provisional admission before the convener, but at the time of reporting for provisional admission before the convener, he had not deposited the original CLC and original Bank Draft of the required amount. Therefore, having failed to deposit the same, the petitioner has been declined to admit into the college due to non-fulfillment

of the requirement of the conditions stipulated in the notice of counseling dated 09.09.2016 under Annexure-5, read with clause 13.3 and clause 1.2 of the Prospectus.

13. Much emphasis has been laid on clause 9.1 of the prospectus by the learned counsel for the petitioner wherein it has been stated that the admission will be made by showing allotment letter in college. Since conditions have been stipulated in the notice for counseling vis-à-vis clause 13.3 read with clause 1.2 of the prospectus putting a mandate on the petitioner to deposit the original CLC before the convener, while reporting for provisional admission, non-production of the same shall debar the candidate for admission, and applying the same the petitioner has been debarred from taking admission. As such, though the petitioner states that he wanted to give an undertaking to produce the original CLC within a stipulated time, but due to the time fixed by the apex Court that admission was to be completed within a week the same could not have been accepted by the convener. In any case, that question does not arise at this stage, because the conditions stipulated in the prospectus vis-à-vis the notice for counseling that the candidate has to deposit the original CLC at the time of reporting for provisional admission into the course, the petitioner having not deposited the same, this Court cannot not find any fault with the authority in denying admission to the petitioner in Superspeciality Course in DM and M.Ch. at MKCG College, Berhampur.

14. **Dolli Chhanda** (supra), which has been relied upon by the learned counsel for the petitioner, is a case wherein admission to M.B.B.S. Course claimed against a seat reserved for children/widow of personnel of armed/paramilitary forces, killed/disabled in action, was rejected at first counseling on the ground that certificate issued to the petitioner therein by Zilla Sainik Board did not satisfy requirement of reserved category. On rectification of the mistake, the petitioner therein produced fresh and correct certificate at second stage of counseling. At that stage, non-consideration of her candidature and giving admission to candidates securing lower rank than her, the Court considered it unjust and illegal and deprecated the highly technical and rigid attitude of the authority and consequently, directed to give admission to the said candidate in any one of the State Medical Colleges. The Court further held that rigid principle should not be applied as it pertains in domain of procedure.

Similarly, in **Asha** (supra), which has been relied upon by the learned counsel for the petitioner, admission to the medical course was under

consideration, where the appellant pleaded that her name was not called for counseling, though she was present. After knowing that less meritorious candidates have been admitted, she immediately raised claim before authorities, but the same was ignored. Her representation was also not considered. Consequently, she filed writ application without any delay stating that she was arbitrarily denied admission to the course. The Court held that the appellant having arbitrarily denied admission, she was entitled only to relief of admission in that current academic session.

In **Snehalata Jagati** (supra), on which reliance has been placed by the learned counsel for the petitioner, admission to P.G. (Medical) course was denied to the petitioner in the second round of counseling for non-production of CLC and not allowing 24 hours time to produce CLC before cut off date. Learned Single Judge of this Court held no fault lies on the part of petitioner, as neither the State Guidelines for allotment of candidates for P.G. (Medical) course in Govt. Medical Colleges nor Regulation and Guidelines for MCI, nor the information of NEET for Admission to P.G. Courses prescribed such pre-condition to produce CLC to participate in first round and/or second round counseling, and action of the opposite parties was unjust and unfair and applying the principle of **Asha** (supra) laid down by the apex Court, directed for admission to the petitioner.

The factual matrix involved in the cases referred to above are totally different from that of the case in hand, inasmuch as, as per the prospectus clause 13.3 read with notice for counseling date 09.09.2016 in Annexure-5, which specifically mandates for deposit of original CLC at the time of counseling for provisional admission as per clause 1.2 of the prospectus itself.

15. Similar question had come up for consideration in **Dr. Susant Moharana** (supra), where this Court has categorically held that as per clause 5.6, 5.7 and 5.8 of the prospectus, candidates who have either completed some P.G. Course in any subject or candidates who have already taken admission under the All India Quota/State Quota or applicants who have taken admission in P.G. Medical Course in any of the three Medical Colleges of Orissa or have not joined or have discontinued after joining shall not be eligible to apply afresh. The College Leaving Certificate, therefore, would be an important document, which will decide the eligibility of the candidate as to whether he had already undertaken P.G. Course earlier. In addition, not only in the Prospectus the petitioners therein were required to produce the College Leaving Certificate in original but also in the call letter itself they

were asked and reminded to produce the College Leaving Certificate/Transfer Certificate issued by the institution last attended with a cause in that no undertaking in any form in compliance to the requirement of production of documents will be entertained in any circumstance. Therefore, non-production of CLC on the date of counseling and admission to the college would deprive the petitioners of their right to admission, even though they have been duly selected.

In **Dr. Sunanda Priyadarshini Mohanty** (supra) relying upon the clauses of the prospectus where it had been specifically mentioned that "under no circumstances a candidate can be admitted without college leaving certificate (CLC)" and non-production of the CLC at the time of counseling for admission into the course, the Division Bench of this Court held that the authorities were justified in not allowing the petitioner therein to participate in the fourth and final round counseling held on 07.07.2014 for non-production of CLC and dismissed the application. The author of this judgment was the author of **Snehalata Jagati** (supra), who considered sitting in singly. He distinguished the **Snehalata Jagati** (supra) with **Dr. Sunanda Priyadarshini Mohanty** (supra) in paragraph 11 of the said judgment.

16. Applying the ratio of **Dr. Susant Moharana** (supra) and **Dr. Sunita Priyadarshini Mohanty** (supra) to the present context, there is no iota of dispute that when the prospectus stipulates a condition for admission to the course for depositing of original CLC at the time of counseling, non-deposit of the same is contrary to the clause 13.3 read with notice for counseling dated 09.09.2016. We may have sympathy for the petitioner as he was higher in merit than opposite party no.5, who has been given admission in the Superspeciality course, and, even though he wanted to, but was unable to get admission. However, in view of the mandatory condition having not been fulfilled by the petitioner as has been held by two Division Bench decisions of this Court, we are of the opinion that the relief prayed for in this writ petition does not deserve to be granted.

17. Having heard learned counsel for the parties and considering the facts and circumstances of the case, we are of the opinion that provision of College Leaving Certificate as well as of the bank draft to be produced at the time of counseling on 14.9.2016 was mandatory, and the petitioner having not produced the same, would not be entitled to admission. The writ petition, accordingly, stands dismissed.

Writ petition dismissed.

2016 (II) ILR - CUT-953

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

W.P.(C) NO. 7518 OF 2016

GYANANANDA MATIA ……..Petitioner

.Vrs.

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

TENDER – Administrative authorities must act fairly, to ensure rule of law and to prevent failure of justice.

In this case tender call notice Dt. 25.01.2016 issued for construction of Panchayat Samiti building – Petitioner, O.P.No.6 and others participated in the tender process – Though petitioner became L-1, tender issued in favour of O.P.No.6 (L-2) – Hence the writ petition – O.P.No.6, being an elected Samiti member could not have participated in the above tender – This Court while entertaining the writ petition passed order Dt. 10.05.2016 that "tender shall not be allowed to any party if the same has not yet been awarded to anybody" – Despite the same, the authorities allowed O.P.No.6 to proceed with the work – Held, selection of O.P.No.6 pursuant to the tender call notice Dt. 25.01.2016 is quashed – Direction issued to O.P.No.4, B.D.O., Kundra not to allow O.P.No.6 to proceed with the work and not to make any payment for the work already undertaken by O.P.No.6 and re-tender the balance work by inviting fresh tender in accordance with law.

(Paras 6 to 9)

Case Laws Referred to :-

1. (2002) 3 SCC 496 : AIR 2002 SC 834 : Haryana Financial Corpn. -V- Gagdamba Oil Mills

For Petitioner : M/s. Neelakantha Panda, L.Mohanty & M.Bhagat

For Opp.parties : Mr. B.P.Pradhan, Addl.Govt. Advocate
M/s. G.S.Namtoar, R.N.Singh & R.L.Kar

Decided on : 15.09.2016

JUDGMENT

DR.B.R.SARANGI,J.

The Block Development Officer-cum-(Member Convenor) Tender Committee, Panchayat Samiti, Kundra in the district of Koraput issued a tender call notice on 25.01.2016 published in local daily newspaper and also official website in respect of the work "Construction of Panchayat Samiti Building at Kundra" inviting bids from the contractors having 'B' and 'C'

class certificates issued by the PWD and CPWD with approximate tender value of Rs.3,45,800/- under TFC scheme and the work was to be completed within a period of ten months. Pursuant to such tender call notice, the petitioner, along with others including opposite party no.6, submitted their tender papers. The petitioner, being a 'B' class contractor and possessing a valid licence, though quoted 14.99% less price, but had not submitted the affidavit as required under Annexure-III to Clauses-45 and 46 of the Detail Tender Call Notice (DTCN). Even though the petitioner was L-1, but opposite party no.6, who had quoted 9.01% less price and was L-2, was selected for award of the work. The petitioner, therefore, against non-award of the work in question in his favour, has approached this Court by means of this writ petition.

2. Mr. Nilakantha Panda, learned counsel for the petitioner specifically urged before this Court that opposite party no.6, being an elected member of the Panchayat Samiti pursuant to the Grama Panchayat election held in the year 2012, his offer could not have been considered by the authority. Although he urged several other questions to declare opposite party no.6 not eligible, but he specifically confined his argument stating that opposite party no.6, being an elected sitting member of the Panchayat Samiti, could not have participated in the tender process and, as such, during pendency of the writ application no work order could have been issued by opposite party no.4 to allow opposite party no.6 to proceed with the work in question.

3. Mr. B.P. Pradhan, learned Addl. Government Advocate appearing for the State opposite parties states that opposite party no.6, being a member of ST community, is entitled to get 10% price preference as per the Government in Works Department's office memorandum no.10224 dated 01.09.2015. Therefore, if the price preference is given to him, he can be taken into consideration for allotment of the work in question. Hence, in selecting opposite party no.6, no illegality has been committed. He further contended that the petitioner, having not submitted the affidavit, as required under Clauses-41, 42 and 45 of the DTCN, his application was defective one and, therefore, the same has rightly been rejected by the authority.

4. Mr. G.S.Namtoar, learned counsel appearing for opposite parties no.5 and 6 states that opposite party no.6, being a Scheduled Tribe 'C' class contractor, is entitled to get 10% price preference. If that would be taken into consideration, opposite party no.6, who had satisfied all other conditions, was eligible and, as such, no illegality has been committed by the authority in issuing the work order in his favour to perform the work in question. It is

further stated by him that the work in question having already been awarded in favour of opposite party no.6, consequentially, the agreement has been executed on 12.04.2016, layout of the work has been given on 25.06.2016 and during the months of June, July, August and running month, i.e., September more than 50% of the work has been completed. The entire work is to be completed by 30th October and he undertook that opposite party no.6 would complete the entire work on 30.10.2016.

5. We have heard learned counsel for the parties and perused the records. Pleadings between the parties having been exchanged, with the consent of learned counsel for the parties the matter is disposed of at the stage of admission.

6. On perusal of records it reveals that agreement has already been executed with opposite party no.6 on 12.04.2016. The petitioner approached this Court by filing the present writ petition on 29.04.2016. While entertaining the writ petition, this Court specifically passed an order on 10.05.2016 to the following effect:

> *"The submission of the learned counsel for the petitioner is that even though the petitioner had complied with the all the conditions laid down in the tender notice and also submitted his affidavit in compliance of Clauses 41, 42 and 45 of the tender notice, yet his tender has been rejected merely on the ground that no such affidavit was filed.*
>
> *Learned Addl. Government Advocate appearing for the State-opposite parties prays for time to obtain instructions and produce the entire record. On his request list this matter on 17.5.2016.*
>
> *Till then, the tender shall not be awarded to any party if the same has not yet been awarded to anybody".*

Subsequently, an additional affidavit was filed by the petitioner on 18.05.2016 and on the request of the learned Additional Government Advocate the matter was directed to be listed on 30.06.2016 and interim order dated 10.05.2016 was allowed to continue. On 30.06.2016, this Court issued notice to all the opposite parties including the State opposite parties granting them two weeks time to file counter affidavit and interim order passed on 10.05.2016 was allowed to continue till the next date of listing. Since there was an error in the address of opposite party no.6, the same was permitted to be corrected vide order dated 10.08.2016 and matter was directed to be listed on 25.08.2016. However, the matter could not be listed on the date fixed, but

it was listed on 01.09.2016. In the meantime, opposite parties no.2 and 4 filed their counter affidavit on 12.07.2016 justifying their action in selecting opposite party no.6. In paragraph 8 of the counter affidavit it has been specifically stated that opposite party no.6, being a S.T. contractor, is entitled to get 10% price preference as per the Government in Works Department's office memorandum dated 01.09.2015, and the petitioner having not submitted the affidavit, as required under Clauses-41, 42 and 45 of the DTCN, he was not selected nor the work in question was award in his favour. In response to the said affidavit filed on 12.07.2016, the petitioner filed rejoinder affidavit, paragraph-3 whereof reads as under:

> *"3. That it is respectfully submitted here that, I go between the line of counter affidavit filed by the Opp. Party No.-4 (Block Development Officer-Kundra) and Opp. Party No.-2 (Collector – Koraput) and understood the contents there of, more over in the Counter Affidavit, which was filed by the Opp. Party No.-4, the Opp. Party No.-4, have submitted some false allegation with an oblique motive denying all the allegation made in the Writ Petition, and prayed for its dismissal; but in this connection, the Opp. Party No-4, has suppressed all the material facts and submitted a false Affidavit / statement, in order to help the Opp. Party No.-6, as well as for his personal gain, who at present holding a post of Samiti Member, of the Kundra Panchayat Samiti, represented from the Village Ghumar, where in the Opp. Party No.-4, is the Official Member of the Samiti, as per Rules framed under Section-15-A, of the Panchayat Samiti Act-1959, as such for the aforesaid suppression of facts, and for his personal gain played a foul play, and submitted this Counter Affidavit, before this Hon'ble Court, for this illegal act he may liable to be prosecute under the penal Law, and a Contempt proceeding may be initiated by this Hon'ble Court for the aforesaid submission of false Affidavit, being a responsible officer of State under Panchayatiraj Department, hence this rejoinder Affidavit, before your Lordship's."*

A miscellaneous application was filed by the petitioner, seeking for interim direction from this Court to the opposite parties not to proceed with the construction work in question pending disposal of the writ application, vide misc. case no.12593 of 2016 paragraph-4 whereof states as follows:

> *"4. That it is respectfully submitted here that, after obtaining the papers under R.T.I. Act, the petitioner approached to this Hon'ble*

Court and filed this Writ Petition, with a prayer to permit him to do this work, as well as for conduct of the Tender process afresh, but it is pertinent to mention here that it was latter came in to light that, the Opp. Party No.-6, is a peoples representative and at present he is holding the post of Samiti Member of the Kundra Panchayat Samiti, and he was contested for the aforesaid post, in respect of Village-Ghumar (S.T.) and he has also secured "1330" numbers of votes in his favour, and declared as elected candidate as Samiti Member, by the Election Officer, for kind perusal of this Hon'ble Court the Photo copy of the aforesaid Election result along with the Votes securing sheets of the contesting Candidates, duly endorsed by the Election Officer, dated 22.02.2012 obtained under R.T.I. Act, is also placed here with this Misc. Case and Marked as ***ANNEXURE-A/4.****"*

7. In course of hearing, Mr. N.Panda, learned counsel for the petitioner specifically urged that opposite party no.6, being an elected sitting member of Panchayat Samiti, ought not to have participated in the tender process. This fact has not been disclosed by opposite parties no.2 and 4 as well as opposite parties no.5 and 6 in their counter affidavits filed before this Court. But, on the basis of the documents available on record, opposite party no.6 having been elected as Panchayat Samiti Member could not have submitted his tender paper for participating in the tender in question and, as such, it is contrary to the provisions of law. The pleadings made in the rejoinder affidavit, as well as in the misc. case filed by the petitioner mentioned above, have not been denied by the opposite parties. In course of hearing, when a query was made by this Court with regard to the allegations made by the petitioner, both learned Addl. Government Advocate as well as learned counsel appearing for opposite party no.6 admitted that opposite party no.6, in whose favour the work has been awarded, being the elected Panchayat Samiti Member of the Kundra Panchayat Samiti, could not have been awarded with the work. Thereby, the authorities have acted contrary to the provisions of law.

In ***Haryana Financial Corpon. V. Gagdamba Oil Mills***, (2002) 3 SCC 496 : AIR 2002 SC 834, it was held that the obligation to act fairly on the part of the administrative authorities was evolved to ensure rule of law and to prevent failure of justice. This doctrine is complementary to the principles of natural justice which quasi judicial authorities are bound to observe.

8. When this Court passed an interim order on 10.05.2016 and continued till 30.06.2016, the layout could not have been given on 25.06.2016. Thereby, the State-opposite parties have acted in violation of the interim order passed by this Court on 10.05.2016, which was extended by order dated 30.05.2016 and remained valid till 10.08.2016. This clearly indicates that the State-opposite parties, in order to overreach the order passed by this Court, in a clandestine manner have allowed opposite party no.6, the elected member to proceed with the contract work in question. This Court deprecates such conduct of the State-opposite parties.

9. In view of aforesaid facts and circumstances, the selection of opposite party no.6 in respect of the work "Construction of Panchayat Samiti Building at Kundra" pursuant to tender call notice dated 25.01.2016 in Annexure-1 is hereby quashed and opposite party no.4-B.D.O., Kundra is directed not to allow opposite party no.6 to proceed with the construction work any further and also not to make any payment for work already undertaken by the said opposite party no.6 in violation of the interim order passed by this Court, henceforth, and retender the balance work by inviting fresh tender in accordance with law.

10. Accordingly, the writ petition is allowed. No order as to cost.

Writ petition allowed.

2016 (II) ILR - CUT- 958

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

W.P.(C) NO. 6174 OF 2014

PRASANTA KU. PRADHAN ……..Petitioner

.Vrs.

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

Tender – Auction of sand Sairat lease for the financial year 2013-14 – Petitioner being the highest bidder deposited the security money but agreement could not be executed for non-production of environment clearance certificate – Petitioner filed writ petition for a direction for issuance of such certificate but in the meantime financial year 2013-14 was over and fresh advertisement issued for the financial year 2014-15 – Petitioner challenged the fresh advertisement without

making any alternative prayer for refund of the amount deposited for the year 2013-14, although he made such prayer in course of hearing of the writ petition – Held, by efflux of time the period of financial year 2013-14 having been expired the writ petition becomes infructuous – This court expresses no opinion with regard to the prayer made by the petitioner for refund of the security money for the financial year 2013-14 – However liberty granted to the petitioner to approach the authority concerned for the said purpose which would be considered on its own merit as permissible under law. (Paras 5,6,7)

Case Laws Relied on :-

1. 1995 Supp.(4) SCC 722 : Arya Samaj Cooperative Craft Society -V- Lt.Governor of the Union Territory of Delhi

For Petitioner : M/s. D.R.Mohapatra, S.R.Mohapatra, K.K.Jena, T.R.Mohanty, B.D.Biswal.

For Opp. Parties : Mr. P.K.Muduli, Addl. Standing Counsel

Date of Judgement : 28.07.2016

JUDGMENT

DR. B.R. SARANGI, J.

Tahasildar, Bhubaneswar-opposite party no.3 issued a public notice on 14.02.2013 inviting tender for lease of Sand Sairat Quarry of Kuakhai river at Pandra by way of public auction for the financial year 2013-14. In response to same, the petitioner along with others submitted tender to participate in the process of auction, which was opened on 19.03.2013. The petitioner, being the highest bidder, deposited the security deposit as well as the auction amount of Rs.1,24,45,124/-. The Tahasildar, Bhubaneswar in turn was to execute the agreement as per Rule 53 of the Orissa Minor Mineral Concession Rules, 2004 subject to compliance of other provisions contained in the said Rules. As the environment clearance was not provided by the authority, the petitioner approached this Court by filing W.P.(C) No.21207 of 2013, which was disposed of on 21.11.2013, wherein direction was issued to the authority to take a decision in the matter in accordance with law within one month of receipt of the said order. Though, in the meantime, 11 months 20 days elapsed, no work order was issued nor any intimation was given to the petitioner to deposit stamp duty for registration of lease deed and the financial year 2013-14 was over. The Tahasildar, Bhubaneswar issued a fresh advertisement on 27.02.2014, which was published in daily newspaper on 28.02.2014. At this stage, the petitioner approached this Court by filing the

present writ petition to quash the fresh advertisement issued by opposite party no.4 and to direct the opposite parties to allow him to operate the sand quarry in question on the basis of the previous auction, for which the auction amount has already been deposited.

2. While entertaining the writ petition, this Court has not passed any interim order protecting the interest of the petitioner. In any case, in the meantime, the period of the financial year 2014-15, for which the advertisement was issued, has already expired.

3. Mr. D.R. Mohapatra, learned counsel for the petitioner although submits that by efflux of time this writ petition has become infructuous, seeks for direction to the authority for refund of the amount deposited by the petitioner pursuant to auction held for the financial year 2013-14.

4. Mr. P.K.Muduli, learned Additional Standing Counsel for the State submits that the writ petition has become infructuous by efflux of time and the same should be dismissed. So far as the claim for refund of amount is concerned, which has been made in course of hearing, the petitioner has not made any prayer in the writ petition to that extent. Therefore, direction for refund of amount to the petitioner should not be issued.

5. Considering the contentions raised by the learned counsel for the parties and after going through the records, it appears that the petitioner has filed this writ petition to quash the advertisement issued for the financial year 2014-15 for auction of Sand Sairat Quarry at Kuakhai river bed, Pandra and further seeks for direction to opposite party no.5 to issue environment clearance certificate in his favour within a stipulated time, and to opposite party no.3 to execute an agreement forthwith by permitting the petitioner to operate the Sand Sairat Quarry in question for a period of one year from the date of execution of agreement. Admittedly, the petitioner was the highest bidder pursuant to auction held for the financial year 2013-14. The period of financial year 2013-14 having been expired, a fresh advertisement was issued for the financial year 2014-15 and, in the meantime, the said period was also over. Therefore, the period for which the petitioner was the highest bidder having been over, relief sought in the writ petition cannot be granted. The apex Court in ***Arya Samaj Cooperative Craft Society vs. Lt. Governor of the Union Territory of Delhi***, 1995 Supp. (4) SCC 722 considered a writ petition challenging the takeover management of educational institution, but by efflux of time, the period of takeover, as provided under statute having been expired; held, the writ petition becomes infructuous and authorities became obliged to return the management to the appropriate management.

6. Applying the same analogy in the present context, since the financial year 2013-14, for which the petitioner was the highest bidder, has already over, effectively, the writ petition has become infructuous. As such, this Court is not inclined to pass any further order as claimed in the writ petition. Accordingly, the writ petition is dismissed.

7. In course of hearing, learned counsel for the petitioner submits that in respect of the amount, which has been deposited by the petitioner pursuant to auction held for the financial year 2013-14, direction may be issued to the authority to refund the same to the petitioner. This Court expresses no opinion with regard to the same. However, liberty is granted to the petitioner to approach the authority concerned for the said purpose, which would be considered on its own merit, if it is so permissible under law.

Writ petition dismissed.

2016 (II) ILR - CUT-961

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

W.P.(C) NO. 14873 OF 2016

SUNITA MOHANTY ……..Petitioner

.Vrs.

UNION OF INDIA & ANR. ……Opp. Parties

(A) EDUCATION – Petitioner qualified in CET-2016 conducted by SVNIRTAR and allotted a seat at NIOH, Kolkata for BPT course in general category – Subsequently she was denied admission on the pretext that she has secured 149 out of 300 marks in PCB which is not 50% as required under clause 4.3 of the prospectus – Hence the writ petition – As per sub-clause 9 of clause 20 of the prospectus, marks should be rounded up to nearest whole number and nothing has been mentioned that rounded up to the nearest whole number has to be considered for the purpose of filling up of the application form – Held, the marks 149 is rounded up to the nearest whole number i.e. 150 and the petitioner having satisfied the eligibility criteria is entitled to take admission in the above course. (Para 19)

(B) EVIDENCE ACT, 1872 – S.115

Estoppel – Petitioner having been qualified in the entrance examination was called upon to participate in the counseling and was

allotted a seat at NIOH, Kolkata in BPT course – Subsequently she can not be denied admission on the pretext that she has not satisfied the eligibility criteria as per the prospectus of 2016 – Held, the action is hit by principle of estoppel. (Para 13)

Case Law Relied on :-

1. 2014(II) OLR 290 : Kabita Dhal -V- State of Orissa.

Case Laws Referred to :-

1. (2011) 3 SCC 436 : 2011 (2) OLR (SC) 585 : State of Orissa v. Mamata Mohanty.
2. AIR 1978 SC 851 : Mohinder Singh Gill v. Chief Election Commissioner New Delhi
3. (2003) 2 SCC 355 : B.L.Sreedhar v. K.M. Munireddy.
4. (2010) 12 SCC 458 : H.R. Basavaraj v. Canara Bank.
5. AIR 1990 SC 1075 : Sanatan Gauda v. Berhampur University.
6. AIR 2014 ORISSA 26 : Dr. (Smt.) Pranaya Ballari Mohanty v. Utkal University.
7. 1992 (II) OLR 341 : Miss Reeta Lenka v. Berhampur University .
8. 1984 (I) OLR 564 : David C. Jhan v. Principal Ispat College Rourkela.

For Petitioner : M/s. Rosalin Rout & R.C.Rout

For Opp. Parties : Mr. D.K.Sahoo, Central Govt. Counsel.

Date of Judgment : 03.10.2016

JUDGMENT

DR. B.R.SARANGI,J.

Swami Vivekananda National Institute of Rehabilitation Training and Research (SVNIRTAR), Olatpur in the district of Cuttack and National Institute for the Orthopedically Handicapped (NIOH), B.T. Road, Koklata are the institutes under the Department of Empowerment of Persons with Disabilities, Ministry of Social Justice and Empowerment, Government of India, established to impart education in the subjects, Bachelor of Physiotherapy (BPT), Bachelor of Occupational Therapy (BOT) and Bachelor of Prosthetics and Orthotics (BPO). For admission to the said course for the session 2016, SVNIRTAR conducted Common Entrance Test (2016) (CET-2016) by publishing information brochure and application form to be available in the website i.e. www.svnirtar.nic.in. The last date of submission of application form was 23.05.2016. The date of entrance examination was 26.06.2016 and the tentative date for declaration of result was 20.07.2016. The petitioner having got the requisite qualification, i.e.,

10+2 in Science applied for the aforesaid courses in the prescribed form by downloading the same from the website and her application having been found in order, she was permitted to appear CET-2016 on 26.06.2016 in B.J.B. College, Bhubaneswar Centre. The merit list was published on 20.07.2016 in the website and the petitioner also received a letter being Ref. No. DA IA 01/CET-2016 dated 27.07.2016 of the Chairman, CET-2016-cum- Director for Counseling–cum-Admission for BPT/BOT/BPO course for the academic year 2016-17 through CET-2016 on 30.08.2016. The petitioner's Roll No. UG-G-01-676 had been indicated in the merit list having secured common rank of 228. She was informed that she was declared provisionally qualified/wait listed as per the common Rank No. 228 in the merit list prepared on the basis of performance in CET-2016 conducted by the SVNIRTAR on 20.06.2016 for admission to one of the mentioned courses at SVNIRTAR, Cuttack or NIOH, Kolkata. Accordingly, she was directed to report at SVNIRTAR, Olatpur, Cuttack for counseling-cum-admission at 9 a.m. on 30.08.2016. It was also indicated that the allotment of course would be exclusively depend upon her rank in the merit list of CET-2016, according to the eligibility criteria mentioned in the prospectus and the number of seats available in each course in respective institutes. On 30.08.2016, as per the rank of the petitioner, she was allotted a seat at NIOH, Kolkata for BPT course in general category. But, at the time of document verification, the NIOH counseling officials found that she had not secured 50% of marks in Physics, Chemistry and Biology (PCB) in qualifying +2 Science Examination, which is eligibility criteria for admission into the said course. Further, it is stated that she has secured 149 marks in PCB out of 300 marks, which is below 50% and she has not fulfilled the eligibility criteria for taking admission to BPT course at NIOH, Kolkata as per "Academic Qualification" published in Clause 4.3 of the prospectus. The parents of the petitioner, referring to sub-point no.9 of point no.20 of the prospectus, though stated that marks should be rounded up to the nearest whole number, the said points are mentioned for guideline to fill up the form in the column no. 9 and 10 of the application form making round up the nearest whole number and that is not considering the eligibility criteria in the academic qualification, thus the petitioner has been denied to take admission and accordingly her candidature has been rejected having not fulfilling the eligibility criteria as per prospectus CET-2016. Hence, this application.

2. Mr. R.C. Rout, learned counsel for the petitioner states that Clause-4.3 of the prospectus indicates the academic qualification wherein it has been

specifically mentioned that minimum aggregate of 50% marks in PCB in +2 Science Examination has to be acquired by the general category candidate to satisfy the requirement of eligibility criteria for admission to BPT, BOT and BPO courses. It is further urged that as per Clause-9 the marks should be rounded up to nearest whole number.Therefore, the petitioner having secured 149 marks in the subjects PCB, which is one mark short to 50% marks in aggregate out of total mark of 300, applying the provisions contained in Clasuse-9 the same has been rounded up to 150 so as to make the petitioner eligible to appear in CET-2016 and she has been qualified in the entrance test having stood in serial no.228 in the merit list, the committee allotted a seat to her at NIOH, Kolkata for BPT course in general category, subsequently the authority cannot turn around stating that the petitioner having not fulfilled the eligibility criteria in academic qualification as per prospectus of CET-2016 she is denied the admission by rejecting her candidature. Such action of the authority is hit by principle of estoppel. Therefore, seeks for interference of this Court.

3. Mr. D.K. Sahoo, learned Central Government Counsel appearing for the opposite parties strenuously urged before this Court that as per Clause-4.3 of the Admission Bulletin of the CET-2016 wherein the eligibility criteria of the qualifying examination in +2 Science has been mentioned which clearly specifies that the students would be eligible in taking admission to BPT/ BOT/BPO courses on production of documentary evidence of having passed the qualifying examination with required percentage. The petitioner having not satisfied the required qualification of securing 50% marks in PCB in +2 Science, she has not satisfied the requirement of eligibility criteria. As per Clause-9, rounding up of mark to the nearest whole number is only meant for filling up of the application form which has no nexus with the eligibility criteria of the candidate. Therefore, the authorities are justified in rejecting the candidature of the petitioner for admission to the aforesaid course. To substantiate his argument, reliance has been placed on the judgments in ***State of Orissa v. Mamata Mohanty***, (2011) 3 SCC 436 : 2011 (2) OLR (SC) 585, and ***Kabita Dhal v. State of Orissa***, 2014 (II) OLR 290.

4. We have heard Mr. R.C. Rout, learned counsel for the petitioner and Mr. D.K. Sahoo, learned Central Government Counsel for the opposite parties. Pleadings having been exchanged between the parties, taking into consideration the urgency in the matter, this writ petition is heard at the stage of admission and is disposed of finally.

5. On the basis of the facts pleaded above, admittedly the petitioner had applied for admission into BPT/BOT/BPO courses of SVNIRTAR, Cuttack and NIOH, Kolkata. A common entrance test described as CET-2016 was conducted by the SVNIRTAR, Cuttack and the petitioner having applied for admission to the said courses well within time, the same has been considered and she has been allowed to appear in the entrance examination on the date fixed, i.e., 26.06.2016 in which she has been placed at serial no.228 in the merit list and accordingly she has been called upon to appear in the counseling on 30.08.2016. On the basis of her rank, she has been allotted a seat at NIOH, Kolkata for BPT course in general category. But, her candidate has been rejected, as she has not fulfilled the eligibility criteria as per the prospectus of CET-2016.

6. Clause-4 of the Admission Bulletin for CET-2016 deals with eligibility condition. Clause-4.3, which deals with academic qualification, being relevant, is extracted hereunder:

"4.3 **ACADEMIC QUALIFICATION**

COURSE	DURATION	ELIGIBILITY
B.P.T.	4yrs. + 6 months	10+2 (Higher/Senior Secondary Examination) I. Sc. Or equivalent- recognized examination with subjects-Physics (P), Chemistry(C), Biology(B) and English with minimum aggregate of 50% in PCB when taken together for General/OBC and 40% for SC/ST & PH candidates.
B.O.T.	4yrs + 6 months	10+2 (Higher/Senior Secondary Examination) I.Sc or equivalent recognized examination with subjects –Physics (P), Chemistry (C), Biology (B) AND English with minimum aggregate of 50% in PCB when taken together for General/OBC and 40% for SC/ST & PH candidates.
B.P.O.	4yrs. + 6 months	10+2 (Higher/Senior Secondary Examination) I Sc or equivalent-recognized examination with subjects Physics (P), Chemistry(C), Biology(B) OR Mathematics (M) AND English with minimum aggregate of 50% in PCB/PCM when taken together for General/OBC and 40% for SC/ST & PH candidates."

7. Clause-20 deals with instructions for completion & submission of offline (manual) application form. Sub-clause (9) of Clause-20 states about marks in qualifying examination (10+2), which reads thus:

"9.MARKS IN QUALIFYING EXAMINATION (10+2)

Kindly fill in the appropriate subject and percentage of marks obtained in the 10+2 (qualifying examination). The original mark sheet will have to be produced at the time of counselling/admission. If the candidate is appearing in 10+2 in this academic year, then put zero in the relevant box. The marks should be rounded of the nearest whole number."

8. The petitioner having qualified in the CET-2016 she has been allotted a seat at NIOH, Kolkata for BPT course in general category. But, at the time of document verification NIOH officials have found that she has not secured 50% marks in PCB in qualifying +2 Science Examination, which is eligible criteria for admission to BPT stream as per prospectus for general category candidate, since she has secured 149 marks in PCB out of total marks of 300, which is below 50% for taking admission to BPT at NIOH, Kolkata as per the academic qualification prescribed in the prospectus Clause 4.3. As per sub-clause-(9) of Clause-20, the marks should be rounded up to nearest whole number. It is stated that the same can only be available to fill up the forms in Column-9 and 10 of the application form and not for considering the eligibility criteria in the academic qualification. In view of such position, in the counter affidavit the opposite parties have reiterated the same issue and denied the admission to the petitioner to the said course, though she has been selected for the same.

9. On a perusal of sub-clause-9 of Clause-20, it would be seen nothing has been provided therein that it would be considered for filling up the forms and not for other purpose. But, in the counter affidavit in paragraph-7 a clarification has been made by the authority stating that the rounding up of marks is only applicable for filling up the forms. The subsequent clarification given in the counter affidavit cannot be taken into consideration. Rather, the clause itself on its face value has to be taken into account. In ***Mohinder Singh Gill v. Chief Election Commissioner, New Delhi,*** AIR 1978 SC 851, the Constitution Bench of the apex Court in Para-8 held as follows:

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

> *"….when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out."*

In view of such position, any explanation given subsequently by way of counter affidavit cannot be taken into consideration.

10. In ***Mamata Mohanty*** (supra) the apex Court held that the minimum qualification prescribed should be adhered to and there should not be any relaxation in such qualification, which has no application to the present context.

11. In ***Kabita Dhal*** (supra) relying upon a circular issued by Government of Orissa in Education and Youth Services Department dated 25.07.1989 the percentage of marks secured in Master's Degree Examination has been directed to be rounded up to nearest whole number. Consequentially, the petitioner in the said case, who had secured 54.6% of marks got the benefit of rounding up mark to nearest whole number as 55% so as to eligible her to receive grant-in-aid. The said case is squarely applicable to the case of the petitioner.

12. Clause 4.3 though specifies that minimum aggregate of 50% marks in PCB had to be taken together for general category students, on perusal of the mark-sheet of the petitioner it would be seen that she has secured 44 marks out of 100 in Physics, 47 marks out of 100 in Chemistry, 23 marks out of 50 in Botany, 35 marks out of 50 in Zoology in the Annual +2 Examination, 2016. Therefore, she has secured 149 marks in PCB out of 300 marks in three subjects. The 50% marks being 150, one mark to be rounded up to the nearest whole number as 50% to be considered as 150 for admission to the course.

13. Clause 9 specifically deals with marks in qualifying examination, i.e., 10+2. Therefore, taking into consideration the marks awarded in PCB, the petitioner having secured 149 marks, the same should be rounded up to the nearest whole number, i.e., 150 in consonance with the said clause. Nothing has been mentioned that the rounded up to the nearest whole number has to be considered for the purpose of filling up of the application form, rather the sentence "the marks should be rounded up to the nearest whole number" is independent of the said clause and thereby the petitioner will get the

advantage of such clause by rounding up of her mark to the nearest whole number as 150. If that will be taken into consideration, then the petitioner has satisfied the minimum qualifying marks for getting herself admitted into the course. More so, the petitioner has been selected for admission into the course by allotting a seat at NIOH, Kolkata for BPT in general category. Once the selection committee has considered her case taking into consideration the merit list, subsequently they cannot turn around and say that the petitioner is not eligible having not satisfied the eligibility criteria as per the prospectus of CET-2016. The same is hit by principle of estoppel.

14. The meaning of estoppel has been described in Black's Law Dictionary 7th Edition as a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true. In ***B.L.Sreedhar v. K.M. Munireddy***, (2003) 2 SCC 355 the apex Court held 'Estoppel' is based on the maxim *allegans contrarir non est audiendus* (a party is not to be heard contrary) and is the spicy of presumption *juries et de jure* (absolute, or conclusive or irrebuttable presumption). Subsequently, in ***H.R. Basavaraj v. Canara Bank***, (2010) 12 SCC 458, the apex Court held that In general words, estoppel is a principle applicable when one person induces another or intentionally causes the other person to believe something to be true and to act upon such belief as to change his/her position. In such a case, the former shall be estopped from going back on the word given. The principle of estoppel is only applicable in cases where the other party has changed his positions relying upon the representation thereby made.

15. In ***Sanatan Gauda v. Berhampur University***, AIR 1990 SC 1075 the apex Court considered that the candidate passing M.A. Examination with 36% marks in the aggregate is duly qualified to be admitted to law course. The petitioner in the said case having not acquired such qualification was admitted to Pre-Law course and permitted to appear in the examination and thereafter Inter-Law Examination. But, subsequently, when the University refused to declare the result on the ground of ineligibility to be admitted to Law course, the apex Court held that the same is barred by principle of estoppel.

16. In ***Dr. (Smt.) Pranaya Ballari Mohanty v. Utkal University***, AIR 2014 ORISSA 26, the petitioner therein having appeared in I.A., B.A., and M.A. Examinations as a regular candidate and also as a Non-Collegiate (Private) candidate by producing the said registration number, subsequently

the cancellation of result in M.A. (Odia) as a Non-Collegiate candidate in the year 1991 cannot sustain by applying the principle of promissory estoppel. In para-14 of the said judgment the Court observed as follows :

> "*The principle of promissory estoppel has been considered by the Apex Court in Union of India and others v. M/s.Anglo Afghan Agencies etc., AIR 1968 SC 718, Chowgule and Company (Hind) Pvt. Ltd. v. Union of India and others, AIR 1971 SC 2021, M/s.Motilal Padampat Sugar Mills Co. Ltd. v. The State of Uttar Pradesh and others, AIR 1979 SC 621, Union of India and others v. Godfrey Philips India Ltd., AIR 1986 SC 806, Delhi Cloth and General Mills Ltd. v. Union of India and others, AIR 1987 SC 2414, Bharat Singh and others v. State of Haryana and others, AIR 1988 SC 2181 and many other subsequent decisions also."*

17. In ***Miss Reeta Lenka v. Berhampur University***, 1992 (II) OLR 341 this Court held that once a student has been declared passed and has taken admission to another course it implies that he has changed his position, his result cannot be changed or altered or cancelled by the authorities.

18. In ***David C. Jhan v. Principal Ispat College, Rourkela***, 1984 (I) OLR 564 this Court by applying the law of estoppel directed the Board authorities not to cancel the result of the students who had already taken admission to the I.A. classes.

19. Applying the above principle to the present context, as the petitioner furnished all the documents in her application form for appearing in the CET-2016 examination and on consideration of the same she has been issued with an admit card to appear in the entrance examination and she having been qualified and called upon to participate in the counseling and, accordingly, she has been allotted a seat at NIOH, Kolkata for BPT course as a general category candidate, subsequently, she cannot be denied admission on the pretext that she has not secured 50 % marks in PCB. If the mark secured in PCB, i.e., 149 out of 300, is rounded up to the nearest whole number, it will become 150, which is 50% of the mark 300. Consequentially, the petitioner has satisfied the requirement of the eligibility criteria to admit into the NIOH, Kolkata for BPT course in general category. In our considered view, applying the principle of estoppels and Sub-clause-9 of Clause-20 of the prospectus, the petitioner, having satisfied the eligibility criteria, is entitled to be admitted to her allotted seat at NIOH, Kolkata for BPT course in general category. Thus, it is directed that she should be admitted forthwith,

preferably within a period of fifteen days from the date of receipt/production of the certified copy of the judgment.

20. Accordingly, the writ petition is allowed. No order as to cost.

Writ petition allowed.

2016 (II) ILR - CUT-970

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

W.P.(C) NO. 4954 OF 2016

CHITTARANJAN MISHRA .....Petitioner

.Vrs.

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

(A) TENDER – Contract for transportation of Mid Day Meal – Petitioner who was previously engaged for the work failed to participate in the tender process for the year 2016-17 as there was sky rocketing enhancement made in the EMD, Security deposit and Solvency Certificate under clauses 10 & 11 of the tender notice Dt. 29.02.2016 – Petitioner challenged the above clauses in writ petition – Maintainability – Held, since the above conditions have been made to favour a group of persons which amounts arbitrary and unreasonable exercise of power and consequently the petitioner has been discriminated and malafidely the benefit has been extended to specific persons, the writ petition filed by the petitioner is maintainable and he has the locus to assail such terms and conditions.

(Para 16)

(B) TENDER – Clause 10 and 11 of the tender notice Dt. 29.02.2016 challenged for sky rocketing enhancement made in EMD, Security deposit and Solvency Certificate in comparison to previous years – Whether court can interfere in administrative policy decision of the Government ? – Since small transport contractors have been deprived of from participating in the bid and big contractors have been favoured, the impugned conditions stipulated in the tender call notice amounts to arbitrary and unreasonable exercise of power and this court has power to interfere in exercise of its power of judicial review – Held, the tender call notice Dt. 29.02.2016 so far it relates to Security deposit, EMD and Solvency Certificate being arbitrary, un-reasonable, malafide and discriminatory are quashed – Consequently selection of O.P.Nos. 4 & 5 being unsustainable is also set aside – Since State-opposite parties are

to supply MDM, direction is given to take necessary steps immediately to continue supply and go for fresh tender with suitable terms and conditions in the interest of the public. (Paras 17,18)

Case Laws Referred to :-

1. (2001) 8 SCC 491 : Union of India and others v. Dinesh Engineering Corporation & anr.
2. (2012) 8 SCC 216 : Michigan Rubber (India) Limited v. State of Karnataka & ors.
3. AIR 1996 SC 11 : Tata Cellular v. Union of India
4. AIR 2004 SC 1962 : Directorate of Education and others v. Educomp Datamatics Ltd. & Ors.
5. (2008) 5 SCC 772 : S.S. and Company v. Orissa Mining Corporation Ltd.

For Petitioner : Ms. Saswati Mohapatra

For Opp. Parties : Mr. A.K.Pandey, Standing Counsel (S&ME)
M/s. Ramachandra Sarangi, S.S.Mohanty, P.K.Deo & L.Sarangi.
M/s. Bibhu Prasad Das, S.N.Das & Deepak Kumar.

Date of hearing : 23.08.2016
Date of Judgment: 01.09.2016

JUDGMENT

DR. B.R. SARANGI, J.

The petitioner is a transport contractor having valid transport license and belonging to rural area.He was awarded with the tender for transportation of food stuff for Mid Day Meal (MDM) in the year 2012-13 in the district of Khurda and successfully completed the same.The Collector-cum-Chairperson (MDM, Khurda)-opposite party no.2 issued a tender call notice on 29.02.2016 inviting sealed tenders from the intending registered transport contractors/agents having valid agent license/common carrier license for engagement of transporting agent under Mid-Day-Meal Programme for transportation of rice from FCI point to School points for the year 2016-17. The tender documents, complete in all respect along with required documents, were to be sent in sealed cover superscribed "sealed tender for undertaking transportation work of food grain (rice) under MDM programme-2016-17" addressed to the District Education Officer, Khurda by registered post/speed post. The last date of receipt of the tender documents was 21.03.2016 by 1.00 P.M. and date of opening of the tenders was

21.03.2016 at 5.00 P.M. in the office of the Addl. District Magistrate, Bhubaneswar. As per the terms and conditions of the tender notice, clause-10 requires that recent solvency certificate issued by the competent authority for Rs.50,00,000/- only, who applied for the whole district, and Rs.10,00,000/- only, who applied for one block, should be furnished by the tenders along with the tender paper. Clause-11 requires that earnest money deposit of Rs.1,00,000/- only per block (multiple of Rs.1,00,000/-, if applied for more than one block) in shape of bank drafts/postal savings pass book/bank pass book/NSC/term deposit duly pledged in favour of the District Project Management Unit (DPMU), MDM, Khurda should be furnished along with the tender paper. The security deposit has been enhanced from Rs.50,000/- to Rs.5,00,000/-; EM.D. has been enchanced from 26,500/- to Rs.1,00,000/- and solvency cost also has been enhanced from Rs.1,00,000/- to Rs.10,00,000/-. Being aggrieved by such terms and conditions of the tender documents, the petitioner has approached this Court by filing the present application.

2. Ms. Saswati Mohapatra, learned counsel for the petitioner strenuously urged that there was no rationality in the enhancement of EMD, solvency certificate and security deposits and, as such, the enhancement of deposits on different rates pursuant to the tender documents of the year 2016-17 is arbitrary, unreasonable and violative of Article 14 of the Constitution of India. By fixation of such conditions, the opposite parties have tried to eliminate small transporting contractors/agents and encourage the big contractors. If such tender conditions are allowed to exist, that would lead to an unhealthy competition, which is absolutely unreasonable, arbitrary and dehorse the provisions of law. It is further urged that the food stuff are being transported under different schemes, namely, Public Distribution System (PDS), SNP and Mid-Day-Meal (MDM). So far as the conditions for transporting of food stuff under PDS and SNP schemes are concerned, there was no change in the conditions which were prevailing earlier whereas in respect of transporting under MDM scheme, the conditions have been substantially changed without assigning any reasons thereof. Apart from the same, it is further urged that due to non-availability of transport contractors/agents because of change of conditions, it has only been confined to some of the transporters belonging to Bhubaneswar and the rural transporters have practically been excluded, though there was no allegation against them and they had successfully completed their tender work assigned in the previous years. It is stated that the transporters/agents of the Bhubaneswar have been assigned to transport food stuff in respect of the areas they had applied for, in addition to the other areas for which they had

not applied. This clearly indicates that favouritism has been shown by the authority towards those transporters/agents of the Bhubaneswar to handle all the transport contracts. It is stated that the conditions of the contract have been changed without any valid or justifiable reason. Therefore, interference of this Court has been sought for. To substantiate her contention, reliance has been placed on the judgment of the Apex Court in Union of India and others v. Dinesh Engineering Corporation and another, (2001) 8 SCC 491.

3. Mr. A.K. Pandey, learned Standing Counsel for the School and Mass Education Department vehemently urged that in order to ensure the smooth supply of MDM, the conditions of the tender documents have been changed and, as such, no illegality or irregularity can be said to have been committed by the authority. It is further urged that the past experience indicates that the small transport contractors used to leave the work at the midway, thereby causing the MDM scheme to suffer for non-supply of food stuff in time to the respective places. Therefore, no fault can be found with the authorities for changing the conditions. It is further urged that where the State acts reasonably, fairly and in public interest, no person can claim a fundamental right to carry on business with the Government. In that case, the scope of Court's interference is very restricted and limited and, as such, in the present case the Court should not interfere with the conditions stipulated in the notice inviting tenders. Furthermore, the Government and their undertakings must have a free hand to set the term of the condition of the tender in exercise of such powers and that once the conditions of the tender have been fixed the Court cannot interfere in exercise of judicial review. To substantiate his contention, reliance has been placed on the judgment of the Apex Court in Michigan Rubber (India) Limited v. State of Karnataka and others, (2012) 8 SCC 216.

4. Mr. R.C. Sarangi, learned counsel for opposite party no.4 states that the Court cannot interfere with the terms of the invitation to tender, as the same are not open to the judicial review/scrutiny, and the same being in the realm of contract, the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. Therefore, the claim made by the petitioner that there was an arbitrary fixation of EMD, security deposit and solvency certificate, which being the terms of he invitation to the tender documents, the same cannot be interfered with in exercise of power under judicial review. In addition to the above, it is urged that the petitioner has no locus standi to file this writ petition, as the person is not adversely affected. Therefore, the petitioner not being a person

aggrieved cannot approach this Court by invoking the jurisdiction under Article 226 of the Constitution of India. The petitioner not being the participant to the bid pursuant to the notice inviting tender in Annexure-4, it cannot be construed that he is a person aggrieved. Therefore, at his behest, the writ petition cannot be maintained. To substantiate his contention, reliance has been placed on the judgments of the Apex Court in Tata Cellular v. Union of India, AIR 1996 SC 11, Directorate of Education and others v. Educomp Datamatics Ltd. and others, AIR 2004 SC 1962 and S.S. and Company v. Orissa Mining Corporation Limited, (2008) 5 SCC 772.

5. Mr. B.P. Das, learned counsel appearing for opposite party no.5 has stated that opposite party no.5 being stood in the position of opposite party no.4, he adopts the arguments advanced by learned counsel for opposite party no.4.

6. We have heard learned counsel for the parties. Since pleadings have been exchanged amongst them, with the consent of learned counsel for the parties this writ petition is being finally disposed of at this stage.

7. The facts are not disputed to the extent that the petitioner is a transport contractor engaged in transportation of Mid Day Meal to various destinations under Khurda district. Pursuant to tender for the year 2012, the petitioner was successful and carried out his work and completed the same within the time specified. As such, there is no adverse remark against the petitioner in carrying out the terms and conditions of the tender documents for the year 2012-2013. The petitioner being a rural based transport contractor and on the basis of the terms and conditions of invitation to tender for the year 2012-13 he having been satisfied with the requirement had been selected and was allowed to discharge his duty in terms of such conditions. When an invitation to tender was made for the year 2016-17, there has been a sky rocketing enhancement in solvency, EMD and security deposits. Consequentially, the petitioner has been deprived of participating in the tender for transportation of food stuff under Khurda district. Being aggrieved by such conditions, he has approached this Court by filing the instant writ petition. In paragraph-3(e) of the writ petition, it is pleaded as follows:

> *"3(e) : It is humbly submitted that the opp. parties have adopted this tactics by hiking the solvency, EMD etc. only to show favouritism to those, who have already done Tender works(s) or rich businessman of their choice. For better appreciation, a Comparative Table is given herein below :-*

Comparative Statement of Tender Notice
Of the years : 2014-15, 2015-16 & 2016-17

Year	***Tender paper Cost (Block-wise)***	***E.M.D.***	***Solvency***	***Security Deposit***	***Quantity in Quintal***
2014-15	*Rs. 2,000/-*	*Rs. 26,500/-*	*Rs. 1,00,000/-*	*Rs.50,000/-*	*206880*
2015-16	*,,*	*,,*	*,,*	*,,*	*,,*
2016-17	*Rs.5,000/-*	*Rs.1,00,000/-*	*Rs.10,00,000/-*	*Rs.5,00,000/-*	*,,*

Considering such contention and finding that the petitioner has made out a prima facie case in his favour, this Court by order dated 21.03.2016 issued notice to the opposite parties passing the following order:

"xxx xxx xxx

Considering the facts, it is directed that till the next date of listing, no contract in pursuance of the tender call notice dated 29.02.2016 shall be awarded by the opposite parties."

The said interim order was also extended from time to time by affording opportunity to the State-opposite parties to file their counter affidavit. But, in the meantime, since the authorities had already selected the transporters/agents, they filed applications for intervention in the matter and have been impleaded as opposite parties no.4 and 5 in the writ petition. They had been given opportunity to file their respective counter affidavits by order dated 05.05.2016. The said opposite parties have filed their counter affidavits, to which the petitioner has also filed rejoinder affidavits, which have also been exchanged amongst the parties. No specific reply has been given to the pleadings made in paragraph-3(e) of the writ petition as mentioned above. But, in the counter affidavit filed by opposite party no.3 dated 04.04.2016 it has been pleaded as follows:

"10. That, it is also submitted to the averments made in the Para-3(b) to 3(d) of the writ that the solvency, EMD and security are intended in the tender for safe security for smooth execution of the said tender work. It is a fact that the volume of work are same as the previous years but the market cost of the MDM rice carried in a

quarter i.e. quantum of rice carries in a quarter by the awardee of the tender is hiked day by day. The solvency, EMD/Security are kept in the tender are taken as such that if any irregularities occurs/arises by the awardee of the said tender during the contract period, the same will be recovered from the securities given by the awardees of the said tender. As such it is a remedial measure for smooth execution of the tender work and the allegations made in the writ petition that the authority without any valid reason arbitrarily hiked the eligibility criteria for competitions within few participants and to show favouritism is baseless and cannot be sustainable in the eye of law. The decision regarding hike of Solvency, EMD/Security amount has been duly approved by the Collector-cum-Chairman, MDM, Khordha before the publishing of the tender dtd. 29.02.2016.

10. That, it is pertinent to mention here that the Commissioner-cum-Secretary, School and Mass Education Department vide letter dtd. 13.03.2015 instructed all the Collectors stating therein that the agreement with the transport contractors shall incorporate strict provisions to deal with pilferage, misappropriation, diversion, quality change, weighment, insurance, security deposit, adulteration, acknowledgement, scrutiny, sample collection, SMS alert, FIR, forfeiture etc. Under no circumstances the Transport contractor be allowed to generate liability beyond the security deposit amount and accordingly in the tender conditions EMD, security deposit and solvency certificate has been hiked in order to meet any exigency arising out of pilferage, misappropriation, adulteration etc.

11. That, it is not out of place to mention here that it is contended by the present petitioner that in respect of Kandhamal district earnest deposit has been stipulated to be Rs.50,000/- and solvency certificate of Rs.5 lakhs is to be given whereas in respect of Khurda district the above said prices are hike.

In response to the above contentions of the present petitioner it is also submitted that although Kandhamal district has prescribed solvency certificate of less amount than that of Khurda district whereas in other districts like Puri, Nabarangpur such prices are also higher.

In respect of Puri District The EMD of Rs. 200000/- (Rupees two lakhs) only per block and solvency of Rs.1000000 (Rupees Ten

> *Lakhs) only are to be deposited by the tenderer. In respect of Nabarangpur district solvency certificate of Rs.1 crore, earnest money deposit of Rs. 1 lakh is to be given. In respect of Jajpur district for the year 2015-16 the solvency certificate for 20 lakhs, EMD of 15 lakhs were required. Moreover the successful tenderer was required to furnish the minimum bank guarantee of 15 lakhs.*
>
> *It is also submitted that the fixation of tender conditions in the different districts have been fixed by their respective tender committee."*

8. Apart from the above pleadings, much reliance has been placed on the letter dated 13.03.2015 in Annexure-E/3 issued by Commissioner-cum-Secretary to Government, School and Mass Education Department, Odisha to all Collectors wherein it has been stated in Clause-3 that the agreement with the Transport Contractor shall incorporate strict provisions to deal with pilferage misappropriation, diversion, quality change, weighment, insurance, security deposit, adulteration, acknowledgement, scrutiny, sample collection, SMS alert, FIR forfeiture etc. etc. and under no circumstances the Transport Contractor can be allowed to generate liability beyond the security deposit amount. Though, no specific reply has been given in the counter affidavit to the pleadings made in paragraph-3 (e) of the writ petition, reliance has been placed on the reasons assigned in paragraphs-10 and 11 of the counter affidavit read with letter dated 13.03.2015 under Annexure-E/3.

9. In the rejoinder affidavit dated 18.04.2016, the petitioner has brought to the notice of this Court indicating how a single tender has been considered in different Blocks. In paragraph-5 it is stated as follows:

> *"5. That out of 11(Eleven) Blocks of Khurda District for five Blocks, no tender was received namely (1) Jatni, (2) Begunia, (3) Bolagarh, (4) Tangi, and (5) Chilika.*

In four blocks of Khurda District, single tender received namely (1) Balianta, (2) Balipatna, (3) Khurda and (4) Banpur. Instead of rejecting the single tender as per the settled position of law, the Authorities have already settled other Blocks to them for which they have never applied in most arbitrary manner. For better appreciation the Table is prepared as per personal knowledge of the petitioner.

Khurda District

Name of the Block	***Name of Tenderer***	***No of Tender er***	***Remarks***
1.Balianta	*Jagannath Gajendra*	*1*	*Single Tender*
2.Balianta	*Jagannath Gajendra*	*1*	*"*
3. Bhubaneswar	*Jagannath Gajendra and Ashok Sahoo*	*2*	*"*
4. Jatni	*Notender is received*	*-*	*-*
5. BMC,	*Ashok Sahoo and Antaryami Sahoo*	*2*	*-*
6.Khurda	*Bibhukalyan Sahoo*	*1*	*Single Tender*
7.Begunia	*No tender is received*	*-*	*-*
8. Bolagarh	*No tender is received*	*-*	*-*
9. Tangi	*No tender is received*	*-*	*-*
10.Chilika	*No tender is received*	*-*	*-*
11.Banpur	*Bhagirathi Senapati*	*1*	*Single Tender*

10. In paragraph-7 of the counter affidavit filed by opposite party no.3 on 18.06.2016 to the rejoinder it has been stated as follows:

"7. That it is humbly submitted to the averments made in the rejoinder Para No. 2 & 3 that the petitioner without having any real base has repeatedly alleged against this opposite party. The hiking of solvency, EMD and security deposit in the tender as invited in the tender call notice dated 29.2.16, is the pre decision of the competent authority prior to the issue of such notice keeping in view of the safe security of the transporting of rice from the FCI point to the School

point under Mid Day Meal programme of the Khordha District. It may ascertained from the last past years tenders that the tenderers were quoted nominal price in the tender in comparison to the fixed price of Rs. 75/- like such as 0.90 paise or near by to 0.90 paise which is not practically workable which clearly intends towards some ulterior motive. It is submitted that the previous tenderers now working for transportation of MDM rice of the district (because of the stay order passed by this Hon'ble Court) are not cooperative and they are not distributing the rice in proper time, even they are not intimating the authorities about the distribution and balance position. Even most of them are not claiming the transportation charges for last two years. This shows their attitude and motive of transporting rice in a low price. In para-3 of the letter no. 312/S&ME(MDM)/SPMU dt. 13.3.15 of Govt. of Odisha School and Mass Education Dept. wherein it is certified that : "Under no circumstances can the transport contractor be allowed to generate liability beyond the security deposit amount."

11. In the rejoinder filed to the counter affidavit dated 17.07.2016 of opposite party no.4, the petitioner has categorically stated that there is no question of any misappropriation, pilferage and shortage of rice at any stage. To substantiate her contentions, paragraphs-4, 5 and 6 are quoted below:

"04 That it is not out of place to mention here that one Government Officer is recommended to be present at the time of lifting of rice from FCI Godown. Receiving Officer at School point will receive the rice and give acknowledgement regarding quantity and quality of rice to the transporting Contractors. The same Policy is adopted by the Government since 2012. Hence, there cannot be misappropriation/pilferage/shortage of rice.

05. That the State Government has failed to assign any reason for hike of Tender condition(s) to the extent of 200% for the same volume of work, specially when petrol/diesel prices are not increasing. The present petitioner is a rural based Transport Contractor. Thus, the petitioner cannot give solvency of Rs. 10,00,000/- (Rupees Ten Lakhs only) as his property belongs to rural area. The solvency of Rs. 10,00,000/- has no nexus to achieve the object. As one can lift rice worth Rs. 50,000/- maximum. As long as acknowledgement of distribution of rice in accordance with diversion, next lifting of rice from Godown is not permissible. Therefore, security deposit of Rs. 50,000/- is just and appropriate.

06. That no policy decision of the Government cannot be arbitrary and unreasonable. Only to deprive of rural based transport Contractor, solvency has been increased from Rs. 1,00,000/- to Rs. 10,00,000/- per Block. The pre-qualification of tender is fixed only to show favouritism in favour of the intervener/opposite parties. Therefore, when additional Blocks (where no tender is available) are distributed among the interveners/Opp. Parties, no further solvency is demanded. In other words, on one solvency of Rs. 10,00,000/-, tender of 3(Three) Blocks are granted. The policy decision of the Government for the year : 2016-17 has not been taken keeping in mind all the relevant facts. Any decision, by it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision. In the instant case, such action of the District Tender Committee is violative of Article -14 of the Constitution of India.

12. In view of the aforesaid facts and circumstances of the case, it is apparently clear that the reason for enhancement of EMD, security deposits and solvency, as has been made in the tender call notice Anneuxre-4, has not been indicated anywhere, save and except reliance being placed on the letter of the Commissioner-cum-Secretary to Government, School and Mass Education Department, Odisha in Annexure-E/3 dated 13.03.2015 and to obligate the same, reply has also been given by the petitioner in his rejoinder affidavit dated 17.07.2016 explaining the position that how there is misappropriation, pilferage and shortage of rice have been safeguarded by the action of the State authorities. Therefore, imposition of conditions in the tender document depriving the small transport contractors to participate in the bid amounts to arbitrary and unreasonable exercise of powers by the authority. More so, these conditions have been incorporated with a mala fide intention to favour a group of persons having single tender in respect of the areas to which transportation is to be made. Time and again, the Apex Court has deprecated the practice of awarding contract in favour of single tender. With all fairness the State should have acted reasonably in cancelling tenders so far as single bidder is concerned. But, it appears that by putting such conditions, the authorities have tried to encourage single tenders/bidders and, resultantly, due to non-availability of competitive bidders, the single bidders have been allowed to operate the areas, for which they had not even applied for in addition to the areas they had applied for.

13. Much reliance has been placed on ***Michigan Rubber (India) Limited*** (supra) by the Standing Counsel for the School and Mass Education Department. It is urged that the State authorities have alone got discretion to set tender conditions/ eligibility criteria in the tender. Therefore, the conditions stipulated in restricting participation of the petitioner in the tender cannot be construed to be unfair and discriminatory. It is no doubt true that the Government and their undertakings must have a free hand to set the term of the condition of the tender in exercise of such powers and that once the conditions of the tender have been fixed, the Court cannot interfere in exercise of judicial review under Article 226 of Constitution of India. But, a rider has been given that where conditions, so stipulated, are arbitrary, discriminatory and mala fide and based on bias, in that case the Court can interfere. The present case being within the domain of arbitrary, discriminatory and mala fide carrying bias action of the authority, this Court has certainly got jurisdiction to interfere with the same.

14. In view of the foregoing discussions, there is no iota of doubt that the State authorities have acted arbitrarily, unreasonably, discriminatorily and malafidely to favour a group of persons/contractors by eliminating the petitioner from the arena of competition.

15. In ***Tata Cellular*** (supra), on which reliance was placed by learned counsel for opposite party no.4, the Apex Court, in paragraph-113 thereof, after discussing various judgments has been pleased to deduce the following principles:

> *"113. The principles deducible from the above are :*
>
> *(1) The modern trend points to judicial restraint in administrative action.*
>
> *(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
>
> *(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*
>
> *(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through*

several tires. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

The Apex Court made it very clear that the decision must not only be tested by the application of Wednesbury principle of reasonableness, but must be free from arbitrariness not affected by bias or actuated by mala fides. Similar view has also been taken in ***Directorate of Education and others*** (supra) wherein the Apex Court categorically held that, though the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract, but the Court can interfere with the administrative policy decision, only if it is arbitrary, discriminatory, mala fide or actuated by bias. Therefore, the present case being within the purview of the arbitrariness, unreasonableness, discriminatory, mala fide or actuated by bias, the judgments referred to in ***Tata Cellular*** and ***Directorate of Education*** mentioned supra, in our view, have no assistance to the present context.

16. In ***S.S. and Company*** mentioned supra, on which reliance has been placed so far as locus standi of the petitioner is concerned, it has been held that if the tenderer did not satisfy the eligibility criteria, even in terms of the unamended clause, and consequently its tender was rejected thereunder, it could not assail the amendment made in the relevant clause in terms whereof it again failed to qualify. But, this is not a case where the petitioner had participated in the tender, rather by putting the conditions by enhancing the EMD and solvency amount, the petitioner has been precluded from participating in the tender itself. So far as the previous years tender conditions are concerned, such conditions were not there and, admittedly, in respect of other distribution systems, namely, PDS and SMP, such stringent conditions have not been put by the State authority and, consequentially, there was fair participation of the bidders in view of the terms and conditions mentioned in the previous years. But, by putting conditions, so far as EMD,

solvency certificate and security deposits are concerned, the petitioner being outstayed from the tender and in order to favour group of persons such stipulations have been made, it amounts to arbitrary and unreasonable exercise of powers. Consequentially, the petitioner has been discriminated and malafidely the benefit has been extended to such people. Thereby, the petitioner has got every locus to assail such terms and conditions. Therefore, the judgment referred to supra has no application to the present case.

17. In ***Dinesh Engineering Corporation and another*** (supra), having found that by putting a condition it would lead to monopoly in the hands of a group of persons capable of giving higher EMD, security deposits and solvency certificates, the Apex Court deprecated such monopoly of particular company. Therefore, the said judgment is squarely applicable to the present context to the extent that by putting such conditions, the small transport contractors/agents have been deprived of from participating in the bid and the big transport contractors have been favoured and, as such, they have not only been shown favour to supply the MDM food stuff to the places, for which they had applied for, but due to non-availability of respective bidders they have also been permitted to supply the MDM food stuff to other blocks, for which they had not even applied. Apart from the same, they being the single bidders, their bids should not have been accepted by the authority in respect of the particular blocks/areas. This is a glaring case of arbitrary and unreasonable exercise of powers by the authority. Therefore, the conditions, so stipulated in the tender call notice, cannot sustain in the eye of law.

18. In view of foregoing discussions, this Court is of the considered view that the tender call notice dated 29.02.2016 Annexure-4, so far as it relates to the conditions for enhancement of security deposits, EMD and solvency certificate, being arbitrary, unreasonable, discriminatory and mala fide, are hereby quashed. Consequentially, the selection of opposite parties no. 4 and 5, as transport contractor pursuant to such tender call notice, being unsustainable, is also set aside. Since the State-opposite parties are to supply the MDM, direction is given to take necessary steps immediately to make arrangements to continue to supply and go for fresh tender with suitable terms and conditions in the interest of the public.

19. The writ petition is accordingly allowed to the extent indicated above. However, there is no order as to cost.

Writ petition allowed.

2016 (II) ILR - CUT-984

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

CRLMP NO. 634 OF 2014

RENUBALA DAS & ORS. ……..Petitioners

.Vrs.

STATE OF ODISHA (VIGILANCE) ……Opp. Party

ODISHA SPECIAL COURTS ACT, 2006 – S. 19

Refund of confiscated property – Learned Special Judge rejected the application filed by the legal heirs of the deceased accused – Hence this petition – Held, authorised officer is the competent authority to deal with an application for release of money or property involved in the confiscation proceeding – Impugned order needs no interference. (Para10)

For Petitioners : M/s. Gokulananda Mohapatra,
P.K.Sahoo & B.N.Mohapatra
For Opp. Party : Mr. Srimant Das,
Sr. Standing Counsel (Vigilance)

Date of Judgment: 28.09.2016

JUDGMENT

By the Bench

Petitioners in this petition under Article 227 of the Constitution of India seek to assail the order dated 13.09.2013 passed by the learned Special Judge, Special Court, Cuttack in Misc. Case No. 1 of 2012 rejecting an application for release of cash and other articles including Bank and Postal deposits, Pass Book and other documents seized in connection with T.R. Case No. 5 of 2008 of his Court registered under Section under Section 13(2) read with Section 13 (1)(e) of the Prevention of Corruption Act, 1988 (for short 'the P.C. Act')

2. The pleadings in the petition under Article 227 reveals that the predecessor of the petitioners, namely, Khetrabasi Das (for short 'person affected') was an accused in T.R. Case No.5 of 2008 of the Court of learned Special Judge, Special Court, Cuttack, registered for commission of offence under Section 13(1) (e) read with Section 13 (2) of the P.C. Act. On 03.04.1988, the residential house of person affected situated at Tulusipur, Cuttack and his parental house situated at Gopapur in the district of Keonjhar were simultaneously raided by the Vigilance Department on the allegation of

acquiring disproportionate assets. Household articles, including valuable documents and cash of Rs.40,143/- were seized, for which T.R. Case No. 5 of 2008 was initiated. During pendency of the aforesaid case, the Government of Odisha through Public Prosecutor filed a petition under Section 13 of the Orissa Special Courts Act, 2006 (for short 'Act 2006') before the Authorized Officer for initiation of a confiscation proceeding. On the basis of said petition, Confiscation Case No.1 of 2009 was initiated on the file of the learned Authorized Officer Cuttack. On receipt of the application, notice for confiscation was served on the person affected under Section 14 of Act, 2006. At such a juncture, person affected breathed his last on 20.11.2010 leaving behind the petitioners as his legal hairs. On the death of person affected, T.R. Case No.5 of 2008 abated. Likewise, Confiscation Case No.1 of 2009 was also dropped by the Authorized Officer pursuant to petition dated 26.2.2011 filed by the present petitioners on account of death of the said person affected. While the matter stood thus, the petitioners filed a petition before Special Judge, Special Court, Cuttack, (Misc. Case No.1 of 2009) for return/release of the seized documents, such as, Bank and Postal deposits, passbooks and other materials including cash seized during the raid conducted by the Vigilance Department. The learned Special Judge on consideration of the petition as well as submissions made by the parties, rejected the same by his order dated 13.09.2013 (Annexure-2), against which the petitioners filed the instant petition.

3. In course of hearing of the petition, this Court by order dated 07.09.2015 made a query to Mr. Gokulananda Mohapatra, learned counsel for the petitioners, as to whether the application for release of the property accumulated by alleged illegal resources can be entertained by the learned trial Judge or only the Authorized Officer is empowered to deal with the question of release of such property, in case of demise of the accused.

4. Mr. Mohapatra, learned counsel for the petitioners submits that though application for confiscation of the properties of the accused Keshetrabasi Das (person affected) was filed before the Authorized Officer, but the properties sought to be confiscated were neither transferred nor placed before the Authorized Officer for confiscation. It is the Authorized Officer, after a declaration made under Section 15 of the Act, 2006 can direct the person, who may be in possession of money or property or both, alleged to have been illegally accumulated, to surrender or deliver possession thereof to the Authorized Officer. Thus, the properties seized under the proceeding initiated under Section 13(1)(e) read with Section 13 (2) of the P.C. Act, 1988 being not in possession or control of the Authorized Officer, he had

no jurisdiction to issue a direction for release of the same in favour of the petitioners. The Authorized Officer can only assume jurisdiction to entertain such a petition once he takes possession of such property under Section 16 of the Act, 2006. Thus, an application for release of the seized articles can only be maintainable before the Special Court before whom the T.R. Case was pending. Hence, he prayed to quash the order under Annexure-2 and issue a direction for release of the aforesaid seized articles by the Special Court.

5. Mr. Srimant Das, learned Senior Standing Counsel for the Department of Vigilance, per contra vehemently opposing contention of Mr. Mohapatra submits that the proposition raised by Mr. Mohapatra is unknown to law. Further, he submits that a trial under the provisions of the P.C. Act does not provide for any procedure either for confiscation or to deal with such proceeding. It is entertained by an Authorized Officer appointed for the purpose of carrying out the confiscation proceeding under the provisions of the Act, 2006. A confiscation proceeding can only be initiated on an application filed by Public Prosecutor being so authorized by the State Government, for confiscation of money or other property allegedly acquired by unlawful means, whether or not the Special Court, constituted under the Act, 2006, has taken cognizance of the offence. Thus, the proceeding under Section 13 of the Act, 2006 is an independent proceeding from one initiated under the provisions of P.C. Act, 1988. Hence, he prayed for dismissal of the petition being devoid any merits.

6. Taking into consideration rival contentions of the learned counsel for the parties, the question that crops up, and also recorded by this Court in its order dated 20.9.2016 in course of hearing of the petition for consideration, is as to whether under Sections 14, 15, 18 and 19 of the Act, 2006 read together gives a right to a Special Judge to release the property, when in fact, no trial has commenced before it nor the cognizance has been taken.

Before delving into the question, it is made clear that the petitioners had not made any application before the learned Authorized Officer for release of the seized money as well as other properties, although a proceeding in Confiscation Case No.1 of 2009 was initiated on the file of learned Authorized Officer pursuant to an application under Section 13 of the Act, 2006 by the Public Prosecutor being so authorized by the State Government.

7. Chapter-III of the Act, 2006 deals with confiscation of property. Section of the Act, 2006 mandates that upon receipt of an application under the said provision Authorized Officer shall serve a notice on the person in respect of whom the application has been made calling upon him to show

cause as to why all or any money or property, or both should not be declared to have been acquired by means of the offence alleged to have been committed by him, confiscated to the State Government in compliance of provision under Section 14 of the Act, 2006. After giving a reasonable opportunity of hearing to the person upon whom notice under Section 14 has been served, he may pass an order confiscating all or any part of the money as well as the property so involved to be confiscated to the State free from all encumbrances. Where any money or property, or both have been confiscated to the State, the Authorized Officer, under the provisions of Section 16 of the Act 2006, shall make an order directing the person affected as well as any other person, who is in possession of such property or money, to deliver possession thereof to concerned Authorized Officer or to any officer duly authorized by him in that behalf within the time specified in the order. Section 19 deals with refund of confiscated money or property, which reads as follows:-

> "**19. Refund of confiscated money or property.—** Where an order of confiscation made under Section 15 is modified or annulled by the High Court in appeal or where the person affected is acquitted by the Special Court, the money or property or both shall be returned to the person affected and in case it is not possible for any reason to return the property, such person shall be paid the price thereof including the money so confiscated with the interest at the rate of five percent per annum thereon calculated from the date of confiscation."

8. On a close reading of Section 19 of the Act, 2006, it is abundantly clear that the order of confiscation passed under Section 15 of the Act, if either modified or annulled by the High Court under Section 17 of the Act, or where a person facing trial is acquitted by the Special Court from the charges leveled against him, the money or property, or both so confiscated, shall be refunded to him and where it would not be possible on the part of the Authorized Officer to refund and / or the money or property, or both to the person affected, he can direct that such person should be paid the price of the property including money, so confiscated, with interest @ 5% per annum.

From a compendious reading of the aforesaid provisions, viz., Sections 13, 14, 15, 18 and 19 of the Act 2006, it is crystal clear that the Authorized Officer is only competent authority to refund and/or return the money or property so confiscated.

9. In the instance case, although a proceeding for confiscation in Confiscation Case No.1 of 2009 was initiated on the file of the Authorized Officer under Section 13 of the Act, 2006, no order of confiscation as required under Section 15 of the Act could be passed before the death of the person affected, namely, late Khetrabasi Das. On the death of the person affected, Confiscation Case No. 1 of 2009 was dropped. Thus, an obvious question that arises as to whether the Authorized Officer would be competent to pass an order to refund/release the money or property so seized in a proceeding under the provisions of the P.C. Act.In the instance case, initiation of confiscation proceeding under the provisions of the Act, 2006 can not be questioned because the Court can entertain a petition under Section 13 of the Act irrespective of the fact that cognizance of offence under the Act has not been taken. On and from the date, the Authorized Officer takes cognizance of the petition and issues notice to the person affected under Section 14 of the Act, 2006, the trial Judge lacks jurisdiction to deal with the said property involved in the confiscation proceeding. Thus, it is only the Authorized Officer, who can deal with the property in the manner prescribed under the provisions of the Act, 2006. No doubt, the Authorized Officer has jurisdiction to refund/return the money or the property, or both involved in a confiscation proceeding under two contingencies, such as.—

(i) when the order of confiscation made under Section 15 is modified or annulled by the Court in appeal under Section 17 of the Act, 2006; and

(ii) whether the person affected is acquitted by the Special Judge?

Thus, Section 19 of the Act, 2006 mandates that when the affected person is acquitted of the offence alleged against him, the Authorized Officer is under obligation to refund the money and return the properties so confiscated. On and from the date when a proceeding for confiscation is initiated pursuant to an application under Section 13 of the Act, 2006, the Authorized Officer takes control of the properties so involved and will act in accordance with the provisions of the Act, 2006. It necessarily implies that the Special Judge before whom the trial is pending lacks jurisdiction to deal with the property so seized. When the Authorized Officer has the jurisdiction to release the money and property confiscated after acquittal of the person affected, there is no reason as to why he would lack jurisdiction or competence to deal with the property after the death of the person affected, whether or not order under Sections 15, 16 or 18 of the Act, 2006 has been passed. Release or refund of the property or money does not have any bearing as to whether or not the

possession of the money or property involved has been confiscated or the possession of the same has been taken over by the Authorized Officer. It has the same power to pass an order under Section 19 even if no order has been passed under Section 15 or 18 of the Act, 2006.

10. From the foregoing discussions, we have no hesitation to hold that the Authorized Officer is the only competent authority to deal with an application for release of the money and/or property involved in a confiscation proceeding in case of demise of an accused and thus the Special Court has rightly passed the impugned order rejecting the application for return of money and property of the person affected.

11. Thus, the CRLMP merits no consideration and the same is accordingly dismissed.

CRLMP dismissed.

2016 (II) ILR - CUT-989

INDRAJIT MAHANTY, J. & BISWAJIT MOHANTY, J.

W.P.(C) NO. 19909 OF 2015

STATE OF ODISHA & ORS. .....Petitioners

.Vrs.

SOMNATH SAHOO .....Opp. Party

SERVICE LAW – Promotion – Vigilance Case/Departmental Proceeding against O.P.No.1 – Promotion kept in sealed cover – In O.A. Tribunal directed to open the sealed cover and to give him promotion to the rank of Deputy Executive Engineer and Executive Engineer from the date his juniors got promotion basing on the G.A. Department circular Dt. 04.07.1995 – Hence the writ petition – Circular Dt. 04.07.1995 does not deal with opening of sealed cover for giving regular promotion but it relates to allow the Government Servant adhoc promotion in a case where a criminal prosecution and disciplinary proceeding against him has not come to an end even after expiry of two years from the date of meeting of 1st D.P.C. but not for opening of sealed cover to give regular promotion – Held, the impugned order passed by the Tribunal and other consequential directions are quashed – Direction issued to the Government to scrupulously follow the guidelines contained in G.A. Department circular Dt. 04.07.1995 within a reasonable time after expiry of two years from the date of holding of the 1st meeting of D.P.C. in order to review withheld promotion cases.

Case Laws Referred to :-

1. (1995) 2 SCC 570 : State of Punjab & Ors. -V- Chaman Lal Goyal

For Petitioners : Mr. M.Sahoo, Addl.G-ovt.Adv.
For Opp. Party : M/s. Saumendra Ku. Mohapatra, D.Nayak & S.S.Mohapatra
M/s. B.P.Mohapatra, Ramesh Sahoo, Mrs. S.Pradhan & Ms. Gayatri Das

Date of Judgment: 5.10.2016

JUDGMENT

BISWAJIT MOHANTY, J.

The State of Odisha and its officers have filed the present writ application praying for quashing of the order dated 20.7.2015 passed by the learned Odisha Administrative Tribunal, Bhubaneswar in O.A. No.839 of 2014, whereby the learned Tribunal had directed to open the sealed cover in respect of promotion of opp. party No.1 to the rank of Deputy Executive Engineer and Executive Engineer from the date his junior was promoted, if he was otherwise found suitable for such promotion and if there was no other legal impediment. While passing the impugned order dated 20.7.2015, the learned Tribunal had made it clear that the promotion given to the opp. party No.1 shall only be *ad hoc,* subject to final result of vigilance case/departmental proceeding pending against him and petitioner No.1 is at liberty to pass appropriate order as per rules after conclusion of the said vigilance case/departmental proceeding.

2. The case of the petitioners is that the learned Tribunal had illegally given the above direction notwithstanding pendency of Vigilance P.S. Case No.8 of 2007 and Vigilance P.S. Case No.8 of 2008 against him and so also pendency of disciplinary proceeding against opp. party No.1. According to the petitioners, in 2007, Bhubaneswar Vigilance P.S. Case No.8 of 2007 was registered against opp. party No.1 on the allegation of misappropriation of government money towards cost of rice received under F.F.W. and SGRY Scheme without executing any work. Again in 2008, Bhubaneswar Vigilance Case No.8 of 2008 has been registered against opp. party No.1 on the allegation of acquiring disproportionate assets. Further, according to the petitioners in Bhubaneswar Vigilance P.S. Case No.8 of 2007, cognizance of offences was taken by the appropriate court on 5.7.2012. While so, on 6.3.2013, charge memo was issued to opp. party No.1 vide Annexure-3 to the Original Application No.839 of 2014 filed by opp. party No.1, which has

been filed as Annexure-1 to the writ application. On receipt of the charge sheet in disciplinary proceeding on 3.6.2013, opp. party No.1 has filed his written statement on defence vide Annexure-4 attached to O.A. No.839 of 2014. During pendency of the disciplinary proceeding, on 30.10.2013, learned Vigilance Court, Bhubaneswar took cognizance of offence under Section 13 (2) read with Section 1 (c) (d) of the P.C. Act, 1988 and Sections 409/468/417 of I.P.C. against the opp. party No.1 and others in T.R. Case No.44 of 2012. On 3.12.2013, the Enquiry Officer was appointed in order to enquire into the allegation made in the charge memo dated 6.3.2013. In such background, on 21.2.2014, Departmental Promotion Committee sat to consider the case of Assistant Executive Engineer for promotion to the post of Deputy Executive Engineer. According to the petitioners, on account of pendency of two Vigilance/Criminal Proceedings and the departmental proceeding though the case of opp. party No.1 was considered for promotion, however, the same was put in sealed cover. Again on 22.2.2014, D.P.C. sat to consider the case of promotion to the post of Deputy Executive Engineer to Executive Engineer. Again on account of pendency of criminal proceeding as well as disciplinary proceeding, the case of opp. party No.1 was considered and put in sealed cover. When the juniors were given promotion to the rank of Deputy Executive Engineer and Asst. Executive Engineer; on 21.3.2014, the opp. party No.1 filed representation to petitioner No.1 for promoting him to the rank of Deputy Executive Engineer and Executive Engineer from the date when his juniors got promotion. Sometime thereafter, opp. party No.1 has filed O.A. No.839 of 2014 before the learned Administrative Tribunal, Bhubaneswar with prayer to open the sealed cover and to give him promotion to the rank of Deputy Executive Engineer and Executive Engineer from the date his junior Lingaraj Gouda got promotion, if he was found suitable by D.P.C. He further prayed for a direction to petitioners to hold a review D.P.C. to consider his case for promotion to the rank of Deputy Executive Engineer and Executive Engineer without taking into account the pendency of vigilance Case and disciplinary proceeding and to allow him all financial and consequential service benefits. As indicated earlier, the learned Tribunal vide its order dated 20.7.2015 disposed of O.A. No.839 of 2014 directing the petitioners to open the sealed cover in respect of promotion of opp. party No.1 to the rank of Deputy Executive Engineer and Executive Engineer from the date when his juniors were promoted, if he has been otherwise found suitable for such promotion if there is no other legal impediment. Challenging the same, the present writ application has been filed.

3. Mr. Sahoo, learned Addl. Government Advocate submitted that in passing such orders, the learned Tribunal has wrongly relied on the decision of Hon'ble Supreme Court in ***State of Punjab and others v. Chaman Lal Goyal*** reported in (1995) 2 SCC 570, which has no application to the present case. In other words, Mr. Sahoo, learned Addl. Government Advocate contended that the above noted decision is factually distinguishable.

4. On the contrary, Mr. Mohapatra, learned counsel for opp. party No.1 stoutly defended the impugned order passed by the learned Tribunal and contended that the interference by this Court is not warranted as there exists no error apparent on the face of the impugned order. He further submitted that learned Tribunal has rightly allowed the prayer of opp. party No.1 relying on the decision of State of Punjab (supra). He further submitted that since similarly placed persons like Prasanta Kumar Mishra and Subrata Das have been given promotion during pendency of disciplinary proceeding/vigilance case, it cannot be said that the Tribunal has gone wrong in passing the impugned order in favour of opp. party No.1. Lastly, he submitted that even as per the decision rendered by this Court in W.P. (C) No.22560 of 2015 (***State of Odisha and Purna Chandra Das and others***) disposed of on 29.8.2016 directing the appointing authority to consider the case of opp. party No.1 therein for adhoc promotion following the Circular dated 4.7.1995, the order of Tribunal did not require any interference.

5. In reply, Mr. Sahoo, learned Addl. Government Advocate contended that in the case of State of Odisha v. Purna Chandra Das and others (supra), this Court nowhere directed for opening of sealed cover but directed that the circular dated 4.7.1995 issued by the General Administration should be followed for considering the case of opp. party No.1 therein for adhoc promotion as more than two years have elapsed from the last DPC held in that case. Further, Mr. Sahoo, learned Addl. Government Advocate placed reliance on G.A. Department Circular No.11962 dated 28.5.2012 and submitted that it has been made clear therein that sealed cover procedure should be adopted in all criminal cases where cognizance has been taken by the appropriate court. He further pointed out that the opp. party No.1 has never challenged the Circular dated 28.5.2012 though the same was filed as Annxure-C to the counter filed by the petitioners before the learned Tribunal. The Circular dated 28.5.2012 issued by the G.A. Department has been filed here as Annexure-5.

6. Heard Mr. M.Sahoo, learned Addl. Government Advocate on behalf of the petitioners and Mr. Mohapatra, learned counsel for opp. party No.1.

7. It is undisputed that by the time D.P.C. sat for considering the case of promotion from the rank of Asst. Executive Engineer to Deputy Executive Engineer on 21.2.2014 and for considering the case of promotion of Deputy Executive Engineer to the post of Executive Engineer on 22.2.2014, two vigilance/criminal proceedings were pending against the opp. party No.1 where the appropriate courts have taken cognizance of offences against opp. party No.1. On the said dates, the disciplinary proceeding initiated vide charge memo dated 6.3.2013 against the opp. party No.1 was also pending. In such background, we have to appreciate the rival contentions made at the bar. In this connection, we have to first see whether the decision of Hon'ble Supreme Court in the case of State of Punjab and others v. Chaman Lal Goyal (supra) has any application to the facts of the present case. In our humble opinion, the facts of the said case are clearly distinguishable and accordingly the ratio decided therein has no application to the present case. The said case nowhere revolved around the issue of opening of sealed cover, which is the issue here. Further in that case, no criminal case was pending against Shri Chaman Lal Goyal whereas in the present case two criminal cases were pending against opp. No.1 by the date the D.P.Cs. sat to consider the cases for promotion. Moreover in that case the issue was for quashing of charge memo in the departmental proceeding on the ground of delay whereas the same is not the issue here. Though the High Court entertained the writ application of Shri Chaman Lal Goyal, in which prayer was made for quashing of charges and appointment of the Enquiry Officer, however, the enquiry was not stayed. Accordingly, the enquiry proceeded to a large extent. Here, there is no prayer for quashing of charge memo dated 6.3.2013. In such background, the Hon'ble Supreme Court directed that the case of Shri Chaman Lal Goyal should be considered for promotion without reference to and without taking into consideration the charge or pendency of the said enquiry, if he is found fit for promotion. However, at the same time, it was made clear that the said direction was made in peculiar facts and circumstances of that particular case though the Hon'ble Supreme Court was aware that rules and practices normally followed in such case might be different. But as indicated earlier, here is a case where charge memo dated 6.3.2013 was never challenged by opp. party No.1 and he only wanted lifting of the sealed cover for getting the benefit of promotion to the posts of Deputy Executive Engineer and Executive Engineer if he has been found fit by the D.P.C. Here, the main issue revolves around the legality of the direction of the Tribunal relating to opening of sealed cover. Therefore, we are inclined to accept the contention of Mr. Sahoo, learned Addl. Government Advocate that

the Tribunal has gone wrong in relying upon the decision of Hon'ble Supreme Court in State of Punjab and others v. Chaman Lal Goyal (supra) for directing to open the sealed cover in respect of promotion of opp. party No.1. Further, though the attention of learned Tribunal was drawn to G.A. Department Circular dated 28.5.2012 under Annexure-5 to the present writ application and though the same has been noted at Paragraph-4 of the order, however, the learned Tribunal has nowhere discussed about the impact of the said order on the present case. The said resolution dated 28.5.2012 as noted earlier makes it clear that sealed cover procedure should be followed in all criminal cases where cognizance has been taken by the court. Here, it is not disputed that by the time the D.P.Cs sat in February, 2014, cognizance of offences against the opp. party No.1 have been taken in both the criminal proceedings. In such background also, the order of the Tribunal in directing to open the sealed cover becomes legally vulnerable. With regard to contention of the learned counsel for opp. party No.1 relating to promotion of Prasanta Kumar Mishra and Subrata Das during pendency of disciplinary proceeding and vigilance case, we may indicate here that facts relating to those promotions are not very clear. May be that, their case have been considered in accordance with G.A. Department Circular dated 4.7.1995. In case they have been given promotion contrary to 4.7.1995 circular, the opp. party No.1 cannot derive any benefit from the same. We, however, hasten to add that any observation made herein shall not in any way prejudicially affect said Prasanta Kumar Mishra and Subrata Das. With regard to the last submission of Mr. Mohapatra, learned counsel for the opp. party No.1 that the direction of the Tribunal as contained in the impugned order need not be interfered with as the same is in consonance with the judgment rendered by this Court, in the case of ***State of Odisha and others v. Purna Chandra Das and others*** (W.P. (C) No.22560 of 2015) disposed of on 29.8.2016, we are unable to accept the said contention for the following reasons. That case revolved around the legality of direction of the Tribunal to open the sealed cover and to give promotion on *ad hoc* basis in view of G.A. Department memo No.14641 dated 4.7.1995. This Court in that judgment has made it clear that the circular dated 4.7.1995 does not deal with opening of sealed cover for giving regular promotion. The said circular relates to allowing the government servant *ad hoc* promotion in a case where a criminal prosecution/disciplinary proceeding against the government employee has not come to an end even after expiry of two years from the date of meeting of first Departmental Promotion Committee and not for opening of sealed cover to give regular promotion. Thus, in such background, the direction of the

learned Tribunal to open the sealed cover and to grant promotion to opp. party No.1 to the rank of Deputy Executive Engineer and Executive Engineer if he has been found otherwise suitable from the date when his juniors were promoted is legally vulnerable. It may also be noted here that in the present case, charge memo in departmental proceeding was issued on 6.3.2013 and the opp. party No.1 had also filed his reply on 3.6.2013 and the said proceeding was pending on the date D.P.Cs were convened. In such background also, the direction to open the sealed cover was wrong.

8. Considering all these facts, we have no hesitation in setting aside the direction of the learned Tribunal for opening of sealed cover with regard to promotion of the opp. party No.1 to the rank of Deputy Executive Engineer and Executive Engineer from the date his juniors got promoted and other consequential directions. However since in this case, the Departmental Promotion Committee held its meeting in February, 2014 and in the meantime more than two years have expired, we direct the petitioners to act strictly in accordance with the Clauses-2 (iii) and 3 of the G.A. Department Resolution No.14641 dated 4.7.1995 for considering the case of opp. party No.1 for *ad hoc* promotion to the post of Deputy Executive Engineer and Executive Engineer. The entire exercise should be completed within a period of two months from the date of this judgment.

9. Before closing the matter, we think it appropriate to bring certain things to the notice of the petitioners. Though the Government in G.A. Department has issued Circular No.14641/Gen. dated 4.7.1995 for reviewing the withheld promotion cases after expiry of two years from the date of 1st meeting of D.P.C., however, we often find that such review is not undertaken within a reasonable time after expiry of two years from the date of 1st meeting of D.P.C. This ultimately results in defeating the spirit of G.A. Department Circular dated 4.7.1995 which was brought in to ameliorate the grievance of the government servants against whom criminal prosecution/disciplinary proceeding have been pending for a long time. Therefore, the appropriate authorities should be directed to scrupulously follow the guidelines as contained in the G.A. Department Circular dated 4.7.1995 within a reasonable time after expiry of two years from the date of holding of the 1st D.P.C. so that the withheld promotion cases can be reviewed. In other words, the process of review of withheld promotion should not be unduly delayed as it would negate the purpose and spirit of G.A. Department Circular dated 14641/Gen. dated 4.7.1995.

10. Accordingly, the writ application is disposed of. A copy of this judgment be sent to the Chief Secretary, Government of Odisha for further consequential action as observed above.

Writ petition disposed of.

2016 (II) ILR - CUT-996

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

W.P.(C) No. 3528 OF 2016

DEEPIKA RANI SETHI & ORS. ……..Petitioners

.Vrs.

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

EDUCATION – Admission – Petitioners were persuaded by O.P.No.7-School to take admission in the unapproved seats for G.N.M. course – Though they have paid admission fee, tuition fee and examination fees they lost their one year study and their valuable right was snatched away for no fault of them – Held, O.P.No.7-School is liable to pay Rs. 1, 00,000/- as compensation to each of the petitioners within two months. (Para 16)

Case Laws Referred to :-

1. 2016 (I) ILR-CUT-1102 : 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 GNM 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 Sundargarh GNM 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 Admit 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 69 students of GNM stream only 35 students were allowed to appear at proposed venue, i.e., DIET, Sundargarh but rest 34 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 35 seats for GNM students and 40 seats for ANM 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 fault 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 GNM course for the academic session 2014-2015, the Management conditionally conceded to give admission beyond approved seats for 34 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 increased 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 GNM 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 GNM 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 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 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 35 students. But the School authority on its own gave admission to 69 students in GNM 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 35 seats in GNM 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 GNM 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 GNM 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 35 seats approved for giving admission to the persons desirous for taking admission for two years GNM 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 GNM 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 GNM 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 GNM 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 GNM 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 GNM 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 admission fee, tuition fee and the 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 GNM 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 GNM 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 GNM 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.

2016 (II) ILR - CUT-1005

S. PANDA, J. & K.R.MOHAPATRA, J.

O.J.C. NO. 7832 OF 1999

SRI MAHANTA SRI GARUDADHWAJA (DEAD) AFTER HIM INDRA RAMANA RAMANUJA DAS ……..Petitioner

.Vrs.

COMMISSIONER OF ENDOWMENTS, ODISHA, BHUBANESWAR ……..Opp. Party

ODISHA HINDU RELIGIOUS ENDOWMENTS ACT, 1951 – S.65(2)

Payment of arrear contribution – Order passed by the Commissioner of Endowments Dt. 11.06.1999 – Writ filed – During the pendency of the writ petition Odisha Hindu Religious Endowments (Amendment) Act, 2014 came into force wherein the words "contribution or other" appearing in sections 28, 35, 58, 63, 65 and 66 were omitted – Question raised whether such amendment was retrospective or prospective – Considering the purposive construction of the Amended Act, 2014, it can safely be concluded that the legislature intended not to further receive contribution from the religious institutions, hence the amended Act is retrospective in nature – Held, since Hindu religious institutions of the state were exempted from payment of contribution by virtue of the Amended Act, the petitioner is exempted from contributing to the Government.

(Paras 6,7,8)

Case Laws Referred to :-

1. (2004) 8 SCC 1 : Zile Singh Vs. State of Haryana and others
2. (2015) 1 SCC 1 : Commissioner of Income Tax (Central)-I, New Delhi Vs. Vatika Township Private Limited,
3. (2006) 6 SCC 289 : Vijay Vs. State of Maharashtra and others
4. AIR 1990 SC 1849 : State of Madhya Pradesh and others Vs. Rameshwar Rathod
5. (2005) 7 SCC 396 : Government of India and others Vs. Indian Tobacco Association
6. AIR 1957 SC 540 : Garikapatti Veeraya Vs. N.Subbiah Choudhury

For Petitioner : Mr. Manoj Mishra, Sr. Advocate
M/s. P.K.Das, P.K.Mohanty, S.Mohapatra, L.Mishra, B.Mishra & A.K.Nayak

For Opp. Party : M/s. S.C.Satapathy, J.N.Rath, S.K.Jethi & S.K.Mishra

Date of hearing : 23.06.2016
Date of Order : 23.06.2016

ORDER

S. PANDA, J.

The petitioner in this writ application assails the order dated 11.6.1999 (Annexure-6) passed by learned Commissioner of Endowments, Odisha, Bhubaneswar directing the petitioner math to pay the arrear of contribution amounting to Rs.51,225/- in exercise power under Section 65(2) of the Orissa Hindu Religious Endowments Act, 1951 (for short 'the Act').

2. Petitioner's case in brief is that by order dated 15.07.57 (Annexure-1) passed in O.A. No.24 of 1947-1948, the Assistant Commissioner of Endowments, Orissa, Cuttack declared that the petitioner-institution is a 'Math' within the meaning of Section 3(vii) of the Act belonging to Ramanuja Sampradaya and the landed properties measuring Ac.490 (covered under Exts. 1 to 7 and 9 series, therein) were declared as the personal properties of Mohanta. But, the usufructs thereof were meant for the secular and religious purposes of the 'Math'. In spite of the some, a demand notice No.1796 dated 24.12.1996 (Annexure-4) was issued against the petitioner levying an amount of Rs.51,225/- towards contribution under Section 63(4) of the Act. The petitioner filed its objection (Annexure-5) stating the aforesaid facts seeking exemption to pay the amount. It was also contended inter alia that similar notice was also issued against the petitioner-Math in the year 1969 against which the petitioner had filed objection under Section 65(2) of the Act (A.A. No. 99 of 1968-1969). Learned Commissioner considering the objection, exempted the institution from payment of contribution on the properties vide order 18.07.1969 (Annexure-2). Further, demand notice for payment of contribution for the year 1977 (vide notice No.1347/89 dated 05.11.1977) was also struck down by learned Commissioner vide order dated 2.5.1978 passed in Misc. Case No. 8 of 1977 under Annexure-3 earlier. Thus, the petitioner claimed that he was not liable to pay any contribution as per assessment made under Annexure-4. Learned Commissioner without proper appreciation of the material on record held the petitioner-Math liable for payment of contribution as assessed under Annexure-4. Accordingly, he rejected the objection raised by the petitioner and directed the Assessment Section to assess the contribution and take follow up action vide his order dated 11.06.1999 (Annexure-6). Hence, the writ application has been filed for aforesaid relief.

3. During pendency of the writ petition, the Odisha Hindu Religious Endowments (Amendment) Act, 2014 come into force in order to amend different provisions of the Act, 1951. Accordingly, Section 28, 35, 58, 63, 65, 66 and 76 of the Act, 1951 were amended. By virtue of operation of Sections 2 an d 3 of the Amendment Act, 2014, the words 'Contribution or other' appearing in Sections 28(1)(a) and 35 (1)(f) of Act, 1951 were omitted. As a consequence, sub-Section (2) of Section 58 of the Act, 1951 was also substituted by operation of Section 4 of the Amendment Act, 2014. Likewise, sub-Section 2(b) as well as sub-Sections (4) and (5) of Section 63 were omitted by operation of Section 5 of the Amendment Act, 2014. Section 66 was completely omitted from the Principal Act (Act, 1951).

4. Mr. Manoj Mishra, learned Senior Counsel for the petitioner submits that in view of the amendment as stated above to the Act 1951, the petitioner-Math is not liable to pay contribution as directed under Annexure-6. He further submits that the amendments (supra) are retrospective in view of legislative intention behind bringing in the amendments. The purposive construction of the amendment makes the same retrospective. In support of his submission, he relied upon decisions of the Hon'ble Supreme Court in the case of ***Zile Singh Vs. State of Haryana and others***, reported in (2004) 8 SCC 1; ***Commissioner of Income Tax (Central)-I, New Delhi Vs. Vatika Township Private Limited,*** reported in (2015) 1 SCC 1; ***Vijay Vs. State of Maharashtra and others***, reported in (2006) 6 SCC 289 and ***State of Madhya Pradesh and others Vs. Rameshwar Rathod***, reported in AIR 1990 SC 1849.

5. Mr.S.P. Das, learned counsel for the opposite party-Commissioner of Endowments has no serious dispute to the facts of the case. However, he vehemently submits that an amendment to the provision of an 'Act' is always prospective, unless the same is made retrospective by enactment or by necessary implication. The amendments brought to the Principal Act (the Act, 1951) by virtue of Amendment Act, 2014 are not retrospective in nature, as no such provisions has been made in the Amended Act itself in that regard. Further, no legislative intention is made out from a plain reading of the Amendment Act, 2014, to make it retrospective. In support his submission, he relies upon the decision of the Hon'ble Supreme Court in the case of ***Garikapatti Veeraya Vs. N.Subbiah Choudhury***, reported in AIR 1957 SC 540 and the case of ***Rameshwar Rathod*** *(supra).*

In the case of ***Government of India and others Vs. Indian Tobacco Association***, reported in (2005) 7 SCC 396, the Hon'ble Supreme Court at paragraphs 26, 27 and 28 held as under:-

> "26. We are not oblivious of the fact that in certain situations, the court having regard to the purport and object sought to be achieved by the legislature may construe the word "substitution" as an "amendment" having a prospective effect but such a question does not arise in the instant case.
>
> 27. There is another aspect of the matter which may not be lost sight of. Where a statute is passed for the purpose of supplying an obvious omission in a former statute, the subsequent statute relates back to the time when the prior Act was passed [See Attorney General vs. Pougette (1816) 2 Price 381: 146 ER 130]
>
> 28. The doctrine of fairness also is now considered to be a relevant factor for construing a statute. In a case of this nature where the effect of a beneficent statute was sought to be extended keeping in view the fact that the benefit was already availed of by the agriculturalists of tobacco in Guntur, it would be highly unfair if the benefit granted to them is taken away, although the same was meant to be extended to them also. For such purposes the statute need not be given retrospective effect by express words but the intent and object of the legislature in relation thereto can be culled out from the background facts."

In the case of ***Zile Singh*** *(supra)*, the Hon'ble Supreme Court held at paragraph-14 held as under:-

> "14. ….It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended…. An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect."

In the case of ***Vatika Township Private Limited*** *(supra),* the Hon'ble Supreme Court held as under:-

> "We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding

> detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect…"

In the case of ***Vijay*** *(supra)*, the Hon'ble Supreme Court held that the statute enacted for the benefit of the community as a whole may be construed to have retrospective operation.

6. Taking into consideration the amendments brought in to the provisions of the Odisha Hindu Religious Endowments (Amendment) Act, 2014, wherein the words "Contribution or other" appears in Sections 28, 35, 58, 63, 65 and 66 were omitted, it can safely be concluded that intention of the Legislature not to further receive contribution from the religious institutions under the Act, 1951 considering the decisions of the Hon'ble Supreme Court supra relied upon hereinabove and purposive construction of the Amended Act, 2014 appears that the Legislature intentionally omitted the words "Contribution or other" in the Amended Act, which is retrospective in nature.

7. In view of the amendment to Act, 1951 by virtue of different provisions of Amendment Act, 2014, as stated above, the Hindu religious institutions of the State of Odisha were exempted from payment of contribution to the Government.

8. Therefore, the Writ petition is allowed and the petitioner is exempted from contributing to the Government.

Writ petition allowed

2016 (II) ILR - CUT-1009

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

O.J.C. NO. 5467 OF 1998

THE MANAGEMENT OF ROURKELA STEEL PLANT, ROURKELA .....Petitioner

.Vrs.

THE PRESIDING OFFICER, INDUSTRIAL TRIBUNAL, ROURKELA .....Opp. Parties

(A) INDUSTRIAL DISPUTES ACT, 1947 – S.33(2)(b)

Whether fairness of the domestic enquiry can be looked into by the Tribunal while granting approval U/s. 33(2)(b) of the Act ? Held, Yes

Domestic enquiry cannot be said to be a mere formality and the Industrial Tribunal cannot act only as post office to give seal of approval upon the decision taken by the management – It has to see the fairness of the domestic enquiry in order to prevent unfair labour practice and victimization of the workman.

In this case, the workman has got appointment on production of forged certificates – The management has conducted domestic enquiry without providing adequate opportunity to the workman – Held, Tribunal has not committed any error in not according approval to the order of dismissal of the workman passed by the management – However, liberty granted to the management to take action against the workman in accordance with law. (Paras 6 to11)

(B) INDUSTRIAL DISPUTES ACT, 1947 – S.33(2)(b)

Approval of action taken by management – Jurisdiction of the Industrial Tribunal is confined to the enquiry as to :

(i) Whether a proper domestic enquiry in accordance with the relevant rules/standing orders and principles of natural justice has been held;

(ii) Whether a prima facie case for dismissal based on legal evidence adduced before the domestic tribunal is made out ;

(iii) **Whether the employer had come to a bonafide conclusion that the employee was guilty and the dismissal did not amount to unfair labour practice and was not intended to victimize the employee.** (Para 6)

(iv) whether the employer has paid or offered to pay wages for one month to the employee;

(v) whether the employer has simultaneously or within such reasonably short time as to form part of the game transaction applied to the authority before which the main industrial dispute is pending for approval of the action taken by him.

Case Laws Referred to :-

1. 1965(2) LLJ 128 (SC) : Tata Iron and Steel Company Ltd. –v- Modak(S.N.)

2. AIR 1962 SC 1500 : Strawboard Manufacturing Co -vs- Gobind
3. (1964) 7 SCR 555 : Tata Oil Miss Co. Ltd. –vs- Its Workmen
4. (1963) 1 Lab LJ 684(SC) : Agnani (W.M.) –vs- Badri Das
5. (1963)1 Lab LJ 679 : P.H.Kalyani and Air France, Calcutta
6. AIR 1978 SC 1004 : Lalla Ram –v- Management of D.C.M. Chemical Works Ltd. & anr.
7. (1964) 1 SCR 709 : AIR 1964 SC 486 Bengal Bhatdee Coal Co, v. Ram Probesh Singh
8. (1961)1 Lab LJ 511 (SC) : Titaghur Paper Mills Co. Ltd. v. Ram Naresh Kumar
9. (1965) 2 SCR 83: AIR 1965 SC 917: Hind Construction & Engineering Co. Ltd. .V. Their workmen
10. (1973)3 SCR 587: AIR 1973 SC 1227: Workmen of Messrs Firestone Tyre & Rubber Company of India (P) Ltd .v. Management & Ors.
11. 1975 Lab IC 1435: AIR 1975 SC 1892 : Eastern Electric and Trading Co. v. Baldev Lal

For Petitioner : M/s. Jagannath Patnaik, Biplab Mohanty & T.K.Patnaik

For Opp. Parties : Mr. S.Mishra, A.G.A.
Mr. Kamal Raj & A.K.Baral

Date of hearing : 22.9.2016
Date of judgment: 22.9.2016

JUDGMENT

S.N.PRASAD,J.

The award dated 24.12.1997 passed in Industrial Misc.Case No.55/97(53/94) by the Presiding Officer, Industrial Tribunal, Rourkela is under challenge whereby and where under approval required under section 33(2)(b) of the Industrial Disputes Act,1947 has not been accorded to the order of dismissal passed against the workman and accordingly the Misc.Case has been dismissed.

2. Brief facts of the case of the petitioner is that the workman, for the purpose of getting appointment, has submitted forged matriculation examination certificate and forged school leaving certificate, the authority after knowing this fact has charge sheeted him under clause 28(iv) and 28(xxviii) of the certified standing orders of the company. The workman has submitted explanation to the charge sheet, having been found unsatisfactory the competent authority had constituted an enquiry committee to enquire into

the charge which was enquired into adhering to the principles of natural justice. During enquiry, the workman admitted the charge voluntarily. After conclusion of the enquiry the enquiry committee submitted its report to the disciplinary authority holding the charge as established against the workman, copy of the enquiry proceeding and copy of the finding thereof were given to the workman. The disciplinary authority confirmed the said finding and held that the workman deserves to be removed from service of the company, while doing so the disciplinary authority also examined past service records of the workman with a view to find out if there were any extenuating circumstances in his favour but could not find any such material. In such circumstances, the disciplinary authority passed order of dismissal of the workman from service with effect from 13.8.1994 as a disciplinary measure under Order 29(2)(d) of the certified sanding orders of the company.

The petitioner-management has paid one month wages as required under proviso to section 33(2)(b) of the Industrial Disputes Act,1947 on 13.8.1994 through money orders and since the workman is a concerned workman in I.D.Case No.25 of 1990 pending disposal of the before the Industrial Tribunal, petition was filed for approval of the action taken by the management against the workman.

3. The Tribunal after going through the materials produced before it has not accorded approval of the order of dismissal passed against the workman. The Tribunal has given reasons for not according approval in the award impugned that the Secretary, Bihar School Examination Board, Patna has found the certificate not genuine as well as also the School Leaving Certificate issued by the school concerned, since the authority who has issued Ext.9 i.e. letter of the Secretary, Bihar School Examination Board, Patna, Ext.10 is the letter of the Joint Secretary by which it has been intimated that the mark sheet was a forged one and the authority who has stated that the school leaving certificate is not genuine is not called upon in course of domestic enquiry to prove the documents and thereby the workman has not been provided with adequate opportunity to cross-examine them.

4. Learned counsel representing the management has assailed the order of the Tribunal on the ground that the Tribunal is only suppose to see requirement of the conditions mentioned in the proviso to section 33(2)(b) of the I.D. Act and that is the condition since been complied with by the management, hence the Tribunal ought to have accorded approval and by no doing so the Tribunal has erred in passing the award.

While on the other hand learned counsel representing the workman has submitted that although statute provides that the conditions mentioned in proviso to section 33(2)(b) of the Act is to be followed before according approval of the order of dismissal but it is not a fact that the Tribunal will accept the enquiry report without applying its mind otherwise there will be no meaning of getting approval from the Tribunal in connection with the decision of dismissal taken against the workman.

5. In order to appreciate the rival submissions of the parties, it would be relevant to the relevant provisions of section 33(2)(b) of the Industrial Disputes Act,1947 which is quoted herein below:

> 33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.-
>
> (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before an arbitrator or a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall—
>
> (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or
>
> (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.
>
> (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman,-
>
> (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or
>
> (b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman: Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the

proceeding is pending for approval of the action taken by the employer.

(3) Notwithstanding anything contained in sub- section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—

(a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or

(b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending. Explanation.-- For the purposes of this sub- section, a "protected workman", in relation to an establishment, means a workman who, being a member of the executive or other office bearer of a registered trade union connected with the establishment, is recognized as such in accordance with rules made in this behalf.

(4) In every establishment, the number of workmen to be recognized as protected workmen for the purposes of sub- section (3) shall be one per cent. of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognized as protected workmen.

(5) Where an employer makes an application to a conciliation officer, Board, an arbitrator, a labour Court, Tribunal or National Tribunal under the proviso to sub- section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, [3] within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit:

Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed."

From perusal of the provisions as contained in Section 33(2)(b) of the I.D. Act, it is evident that Section 33 bars alterations in the conditions of service prejudicial to the workmen concerned in the dispute and disciplinary punishment of discharge or dismissal when either is connected with *pendent lite* industrial dispute, save with the permission of the authorities before which the proceeding is pending or where the discharge or dismissal is for any misconduct not connected with the *pendent lite* industrial dispute without the approval of such authority.

Section 33(1) shows that provisions of the said sub-section protects the workman concerned in the main dispute which is pending conciliation or adjudication. Fact of such sub-section(1) is that where condition precedent prescribed by it are satisfied, the employer is preferring from taking any action in regard to matters as specified in Clauses (a) and (b) against the employee concerned, no such dispute without previous express permission in writing by the authority before which the proceeding is pending. Otherwise, in cases falling under sub-section(1) before any action can be taken by the employer to which reference is made by Clauses (a) and (b) he may obtain expression permission by specified authority. Proviso to section 33(2) shows where action is required to be taken by an employer against any of these employees which falls within the scope of clause(b), he can do so subject to the requirement of the proviso. If the employer intends to discharge or dismissal of the workman, an order can be passed by the employer against him provided he has paid such employees wages for one month and he has made an application to the authority before which the proceeding is pending for approval of the action taken by him, these requirements of proviso are to be satisfied by employer on the basis of forming part of the same transaction. It also settled that if approval is concerned, it shall take effect from the date of the order passed by the employer for which approval so sought for. If Tribunal has not granted order of dismissal or discharge passed by the employer is wholly invalid or inoperative and the employee can legitimately claim to continue to be an employee of the employer notwithstanding the order passed by him dismissing or discharging him. Scope of Section 33(2)(b) has been discussed by Hon'ble Apex Court in the case of **Tata Iron and Steel Company Ltd. –v- Modak(S.N.)** reported in 1965(2) LLJ 128 (SC), **Strawboard Manufacturing Co -vs- Gobind** reported in AIR 1962 SC 1500.

6. The issue as to whether fairness of the domestic enquiry can be looked into by the Tribunal while granting approval under section 33(2)(b) of the Industrial Disputes Act,1947 or not ?, this issue fell for consideration before the Hon'ble Apex Court in the case of **Tata Oil Miss Co. Ltd. –vs- Its Workmen** reported in (1964) 7 SCR 555 and **Agnani (W.M.) –vs- Badri Das**, reported in (1963) 1 Lab LJ 684(SC). In the case of **Agnani(W.M.) –vs- Badri Das** (supra) the Hon'ble Apex Court held as under:

> "It is true that if a domestic enquiry is properly held and the employer terminates the service of his employee, the industrial tribunal dealing with industrial disputes arising out of such dismissal is not authorized to sit in appeal over the findings of the enquiry committee, or to examine the propriety of the ultimate order of dismissal passed by the employer."

In the case of **P.H.Kalyani and Air France, Calcutta** reported in (1963)1 Lab LJ 679 it has been held by the Hon'ble Apex Court

> "If the enquiry is not defective, the labour court has only to see whether there was a prima facie case for dismissal, and whether the employer had come to the bona fide conclusion that the employee was guilty of misconduct. Thereafter, on coming to the conclusion that the employer has bona fide come to the conclusion that the employee was guilty, i.e. there was no unfair labour practice and no victimization, the labour court would grant the approval which would related back to the date from which the employer had ordered the dismissal. If the inquiry is defective for any reason, the labour court would also have to consider for itself on the evidence adduced before it whether the dismissal was justified. However, on coming to the conclusion on its own appraisal of evidence adduced before it that the dismissal was justified, its approval of the order of dismissal made by the employer in a defective enquiry would still relate back to the date when the order was made."

In the case of **Lalla Ram –v- Management of D.C.M. Chemical Works Ltd. and another**, reported in AIR 1978 SC 1004 it has been held by the Hon'ble Apex Court that in proceedings under Section 33(2)(b) of the Act, the jurisdiction of the Industrial Tribunal is confined to the enquiry as to-

(i) whether a proper domestic enquiry in accordance with the relevant rules/Standing Orders and principles of natural justice has been held;

(ii) whether a prima facie case for dismissal based on legal evidence adduced before the domestic tribunal is made out;

(iii) whether the employer had come to a bona fide conclusion that the employee was guilty and the dismissal did not amount to unfair labour practice and was not intended to victimize the employee, regard being had to the position settled by the decisions of the Hon'ble Apex Court in the case of **Bengal Bhatdee Coal Co, v. Ram Probesh Singh**, (1964) 1 SCR 709 : AIR 1964 SC 486; **Titaghur Paper Mills Co. Ltd. v. Ram Naresh Kumar**, (1961)1 Lab LJ 511 (SC); **Hind Construction & Engineering Co. Ltd. v. Their Workmen**,(1965) 2 SCR 83: AIR 1965 SC 917; **Workmen of Messrs Firestone Tyre & Rubber Company of India (P) Ltd. v. Management & Ors,** (1973)3 SCR 587: AIR 1973 SC 1227; and **Eastern Electric and Trading Co. v. Baldev Lal**, 1975 Lab IC 1435: AIR 1975 SC 1892 that though generally speaking the award of punishment for misconduct under the Standing Orders is a matter for the management to decide and the Tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive or too severe yet an inference of mala fides may in certain cases be drawn from the imposition of unduly harsh, severe, unconscionable or shockingly disproportionate punishment;

(iv) whether the employer has paid or offered to pay wages for one month to the employee;

(v) whether the employer has simultaneously or within such reasonably short time as to form part of the game transaction applied to the authority before which the main industrial dispute is pending for approval of the action taken by him.

If these conditions are satisfied, the Industrial Tribunal would grant the approval which would relate back to the date from which the employer had ordered the dismissal. If however, the domestic enquiry suffers from any defect or infirmity, the labour authority will have to find out on its own assessment of the evidence adduced before it whether there was justification for dismissal and if it so finds it will grant approval of the order of dismissal which would also relate back to the date when the order was passed provided the employer had paid or offered to pay wages for one month to the employee and the employer had within the time indicated above applied to the authority before which the main industrial dispute is pending for approval of the action taken by him.

7. Thus, in view of the reasons given by the Larger Bench judgment of the Hon'ble Apex Court before the conditions mentioned in proviso to section 33(2)(b) of the I.D. Act, victimized part is also to be seen while granting approval by the Tribunal. In this connection, reference may be to the judgment rendered by the Calcutta High Court in the case **B.Yallappa -vs- Presiding Officer, Eighth Industrial Tribunal and others** reported in (1997) 2 LLJ 1047 needs to be referred wherein it has been held at para-11 which is being quoted herein below:

> "Since a point has been raised that the proviso to such Section was not complied with inasmuch as, one month's salary was not paid to the petitioner, the Tribunal is certainly required to decide the question whether such application which has been made by the company was at all maintainable and proviso in respect of the said Section was complied with or not, Before going into such question, the question of examining the validity of the domestic enquiry, therefore cannot arise. I am not oblivious of the position that whether the domestic enquiry is valid or not is also to be examined prima facie for the purpose of granting or refusing (sic.) approval under Section 33(2) of the said Act and to that extent it may be said that such issue is also linked up with the previous question raised by the petitioner. But the learned Judge has erred in holding that the question as to the validity of the domestic enquiry must be decided first, inasmuch as, such a specific question haying been raised by the petitioner that the proviso to the said Section was not complied which pertains to the very maintainability of the application, unless such question is first decided, the question of examining the validity of the enquiry for the purpose of granting or refusing such approval does not arise. If the very application is not maintainable for non-compliance of the proviso, such application is bound to fail as such provisions have been held to be mandatory by the Supreme Court as indicated above."

8. The Hon'ble Apex Court has further considered scope of Section 33(2)(b) of the Industrial Disputes Act,1947 by its constitution Bench in the case of **Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. –v- Shri Ram Gopal Sharma and others**, reported in AIR 2002 SC 643 wherein it has been held that where an application is made under Section 33(3)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair

labour practice; whether the conditions contained in the proviso were complied with or not, etc.

9. After going through these authoritative pronouncements of the Hon'ble Apex Court the original statute although provides that for getting approval the condition provided in the proviso to Section 33(2)(b), i.e. one month wages and approval from the Tribunal where the reference is pending connected with the workman but the Tribunal has also suppose to see regarding fairness of the enquiry and as to whether order of dismissal has been passed in way of victimization or unfair labour practice.

10. In the light of the pronouncement we have examined the case in hand. From appraisal of the facts of this case it is evident that the workman has been provided appointment under the displaced quota on account of acquisition of land under the rehabilitation policy of the State Government. The workman has got his appointment and started discharging his duty but all of a sudden charge sheet has been issued against him for committing irregularities in getting engagement by submitting forged certificates i.e. Matriculation Certificate having been issued by the Secretary, Bihar School Examination Board, Patna as well as the School Leaving Certificate issued from the school where he had studied. Management alleged that these two certificates have been forged from the issuing offices and they have given certificates that these certificates have never been issued by them and the said certificates have been brought on record before the domestic enquiry and on the basis of these documents charge sheet leveled against the petitioner has been proved, thereafter he has been dismissed from service. Since the reference is pending and the concerned workman is connected with the matter application under section 33(2)(b) has been filed for seeking approval of the order of dismissal. The Tribunal has refused to grant approval on the ground that the domestic enquiry has not been conducted fairly. There is no denial about the fact that the employee having tarnished character has got no right to remain in service but before reaching to this conclusion the workman has to be provided with adequate and sufficient opportunity to defend his case. The management has called the report from the concerned issuing office and they have issued certificates by saying that these two certificates having not been issued by their office but the workman has not been apprised as to who is the authority has issued certificates since these authorities having not been brought to depose before the enquiry officer so that they may be cross-examined by the workman and thereby the workman has been deprived from adequate and sufficient opportunity to defend himself.The Industrial Tribunal has taken into consideration this aspect of the matter and given finding that

the domestic enquiry is not fair. Order of dismissals since was passed upon the domestic enquiry and as such the Tribunal has refused to grant permission.

The contention of the learned counsel for the management is that proviso to section 33(2)(b) of the Industrial Disputes Act,1947 is only to see as to whether one month wage has been paid to the workman and application for getting approval from the Tribunal where connected Reference is pending, and since these two conditions have been complied with, the Tribunal has got no scope not to grant approval of order of dismissal passed against the workman but this argument is not worthy to be considered in view of the discussions having been made by us of authoritative pronouncements of the Hon'ble Apex Court in the preceding paragraphs whereby and where under scope of Section 33(2)(b) of the Industrial Disputes Acts has not been restricted only to see compliance of proviso to Section 33(2)(b) rather the Tribunal has also authorized to see fairness of domestic enquiry, unfairness and victimization of the concerned workman. The management has conducted domestic enquiry but without providing adequate and sufficient opportunity to the workman. As per the settled proposition, order of dismissal has to be passed after following due procedure i.e. after conducting full-fledged enquiry but the enquiry has to be conducted properly by providing adequate and sufficient opportunity of being heard to the concerned workman. Domestic enquiry cannot be said to merely a formality. In this case, even the two documents, i.e. the certificates issued by the concerned issuing authorities have been brought on record, as such it was duty of the management to call upon those authorities to prove said documents in order to see genuineness of the same then only it could have been said that the workman has committed irregularities and got employment by way of commission of fraud, without doing so the management has proved the charges against the workman in the domestic enquiry and as such it cannot be said to be proper enquiry in the eye of law.

The Tribunal after taking into consideration these aspects of the matter has not granted approval and by doing so it cannot be said that the Industrial Tribunal has committed illegality although scope of Tribunal under Section 33(2)(b) is very limited but simultaneously it cannot be said that the Industrial Tribunal will act only as Post Office to give seal upon the decision taken by the management and the position has been clarified by the Hon'ble Apex Court in the constitutional judgment as has been referred to above.

11. We, after examining the entire aspect of the matter, have found that the Industrial Tribunal has not committed error in not according approval with respect to the order of dismissal of the workman. Accordingly, we find no reason to interfere with the same.

Simultaneously we are conscious of the fact that merely on the ground of not providing adequate and sufficient opportunity the delinquent-workman cannot be given benefit rather truth has to come into surface by adopting proper method. It is also true that if the conduct of the workman or the employer is not proper, concerned workman has no right to continue in service, taking into this aspect of the matter, we thought it proper to give liberty to the management to take recourse of law in accordance with law if they so desire. With the above observation and direction, the writ petition is disposed of.

Writ petition disposed of.

2016 (II) ILR - CUT- 1021

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

W.P.(C) NOs. 7013 & 6806 OF 2016

ANTARYAMI DASH & ORS. ……..Petitioners

.Vrs.

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

ODISHA HINDU RELIGIOUS ENDOWMENTS ACT, 1951 – Ss. 19, 19-A

Whether to sell the immovable property of "Private family deity", No Objection Certificate from the Commissioner of Endowments is necessary ? Held, yes.

Provisions of section 19 or 19-A of the Act, 1951 or Rule 4(A) of the Rules, 1959 are only applicable in case of transfer of immovable property of Public religious institution but there is no such provision in the Act or Rules to protect the property of the private family deity – However this Court felt it proper to authorize the Endowment Commissioner to look after the property of the family deity – Held, the deity desirous to transfer immovable property of the family deity, will make an application before the Endowment Commissioner showing reasons for disposal of the property in the name of third party for

worshiping the deity and if the Commissioner is satisfied that the purpose for disposal of the property is to worship the deity and if it will not be disposed of, worship will be hampered, he will consider regarding availability of other alternative means for worshiping the deity – If alternative means is available he shall deny permission and if not available he shall grant permission for disposal of such property – On submission of such permission by the deity the registering authority will transfer the immovable property in the name of third party. (Para 8)

Case Laws Referred to :-

1. AIR 1970 SC 439 : Kalanka Devi Sansthan -V- The Maharashtra Revenue, Tribunal Nagpur & Ors.

For Petitioners : M/s. Suresh Ku. Choudhury, S.R.Kanungo, M.R.Nayak & G.Behura.
M/s. Rajjet Roy, R.Routray, S.K.Singh & S.Sourav.

For Opp. Parties : M/s. Sidharth Pr. Das-A & Amit Ku. Nath.
Mr. C.A.Rao & Mr. Manoj Mishra (Amicus Curie)

Date of hearing : 23.08. 2016
Date of Judgment : 08.09.2016

JUDGMENT

S. N. PRASAD, J.

In both the writ petitions common issues are involved and as such both the writ petitions have been heard together and this common judgment is passed.

This court vide order dtd.20.07.2016 in W.P.(C) No.7013 of 2016 has requested learned senior counsels Mr. C. A. Rao and Mr. Manoj Mishra to assist the court so far as Section 19-A of Orissa Hindu Religious Endowments Act along with Rules and in view thereof both the learned senior counsels after taking much pain have assisted the court at length.

The order passed by the Commissioner of Endowments, Odisha, Bhubaneswar refusing to grant no objection certificate U/s.19-A of the Orissa Hindu Religious Endowments Act, 1951 (OHRE Act, 1951) is under challenge.

The issue fell for consideration in these writ petitions is:-

"As to whether requirement of no objection certificate in order to sell the property of private family deity is necessary?"

2. The brief facts of the case of petitioners in W.P.(C) No.7013 of 2016 is that the founder of deity / institution had donated a piece of land which has been recorded in the name of the deity and when the petitioners needed huge amount of money for their personal purposes they wanted to sell the schedule land and when the petitioners approached the Sub-Registrar for the purpose of registration of the said land in the name of the purchaser, the Sub-Registrar insisted upon no objection certificate from the court of Commissioner of Endowment, Odisha, Bhubaneswar. So a petition has been filed before the Commissioner of Endowment U/s.19-A of the Orissa Hindu Religious Endowments Act, 1951 with a prayer to issue no objection certificate in favour of the petitioners to sell the schedule land for their personal purposes but the Commissioner, Endowment has passed order refusing to grant no objection certificate.

3. The fact of the case of petitioners in W.P.(C) No.6806 of 2016 is that the petitioners have made an application to issue no objection certificate to sell the schedule land recorded in the name of Shree Gobinda Gopinath Jew. According to the petitioners the schedule land stood recorded in the name of father of petitioner nos.1 to 3 as well as in the name of petitioner no.4 as Marfatdar of the case deity with Sthitiban status. The schedule land was purchased by the fore-fathers of petitioner nos.1 to 4 out of their personal funds. The case deity was being worshipped inside the residential premises of the petitioners as their private family deity. The case deity being the private family deity of petitioner nos.1 to 4, they wanted to sell / transfer the schedule land to the intended purchaser to meet their legal necessity, but the local Registering Authority refused to register the proposed sale deed in respect of the case land and insisted upon them to obtain "No Objection Certificate" from the Commissioner of Endowments, Odisha, Bhubaneswar U/s.19-A of the O.H.R.E. Act and therefore the petitioners have approached the Commissioner of Endowment who has framed three issues, one of them is "as to whether the case deity / institution is the private family deity of the petitioners?" and after discussing evidence in this regard has came to conclusion that the case deity / institution cannot be accepted as the private family deity of the petitioners as claimed by them and hence the petition U/s.19-A of O.H.R.E. Act, 1951 is not maintainable in the eye of law and accordingly held the petitioners not entitled to avail the compensation amount awarded and deposited in favour of the case deity / institution.

Thus in the writ petition being W.P.(C) No.7013 of 2016 the issue is with respect to selling of the property of private family deity wherein

conscious finding has been given by the Commissioner of Endowment that it is the private family deity while in W.P.(C) No.6806 of 2016 the finding given by the Commissioner of Endowment is that the deity is a public deity, hence in these two factual aspects both the cases have been taken for their final disposal.

4. Before dealing with the issues, it would be relevant to discuss certain provisions of Orissa Hindu Religious Endowments Act, 1951, these are short title, extent, application and commencement of the Act. Section 1 contains short title, extent, application and commencement which speaks as follows:-

> *"**1. Short title, extent, application and commencement** – (1) This Act may be called the Orissa Hindu Religious Endowments Act, 1951.*
>
> *(2) It extends to the whole of the State of Orissa and applies to all **Hindu public religious institutions and endowments**.*
>
> *Explanation I – In this sub-section Hindu public religious institutions and endowments do not include Jain or Buddhist public religious institutions and endowments but include Sikh public religious institutions and endowments.*
>
> *(3) It shall come into force on such date as the State Government may, by notification, direct."*

The definitions of 'religious endowment' or 'endowment' as defined U/s.3(xii) of the Orissa Hindu Religious Endowments Act, 1951 which speaks as follows:-

> *"**3(xii) "religious endowment**" or "**endowment**", means all property belonging to or given or endowed for the support of maths or temples or given or endowed for the performance of any service or charity connected therewith or of any other religious charity, and includes the institution concerned and the premises thereof and also all properties used for the purposes or benefit of the institution and includes all properties acquired from the income of the endowed property:*
>
> *Provided that gifts of immovable properties made as personal gifts to hereditary trustee of a math or temple or the archaka, sevaka, service-holder or other employee of a religious institution shall not be so included, if the donee has been possessing and enjoying the same as a separate and distinct identity all along;*

Explanation I*- Any jagir or inam granted to an archaka, sevaka, service-holder or other employee of a religious institution for the performance of any service or charity in or connected with a religious institution shall not be deemed to be a personal gift to the said archaka, service-holder or employee but shall be deemed to be a religious endowment;*

Explanation II*- All property which belonged to or was given or endowed for the support of a religious institution, or which was given or endowed for the performance of any service or charity of a public nature connected therewith or of any other religious charity shall be deemed to be a "religious endowment" or "endowment" within the meaning of this definition, notwithstanding that, before or after the commencement of this Act, the religious institution has ceased to exist or ceased to be used as a place of religious worship or instruction, or the service or charity has ceased to be performed :*

[Provided that this Explanation shall not be deemed to apply in respect of any property which is vested in any person before the commencement of this Act by the operation of the law of limitation;]

Explanation III*- Where an endowment has been made or property given for the support of an institution which is partly of religious and partly of a secular character or where an endowment made or property given is appropriated partly religious and partly to secular uses, such endowment or property or the income therefrom shall be deemed to be a religious endowment and its administration shall be governed by the provisions of this Act."*

It is evident after going through the provisions of 'religious endowment' or 'endowment' which means all property belonging to or given or endowed for the support of maths or temples, for the performance of any service or charity connected therewith or of any other religious charity and includes the institution concerned and the premises thereof and also all properties used for t he purposes or benefit of the institution and includes all properties acquired from the income of the endowed property, meaning thereby if any property has been endowed by any body by way of devotion towards a deity, the property is to be used for all practical purposes for the benefit of the deity. It is also evident from the definition that the moment the property will be endowed for the support of maths, the person who is endowing the property will cease his right, title and claim over the said land.

Section 19 which provides provision of alienation of immovable trust property speaks as follows:-

> "**Section 19 - Alienation of immovable trust property-** (1) Notwithstanding any*thing contained in any law for the time being in force no transfer by exchange, sale or mortgage and no lease for a term exceeding five years of any immovable property belonging to, or given or endowed for the purpose of, any religious institution, shall be made unless it is sanctioned by the Commissioner as being necessary or beneficial to the institution and no such transfer shall be valid or operative unless it is so sanctioned.*
>
> *[**Explanation-** A lease for a term not exceeding five years but with a condition of renewal permitting continuance of the lease beyond five years shall, for the purposes of this sub-section, be deemed to be a lease for a term exceeding five years.*
>
> *(1 -a) The fact of execution of a lease deed with a condition for renewal or renewal of such a deed shall be communicated to the Commissioner by the Trustee not later than fifteen days from the date of execution.*
>
> *(1-b) After expiry of the term of the lease the lessee shall deliver possession of the leasehold land to the lessor, failing which, the Commissioner may take action in accordance with the provision of Section 68 :*
>
> *Provided that all structures, permanent or temporary, if any, constructed plants and machineries and other things installed and kept on the leasehold land, which is a subject-matter of a lease executed after commencement of the Orissa Hindu Religious Endowments (Amendment) Act 22 of 1989 by the lessee, his servants or agents, shall become the property of the religious institution unless removed from the land within such period, as may be prescribed, after expiry of the term of lease, in respect of which the Commissioner shall take action under the provision of Section 68.*
>
> *(1 -c) Notwithstanding anything contained in the proviso to Sub-section (1-b), no property belonging to a person other than the lessee shall be subjected to confiscation under the said proviso, unless such person fails to remove his property within a period of thirty days from the date of publication of a notice which shall be issued by the Trustee*

within such period as may be prescribed after the expiry of the term of lease :

Provided that any person whose property is affected under Sub-section (1-c), may file an application to the Commissioner claiming the property whose decision shall, subject to the decision of the Civil Court, be final.]

(2) In according such sanction, the Commissioner may declare it to be subject to such conditions and directions as he may deem necessary regarding the utilization of the amount raised by the transaction, the investment thereof and in the case of a mortgage, regarding the discharge of the same within a reasonable period,

(3) A copy of the order made by the Commissioner under this section shall be communicated to the State Government and to the trustee and shall be published in such manner as may be prescribed.

[(4) The trustee may, within thirty days from the date of receipt of a copy of the order and any person having interest may, within thirty days from the date of publication of the order, appeal to the State Government to modify the order or set it aside :

Provided that appeals from the orders communicated or published prior to the date of commencement of the Orissa Hindu Religious Endowment (Amendment) Act, 1980 shall lie within a period of three months from the date of communication or, as the case may be, publication of the order or within a period of thirty days from the commencement of the said Act whichever period expires earlier.

(5) In any case where appeal has not been made to the State Government it appears to the State Government [Inserted vide O.A. No. 22 of 1989.] [that the alienation is not necessary or beneficial to the institution, or] that the consideration fixed in respect of the transfer by exchange, sale, mortgage or lease for a term exceeding five years of any immovable property is inadequate, they may, within ninety days from the date of the receipt of the order communicated to them under Sub-section (3) or the date of the publication of the order whichever date is later, call for the record of the case from the Commissioner and after giving an opportunity of hearing to the parties concerned, revise the order of the Commissioner :

Provided that in any case where the transfer has not been effected in pursuance of the order of the Commissioner under Sub-section (1),

the State Government may exercise the aforesaid power even after the expiry of ninety days from the date of such order.

(6) The State Government may, by order, stay execution of the deed of transfer in respect of the immovable property which form the subject-matter of an appeal or revision till the disposal of the appeal, or as the case may be, the revision.

(7) The order of the Commissioner made under this section shall, subject to orders, if any, passed in an appeal or revision, be final.]"

After going through the provisions of Section 19 the alienation of immovable trust property has been barred but, however, subject to condition that in case if sanction to dispose of the property has been granted by the Commissioner as being necessary or beneficial to the institution, then only the immovable trust property can be alienated.

The provision further transpires that Sec.19 deals with the property which has been endowed by a person and having been given under custodian of a trust and in order to put restriction upon the trust to dispose of the property which has been endowed by the person for the benefit of deity or for benefit of the institution, the same cannot be disposed of without seeking sanction from the Commissioner of Endowment, thus the alienation of immovable property has been allowed for any religious institution whose property is being taken care of by a trust.

Section 19-A provides provision for regulation of registration of documents which speaks as follows:-

*"**Section 19A - Regulation of registration of documents -** Notwithstanding anything contained in any other law for the time being in force, where any document required to be registered under Section 17 of the Registration Act, 16 of 1908, purports to evidence a transfer, by exchange, sale, mortgage or by lease for a term exceeding five years, of any immovable property belonging to or given or endowed for the purpose of any public religious institution, no Registering Officer, appointed under that Act, shall register any such document unless the transfer or produces before such Registering Officer, the sanction order passed by the Commissioner under Section 19, or, as the case may be, no objection certificate in the prescribed form granted by the Commissioner or any Officer authorised by him in that behalf:*

Provided that a no objection certificate granted under this sub-section shall not be a bar to a dispute or abate any dispute, if pending under Section 41:

Provided further that a no objection certificate shall be deemed to have been granted, if the Registering Officer is satisfied that the transfer or having applied for grant of no objection certificate to the Commissioner or the authorised officer, as the case may be, has not received the same within three months from the date of the application under Section 19 is moved before the Commissioner and that the application has not been rejected before expiry of that period."

From perusal of the provision as contained in Section 19-A, it is evident that apart from sanction of the Commissioner of Endowment as required U/s.19 a "No Objection Certificate" is required to be produced before the Registering Authority for registration of the land in case of transfer of property of any public religious institution.

The State of Orissa in exercise of power conferred U/s.76 of Orissa Hindu Religious Endowments Act, 1951 and in consonance of all Rules on the subject, makes a Rule, known as the Orissa Hindu Religious Endowments Rules, 1959 which contains a provision under Rule-4-A which provides provision of procedure for obtaining "No Objection Certificate" U/s.19-A which speaks as follows:-

"***4A- Procedure for obtaining No Objection Certificate under Section 19-A*** *– (1) For the purpose of obtaining necessary No Objection Certificate from the Commissioner for production before the Registering Officer for registration of document purporting to evidence, transfer, exchange, sale or mortgage or lease for term exceeding 5 years, of any immovable property belonging to or give or endowed for the purpose of any religious institution on the ground that it is not public religious institution for which it does not require sanction U/s.19 of the Act, an application shall have to be filed by the person / persons in control or charge over the immovable property and the institution in the manner prescribed in Rules 34 to 41 of these rules.*

(2) On receiving such application, the Commissioner shall issue notice for information of general public together with copy of the application filed under Sub-rule (1) to be published in a conspicuous

place of the Office of the Urban or Rural local bodies as the case may be under whose jurisdiction the property is situated and at such other place as the Commissioner deems fit and proper, inviting objection to the said application to be received within one month from date of publication of such notice.

(3) On receiving the objection if any, within the stipulated period and after giving reasonable opportunity of hearing to the parties if the Commissioner is prima facie satisfied that the institution in question is not a public religious institution for which no sanction under section 19 of the Act is required, he shall grant "No Objection Certificate" in Form AA to these rules."

From perusal of provision of Rule-4A it is evident that for getting registration of the land of public religious institution for its transfer, an application has to be filed by the religious institution before the Commissioner of Endowment for getting "No Objection Certificate" on the ground that it is not a public religious institution for which it does not require sanction U/s.19 of the Orissa Hindu Religious Endowments Act, 1951.

After going through these statutory provisions it is evident that Legislature has made provision for transfer of immovable property of the public religious institution but subject to condition as laid down U/s.19 to get sanction from the Commissioner of Endowment and for getting the property registered "No Objection Certificate" is required to be obtained from the Commissioner of Endowment under the provision of Section 19-A of the Orissa Hindu Religious Endowments Act, 1951, read with Rule-4A of Orissa Hindu Religious Endowments Rules, 1959, but in the entire statute there is no reference that what procedure to be adopted for transfer of land of private family deity.

The Legislature while enacting the Act, 1951 or Rules, 1959 has taken care of the trust property which has been endowed to the public religious institution and given under the custody of trust and for the benefit of the deity or the religious institution and in order to run the institution smoothly, in case of exigency, provision has been made in the enactment to dispose of the property, subject to the condition that the proceeds will be used for the benefit of the institution only and if the Commissioner of Endowment will be satisfied with the purpose, then only the sanction for alienation of immovable property and for getting "No Objection Certificate" Section 19-A of the Act, 1951 and Rule 4-A of the Rules, 1959 have been made mandatory

requirement which suggests that the Legislature was conscious about the fact that if there is complete embargo in disposing the property of any public religious institution having been controlled by the trust, then in future there may be situation that due to lack of finance the public religious institution may not be able to function smoothly and ultimately the purpose for which the property has been endowed by a person for the benefit of the institution would be frustrated.

Keeping these aspects into consideration the provision has been made to dispose of the property subject to the condition laid down U/s.19, 19-A of the Act, 1951, read with Rule 4-A of the Rules, 1959, but no such provision has been made regarding property of private family deity the reason being that the private family deity is being controlled by a family for worshipping the deity and for that purpose the property has been endowed in the name of the deity by surrendering the right and title in favour of the deity to be used for the benefit of the deity and once the property has been endowed in the name of the deity by the title holder, he will cease his right, title over the property since it has been recorded in the record of right in the name of the family deity and once the right and title of a property has been relinquished by the title holder making it in the name of the deity, he / his legal heirs ceases from his / their rights to transfer the title of the property in favour of the third party.

The intention of Legislature in allowing the alienation of immovable trust property is also for the reason that if any decision is to be taken for alienation of immovable property, it is to be taken by the trust which consists of the trustees but in case of family deity there is no such committee, rather it is only by legal heirs or the person who has endowed the property and there is every likelihood of disposal of the property by the legal heirs for their personal use laying behind the whole purpose of the forefathers who had endowed the property for the benefit of the deity and it is for this reason no provision has been made in the enactment to alienate the property of the family deity.

The difference being in the public religious institution and the private family deity that in the public religious institution the property which is being endowed or has been endowed is in the name of the trust so the title has been shifted in the name of the trust and thereafter the trust becoming the title holder has got every right over the property to transfer it in consonance with the provisions of law, but in the case of private family deity the title of the endowed property is not being handed over to any trust, rather it is in the

name of the deity having been recorded in the Record of Right and the moment it has been recorded in the Right of Record, the title holder will cease his right to claim any title over the land and once the title has been ceased, the person who has endowed the property cannot have any right to think about transferring the property in the name of third party and it is only for this reason the Hindu Religious Endowment Act, 1951 has not made any provision regarding transfer of property which has been endowed by the title holder in the name of the private family deity because of the reason that once title has been relinquished and recorded in the name of the deity in the Record of Right, there cannot be shift of title.

At this juncture reference needs to be made to the judgment rendered by Hon'ble Apex Court in the case of **Kalanka Devi Sansthan Vrs. The Maharashtra Revenue, Tribunal Nagpur and others, AIR 1970 SC 439** wherein their Lordships have been pleased to hold at paragraph 4 and 5 that when property is given absolutely for the worship of an idol it vests in the idol itself as a juristic person. The idol is capable of holding property in the same way as a natural person. The properties of the trust in law vest in the trustee whereas in the case of an idol or a Sansthan they do not vest in the manager or the Shebait. It is the deity or the Sansthan which owns and holds the properties. It is only the possession and the management which vest in the manager.

Thus there is no dispute about the fact that the moment a property is being endowed or donated in favour of family deity it becomes the property of the deity and the other family members can only be said to be the manager to protect the same which means that the manager or the legal heirs of the forefathers who had donated the property has got no right, title over the land in question save and except to manage it.

It is also this explanation gets support from the provision of Section 1(2) which speaks that the provision of Orissa Hindu Religious Endowment Act, 1951 extends to the whole of the State of Orissa and applies to all Hindu public religious institutions and endowments.

This stipulation as contained in Section 1(2) itself is clear that the entire Act known as the Orissa Hindu Religious Endowment Act, 1951 has been made applicable to the **Hindu public religious institutions and endowments** falling within the State of Orissa.

5. So far as applicability of Section 8-B of the O.H.R.E. Act, 1951 is concerned, the same has got no nexus with the property of private family deity as would be evident from the bare reading of provisions as contained in

Section 8-B which speaks that the Commissioner and the Assistant Commissioner shall have power to take action under any of the provisions of this Act in respect of any institution, if on information received or otherwise, they are satisfied that such institution is a religious institution within the meaning of this Act and the religious institution has been defined U/s.3(xiii) of the Act which speaks that the religious institution means a Math, a temple and endowment attached thereto or a specific endowment and includes an institution under direct management of the State Government. But here the facts relates to the property endowed in favour of the private family deity, the fact does not say about a Math or a temple or endowment attached thereto rather it is endowment made in favour of the family deity and as such Section 8-B is not applicable so far as it relates to the property endowed in favour of the family deity.

Otherwise also the provision of Sec.8-B confers power upon the Commissioner or the Assistant Commissioner to act without initiating proceeding U/s.41-(1) with respect to the religious institution and Section 41 confers power upon the Assistant Commissioner to enquire into and decide the disputes and the matters relates to as to (i) whether an institution is a public or religious institution; (ii) whether an institution is a temple or a math; (iii) whether a trustee holds or held office as a hereditary trustee, and hence we are of the considered view that Section 8-B also does not pertains to the property related to the family deity.

6. In the light of this now it is to be seen that as to whether the order passed by the Endowment Commissioner which is under challenge in W.P.(C) No.7013 of 2016 has got infirmity.

After having discussed the factual as well as legal aspect, it is thus evident that in the O.H.R.E. Act, 1951 there is provision U/s.19 or 19(A) read with Rule 4(A) of the Rules, 1959 which meant for transfer of property of deity of public religious institution, where sanction U/s.19 or "No Objection" U/s.19(A) or under Rule 4(A) is required. But so far as the land of private family deity is concerned there is no provision of transfer of immovable property by any means since no provision is provided under the Act which clarifies the position that immovable property once endowed in favour of family deity having been recorded in the name of the deity in the Record of Rights, the title of property ceases to be in the name of the donee and it became in the name of deity and when the erstwhile owner seizes to be the title holder, he cannot be said to be the title holder and as such he seizes his / her right to transfer the said property in the name of others and it is only for

this reason there is no provision of sanction or to get "No Objection" for transfer of the land in the O.H.R.E. Act, 1951.

It has also been clarified in this way that a person having locus in the property has a right to make application for its sale or transfer by any means and that person is supposed to make application for its transfer but once the property endowed in favour of family deity and the deity being a juristic person he cannot make application before any authority and hence Legislature has not intended to any anything in the statute for getting sanction or "No Objection" for transfer of immovable property of family deity, meaning thereby once immovable property has been endowed in favour of family deity, for all the time it became the property of deity.

Accordingly we hold that the provision of Section 19 or 19(A) of the Act, 1951 or Rule 4(A) of Rules, 1959 is only applicable to immovable property of public religious institution because in that situation the title of immovable property shifts in favour of trust.

After going through the order passed by the Endowment Commissioner which is impugned in W.P.(C) No.7013 of 2016 we find that the Commissioner has gone into wrong direction that if the property will be disposed of for the benefit of deity it can be sold but the applicability of the provision of Section 19(A) of the Act, 1951 or Rule 4(A) of the Rules, 1959 has not been discussed as has been discussed by us above.

In view of the discussion made above we are of the considered view that the order impugned needs modification to the effect that Section 19(A) which requires application to be filed for seeking "No Objection" for transfer of immovable property endowed in favour of private family deity is not maintainable, hence the writ petition being W.P.(C) No.7013 of 2016 is dismissed.

7. So far as the fact of the case in W.P.(C) No.6806 of 2016 is concerned, the same is little bit different, because in this case the property has been found to be not of the private family deity and taking into consideration the various depositions recorded in course of hearing the Commissioner of Endowment has given a specific finding in this regard.

Section 19 or 19-A of the Act, 1951 or Rule 4-A of the Rules 1959 speak of getting sanction for alienation of immovable trust property and to get no objection for registration of the property from the office of the Registering Authority but before according sanction or before giving "No Objection Certificate" the authority is required to see that the proceeds is to

be used for the benefit of the institution. The sale proceeds to the tune of Rs.10,33,449/- has been awarded in favour of the case deity and the same has been deposited in long term fixed deposit scheme in the name of the deity in U.B.I., Balasore which has been pledged in favour of the Commissioner of Endowment and the original T.D.Rs. have been deposited in the head office for safe custody. Since the finding has been given to the effect that it is not a private family deity and the Commissioner who has been made custodian to see as to whether the proceeds is to be used for the benefit of the institution and considering the fact that keeping the amount of compensation in the fixed deposit scheme he has thought it proper that it will be more beneficial for the benefit of the deity and taking into consideration this aspect of the matter it has been held that the application U/s.19-A of the Act, 1951 is not maintainable and accordingly the petitioner nos.1 to 4 are held not entitled to get the award deposited in favour of the case deity / institution.

Accordingly we found no reason to interfere with the order.

The issue is answered accordingly.

8. Since we have answered the issue by holding that there is no applicability of either Section 19 or Section 19-A of the Orissa Hindu Religious Endowment Act, 1951 and Rule 4-A of the Orissa Hindu Religious Endowment Rules, 1959 keeping the fact into consideration that once the land has been endowed in favour of the family deity and have been recorded in the records of right, the title is shifted from the title holder in favour of the deity, hence the land once endowed in favour of the family deity, it cannot be transferred in the name of the third party, meaning thereby there is complete embargo in transfer of the land once endowed by the forefathers in favour of the family deity, but simultaneously we are also conscious of the fact that if the immovable properly donated for the purpose of worshiping of the family deity and if at the time of urgency it will not be transferred, the whole purpose of donating immovable property by way of endowment would frustrate. Although in the Act,1951 or Rules 1959 no provision has been made conferring power of Endowment Commissioner to protect the property of the family deity, but we thought it proper to authorise the Endowment Commission concern to look after the property of the family deity, hence the deity desirous to transfer immovable property of the family deity will have to make application before the Endowment Commissioner showing the reason of the disposal of the property in the name of third party for worshiping the deity, shall also to furnish before the Endowment Commissioner showing reason and if the Endowment Commissioner is satisfied that the purpose for

disposal of the property is to worship deity and if it will not be disposed of, worship will be hampered, he will take into consideration regarding availability of other alternative means for worshiping the deity. If alternative means is available, he shall deny permission and if alternative means are not available he shall grant permission for disposal of the immovable property. The deity shall have to furnish permission from the Endowment Commissioner to be enclosed along with the application to be submitted before the Registering authority and it is only thereafter the registering authority will transfer the immovable property in the name of third party.

We thought it proper to direct the Secretary of the Revenue and Disaster Management being the controlling authority of registration, to issue instruction making it necessary to submit the Record-of-Rights along with the application which is to be filed by the applicant for registration of the land in question (if not already issued) and to be circulated widely for knowing public in general. The Registering authority will verify from the Record-of-Rights the nature of the land by calling upon report from the concerned Tahasildar.

This observation is made in the peculiar facts and circumstances of the case and in order to protect immovable property of the family deity and sentiment upon which the immovable property has been endowed by the forefathers in favour of family deity and also keeping the fact into consideration that the immovable property may not be squandered in any manner by the legal heirs. With these observations, both the writ petitions are disposed of.

Writ petitions disposed of.

2016 (II) ILR - CUT-1037

S. C. PARIJA, J.

M.A.C.A. NO. 257 OF 2009

MANGULI JUANGA @ PADHAN & ORS. .....Appellants

.Vrs.

DINABANDHU SAHU & ANR. .....Respondents

MOTOR VEHICLES ACT, 1988 – Ss. 147, 168

Compensation – Tribunal holding the deceased as gratuitous passenger in the offending vehicle (Tipper) saddled the liability on the owner of the vehicle on the ground of violation of policy condition – Hence this appeal – Held, in order to ensure prompt payment of compensation to the family members of the deceased and while protecting the interest of the insurer, this court feels it just and proper to direct the Insurance Company to pay the awarded compensation amount to the claimants with the right to recover the same from the owner of the offending vehicle – This court also modified the quantum of compensation from Rs. 1,63, 000/- to Rs. 1,50,000/- and interest from 9% to 6%.

Case Laws Relied on :-

1. 1. AIR 2004 S.C.1340 : M/s National Insurance Co.Ltd. v. Baljit Kaur & Ors.
2. 2013) 2 SCC 41 : Manager, National Insurance Co.Ltd. v. Saju P.Paul and Anr.,
3. 2003 (2) SCC 223 : New India Assurance Co. Ltd. v. Asha Rani & Ors.

For Appellants : M/s. B.N.Rath & A.K.Jena

For Respondents : M/s. Surath Roy & Associates

Date of Order : 29.7.2016

ORDER

S. C. PARIJA, J.

Heard learned counsel for the claimants-appellants and learned counsel for the Insurance Company-respondent no.2. None appears for the owner-respondent no.1 inspite of valid service of notice.

This appeal by the claimants-appellants is directed against the judgment/award dated 09.1.2009, passed by the learned 1st Motor Accident Claims Tribunal, Keonjhar, in MAC Case No.177 of 2005, awarding an amount of Rs.1,63,000/- as compensation along with interest @ 9% per

annum from the date of filing of the claim application, till payment and directing the owner-respondent no.1 to pay the same.

Learned counsel for the claimants-appellants submits that as there was sufficient evidence available on record to show that the deceased was travelling as a labourer in the offending vehicle (Tipper) no.OR-09-D/6421 and died in an accident on 18.4.2005, due to the rash and negligent driving by the driver of the said vehicle, learned Tribunal erred in holding the deceased to be a gratuitous passenger in the offending vehicle and saddling the liability on the owner of the vehicle. It is further submitted that even accepting the fact that the deceased was travelling as a gratuitous passenger in the offending vehicle in violation of the policy condition, learned Tribunal should have directed the Insurance Company to pay the awarded compensation amount with the right to recover the same from the owner of the vehicle. In this regard, learned counsel for the claimants has relied upon a decision of the apex Court in the case of ***M/s National Insurance Co.Ltd. v. Baljit Kaur and others***, AIR 2004 S.C.1340 and the decision in the case of ***Manager, National Insurance Co.Ltd. v. Saju P.Paul and Anr***.,(2013) 2 SCC 41. It is accordingly submitted that the learned Tribunal was not justified in saddling the liability on the owner of the offending vehicle.

Learned counsel for the Insurance Company-respondent no.2 while supporting the impugned award submits that the same having been passed on appreciation of the evidence available on record, no interference is warranted. It is submitted that as the deceased was found to be travelling as a gratuitous passenger in the offending vehicle at the time of the accident, which was in gross violation of the policy condition, no liability should have been saddled on the present appellant, as the insurer of the offending vehicle, as has been held in ***New India Assurance Co. Ltd. v. Asha Rani and others***, 2003 (2) SCC 223. It is further submitted that as the driver of the offending truck was possessing a fake driving licence, as has been found by the learned Tribunal, which is also in violation of the policy condition, the Insurance Company cannot be made liable to pay the compensation amount.

It is further submitted that even otherwise, the assessment of the compensation amount is not proper and justified and the award of interest @ 9% per annum is highly excessive.

On a perusal of the impugned award, it is seen that the learned Tribunal has taken into consideration the evidence available on record, both oral and documentary, in coming to hold that deceased Arjun Pradhan @ Juanga was travelling in the offending truck as a gratuitous passenger along

with others at the time of the accident. Accordingly, learned Tribunal has come to hold that as the deceased was travelling as a gratuitous passenger in the offending truck, which was in violation of the policy condition, no liability can be saddled on the insurer of the said vehicle. Learned Tribunal has further found that the driver of the offending truck was possessing a fake driving licence, which was also in violation of the policy condition. Accordingly, learned Tribunal has saddled the liability on the owner of the offending vehicle.

In the decisions of the apex Court relied upon by the claimants in *Baljit Kaur and Saju P.Paul (*supra), where the facts were similar to the facts in the present case, the Hon'ble Court, in order to ensure prompt payment of compensation to the family members of the deceased while protecting the interest of the insurer, has directed the Insurance Company to pay the awarded compensation amount with the right to recover the same from the owner of the offending vehicle.

Therefore, in the present case, I feel it is just and proper that the Insurance Company should be directed to pay the awarded compensation amount with the right to recover the same from the owner of the offending vehicle.

As regard the quantum of compensation amount awarded and the basis on which the same has been arrived at, I feel, the interest of justice would be best served, if the awarded compensation amount of Rs.1,63,000/- is modified and reduced to Rs.1,50,000/-. The award of interest @ 9% per annum is also not proper and justified and the same is accordingly modified and reduced to 6% per annum.

Accordingly, the Insurance Company is directed to pay to the claimants the modified compensation amount of Rs.1,50,000/- along with interest @ 6% per annum from the date of filing of the claim application, with the right to recover the same from the owner of the vehicle. The impugned award is modified to the said extent.

The Insurance Company-respondent no.2 is directed to deposit the modified compensation amount of Rs.1,50,000/- along with interest @ 6% per annum with the learned Tribunal within six weeks hence. On deposit of the amount, the same shall be disbursed to the claimants proportionately, as per the direction of the learned Tribunal given in the impugned award. MACA is accordingly disposed of.

Appeal disposed of.

2016 (II) ILR - CUT-1040

B.K.NAYAK, J.

CRLMC NO. 1443 OF 2016

BHUAN @ PRAMOD KUMAR PATRA …….Petitioner.

.Vrs.

STATE OF ORISSA & ANR. ……Opp.parties.

CRIMINAL PROCEDURE CODE, 1973 – S. 173 (8)

Whether a Judicial Magistrate can direct fresh investigation or re-investigation into a case ? – Held, No – The Magistrate has only power to direct further investigation but has no power to direct fresh investigation or denovo investigation – Such power can only be exercised by the Supreme Court and High Courts.

In this case the impugned order passed by the learned S.D.J.M. for fresh investigation, seventeen years after completion of the first investigation being legally untenable is quashed.

(Paras 8,9)

Case Laws Referred to :-

1. AIR 1998 SC 2001 : K. Chandrasekhar v. State of Kerala and others.
2. (2013) 5 SCC 762 : Vinay Tyagi v. Irshad Ali Alias Deepak and others.

For petitioner : Mr. Srinibash Satapathy.
For opp. Parties : Mr.Anil Kumar Nayak, ASC.

Date of hearing : 09.09.2016
Date of judgment: 07.10.2016

JUDGMENT

B.K.NAYAK, J.

Challenge in the present petition is to the order dated 14.3.2016 passed by the learned S.D.J.M., Cuttack in G.R. Case No.1173 of 1999, arising out of Madhupatna P.S. Case No.229 of 1999, which raises the question whether a Judicial Magistrate (SDJM) can direct fresh investigation or re-investigation into a case.

2. The question arises in the following circumstances :

2.1. On the basis of F.I.R. lodged by the informant on 13.07.1999, Madhupatna P.S. Case No.229 of 1999 was registered against the present petitioner under Sections 448/379/294/506/34 of the I.P.C.

The F.I.R. allegations are that the informant was in occupation of Shop No.6 in the OSRTC shopping Complex, Badambadi and the petitioner was the agent of OSRTC. The informant paid Rs.45,444/- to the petitioner towards rent of the shop room but the petitioner did not grant any money receipt. Later the petitioner prevented the informant to open the shop. On 12.07.1994 the persons of the petitioner forcibly entered into the shop, scolded the informant in obscene language, dragged him out of the shop and looted the goods from the shop worth Rs.3.5 lakhs barring a few items and threatened to kill the informant in case he reported the matter to the police.

2.2. On completion of investigation the Investigating Officer submitted Final Report before the S.D.J.M., Cuttack on 24.09.1999 stating the case as one of mistake of law. The Final Report reveals that the informant was in default of payment of rent in respect of Shop Room No.6 to the tune of Rs.1,55,132/- in spite of demand by the petitioner (agent), for which OSRTC cancelled the allotment of the shop in favour of the informant and allotted the same in favour of the petitioner and informed the informant on 12.07.1999. Thereafter, the articles in the shop were handed over to the informant in presence of neighbouring shop owners and the matter was amicably settled.

It transpires further that there was a faisalanama (compromise) dated 30.08.1999 between the petitioner and the informant on the intervention of local gentries in pursuance to which the informant paid some money to the informant towards the value of fittings of the show-room.

2.3. It is stated that after submission of final report notice was issued to the informant by the S.D.J.M. by order dated 15.09.2000, but he did not raise any protest and ultimately long ten years thereafter by order dated 28.11.2010 in the Lok Adalat the learned S.D.J.M. accepted the Final Report and closed the case.

2.4 In the meantime due to bifurcation of Madhupatna Police Station and creation of new Badambadi Police Station the place of occurrence came within the limits of Badambadi Police Station. Thereafter, on an alleged complaint lodged by the informant expressing his dissatisfaction on the investigation made by Madhupatna Police, the Inspector-in-charge, Badambadi Police Station made a prayer before the SDJM in 2016 for reopening of investigation of the case. By the impugned order dated 14.03.2016 the S.D.J.M. allowed the prayer of

the IIC., Badambadi Police Station stating that there is no bar for the Officer-in-charge of Police Station to make further investigation.

3. Learned counsel for the petitioner submits that by the impugned order though the SDJM, Cuttack has purportedly allowed further investigation of the case but in essence it is direction for fresh investigation inasmuch as the earlier investigation by the Madhupatna Police Station having been completed final report was submitted, which was accepted by the learned S.D.J.M. and the case was closed. Therefore, the learned S.D.J.M has no power or jurisdiction to direct fresh investigation or de novo investigation.

Learned Additional Standing Counsel contended that the Judicial Magistrate has power to permit or direct further investigation and the instant case being a matter of further investigation, no exception can be taken to the impugned order.

4. From the facts noted above, it is clear that Madhupatna P.S. Case No.229 of 1999 had been fully investigated and on closure of investigation final report under Section 173(2) of the Cr.P.C. had been filed on 24.09.1999 and the informant was issued notice by order of the learned SDJM, but he did not raise any protest to the final report which was finally accepted by the learned S.D.J.M. on 28.11.2010, i.e., eleven years after submission of the final report. It was not a case where the police submitted preliminary report under sub-section (2) of Section 173, Cr.P.C. keeping the investigation further open under sub-section (8) of Section 173, Cr.P.C. Definitely the Judicial Magistrate has power to permit or direct further investigation where on submission of police report under sub-section (2) the investigation is further kept open by the Investigating Officer or where the final report has not been accepted. Six years after the final report was accepted, the IIC., Badambadi Police Station made prayer to the SDJM for reopening of investigation. Reopening of an investigation after closure of the case does not amount to further investigation, but amounts to reinvestigation or de novo investigation. Hence, the contention of the learned Additional Standing Counsel or the opinion of the learned SDJM that he directed further investigation is not correct.

5. It has been held by the Hon'ble Supreme Court in the case of ***K. Chandrasekhar v. State of Kerala and others*** reported in ***AIR 1998 SC 2001*** as follows :

> "**25**. From a plain reading of the above Section it is evident that even after submission of police report under sub-section (2) on completion

of investigation, the police has a right of 'further' investigation under sub-section (8) but not 'fresh investigation' or 're-investigation'. That the Government of Kerala was also conscious of this position is evident from the fact that though initially it stated in the Explanatory Note of their notification dated June 27, 1996 (quoted earlier) that the consent was being withdrawn in public interest to order a 'reinvestigation' of the case by a special team of State police officers, in the amendatory notification (quoted earlier) it made it clear that they wanted a 'further investigation of the case' instead of 're-investigation of the case'. The dictionary meaning of 'further' (when used as an adjective) is 'additional', more supplemental. 'Further' investigation therefore is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether. In drawing this conclusion we have also drawn inspiration from the fact that sub-section (8) clearly envisages that on completion of further investigation the investigating agency has to forward to the Magistrate a 'further' report or reports -and not fresh report or reports - regarding the 'further' evidence obtained during such investigation. Once it is accepted - and it has got to be accepted in view of the judgment in Kazi Lhendup Dorji,(1994 AIR SCW 2190) (supra) that an investigation undertaken by CBI pursuant to a consent granted under Section 6 of the Act is to be completed, notwithstanding withdrawal of the consent, and that 'further investigation' is a continuation of such investigation which culminates in a further police report under sub-section (8) of Section 173, it necessarily means that withdrawal of consent in the instant case would not entitle the State police, to further investigate into the case. To put it differently, if any further investigation is to be made it is the C.B.I. alone which can do so, for it was entrusted to investigate into the case by the State Government. Resultantly, the notification issued withdrawing the consent to enable the State Police to further investigate into the case is patently invalid and unsustainable in law. In view of this finding of ours we need not go into the questions, whether Section 21 of the General Clauses Act applies to the consent given under Section 6 of the Act and whether consent given for investigating into Crime No. 246/94 was redundant in view of the general consent earlier given by the State of Kerala."

6. In the recent decision in the case of ***Vinay Tyagi v. Irshad Ali Alias Deepak and others: (2013) 5 SCC 762,*** it has been held by the Apex Court thus:

> *"***20.** Having noticed the provisions and relevant part of the scheme of the Code, now we must examine the powers of the court to direct investigation. Investigation can be ordered in varied forms and at different stages. Right at the initial stage of receiving the FIR or a complaint, the court can direct investigation in accordance with the provisions of Section 156(1) in exercise of its powers under Section 156(3) of the Code. Investigation can be of the following kinds:
>
> (*i*) Initial investigation,
>
> (*ii*) Further investigation,
>
> (*iii*) Fresh or de novo or reinvestigation.
>
> **21.** The "initial investigation" is the one which the empowered police officer shall conduct in furtherance of registration of an FIR. Such investigation itself can lead to filing of a final report under Section 173(2) of the Code and shall take within its ambit the investigation which the empowered officer shall conduct in furtherance of an order for investigation passed by the court of competent jurisdiction in terms of Section 156(3) of the Code.
>
> **22.** "Further investigation" is where the investigating officer obtains further oral or documentary evidence after the final report has been filed before the court in terms of Section 173(8). This power is vested with the executive. It is the continuation of previous investigation and, therefore, is understood and described as "further investigation". The scope of such investigation is restricted to the discovery of further oral and documentary evidence. Its purpose is to bring the true facts before the court even if they are discovered at a subsequent stage to the primary investigation. It is commonly described as "supplementary report". "Supplementary report" would be the correct expression as the subsequent investigation is meant and intended to supplement the primary investigation conducted by the empowered police officer. Another significant feature of further investigation is that it does not have the effect of wiping out directly or impliedly the initial investigation conducted by the investigating agency. This is a kind of continuation of the previous investigation. The basis is

discovery of fresh evidence and in continuation of the same offence and chain of events relating to the same occurrence incidental thereto. In other words, it has to be understood in complete contradistinction to a "reinvestigation", "fresh" or "de novo" investigation.

23. However, in the case of a "fresh investigation", "reinvestigation" or "de novo investigation" there has to be a definite order of the court. The order of the court unambiguously should state as to whether the previous investigation, for reasons to be recorded, is incapable of being acted upon. Neither the investigating agency nor the Magistrate has any power to order or conduct "fresh investigation". This is primarily for the reason that it would be opposed to the scheme of the Code. It is essential that even an order of "fresh"/"de novo" investigation passed by the higher judiciary should always be coupled with a specific direction as to the fate of the investigation already conducted. The cases where such direction can be issued are few and far between. This is based upon a fundamental principle of our criminal jurisprudence which is that it is the right of a suspect or an accused to have a just and fair investigation and trial. This principle flows from the constitutional mandate contained in Articles 21 and 22 of the Constitution of India. Where the investigation ex facie is unfair, tainted, mala fide and smacks of foul play, the courts would set aside such an investigation and direct fresh or de novo investigation and, if necessary, even by another independent investigating agency. As already noticed, this is a power of wide plenitude and, therefore, has to be exercised sparingly. The principle of the rarest of rare cases would squarely apply to such cases. Unless the unfairness of the investigation is such that it pricks the judicial conscience of the court, the court should be reluctant to interfere in such matters to the extent of quashing an investigation and directing a "fresh investigation".

With regard to the question whether the Magistrate has power to direct reinvestigation or fresh investigation, the apex Court in the aforesaid case further held as follows :

"**28**. The next question that comes up for consideration of this Court is whether the empowered Magistrate has the jurisdiction to direct "further investigation" or "fresh investigation". As far as the latter is concerned, the law declared by this Court consistently is that the learned Magistrate has no jurisdiction to direct "fresh" or "de novo"

> investigation. However, once the report is filed, the Magistrate has jurisdiction to accept the report or reject the same right at the threshold. Even after accepting the report, it has the jurisdiction to discharge the accused or frame the charge and put him to trial. But there are no provisions in the Code which empower the Magistrate to disturb the status of an accused pending investigation or when report is filed to wipe out the report and its effects in law. Reference in this regard can be made to *K. Chandrasekhar* v. *State of Kerala*[9], *Ramachandran* v. *R. Udhayakumar*[10], *Nirmal Singh Kahlon* v. *State of Punjab*[11], *Mithabhai Pashabhai Patel* v. *State of Gujarat*12 and *Babubhai* v. *State of Gujarat"*

7. From the law laid down by the Hon'ble apex Court in the aforesaid decisions, it is clear that the Magistrate has only power to direct further investigation, but has no power to direct fresh investigation or de novo investigation. The power to direct fresh investigation or reinvestigation vests only with the constitutional courts, viz. Supreme Court and the High Court and such power is to be exercised very sparingly.

8. In the instant case, the impugned order of the learned S.D.J.M., Cuttack is nothing but a direction for fresh investigation or de novo investigation and the SDJM lacks power to give such a direction. Therefore, the impugned order is legally untenable.

9. It is also clear that during initial investigation the dispute between the petitioner and the informant was compromised in terms of a Faisalanama and the informant undertook not to agitate the matter further. It would also be an abuse of the process of law and a travesty of justice to direct de novo investigation or fresh investigation in a case of the present nature, that too seventeen years after the completion of first investigation and filing of final report in respect thereof.

10. For the reasons aforesaid, the impugned order and the reinvestigation taken up by the Badamabadi Police in pursuant thereto are quashed. The CRLMC is thus disposed of.

Application disposed of.

2016 (II) ILR - CUT-1047

B.K.NAYAK, J.

CRLMC NO. 3316 OF 2015

MANORANJAN SAHU …….Petitioner.

.Vrs.

STATE OF ODISHA & ANR. …….Opp.parties.

CRIMINAL PROCEDURE CODE, 1973 – S. 482.

Quashing of proceeding U/ss 498-A & 417 I.P.C. – F.I.R. shows parties have exchanged garlands in a temple, petitioner put vermilion on the head of the girl and gave her bangles, which do not constitute a valid marriage between them, so no offence is made out U/s 498-A I.P.C. – After that the above petitioner left the informant at her parental house and visited there on two occasions and made sexual intercourse with her with the believe that they were married which attracts the offence U/s 493 I.P.C. – Held, the impugned order taking cognizance U/s 498-A I.P.C. is quashed – Direction issued to the learned SDJM. to take cognizance against the petitioner for the offences U/s 493 & 417 I.P.C. (Paras 9,10)

For petitioner : Mr. P.C. Mishra
For opp. Parties : Mr.Anil Kumar Nayak, (A.S.C)

Date of hearing : 25.08.2016
Date of judgment: 07.10.2016

JUDGMENT

B.K.NAYAK, J.

In this application under Section 482, Cr.P.C., the petitioner challenges the initiation and continuance of the criminal proceeding against him in C.T. Case No.285 of 2014 pending on the file of the learned S.D.J.M., Deogarh, arising out of Reamal P.S. Case no.75 of 2014 for alleged commission of offences under Sections 498-A/417 of the Indian Penal Code.

2. The prosecution allegations against the petitioner in the aforesaid case, as revealed from the F.I.R. and the statement of the victim-informant recorded under Section 161 of the Cr.P.C. are as follows:

> The victim girl during 2011 was a student of +2 in Batagaon College, Sambalpur and the accused-petitioner was staying in his aunt's house at Batagaon. The petitioner used to pass comments to the informant on her way back from college. Gradually love relationship developed

between them. The petitioner promised to marry the informant and on various occasions used to visit her house in village-Kuapani, P.S. Reamal, Dist-Deogarh. On 10.12.2013 he took the victim to the temple of Maa Budhi Tahkurani in Angul and married the victim by offering bangles and putting vermilion on her head and by exchanging garlands. From the temple they went to Angul Court for registration of their marriage where they got their marriage registered before a Notary. On the way back from Angul Court when the informant asked to accompany the petitioner to his house as his wife, the informant told that he will fix a suitable auspicious date and solemnise marriage ceremonially and take the informant to his house, whereupon the informant came back with her father and kept waiting for nearly six months whereafter she got the news that the petitioner was going to marry another girl on the next date. On hearing such news, the informant lodged the F.I.R. on 08.05.2014, on the basis of which Reamal P.S. Case No.75 of 2014 was registered under Sections 498-A/417 of the I.P.C.

On completion of investigation, the police submitted charge-sheet against the petitioner for commission of aforesaid offences, on the basis of which the learned S.D.J.M., Deogarh by his order dated 20.11.2014 in C.T. Case No.285 of 2014 took cognizance of the offences under Sections 498-A/417 of the I.P.C. and issued summons to the petitioner.

3. It is to be noted that earlier the petitioner had filed CRLMC No.444 of 2015 praying to quash the order of cognizance in C.T. Case No.285 of 2014, but during the course of hearing on 04.2.2015, he withdrew the CRLMC, which was accordingly dismissed as withdrawn. Thereafter, the petitioner again filed CRLMC No.2226 of 2015 before this Court challenging the very initiation of the criminal proceeding against him in the aforesaid Reamal P.S. Case No.75 of 2014 and the continuance of the investigation in such criminal proceeding, even though by then cognizance of offence had already taken and he had been summoned to appear before the learned S.D.J.M. However, CRLMC NO.2226 of 2015 was dismissed on 19.06.2015 with the following observation:

> "Considering the submissions made, I am not inclined to entertain this application at this initial stage, when investigation is under progress and all facts are yet to come on record"

The aforesaid order suggests that at the time of argument of the CRLMC it was not represented before the court that investigation had already been completed, charge-sheet was submitted and cognizance taken against the petitioner.

It is thus apparent that the petitioner's 2nd criminal misc. case, i.e., CRLMC No.2226 of 2015 was disposed of giving an impression to the court that investigation was then still in progress, so that the petitioner would have a further opportunity to challenge the proceeding against him, if the situation so demanded, after completion of investigation. This was apparently aimed to mislead this court.

Now for the 3rd time the proceeding has been challenged in the present application under Section 482, Cr.P.C.

4. The petitioner mainly challenges the order of cognizance under Section 498-A/417 of the I.P.C. contending that the allegations made in the F.I.R. and statements of the informant as well as the witnesses do not make out a prima facie case under Section 498-A of the I.P.C., inasmuch as the allegations are that in the temple there was merely exchange of garland between the informant and the petitioner and offering of vermilion and bangles to the informant, which do not make a valid Hindu Marriage and since there was no valid marriage, the offence under Section 498-A cannot be said to have been committed. It is his further submission that it is the admitted case of the prosecution that the relationship between the petitioner and the informant was one of love and, therefore, the ceremony of exchange of garland cannot be said to be a case of deception which would amount to cheating. Therefore, offence under Section 417 of the I.P.C. cannot be said to have been prima facie committed by the petitioner.

5. Mr. A.K. Naik, learned Additional Standing Counsel submitted that there is allegation that marriage of the petitioner with informant was registered in the court at Angul though in fact the petitioner, as per the case diary, swore the affidavit before the Notary, Angul that he has married the informant in the temple and, therefore, he cannot fall back and say against his own admission and affidavit that no marriage was solemnised. Hence, the offence under Section 498-A of the I.P.C. can be prima facie said to have been committed by him. Alternatively, he submits that assuming that there was no valid marriage, in view of the allegation of the informant herself that after returning from Angul after exchange of garlands and leaving the informant at her parental house, the petitioner also visited the house of the

informant on two occasions and made sexual intercourse with her leading her to believe that they were married and, therefore, offence under Section 493 of the I.P.C. has been clearly made out against him. He also submits that creating a belief in the mind of the informant that they were married by the ceremony of exchange of garlands and giving her bangles and vermilion and thereafter disowning the marriage and negotiating another marriage amounts to deception and cheating punishable under Section 417 of the I.P.C.

6. The prosecution allegations of the informant as seen above, stand fully corroborated by the statements of her father, Puruna Chandra Dhal and grandmother, Abala Godnaik and also by the statement of one Dhruba Charan Sahu a friend of the petitioner. Mere exchange of garland and/or putting vermilion on the head of the girl and giving her bangles by themselves do not constitute a valid Hindu Marriage. The materials on record also reveal that the so called marriage was not registered before the Registrar of Marriages. The two separate affidavits sworn by the petitioner and the informant before the Notary, Angul show that they were married in the temple. The two affidavits have been seized by the police during the course of investigation. Apparently, therefore, there was no valid marriage between the petitioner and informant and hence, no offence prima facie under Section 498-A of the I.P.C. can be said to have been committed by the petitioner.

7. However, the allegations of the prosecution and materials in respect thereof clearly make out a case of commission of offence by the petitioner under Section 493 of the I.P.C.

Section 493 of the I.P.C runs as under :

> "**493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage-**Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

The fact that the petitioner exchanged garland with the informant and gave her bangle and vermilion before the deity in the temple created a belief in her mind that she was legally married to him. Thereafter, the petitioner visited the paternal house of the informant and co-habited with her, which was allowed by the informant under the belief that she was lawfully married to the petitioner. This clearly makes out the offence under Section 493 of the I.P.C., for which the petitioner is liable to be prosecuted.

8. Offence of cheating is defined in Section 415 of the I.P.C.

Section 415 runs as under :

"**415. Cheating-** Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation-A dishonest concealment of facts is a deception within the meaning of this section."

9. The prosecution allegations clearly make out a case of deception since the petitioner leading the informant to believe that she was legally married to him, committed intercourse with her and thereafter negotiated his marriage with another girl, which definitely cause damage and harm to the informant in her body, mind and reputation. Therefore, the petitioner is also liable for cheating under Section 417 of the I.P.C.

10. In the aforesaid analysis, the cognizance of offence under Section 498-A of the I.P.C. taken in C.T. Case No.285 of 2014 by the learned S.D.J.M., Deogarh is quashed. Instead the S.D.J.M. is directed to take cognizance of offence against the petitioner under Section 493 of the I.P.C. The prosecution of the petitioner shall continue for the offences under Sections 493/417 of the I.P.C. The CRLMC is accordingly disposed of.

Application disposed of.

2016 (II) ILR - CUT-1052

S. K. MISHRA, J.

W.P.(C) NO. 9126 OF 2015

MANIKYA SUNA ……..Petitioner

.Vrs.

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

ODISHA PANCHAYAT SAMITI ACT, 1959 – S.46-B

Vote of no confidence against Chairman – Action challenged as the meeting fixed when the Parliament was in session, in view of the circular of the Government in the Department of Panchayati Raj Dt. 30.09.2009 – Collector-O.P.No.2 keeping in view that the session of the Parliament was to end on 08.05.2015, fixed the meeting to 13.05.2015 but subsequently it was extended upto 13.05.2015 – So the action of O.P.No.2 cannot said to be malafide or tainted with any ulterior motive to violate the above circular – Moreover, once the meeting is fixed it cannot be deferred U/s. 46-B (2)(f) of the Act and the Government Circular can not override the provision in the Act – Held, "No confidence meeting" held on 13.05.2015 is not illegal, hence cannot be quashed. (Para 18)

Case Laws Referred to :-

1. 101 (2006) CLT 245 : Akrura Nial Vrs. State of Orissa and others.
2. 101 (2006) CLT 697 : Parbati Hembram Vrs. State of Orissa and 22 ors.
3. 65(1986) C.L.T. 122 : Sarat Padhi V. State of Orissa and others.

For Petitioner : M/s. Dhananjaya Mund, R.K.Achrya, S.N.Padhee,P.K.Nanda, P.K.Behera

For Opp. Parties: Addl. Govt. Advocate
M/s. S.K.Nanda & Associates.
M/s. M.K.Mohapatra & Associates.

Date of judgment: 05.10.2016

JUDGMENT

S.K.MISHRA,J.

In this writ petition, the petitioner, who has been the elected as the Chairman of Karlamunda Panchayat Samiti in the district of Kalahandi, has prayed to quash the initiation of "No Confidence Motion" under Section 46-B of the Orissa Panchayat Samiti Act, 1959 (hereinafter referred to as the "Act" for brevity) on the ground that the procedure adopted by the Sub-Collector, Bhawanipatna, opposite party no.2, is defective and in

contravention of the statutory provisions of the Act as well as violative of the circular No.31535 dated 30.9.2009 of the State Government in the Department of Panchayati Raj as well as the circular issued by the Central Government.

2. The petitioner is the elected Chairman of Karlamunda Panchayat Samiti in the election held in the year 2012. She submits that on 7.5.2015 in the morning hours she has gone to the Block Office and on her return to her house in the afternoon, she found photo copy of letter issued by opposite party no.2 vide No.1922 (27), dated 4.5.2015. On query, she was informed that one person has come allegedly from the Block Office to serve the letter on being instructed by the G.P.O.The petitioner could know from the contents of the letter that opposite party no.2 requested her to remain present on 13.5.2015 at 11 A.M. at Karlamunda Panchayat Office to take part in the "No Confidence Motion" initiated against her at the instance of some members.

3. After coming to know contents of the document she made queries from other members like Sarpanches and some members of the Panchayat Samiti, but they expresses their ignorance regarding any such "No Confidence Motion". The petitioner pleads that as per Government Circular while Lok Sabha or Assembly is in Session, no proceeding for no confidence motion under G.P. Act, Panchayat Samiti Act or Municipal Act can be initiated. It is further submitted that as Lok Sabha was going on, the aforesaid motion is bad in law and is liable to be set aside. She further pleaded that Lok Sabha Sessions started from 23rd February 2015 till 8th May, 2015. Subsequently, the Session extended till 13th May, 2015. The second plea raised by the petitioner is that the provisions of the Act, especially Section 46-B of the said Act, notice of "No Confidence Motion" should be appended with the proposed resolution. In the instant case, opposite party no.2 has not send the original notice along with the proposed resolution. Therefore, it is stated that the action of opposite party no.2 is violative of the provisions of the Act. It is further stated that opposite party no.2 has singed the notice on 2.5.2015 , but the same was issued by the office of opposite party no.2 on 4.5.2015 and was sent to the house of the petitioner on 7.5.2015 directing the petitioner to remain present on 13.5.2015 to discuss and cast vote in the motion. Therefore, the petitioner is apprehending some foul play with regard to service of notice to the members to cast vote in the motion and she apprehends that every chance of tampering her signature as well as signature of other members to fulfil the ill motives of the opponents. Thus, her

specific case is that initiation of the motion is based on fraud and misrepresentation of the facts at the instance of the members of the ruling party and hence the entire proceeding has been initiated by few members and the petitioner was not aware of the alleged proposed resolution. It is further claimed that at the time of "No Confidence Motion" the presence of local M.L.A. and M.P. or their representatives are required. Therefore as per Circular No.31535 dated 30.9.2009 issued by the State in P.R. Department, "No Confidence Motion" cannot be issued or initiated while assembly or parliament is in session. In the instant case, the said circular has been violated. Therefore, the petitioner has prayed that the notice issued by opposite party no.2, i.e. Annexure-1, for holding of the "No Confidence Motion" against her should be quashed.

4. Counter affidavit has been filed by the Block Development Officer, Karlamunda having been authorized by Opposite party no.2. It is submitted that one Shrinibas Mishra, Vice Chairman, Karlamunda Panchayat Samiti and eleven other Panchayat Samiti Members and Sarpanches of Karlamunda Panchayat Samiti filed a requisition before opposite party no.2 on 2.5.2015 as per Section 46-B of the Act to convene the special meeting to pass and adopt the "No Confidence Motion" against the present petitioner. They had annexed a copy of the proposed resolution to be moved in the meeting signed by twelve members of the Samiti including the Vice Chairperson. The copy of the resolution and the proposed resolution to be moved in the meeting has been annexed to the counter. It is further stated that as per the provision enshrined in Section 46-B(2)(a) of the Act, the requisition and the proposed resolution for "No Confidence Motion" to be moved in the meeting was signed by twelve members, which is more than one third members having right to vote. The total members in Karlamunda Panchayat Samiti are twenty-six.

5. It is further stated that opposite party no.2 verified and compared the signatures of the Vice Chairperson, Panchayat Samiti Members and Sarpanches and found it to be correct. Opposite party no.2 also enquired personally from the Samiti Members and Sarpanches of Karlamunda Panchayat Samiti for "No Confidence Motion" against the chairperson. Finding the same to be correct, opposite party no.2 fixed the date and time i.e. on 13.5.2015 at 11 A.M. for the special session of the Panchayat Samiti in the Meeting Hall at Karlamunda Panchayat Samiti Office. Notice was issued vide Notice No.1922 dated 4.5.2015 in accordance with the provisions of the aforesaid Act.

6. It is further pleaded that Basudev Nayak, Tahasildar, Narla was authorized by opposite party no.2 to conduct, regulate, preside over and record the proceedings of specially convened meeting for "No Confidence Motion" against the present petitioner. In the mean time, interim orders were passed by this Court. Hence, the Tahasildar, Narla, presided over the specially convened meeting on 13.5.2015 and kept the resolution adopted in sealed cover. Out of 26 members, 19 members attended the specially convened meeting and voted in the meeting. It is also stated that presence of 19 members fulfilled the requirement of quorum, i.e. 2/3rd of the total membership of Karlamunda Panchayat Samiti. The petitioner though present in the meeting, refused to put her signature on the attendance sheet.

7. As far as the allegation of holding a meeting during the session of the parliament is concerned, it is stated by opposite party no.2 that the last session of parliament was fixed to be held from 20.4.2015 to 8.5.2015. Keeping in view the closure of parliament session on 8.5.2015, opposite party no.2 fixed up the date, time and venue of special meeting of Karlamunda Panchayat Samiti on 13.5.2015. Accordingly, notices were issued through Registered Post. Notices were also issued to B.D.O., Karlamunda. However, the session of the parliament was suddenly extended upto 13.5.2015. In the said circumstances, opposite party no.2 could not defer or postpone the meeting to subsequent date as the date has already been fixed and notices were also issued. It is also stated that notices issued to the petitioner through registered post was to be served on the petitioner, but as she was absent from 11.5.2015 to 15.5.2015 the same could not be served upon her. To that effect endorsement is available to the said document. Rest of the allegations have been denied by opposite party no.2.

8. Opposite party nos.4 to 15 also filed their counter affidavit which is similar to the stands taken by opposite party no.2. It is not necessary to go into the details of the said counter affidavit as it would be repetition of facts already stated earlier.

9. The petitioner filed a rejoinder to the aforesaid counter affidavit on 31.1.2016. She further submits that opposite party no.2 without comparing the signatures accepted the alleged requisition and stated to have issued notices to all members on the same day. She further pleads that she has come to know that some of the members, Lok Sabha M.P., Rajya Sabha M.P. and M.L.A.had not received the notices before the date fixed for "No Confidence Motion". Her specific case is that the document, i.e. Annexure-L/2 has been prepared by one Bikash Kumar Jain, who is a member of the Panchayat

Samiti, in his house after collecting all notices which is supposed to be served by the competent authority to the individual members with due endorsement and by giving clear seven days notice. The petitioner has neither accepted any notice nor signed on the acknowledgement sheet that is, Annexure-L/2. She specifically submits that the Annexure-L/2 is a forged one. A further rejoinder affidavit has been filed by the petitioner on 21.1.2016 more or less reiterating the aforesaid pleas already discussed above.

10. The petitioner has also filed Misc. Case No.5880/2016 purportedly to be an application under Order 26, Rule 10 of the C.P.C. praying to refer the documents, i.e. Annexures-L/2 and G/2 of the counter filed by opposite party no.2 and Annexure-5 of the rejoinder affidavit filed by her be sent to a handwriting expert for scientific investigation to ascertain the authenticity of the document as well as her signature and signatures of the P.S. members and Sarpanches appears in Annexure-L/2.

11. Discussions of the pleadings of the parties revealed that the petitioner based her case on three grounds. Firstly, it is stated that notice dated 4.5.2015 is not according to settled position of law. No clear seven days notice has been given to the members before the scheduled date of the special meeting of the Panchayat Samiti. Secondly, notice is not accompanied by proposed resolution to be passed in the said meeting. Thirdly, it is contended that the special meeting of the Panchayat Samiti has been held during the session of the parliament and hence the aforesaid date of "No Confidence Motion" is illegal. Another point also comes to forth is that the signature of the present petitioner is allegedly forged by the parties concerned and that she has not signed the acknowledgement sheet for receipt of the notice.

12. Learned counsel for the petitioner relied upon the cases of ***Akrura Nial Vrs. State of Orissa and others***; 101 (2006) CLT 245 and ***Parbati Hembram Vrs. State of Orissa and 22 others***; 101 (2006) CLT 697. It is contended on behalf of the learned counsel appearing for the petitioner that the date of dispatch from the post office is relevant date and the date of signing of the notice by the Sub-Collector or the date of receipt of notice by the member concerned is not relevant. However, this question was the subject matter of dispute in the reported case of ***Sarat Padhi V. State of Orissa and others***; 65(1986) C.L.T. 122 which was decided by the Full Bench of this Court. In the case of ***Sarat Padhi V. State of Orissa and others***(supra) the question arose about the mandatory requirement of law as enshrined under Section 24(2)(c) of the Orissa Grama Panchayat Act, 1964(hereafter referred to as the "G.P. Act"). Section 24 (2) of the G.P. Act reads as follows:

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

xxx xxx xxx xxx xxx xxx xxx

(f) the Sub-Divisional Officer or if he is unable to attend, any Gazetted Officer specially authorized by him in that behalf shall preside over, conduct and regulate the proceedings of the meeting;

(g) the voting at all such meetings shall be secret ballot;

(h) no such meeting shall stand adjourned to a subsequent date and no item of business other than the resolution for recording want of confidence in the Sarpanch of Naib-Sarpanch, as the case may be, shall be taken up for consideration at the meeting;

(i) if the number of members present at the meeting is less than two-thirds of the total membership of the Grama Panchayat the resolution shall stand annulled;

(j) If the resolution is passed at the meeting supported by the majority as specified in Sub-section (1) the Presiding Officer shall immediately forward the same in original along with the record of the proceedings to the Collector who shall forthwith publish the resolution in accordance with the provisions of Sub-section (1); and

(k) where any Gazetted Officer presides at the meeting he shall, without prejudice to the provisions of Clause (j), also send a copy of the resolution to the Sub-divisional Officer for information and such action as may be necessary."

13. It is profitable to refer Section 46-B of the Act which is pari materia to the corresponding section of the G.P. Act. The main difference is that in the G.P. Act sub-section (2) (c) of Section 24 provides fifteen days notice whereas Section 46-B (2)(c) provides the notice should be at least seven clear days before the date scheduled to hold the "No Confidence Motion". So the interpretation of law which arises in this case of the aforesaid section is pari material to Section 24 of the G.P. Act.

14. Having interpreted the scope of Section 24(2)(c) of the G.P. Act, the Full Bench of this Court held as follows:

"The scheme of the notice contemplated under section 24(2)(c) may be divided into three parts-(i) requirement of giving the notice, (ii)

> fixing the margin of time between the date of the notice and the date of the meeting, and, (iii) service of notice on the members. I am of the view, which is also conceded by the learned Advocate General, that the first two parts namely, the date of issue the notice and the margin of clear 15 days between the date of the notice and the date of the meeting, are mandatory. In other words, if there is any breach of these two conditions, then the meeting will be invalid without any question of prejudice. But the third condition, i.e., the mode of service or the failure by any member to receive the notice at all or allowing him less than 15 clear days before the date of the meeting will not render the meeting invalid.This requirement is only directory. This is also based on a sound public policy as in that event any delinquent Sarpanch or Naib-Sarpanch can frustrate the consideration of the resolution of non-confidence against him by tactfully delaying or avoiding the service of the notice on him and thus frustrate the holding of the meeting. The legislation has also accordingly taken care to provide in unequivocal terms a provision to obviate such contingencies by incorporating clause (e) to sub-section (2) of section 24."

15. In this case, the requisition was received by the opposite party on 2nd May, 2015., on being satisfied about the fulfillment of the provision of Section 46-B(2)(a) of the Act, opposite party no.2 issued notice to the respective members. He signed the said document on 2.5.2015, but it was dispatched on 4.5.2015. The said meeting was to be held on 13.5.2015. Annexure-1 itself provides that the said notice was annexed with the requisition signed by more than 1/3rd members of the Panchayat Samiti and the proposed "No Confidence Motion" be discussed in the meeting. So this Court is of the opinion that there is clear seven days notice to the parties concerned, i.e. the members of the Panchayat Samiti, Chairman etc. and there is no violation of Section 46-B(2)(c) of the Act.

16. As far as the plea of the petitioner not receiving a copy is concerned, it is seen that the petitioner has got a copy of the notice about the meeting and it is alleged that she got the copy without Annexures. She further states that the said notice was left in her house by some messenger from the Block Development Office. Her plea in this case appears to be in correct. The reasons for this Court coming to such a conclusion is that on the prayer made by the learned counsel for the petitioner in Misc. Case No.3634/2016, on 26.2.2016 the learned Addl. Government Advocate was directed to

produce the records of "No Confidence Motion", dispatch register etc. and the documents were placed before the Court in a sealed cover. This Court inspected the record in the Court itself. From it, the Court found that the original sealed notice (through registered post) issued in favour of the petitioner forms part of the record. This Court opened the said envelope and from the envelope found that the notice to hold the aforesaid meeting has two Annexures. The first is the requisition signed by the requisite number of members and the second is the proposed resolution. A careful examination of the envelope reveals that the postman made attempts to serve the notice on the petitioner on 11.5.2015, 12.5.2015, 13.5.2015, 15.5.2015 and finally the petitioner refused to accept the notice and it was sent to the sender. It is seen that the post man noted that the petitioner was not at home when he made an attempt to serve notice. Now, this aspect of the case if viewed with the observations made by the Full Bench of this Court in the case of ***Sarat Padhi V. State of Orissa and others***(supra), this Court comes to the conclusion that there is no violation of the mandatory provisions of Section 46 (2)(c) of the Act, this is because the Full Bench has very categorically held that the mode of service or the failure by any member to receive the notice at all or allowing him less than 15 clear days before the date of the meeting will not render the meeting invalid. This requirement is only directory. This is also based on sound public policy as in that event any delinquent Sarpanch or Naib-Sarpanch can frustrate the consideration of the resolution of non-confidence against him by tactfully delaying or avoiding the service of the notice on him and thus frustrate the holding of the meeting. The legislation has also accordingly taken care to provide a suitable provision to obviate such contingencies by incorporating clause (e) to sub-section (2) of Section 24. Though in the Panchayat Samiti under Section 46-B no such provision like Clause (e) is appearing, this Court is of the view that non the less the ratio decided by the Full Bench in the case of ***Sarat Padhi V. State of Orissa and others***(supra) shall be applicable to the proceeding in Panchayat Samiti Act as far as no motion as against the Chairman or Vice Chairman is concerned.

17. The second contention raised by the learned counsel for the petitioner is that notice was not accompanied by the proposed resolution. As discussed earlier in the preceding paragraphs, this Court has taken a note of the fact that the notice issued to the petitioner contain the requisition signed by requisite number of members of Panchayat Samiti consisting 1/3rd number of total members having right to vote. It is also seen that such notice was

enclosed with a document which in the last paragraph has given the reasons for convening such a meeting. From the contents of the said document, it is apparent that the proposed resolution was to seek "No Confidence Motion" against the present petitioner. So the second point is also answered against the present petitioner.

18. The 3rd contention is that the while the Lok Sabha is in session the meetings of Panchayat Samiti, Zilla Parishad etc. would not have been called for as per the directions given by the Government of Orissa, Panchayat Raj Department. It is not disputed in the case that the Parliament was in session when the aforesaid meeting was held. It was further not disputed that the Parliament was originally scheduled to be held its sessions from 20.4.2015 to 8.5.2015. Opposite party no.2 received the notice on 2.5.2015 and keeping in view of the fact that the session of the Parliament was to end on 8.5.2015, he fixed the special meeting of the Panchayat Samiti on 13.5.2015. However, in the mean time the session of the Parliament was extended up to 13.5.2015. The action of opposite party no.2 cannot be said to be *mala fide* or tainted with any ulterior motive to violate the direction given by the State Government or the Central Government. Moreover, once a meeting of "No Confidence Motion" is filed it cannot be deferred as per clause (f) of sub-section (2) of Section 46-B of the Act. The said clause provides that no such meeting shall stand adjourned to a subsequent date and no item of business other than the resolution for recording want of confidence in the Chairman or the Vice-Chairman shall be taken up for consideration at the meeting. Hence, opposite party no.2 had no other option but to carry on with the proceeding of the aforesaid "No Confidence Motion". It is also trite principle of law that department circulars or Government orders be it of the State Government or the Central Government cannot override the specific provisions in an Act. So in the view of the aforesaid clause (f) of sub-section (2) of Section 46-B of the Act, "No Confidence Motion" held on 13.5.2015 is not illegal. Hence, this Court is of the opinion that only for that reason notice issued to hold "No Confidence Motion" can not be quashed.

19. As far as the allegation of the petitioner that her signature was forged one is concerned, this Court is of the opinion that the petitioner was well aware of the "No Confidence Motion" brought against her.It is also not disputed that notice was sent through registered post and it was not served on the petitioner because she was absent from her home. The post man made several attempts to serve notice on her and ultimately she refused to accept the same. So there has been sufficient compliance of Section 46-B (2)(c) of

the Act and even though she might not have been served with the notice through Special Messenger it would not vitiate the proceedings.So, this Court is of the opinion that it is not necessary to send the signature of the petitioner appearing in various papers and the signatures appearing in the issue register or document prepared by the Block Development Officer for comparison to a handwriting expert. It may be noted here that the Act itself does not provide for any particular mode of service of notice. It may be served either Special Messenger or Postal Document or it may be served both ways. In this case, this Court is of the opinion that the Block Development Officer has served notice in both ways and though the petitioner has received notice as apparent from her pleadings, she is making out a concocted story of the same being given at her residence. One more thing is noted here that while arguing the case, Mr. Dhananjaya Mund, learned counsel for the petitioner, submitted that she found a copy of the notice on his office table. However, in the pleading the petitioner has pleaded that notice was left at her house. So, this itself shows that non-receipt of notice along with annexures is an afterthought and she has raised such a plea only to make out a case in her favour. On the basis of the aforesaid discussions above and the analogous provisions of the Orissa G.P. Act, this Court, on the basis of the discussions made in the preceding paragraphs, come the conclusion that the there is no cogent and plausible reason to quash Annexure-1, i.e the notice issued by opposite party no.2 as it does not suffer from any illegality and it requires no interference. Accordingly, the writ petition is dismissed being devoid of any merit and the interim order passed earlier stands vacated. No costs.

Writ petition dismissed.

2016 (II) ILR - CUT-1062

DR. A.K. RATH, J.

CMP NO. 217 OF 2016

SMT. MANJULATA BHOI ……..Petitioner.

.Vrs.

SMT. SABITRI SETHI ……Opp.party.

CIVIL PROCEDURE CODE, 1908 – O-18, R-1

Right to begin – Scope – Party who would fail in case leads no evidence has the right to begin.

In this case plaintiff claims to be the adopted daughter of deceased-defendant No1 and defendant No2 claims that her husband was adopted by defendant No1 – Since plaintiff would fail in case no evidence is led he has to begin first – The impugned order rejecting the application of the plaintiff that defendant has to begin first is not illegal warranting interference by this Court. (Paras 6,7,8)

For petitioner : Mr. Samir Kumar Mishra.
For opp. Party : Mr. P.K. Rath

Date of hearing : 28.09. 2016
Date of judgment: 28.09. 2016

JUDGMENT

DR. A.K.RATH, J

This petition challenges the order dated 28.1.2016 passed by the learned Civil Judge (Senior Division), Puri in C.S No.92 of 2014. By the said order, learned trial court rejected the application filed by the plaintiff under Order 18 Rule 1 CPC for a direction to the defendant to begin first.

2. The petitioner as plaintiff instituted the suit to set aside the sale deed dated 13.12.2013 in favour of defendant no.2 and permanent injunction impleading the opposite party as defendant. The case of the plaintiff is that she is the adopted daughter of defendant no.1. She was adopted on Akhi Trutiya day of 1981. Subsequently the deed of acknowledgment of adoption was executed on 27.8.2010. After the death of her mother, defendant no.2 raised claim over Schedule-B property on the strength of sale deed said to have been executed by defendant no.1 on 13.12.2013. The same is invalid, since no consideration was paid. Be it noted that the defendant no.1 died during pendency of the suit.

3. Pursuant to issuance of summons, the defendant no.2 filed a written statement-cum-counter claim praying for a declaration that the plaintiff is not the adopted daughter of defendant no.1, deed of acknowledgment of adoption dated 27.8.2010 is illegal, the gift deed dated 27.8.2010 as void and permanent injunction. The case of the defendant no.2 is that the deed of acknowledgment of adoption and gift deed executed in favour of the plaintiff are invalid documents. Defendant is in possession of the suit property. It is further stated that in the year 1968 on Akhi Trutiya day, her husband was adopted by defendant no.1 and thereafter the deed acknowledging adoption was executed on 11.2.1987.

4. The plaintiff filed a written statement denying the assertions made in the counter claim. While the matter stood thus, the plaintiff filed a petition under Order 18 Rule 1 CPC praying for a direction to the defendant to begin first. It is stated that since the defendant has disputed her status and the gift deed, burden lies on the defendant to prove the same and, as such, the defendant should begin first. Defendant no.2 filed an objection stating that the burden lies on the plaintiff to establish that she is the adopted daughter of defendant no.1 and Neta Sethi. Learned trial court held that the burden lies on the plaintiff to prove that she is the adopted daughter of Halu Sethi. Held so, learned trial court rejected the application.

5. The sole question arises for consideration as to whether defendant shall begin first ?

6. In Chamara Jhankar and others v. Banamali Jhankar and others (WP(C) No.142 of 2010 disposed of on 18.4.2016), this Court held thus :

> "7. Order 18 Rule 1 CPC, which is hub of the issue, is quoted hereunder:
>
> "1. Right to begin- The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin."
>
> 8. In Balakrishna Kar and another Vrs. H.K.Mahatab, AIR 1954 Orissa 191, a Division Bench of this Court held that it should therefore be borne in mind that the right to begin is not the same as the adducing of evidence in support of a party's case. There is a distinction between the two.

9. In Sudarsan Mohapatra and another v. Prasanna Kumar Mohapatra and others, 1990 (I) OLR 153, it is held that the party who would fail in case leads no evidence has the right to begin.

10. In Purastam alias Purosottam Gaigouria and others v. Chatru alias Chatrubhuja Gaigouria, 1992 (I) OLR 72, the Division Bench of this Court in para-5 of the report held thus :

"5. In this case, the plaintiff sought partition alleging that the property was joint family property and had not been decided by metes and bounds. The defendant-petitioners placed a previous partition since 1960-61 to defeat the plaintiff's suit. In view of the plea of the defendants that there was a previous partition, the learned Subordinate Judge called upon the defendants to begin. The plaintiff's plea that the property was joint family property having been admitted by the defendants and the latter having pleaded previous partition, the defendants are to lose if neither party adduced evidence, the burden being on the defendants to prove previous partition. Only when the defendants lead some evidence in proof of previous partition, the plaintiff would be obliged to lead evidence in rebuttal"

7. The instant case may be examined on the anvil of the decision cited supra. The plaintiff claims to be the adopted daughter of Halu Sethi deceased defendant no.1 and Neta Sethi. Adoption results in changing the course of succession. The burden lies on the person who claims to have succeeded to the property by virtue of being adopted to a family. The plaintiff would fail in case no evidence is led. In view of the same, the plaintiff has to begin first.

8. The impugned order of the learned trial court cannot be said to be perfunctory or flawed warranting interference of this Court under Article 227 of the Constitution. Accordingly, the petition is dismissed. No costs.

Petition dismissed.

2016 (II) ILR - CUT-1065

DR. A.K. RATH, J.

S.A. NO. 34 OF 2000

STATE OF ORISSA ……..Appellant

.Vrs.

P.S.N. RAO ……..Respondent

CIVIL PROCEDURE CODE, 1908 – O.41, R-27

Whether, the appellate court can consider the application for additional evidence at any stage of the appeal ? – Held, application for adducing additional evidence can only be considered at the time of hearing of the appeal. (Paras 11,12)

Case Laws Referred to :-

1. (2009) 17 SCC 465 : Jatinder Singh & Anr. -V- Mehar Singh & Ors.
2. 2015 (II) CLR 583 : Sankar Pradhan -V- Premananda Pradhan (dead) & Ors.

Appellant : Ms. Samapika Mishra, A.S.C.
Respondent : Ms. Mira Ghose

Date of Hearing : 29.09. 2016
Date of Judgment: 05.10. 2016

JUDGMENT

DR.A.K.RATH, J.

This is plaintiff's appeal against a reversing judgment in a suit for declaration and permanent injunction.

2. The case of the plaintiff is that the Government of Orissa had issued notifications for acquisition of the suit schedule land for the purpose of construction of M.K.C.G. Medical College, Berhampur. The suit land had been recorded in the name of Government of Orissa in the Department of Health and Family Planning. The final R.O.R. was published in the year 1979. The boundary wall of the Medical College had been constructed over the suit land. On 28.10.1996, the defendant had damaged the boundary wall of the Medical College and started construction over the same. The plaintiff informed the matter to the police about the illegal entry of the defendant over the suit land. The defendant has no semblance of right, title and interest over the suit land.

3. Pursuant to issuance of summons, the defendant entered appearance and filed a written statement denying the assertions made in the plaint. It is stated that his mother P.Managmma purchased the suit lands from one Tulasi Patra and Purna Chandra Mohanty under three registered sale deeds and remained in possession of the same. The plaintiff had not acquired the suit land at any point of time, nor possessed the same. During the last settlement operation, the suit lands were wrongly recorded in the name of the plaintiff. It is further stated that he and his family members were staying away from Berhampur. When he learnt about the wrong recording of the suit land in the name of plaintiff, he filed a petition before the Tahasildar to mutate the suit land in his favour. The Tahasildar demanded a no objection certification from the plaintiff. The plaintiff, after discovering that the suit land had not been acquired and included in the Master Plan for Medical College, tried to ascertain from the Revenue authorities and the Land Acquisition Authority about the real position and when the authority reported that the lands had not been acquired, the suit was filed.

4. On the inter se pleadings of the parties, the learned trial court struck five issues. The same are as follows:-

"1. Is the suit as laid maintainable in the eye of law ?

2. Has the plaintiff any cause of action to bring the suit ?

3. Is the plaintiff entitled for a declaration that he has right, title, interest over the suit land ?

4. Is the plaintiff entitled for a decree of permanent injunction as prayed for ?

5. To what other relief, if any, the plaintiff is entitled ?"

5. To substantiate the case, the plaintiff had examined one witness and on its behalf, three documents were exhibited. The defendant no.1 was examined as D.W.1 and on his behalf, twelve documents were examined. The suit was decreed. Assailing the judgment and decree passed by the learned trial court, the defendant filed T.A.No.56 of 1998 in the court of the learned District Judge, Ganjam-Gajapati, Berhampur. The appeal was allowed.

6. This Second Appeal was admitted on the following substantial questions of law:-

"(i) Whether in absence of records of land acquisition, the lower appellate court committed an illegality in not accepting the letter dated

16.6.1975 of the Land Acquisition Officer, Ganjam indicating acquisition of the suit property under the Land Acquisition Act as an additional evidence ?

(ii) Whether the R.O.R. vide Ext.1 can be accepted as a proof of acquisition of the disputed land ?"

7. Ms.Mishra, learned Additional Standing Counsel for the appellant, submitted that the suit land was acquired by the State of Orissa for the purpose of construction of M.K.C.G. Medical College. In spite of the best efforts, the notifications issued by the State of Orissa could not be produced. In course of hearing of the appeal, an application under Order 41 Rule 27 C.P.C. was filed to take into consideration the notifications issued by the State of Orissa as additional evidence. But then the learned appellate court has not considered the said application and proceeded to decide the appeal. She further submitted that the document, which was sought to be taken as additional evidence, is relevant to decide the real issue in controversy. In view of the same, the matter may be remitted back to the learned lower appellate court to decide the application for additional evidence and the appeal on merit. She cited the decision of the apex Court in the case of *Jatinder Singh and another Vrs. Mehar Singh and others,* (2009) 17 S.C.C. 465.

8. Per contra, Ms.Ghose, learned Advocate for respondent supported the judgment.

9. It is evident from the order no.11 dated 14.9.1999 of the learned lower appellate court in T.A.No.56 of 1998, an application under Order 41 Rule 27 C.P.C. was filed by the appellant along with photostat copies of the documents, but then the learned trial court did not delve into the same and proceeded to decide the appeal.

10. The question does arise as to whether the learned appellate court can decide the appeal without considering the application filed under Section 41 Rule 27 C.P.C.? In Jatinder Singh (supra), an application under Order 41 Rule 27 C.P.C. for acceptance of additional evidence was filed in the Second Appeal. Though an application under Order 41 Rule 27 C.P.C. was filed for acceptance of additional evidence of the documents, but the High Court failed to take notice of the said application. The apex Court held that when an application for acceptance of additional evidence under Order 41 Rule 27 C.P.C. was filed by the appellant, it was the duty of the High court to deal with the same on merits. The judgment of the High Court was set aside and

the matter was remitted back. The same ratio proprio vigore applies to the facts of this appeal.

11. The next question arises for consideration whether the appellate court can consider the application for additional evidence at any stage of the appeal ?

12. The subject matter of dispute is no more res integra. This Court in the case of Sankar Pradhan V. Premananda Pradhan (dead) and others, 2015 (II) CLR 583 held thus:

> "7. In *Persotim Thakur Vrs. Lal Mohar Thakur and others,* AIR 1931 Privy Council 143, it is held that under Cl.(1) (b) of Rule 27 it is only where the appellate Court "requires" it, (i.e., finds it needful) that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment or for any other substantial cause, but in either case it must be the Court that requires it. This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but when on examining the evidence as it stands some inherent lacuna or defect becomes apparent. It may well be that the defect may be pointed out by a party, or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands. Wherever the Court adopts this procedure it is bound by Rule 27(2) to record its reasons for so doing (emphasis laid). The same view was taken by this Court in the cases of *Banchhanidhi Behera Vrs. Ananta Upadhaya and others,* AIR 1962 Orissa 9 and *State Bank of India Vrs. M/s.Ashok Stores & others,* 53 (1982) C.L.T.552.
>
> 8. Keeping in view the enunciation of law laid down by the Privy Council in Persotim Thakur (supra), this Court has examined the case. Hearing of the appeal has not yet commenced. The appellate court is yet to examine the pleadings of the parties and evidence of both oral as well as documentary to adjudge the requirement of provisions of clause (b). Application for adducing additional evidence can only be considered at the time of hearing of the appeal. The learned lower appellate court has not exercised its discretionary power in a judicial manner." (emphasis laid)

13. In the wake of the aforesaid, the judgment and decree dated 20.9.1999 and 25.9.1999 respectively passed by the learned District Judge, Ganjam-Gajapati in Title Appeal No.56/98 are set aside. The appeal is allowed. The matter is remitted back to the learned lower appellate court for de novo hearing. Since the matter is remitted back to the learned appellate court, this Court has not considered the substantial question of law enumerated in Ground No.(ii). The learned lower appellate court shall decide the appeal in the light of the observations made above.

Appeal allowed.

2016 (II) ILR - CUT-1069

DR. A.K. RATH, J.

R.S.A. NO. 234 OF 2012

JAYASINGH MALLICK ……..Appellant

.Vrs.

THE STATE OF ODISHA & ANR. ……..Respondents

CIVIL PROCEDURE CODE, 1908 – S. 80 (2)

Plaint presented with an application U/s. 80(2) C.P.C. to waive notice on defendants – Trial Court neither passed any order nor returned the plaint to be presented, after complying the requirements of section 80(1) C.P.C. – Since no order has been passed to that effect it is to be held that leave was impliedly granted – Held, learned Courts below committed patent illegality in holding that the suit is bad for non-service of notice U/s. 80 C.P.C. (Para12)

Case Law Referred to :-

1. AIR 1971 SC 442 : Gangappa Gurupadappa Gugwad -V- Rachawwa & Ors.

For Appellant : Mr.P.K.Rath
For Respondent : Ms.Samapika Mishra, A.S.C.

Date of Hearing : 29.09.2016
Date of Judgment: 05.10.2016

JUDGMENT

DR.A.K.RATH, J.

Plaintiff is the appellant against a confirming judgment.

2. The plaintiff instituted Title Suit No.4 of 1996 in the court of the learned Civil Judge (Junior Division), Balliguda for declaration of right, title, interest and possession over the suit schedule property and permanent injunction. Case of the plaintiff is that he belongs to Kandha caste, which is recognized as scheduled tribe. His father had some agricultural land at mouza Bataguda under Baliguda Tahasil. He lived separately after his marriage and was earning his livelihood by cultivating agricultural land. While matter stood thus, the Tahasildar, Baliguda settled the suit land on 30.11.1977 in Lease Case No.2280 of 1977 and put him into possession. After delivery of possession, he reclaimed the suit land and raised crops. He dug a pucca well over the said land for the purpose of irrigation and also constructed a pucca house over a portion of the suit land to look after his agricultural operation. During settlement operation, he could not take steps before the settlement authorities to record the suit land in his name. In spite of the same, he possessed the suit land uninterruptedly and continuously without any interference from any authority. Thus he has perfected his title over the suit land by way of adverse possession. It is further stated that the lease granted by the Tahasildar was not revoked or cancelled by any competent authority. Despite the same, the Additional Tahasildar, Baliguda initiated Land Encroachment Case No.199 of 1990 against him and passed an order on 21.7.1993 for eviction from the said land. Thereafter he preferred an appeal before the Sub-Collector, Balliguda, which was dismissed. He challenged the said order of the appellate court before the Additional District Magistrate, Phulbani in R.C.No.67 of 1994. The A.D.M. remanded the case to the Tahasildar vide its order dated 22.4.1995 and directed the Tahasildar to verify the physical possession and to dispose the case on merit. After remand, the Additional Tahasildar, Balliguda passed an order on 9.1.1996 directing to evict him from the suit land. Thereafter he instituted the suit. Though it was required to serve notice against the defendants under Section 80 C.P.C. prior to institution of the suit, but he instituted the suit by filing a petition under Section 80 (2) of C.P.C. seeking leave for exemption of service of the notice as some urgent and immediate relief was necessary.

3. Pursuant to issuance of summons, the defendants entered appearance and filed a written statement denying the assertions made in the plaint. It is stated that though a lease patta was created in favour of the plaintiff, but he was not given possession of the same nor he ever possessed the suit land at

any point of time. The Tahasildar has passed a legal and reasonable order for eviction of the plaintiff from the suit land. The plaintiff has no right to initiate the suit and he is not entitled to get any relief.

4. On the inter se pleadings of the parties, the learned trial court struck four issues. The same are as follows:-

"1. Whether the suit is maintainable ?

2. Whether the plaintiff has preferred his right, title and interest over the suit land by adverse possession ?

3. Whether the plaintiff is a landless person and he is entitled to the suit schedule land ?

4. To what relief, if any, the plaintiff is entitled ?"

5. To substantiate the case, the plaintiff had examined three witnesses including himself as P.W.1 and eight documents on its behalf were exhibited. The defendant no.1 was examined as D.W.1. The suit was dismissed. The plaintiff unsuccessfully challenged the same before the learned Additional District Judge, Fast Track Court No.1 in R.F.A.No.12/02 of 2002-2011, which was eventually dismissed.

6. This Second Appeal was admitted on the following substantial questions of law:-

> "(1) As to whether the courts below are justified in non-suiting the plaintiff when the defendants have admitted that notice under Section 80 C.P.C. has been received by them;
>
> (2) As to whether the courts below are justified in ignoring the leased patta vide Ext.1, when the same was not cancelled by any other authority and attained finality."

7. Mr.P.K.Rath, learned counsel for the appellant, submitted that the courts below committed manifest illegality and impropriety in holding that the suit was not maintainable for non-service of notice to the defendants under Section 80 C.P.C. He further submitted that the suit was filed along with a petition under Section 80 (2) C.P.C. The learned trial court admitted the plaint and decided the matter on merit and, as such, it is to be held that leave was impliedly granted. He further submitted that lease patta was granted in favour of the plaintiff, vide Ext.1. The same was not cancelled. Initiation of proceedings under the Orissa Prevention of Land Encroachment Act, 1972 is bad in law. The appellant is in possession of the suit property. Since the day patta was granted in his favour, he is in possession of the land

peacefully and continuously with hostile animus to the defendants. Thus the plaintiff has perfected title by way of adverse possession.

8. Per contra, Ms.S.Mishra, learned Additional Standing Counsel supported the judgments of the courts below.

9. Admittedly, the suit was filed along with a petition under Section 80 (2) of C.P.C. for waiver of notice on the defendants. The learned trial court has not passed any express order granting leave. The suit was admitted. Issues were framed. Both parties adduced evidence. The learned trial court held that the suit was not maintainable for non-service of notice under Section 80 C.P.C. but decided the suit on merit. The learned lower appellate court concurred with the findings of the learned trial court. Both the courts held that suit is bad for non-service of notice under Section 80 C.P.C.

10. Section 80 C.P.C. prohibits institution of suit unless the conditions enumerated therein are satisfied. Sub-section (1) of Section 80 C.P.C. provides that no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months from the service of notice in the manner prescribed. Sub-section 2 of Section 80 C.P.C. carves out exception. It enables the Court to grant urgent or immediate relief against the Government or a public officer in certain circumstances without service of notice as required under sub section (1) of Section 80 C.P.C.. Proviso to sub-section (2) of Section 80 C.P.C. postulates that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of sub-section (1).

11. In *Gangappa Gurupadappa Gugwad Vrs. Rachawwa and others,* AIR 1971 S.C.442, the apex Court held that where the plaintiff's cause of action is against a Government and the plaint does not show that notice under Section 80 claiming relief was served in terms of the said section, it would be the duty of the Court to reject the plaint recording an order to that effect with reasons for the order. In such a case the Court should not embark upon a trial of all the issues involved and such rejection would not preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

12. The necessary corollary is that once the plaint is presented along with an application under Section 80(2) of C.P.C, the Court shall pass an order. In the event the Court is satisfied that no urgent or immediate relief need be granted in the suit, it shall return the plaint for presentation after complying with the requirements of sub-section (1). No fault can be found with the

plaintiff. A party can not be made to suffer on account of an act of the Court. There is a well-recognised maxim of equity, namely, *actus curiae neminem gravabit* which means an act of the court shall prejudice no man. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law. In view of the same, the courts below committed patent illegality in holding that suit is bad for non-service of notice under Section 80 C.P.C.. Accordingly, the substantial question of law no.(i) has been answered in favour of the plaintiff.

13. The learned appellate court held that the suit plot was recorded in the name of the Government under 'Rakhit Khata' with kissam 'Unata Jojona Jogya'. The land was not dereserved before issuance of lease patta. It was further held that the plaintiff was a Government servant at the time of issuance of lease patta and was not a landless person. He had sufficient landed properties. Thus, lease patta, vide Ext.1 is not a valid and genuine document. The learned appellate court negatived the plea of adverse possession.

14. The lease patta, vide Ext.1, shows that the same was unauthorizedly occupied by the plaintiff. The land was objectionable. Patta was granted without taking prior approval of the higher authority and without taking salami. The plaintiff was a Government servant. He was not a landless person. The land was recorded under Rakhit Khata (reserved land) for future development. In view of proviso to sub-section (2) of Section 7 of the Orissa Prevention of Land Encroachment Act, no such settlement can be made, if the land recorded as Gochar, Rakhit or Sarbasadharan in any record-of-rights prepared under any law. The lease patta, vide Ext.1, is not valid. Adverse possession is a mixed question of fact and law. The plea of adverse possession has been negatived by the learned courts below. The substantial question of law enumerated in ground no.(ii) is answered in affirmative against the plaintiff.

15. In the result, the appeal is dismissed. No costs.

Appeal dismissed.

2016 (II) ILR - CUT-1074

D. DASH, J.

CRLA NO. 441 OF 2008

PRADIPTA KUMAR JENA ……..Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

PREVENTION OF CORRUPTION ACT, 1947 – S.5(1)(d), (2)

Trap case – Appellant alleged to have accepted illegal gratification while discharging official duty – Mere recovery of currency notes is not enough but demand of illegal gratification is sine qua non to constitute the offence.

In this case complainant did not support the prosecution case so far as demand by the accused is concerned – Regarding acceptance of bribe of Rs. 50/- the appellant stated that when he was going out there was insertion of something in the back pocket of his trouser and he immediately brought those out and finding the same to be currency notes threw away and such version of the appellant was corroborated not only by D.W.1 but also from the evidence led by the prosecution that the money was seized from the verandah near the office room – Evidence of D.W.1 was discarded on the ground of some discrepancy with regard to timing even though the witness was examined after lapse of twenty years and learned trial court ought not to have attached any importance to such discrepancies when presence of D.W.1 is not specifically denied – Held, proved facts do not lead to draw a legitimate presumption that the appellant demanded and accepted such currency notes – Impugned judgment of conviction and order of sentence are set aside. (Paras 18,19)

Case Laws Referred to :-

1. AIR 2001 SC 318 M. Narsinga Rao v. State of A.P.
2. AIR 2015 SC 3681 : Indra Vijay Alok-vrs.- State of M.P.
3. AIR 2014 SC (suppl) 1837 : B.Jayaraj vs. State of A.P.
4. AIR 2015 SC : Vinod Kumar-vrs-State of Punjab
5. AIR 2015 SC 3681 : 1206 and Indra Vijay Alok vrs. State of M.P.
6. AIR 1975 SC1432 : Ram vs. State of Rajasthan

Appellant : M/s. Deba Pr. Das & J.Sahu
Respondent : Mr. Sanjay Kumar Das, Standing Counsel (Vig.)

Date of hearing : 25.05.2016
Date of judgment: 04.07.2016

JUDGMENT

D. DASH, J.

The appellant in this appeal assails the judgment of conviction recorded by the learned Special Judge (Vigilance), Balasore on 23.09.2008 in T.R. Case No.483 of 2007 corresponding to T.R. Case No.12 of 1989 on the file of learned Special Judge (Vigilance), Bhubaneswar arising out of Balasore Vigilance P.S. Case No.6/88, convicting him for commission of offence under Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act 1947 (hereafter called in short as 'the Act') read with Section 161 of the I.P.C. and sentencing him to undergo rigorous imprisonment for a period of 6(six) months for the offence under Sec. 161 of I.P.C. and R.I. for a period of 1(one) year followed by payment of fine of Rs.100/-(Rupees One hundred) and in default to undergo further R.I. for one month for the offence under sec. 5(2) read with Sec. 5(1)(d) of the Act with the stipulation that the substantive sentence would be running concurrently.

2. Prosecution case is as follows:-

On 30.03.1988 the appellant was working as the Welfare Extension Officer at Sadar Block, Balasore. That the complainant P.W.8 is a member of Scheduled Caste. He had the intention to sell a piece of his land to one Narahari Sahu and his brothers in order to meet the expenses for the marriage of his sister. But being a member of scheduled caste in view of restriction for transfer of any immovable property as provided in the O.L.R. Act and as it was only possible with prior permission, he made an application seeking said permission. It is stated that for the purpose, he approached the appellant who was then the Welfare Extension Officer of Sadar Block, Balasore for obtaining a caste certificate. The allegation next runs that the appellant for extending the said help demanded bribe of Rs.100/-. Finally it was settled at Rs.50/- to which the complainant yielded against his will.

So he lodged the F.I.R., Ext.9 with the D.S.P., Vigilance, Balasore which necessitated the registration of the case against the appellant and thereafter trap was decided to be laid after observing all other formalities. It is stated that the complainant and over-hearing witnesses went in a rickshaw to the Block Office. Other members of the raiding party including the Magistrate and another Govt. Official went to the office and remained at such position within the visible range. The appellant was then absent in the office and a little while thereafter he arrived. It is alleged that no sooner did the appellant see the complainant, he asked him as to if he had brought money.

On his asking, the complainant bringing out the tainted currency notes from his left side chest pocket from inside the white paper, handed those notes to the appellant who then having accepted the same, kept those notes being earlier smeared with phenolphthalein powder inside the right side back pocket of his trouser. At this time, the witnesses as per earlier arrangement receiving the signal arrived, when they found that the appellant was coming out side followed by the complainant. It was then pointed out by the complainant to the Investigating Officer and the members of the raiding party. They took the appellant inside his room and told him to have received the bribe which he initially denied. The appellant was then asked to give his hand-wash in sodium carbonate solution, which although was not immediately agreed to, yet when finally taken, the colour became pink. It is further alleged that during the period, the appellant brought out the currency notes from his pocket and threw those away. The hand-wash so collect was then kept in a clean, dry and empty bottles which were sealed and signed in presence of the witnesses. The currency notes thrown were collected and compared by the Magistrate with the copy of the preparation report written and kept by him and the numbers tallied. The hand wash of the Magistrate and witnesses were also taken and that also changed to pink colour and accordingly preserved in clean and dry bottles, duly sealed and signed. The dresses of the appellant were taken. When the right side back pocket of his trouser was washed with sodium carbonate solution, the colour also changed to pink which was preserved. The detection report was made. Seizure of tainted notes, clean glass bottles, bottles with hand wash & other wash, solutions etc. were also seized and sent for chemical examination. The case record of the O.L.R. Case No.68/88 was seized from the office of Sub-Divisional Officer, Balasore. The report from the Chemical Examiner, S.F.S.L., Rasulgarh being received, the Investigating Officer placed the relevant papers including his consolidated report before the Sanctioning Authority. Necessary sanction being accorded, charge sheet was placed against the appellant for facing the trial for the offences as stated above.

3. The appellant during trial admitted that a person had come to him on 28.3.88 with a request to give a caste certificate but then he told him to approach the Tahasildar or Revenue Officer as the case may be for the purpose of grant of caste certificate, they being the competent authority. It is also his case that on 30.3.88 that person again came and renewed his request as made before and then he forcibly kept the currency notes in the back pocket of his trouser which were immediately thrown by him and under that situation he was compelled to leave the room. It is stated that only near the

gate of the Block Office, he was caught hold of and brought back. It is also his case that by then he had no information from any quarter even as regards any enquiry if required to be made by him in relation to the issue of the cast certificate if any.

4. The trial court in view of such case and counter case, as it appears, has rightly formulated the following points for determination:-

(i)Whether the appellant is a public servant being the welfare Extension Officer of Sadar Block, Balasore demanded and accepted the cash of Rs.50/- as gratification other than the remuneration from P.W.8 as a motive or reward for doing an official act for submitting an enquiry report regarding issuance of caste certificate; and

(ii)Whether the appellant being a public servant by illegal means or official abusing his position as such obtaining for himself the pecuniary advantage to the extent of Rs.50/- from P.W.8.

5. Going to answer the aforesaid points as is seen, the trial court has taken up the exercise of examination of evidence and their evaluation in searching the answers to the above points. Finally, the answers having been recorded in favour of the prosecution, the appellant has been convicted and visited with the sentence as aforesaid.

6. Learned Counsel for the appellant, Mr. D.P.Das at the outset submits that the evidence on record are not at all sufficient to record a finding in favour of the prosecution in so far as the factum of demand and acceptance of bribe is concerned. For the purpose, he has placed the evidence of P.W.8 the complainant who has not spoken in favour of those facts and whose evidence from the very beginning even with regard to the purpose is wholly unsatisfactory absolutely showing no occasion for the same. It is strenuously argued that leaving aside the fact that P.W. 8 has not supported the prosecution which itself is not enough to discard the prosecution case, yet here the evidence as stand do not go to establish all such circumstances to hold that the appellant received the gratification from P.W. 8 and therefore the recovery of money from the appellant even though accepted, the same without being coupled with such other circumstances, the presumption as engrafted in section 4(1) of the Act which corresponds to section 20 of the Act of 1988 cannot be drawn.

He further contends that the evidence of D.W.1 establishes the case of the defence since he has stated that the person who was approaching the appellant for issuance of a caste certificate kept something in the pocket of

the appellant which he immediately threw. So it is contended that when the presence of D.W.1 at the spot at the relevant time is not disputed as he is a signatory to the detection report and his evidence as above has not been shaken nor can be doubted as there surfaces no such evidence on that score, it is not understood as to how the trial Court has ignored his evidence from being given any weightage when the law is not that the evidence adduced by the defence are to be approached from the beginning carrying the suspicion in mind. It is also contended that when the witness deposed after 20 years of the incident, it was but natural to have the minor variations and rather had it not been so, his evidence would have otherwise been held to be tainted with interestedness. Therefore, with such minor variations in the factual backdrop, the trial Court ought not to have discarded his evidence. He lastly contends that viewing the evidence on record from every angle, the prosecution in the case cannot be said to have proved its case on the factum of demand and acceptance of bribe by the appellant. Reiterating that in the obtaining factual matrix, the presumption as provided under the Act would not be attracted, he contends that this appellant has thus with above evidence been unnecessarily put to harassment for all these period from the year 1988 and undergo the sufferings for being out of service for about 8 years by now. Thus he finally urges that the judgment of conviction and the order of sentence as passed by the trial court are liable to be set aside.

7. Learned Standing Counsel for the Vigilance, Mr. S.K.Das submits all in favour of the findings recorded by the trial court. According to him, the appreciation of evidence on record as made by the trial court under no circumstance can be said to be faulty and on the basis of evidence proving the recovery of money and other circumstances when the presumption available under the law gets drawn which the appellant has failed to rebut, the trial court did commit no mistake in returning a finding of guilt against the appellant for the offences for which he stood charged. He therefore urges for dismissal of the appeal.

He has placed reliance upon the decisions of the Hon'ble Apex Court in case of Vinod Kumar-vrs-State of Punjab; AIR 2015 SC 1206 and Indra Vijay Alok vrs. State of M.P.; AIR 2015 SC 3681.

8. In the instant case, now it is to be seen as to whether the factum of demand and acceptance have been proved beyond reasonable doubt through reliable evidence or whether the recovery of the money coupled with other circumstances leads to the conclusion that the appellant received gratification from the person concerned, thereby raising the presumption as mandated

under section 4 (1) of the Act as it was then which corresponds to section 20 of the Act of 1988 calling upon the appellant to rebut it either through cross-examination of the witnesses cited against him or by adducing reliable evidence and that if it has been so done.

9. In view of the rival contentions as raised before proceeding further to dwell upon the same it is felt the need at this place to note few decisions of Hon'ble Apex Court.

10. In case of Sita Ram vs. State of Rajasthan; AIR 1975 SC 1432, the complainant had turned hostile in the Court of Special Judge. However, the Trial Judge convicted the accused who was tried along with another accused. The High Court on appreciation of the evidence acquitted that other accused but maintained the conviction against the appellant. The Apex Court opined that the presumption under Section 4(1) of the Act could not be drawn in the facts of the case. However, there the question, whether the rest of the evidence was sufficient to establish that the accused had obtained the money from the complainant was not considered.

The Hon'ble Apex Court in Hazari Lal vrs. State (Delhi Admn.); AIR 1980 SC 873 distinguished the pronouncement in Sita Ram (supra) by stating thus:-

"... The question whether the rest of the evidence was sufficient to establish that the accused had obtained the money from the complainant was not considered. All that was taken as established was the recovery of certain money from the person of the accused and it was held that mere recovery of money was not enough to entitle the drawing of the presumption under Section 4(1) of the Prevention of Corruption Act. The Court did not consider the further question whether recovery of the money along with other circumstances could establish that the accused had obtained gratification from any person. In the present case we have found that the circumstances established by the prosecution entitled the court to hold that the accused received the gratification from P.W.3. In Suraj Mal v. State (delhi Admn.), also it was said mere recovery of money divorced from the circumstances under which it was paid was not sufficient when the substantive evidence in the case was not reliable to prove payment of bribe or to show that the accused voluntarily accepted the money. There can be no quarrel with that proposition but where the recovery of the money coupled with other circumstances leads to the conclusion that the accused received gratification from some person the court would certainly be entitled to draw the presumption under Section 4(1) of the Prevention of Corruption Act. In our

view both the decisions are of no avail to the appellant and as already observed by us conclusions of fact must be drawn on the facts of each case and not on the facts of other cases."

11. In case of M.Narsinga Rao v. State of A.P.; AIR 2001 SC 318, allegations against the accused-appellant were that one Satya Prasad, PW1 therein was to get some amount from Andhra Pradesh Dairy Development Co-operative Federation for transporting milk to or from the milk chilling centre at Luxettipet (Adilabad District). He had approached the appellant for taking steps to enable him to get money disbursed. The appellant demanded Rs.5000/- for sending the recommendation in favour of payment of the amount due to P.W.1. As the appellant persisted with his demand PW1 yielded to the same. But before handing over the money to him he lodged a complaint with DSP of Anti-Corruption Bureau. On the basis of the said complaint all arrangements were made for a trap to catch the corrupt public servant red-handed. Thereafter the Court adverted how the trap had taken place. The court took note of the fact that PW1 and PW2 made a volteface in the Trial Court and denied having paid any bribery to the appellant and also denied that the appellant demanded the bribe amount. The stand of the accused before the Trial Court under Section 313 of Cr.P.C. was that one Dr. Krishna Rao bore grudge and had orchestrated a false trap against him by employing PW 1 and PW 2. Be it stated, in his deposition PW 1 had stated that he had acted on the behest of one Dr.Krishna Rao. It was further the stand of the accused-appellant that the tainted currency notes were forcibly stuffed into his pocket. The Trial Court and the High Court had disbelieved the defence evidence and found that PW 1 and PW 2 were won over by the appellant and that is why they turned hostile against their own version recorded by the investigating officer and subsequently by a Magistrate under Section 164 of Cr.P.C. The Special Judge ordered the witnesses to be prosecuted for perjury and the said course suggested by the trial-Judge found approval of the High Court also. While dealing with the controversy this Court took note of the fact that the High Court had observed that though there was no direct evidence to show that the accused had demanded and accepted the money, yet the rest of the evidence and the circumstances were sufficient to establish that the accused had accepted the amount and that gave rise to a presumption under Section 20 of the Prevention of Corruption Act that he accepted the same as illegal gratification, particularly so, when the defence theory put forth was not accepted. It was contended before this Court that presumption under Section 20 of the Act can be drawn only when the

prosecution succeeded in establishing with direct evidence that the delinquent public servant had accepted or obtained gratification. It was further urged that it was not enough that some currency notes were handed over to the public servant to make it acceptance of gratification and it was incumbent on the part of the prosecution to further prove that what was paid amounted to gratification. In support of the said contention reliance was placed on Sita Ram (AIR 1975 SC 1432) (supra) and Suraj Mal v. State (Delhi Admn.). Their Lordships referred to Section 20(1) of the Act of 1988; the pronouncements in Hawkins v. Powells Tillery Steam Coal Co. Ltd. and Suresh Budharmal Kalani v. State of Maharashtra and adverting to the facts came to hold as follows:-

"From those proved facts, the court can legitimately draw a presumption that the appellant received or accepted the said currency notes on his own volition. Of course, the said presumption is not an inviolable one, as the appellant could rebut it either through crossexamination of the witnesses cited against him or by adducing reliable evidence. But if the appellant fails to disprove the presumption the same would stick and then it can be held by the court that the prosecution has proved that the appellant received the said amount."

Referring to the observations in Hazari Lal (AIR 1980 SC 873) (supra), it has been opined that:-

"The aforesaid observation is in consonance with the line of approach which we have adopted now. We may say with great respect to the learned Judges of the two Judge Bench that the legal principle on this aspect has been correctly propounded therein."

12. The authority in case of B.Jayaraj vs. State of A.P.; AIR 2014 SC (suppl) 1837, may next be placed. Here the complainant did not support the prosecution version and had stated in his deposition that the amount that was paid by him to the accused was with a request that it may be deposited in the bank as fee for renewal of his licence for the fair price shop. The court referred to Section 7 of the Act and observed as follows:-

"Insofar as the offence under Section 7 is concerned, it is a settled position of law that demand of illegal gratification is sine qua non to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. The above position has been succinctly laid down in several judgments of this Court. By way of illustration, reference may be made to the

decision in C.M. Sharma v. State of A.P. AIR 2011 SC 608 and C.M. Girish Babu v. C.B.I.; AIR 2009 SC 2022.

Having observed as above, the court proceeded to state as under:-

"In the present case, the complainant did not support the prosecution case insofar as demand by the accused is concerned. The prosecution has not examined any other witnesses, present at the time when the money was allegedly handed over to the accused by the complainant, to prove that the same was pursuant to any demand made by the accused. When the complainant himself has disowned what he had stated in the initial complaint (Ext.P-11) before LW-9, and there is no other evidence to prove that the accused had made any demand, the evidence of PW-1 and contents of Ext.P-11 cannot be relied upon to come to the conclusion that the above material furnishes proof of the demand allegedly made by the accused. We are, therefore, inclined to hold that the Ld. Trial court as well as the High Court was not correct in holding the demand alleged to be made by the accused as proved. The only other material available is the recovery of the tainted currency notes from the possession of the accused. In fact, such possession is admitted by the accused himself. Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section7. The above also will be conclusive insofar as the offence under Section 13(1)(d)(i)(ii) is concerned as in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing of pecuniary advantage cannot be held to be established.

13. The said principle has been followed in M.R. Purushottam v. State of Karnataka giving a careful reading to the aforesaid decisions, it is found that the court disbelieved the story of the prosecution as no other evidence was brought on record. In N.Narsinga Rao case (supra) the accused was charged for the offences punishable under Section 7 read with Section 13 (1)(d) & (2) of the Act of 1988. The court, as already stated, had referred to section 20(1) of the said Act and opined that from the proven facts the court can legitimately draw a presumption that the delinquent officer had received and accepted money. Therefore, it is clear that the authorities in B.Jayaraj (surpa) and M.R. Purushottam (supra) do not lay down as a proposition of law that when the complainant turns hostile and does not support the case of the prosecution, the prosecution cannot prove its case otherwise and the court cannot legitimately draw the legal presumption as available in the statute.

14. In the cited case of Vinod Kumar vs. State of Punjab; AIR 2015 SC 1206; Their Lordships referring to all the above decisions and discussing the evidence as placed in those cases as also the evidence of the case under consideration first of all have concluded that the whole case of prosecution cannot collapse merely because the complainant having turned hostile resiles from his version and supports the accused in directly. The facts and circumstances emanating from evidence on record in the cited case being found to be worthy of acceptance, Their Lordships have held that from all those legitimately a presumption stands drawn that the accused had received or accepted the said currency notes on his own volition. Thus the factum of presumption and testimony of those accompanying witnesses have been taken together to hold the prosecution case as laid to have been proved on the factum of demand, acceptance and recovery of the amount when in that case the accused had offered no explanation as regards recovery except baldly stating during his examination under section 313 Cr.P.C. to be innocent and to have been falsely implicated and the presumption standing in no way thus been rebutted.

15. In the next cited case of Indra Vijay Alok-vrs.- State of M.P.; AIR 2015 SC 3681, Their Lordships upon discussion of evidence held the prosecution to have established beyond reasonable doubt on all the required aspects of the case as also with the presumption being otherwise drawn.

16. Keeping in mind the above settled principles, let me now advert to the case in hand and proceed to analyse the evidence on record to examine the sustainability of the answer to the point for determination as given by the trial court in fashioning the guilt upon the appllan.t

Admittedly, the appellant was working as the Welfare Extension Officer in Balasore Sadar Block at the relevant time. It is the prosecution case that the complainant had gone and met the appellant for the purpose of providing necessary help for obtaining a caste certificate. However, it is stated in the very F.I.R. Ext 9 that the complainant being a member of scheduled caste had wanted to sell a piece of land to one Narahari Sahu and his brothers for meeting the expenses for the marriage of his sister and for the purpose an application had been filed for grant of permission. It is further stated that the application having been filed before the Sub-Divisional Officer, for an enquiry it was sent to the local R.I.. Having collected the report of enquiry from that R.I., on 28.03.88, it is said that the complainant on 29.03.88 had gone to meet this appellant for obtaining a caste certificate. First of all, it is not made clear as to why there was the occasion for

advancing a prayer for grant of a caste certificate before this appellant who was in no way competent having any authority in that behalf and secondly, when the matter was pending for grant of permission for sale and it had been sent for an enquiry not to the appellant but to the local R.I. where was the reason to discuss with him about the grant of caste certification. Moreover, there appears no need for production of caste certificate either of the proposed vendor or vendee since the Authority competent for granting the permission had already assumed the jurisdiction in the matter of permission which is only sought for when the person being a member of scheduled caste or tribe desires to transfer the immovable property. It is only when the proposed vendor makes an application asserting himself to be a member of scheduled caste or tribe as the case may be which is seen from the land documents the permission case is registered for its disposal in accordance with law. Thus, the very reason assigned by the complainant in the F.I.R. Ext.9 as to have led him to meet the appellant does not stand to reason and falls flat. So is not at all acceptable that on 29.3.88 he had the reason to approach the appellant to bring his caste certificate. It is also not stated that the complainant having earlier applied for grant of a caste certificate, it was awaiting to be issued or was finally to be handed over by the appellant being connected in the process in some way or other. So in this connection of making prayer for permission for sale of land, the approach of the complainant to the appellant for grant of a caste certificate who has no authority to do so and which has no purpose to serve so far as the main objective of permission in selling the land for meeting urgent expenditure is concerned, rather goes to create doubt in the mind from the very beginning. Now, let us glance at the relevant case record proved in the case marked as Ext. 5. It reveals therefrom that the application was filed by the P.W.8 and three others who are his brothers seeking permission for sale of land. It having been presented on 15.2.88, the first order has been passed on 22.2.88. The order sheet shows that Welfare Extension Officer, Balasore Block was forwarded with the copy of the application as also the Revenue Inspector for enquiry and report. The next date being fixed to 30.3.88, the service return inviting objection as also the reports being not received by then, the case got posted to 4.5.88 awaiting those service return and the reports. The trap has been laid on 30.3.88 basing on the FIR lodged on 29.3.88 after the demand of illegal gratification said to have been made by the appellant on 28.3.88. This gives rise to suspicion in mind that even if it is accepted for a moment that this appellant was asked to report and he was withholding the same with an intent to demand the illegal gratification and hoping for th e payment of the

same how could it be that very date fixed for the purpose having not crossed and even without ascertaining as regards non-receipt of report, P.Ws. 7 and 8 would be going to approach the appellant when fact stands that the report is to be directly sent to the concerned authority and not to be handed over to the applicant. This has not been removed by proving any document that the appellant has in fact received that copy of the application before 28.3.88. The time gap also being very short, no such inference can even be drawn. Next doubt is cast by going through a petition marked as Ext. 6 said to have been filed before the authority by P.W. 8. Although it has been stated there that as the Welfare Officer is demanding gratification, he is not submitting the report yet nothing has been stated therein that by then the trap had already been laid. On that day, the authority has not even been informed about the incident. When the Revenue Officer had been asked by the authority to submit the report the FIR narration is that it had been so received by P.W.8 on 28.3.88. On the other hand, the report of the R.I. is very much available in the case record and that when shows to have been signed on 15.3.88, but it is not so noted till 4.5.88 in the order sheet nor it contains any endorsement as regards its receipt. Surprisingly, the authority in seision of the proceeding appears to have been apprised of the fact only on 16.5.88. The state of affair in oral evidence as also as per the above documents being cumulatively viewed the doubt gets fortified as regards the prosecution case that the appellant on 28.3.88 had made the demand of illegal gratification for the purpose of helping P.W. 8 in getting the caste certificate or even let us say that permission for sale of land by him to P.W.7 and others. Thus the very reason for lodging the FIR does not stand for being believed. Therefore, in my considered view the court in this case has to approach the evidence of the prosecution and appreciate the same on other factual aspects of the case with great care and caution.

17. The complainant in this case has been examined as P.W.8. He has not supported the prosecution case. Although he has been declared hostile and the prosecution had been permitted to crossexamine him, except drawing the attention of this witness to his previous statements made before hand which he has denied to have ever stated, no such further material has been brought out by the prosecution so as to suggest his dubious conduct if any to have developed latter for some reason or other. His evidence is that one Srihari Sahu was looking after the matter. In the above premises the evidence of Srihari Sahu who has been examined as P.W.7 bears importance. He states that P.W.8 had taken him to Balasore to obtain caste certificate from the Welfare Officer, as it was necessary for executing the registered sale deed

which as already discussed is not acceptable. This P.W.7 is none other than the proposed vendee. He being the bonafide proposed vendee, is supposed to know that prior permission for sale is necessary and this appellant had no authority to grant it. He being the purchaser thus appears to have not made any enquiry that what are the necessary documents required for the execution of the sale deed and its registration. The evidence of this witness that they had gone to the appellant for the purpose is not believable as from the beginning he had known that P.W.8 was a member of scheduled caste and so there was only the requirement of permission for the sale transaction to materialize and not the caste certificate.

Although this witness is a signatory to the F.I.R. yet he is not a member of the raiding party. The office of the appellant is in the Block Headquarters where the offices of the B.D.O. and Chairman are also there. None of them who are the superior in office have been told about this incident of demand of bribe by the appellant. It is also in the evidence of this witness that the appellant came out of his office room and on the verandah demanded the bribe when he also states that immediately on the approach of P.W.8, the appellant demanded a sum of Rs.100/- as bribe and when inability was expressed, he reduced the demand of bribe by half i.e. Rs.50/-. His further evidence is that thereafter they both went straight to the Vigilance Office. When the evidence of these witnesses are read together and viewed cumulatively, a doubt arises in mind in so far as the prosecution case is concerned concerning demand of bribe by the appellant prior to the raid and those when seen with the state of affair as found from the relevant case record are suggestive of the fact that these P.Ws.7 & 8 had some axe to grind.

18. Adverting to the evidence on the factum of acceptance of bribe by the appellant, the specific plea of the appellant be seen first. It is stated that he had told to have no competency to grant a caste certificate. When he was going out, there was insertion of something in the back pocket of his trouser and the appellant then immediately brought those out and finding those to be currency notes threw away. This version of the appellant finds corroboration from the evidence let in by the prosecution that the money was seized from the verandah near the office room. In order to reconcile, the prosecution has led evidence that when the appellant was asked about the receipt of bribe and Vigilance Officials were discussing with him in the matter, he threw the money. Then he was asked for his hand-wash. It is in the evidence of P.W.1 in crossexamination that after receipt of the signal, the members of the trap party rushed in and the Inspector caught hold of the hand of the appellant

there and it was after the appellant was pointed out by Balram and then his pockets were not searched. So if the Vigilance Officials had caught hold of the hands of the appellant, hardly there was the scope for him to bring out the currency notes from inside the back pocket of his trouser and throw those. Admittedly in this case, the appellant was caught at a distance of forty feet apart from the Block Office Building. Even accepting for a moment that he brought out the currency notes and threw those, it is also hard to believe that three currency notes of denominations of Rs.20+Rs.20+Rs.10 in total coming to Rs.50.00 would get spread beyond the office room. All these rather lead to believe the case of the appellant to be a probable one that no sooner did the currency notes were inserted in the back pocket of his trouser, those were thrown and at that time he was near the door of the office room proceeding towards the office of the B.D.O.. The evidence that seeing the vigilance people and after discussion with them, he threw those notes is rendered unbelievable.

19. The Chairman of the Panchayat Samiti has been examined as D.W.1 from the side of the appellant. He has deposed that when the appellant was going with him, the complainant kept something in the back pocket of his trouser. So the appellant immediately brought those and threw away, where-after the Vigilance Inspector and other staff caught hold of the hands of the appellant. His evidence has been discarded on the ground of some discrepancy with regard to the timing.The examination of this witness having been made after lapse of about twenty years, the trial court ought not to have attached any importance to such discrepancies particularly when the presence of this D.W.1 is not specifically denied. Above being the state of affair in the evidnece on record, taking a cumulative view on all those, I hold that the proved facts do not lead to draw a legitimate presumption that the appellant received or accepted the said currency notes on his own volition so as to hold that the factum of presumption and the testimony of the witnesses examined on behalf of the prosecution go to prove the case of the prosecution as laid as regards demand and acceptance.

For the aforesaid discussion and reasons, the finding of guilt as recorded by the trial Court against the appellant is held as unsustainable. Thus, the judgment of conviction and order of sentence which have been impugned in this appeal are hereby set aside.

20. In the result, the appeal stands allowed.

Appeal allowed.

2016 (II) ILR - CUT-1088

S. PUJAHARI, J.

CRLREV NO. 1230 OF 2010

CH. AMRITALINGAM .....Petitioner

.Vrs.

STATE .....Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – S.197

Sanction for prosecution – When not necessary – If the act of the public servant is not treated as part of his official duties, it does not attract provisions U/s. 197 Cr.P.C.

In this case, act of false documentation, alleged against the petitioner not being in discharge of his official duties no sanction U/s. 197 Cr.P.C. was required for prosecution of the petitioner who had been charge-sheeted for commission of offence U/s. 120-B/420 I.P.C. – Impugned order passed by the learned Special Judge, Vigilance, Bhubaneswar needs no interference. (Paras 8 to10)

Case Laws Referred to :-

1. (2009) 8 SCC 617 : State of M.P. .V. Sheetla Sahai
2. (2007) 1 SCC 1 : Parkash Singh Badal and another .V. State of Punjab and others,
3. (2015) 1 SCC 513 : Rajib Ranjan and others .V. R. Vijaykumar

For Petitioner : M/s. Laxmidhar Pangari
For Opp. Party : S.C.(Vigilance)

Date of Order : 24.06.2016

ORDER

S. PUJAHARI, J.

I have heard the learned counsel for the petitioner and the learned Senior Standing counsel appearing for the Vigilance Department.

2. The order dated 08.09.2010 of the learned Special Judge, Vigilance, Bhubaneswar passed in T.R. No.59 of 2006 is under challenge in this revision petition.

3. Brief facts of the case is that the present petitioner was working as Executive Director (Finance) and co-accused – Swasti Ranjan Mohapatra was working as Company Secretary of ORHDC and both of them along with the co-accused-builder –S.R.K.K. Rajabahadur entered into a criminal conspiracy and the above officials of the Corporation committed criminal misconduct

and showing undue official favour to the co-accused - S.R.K.K. Rajabahadur sanctioned and disbursed Rs.20 lacs without proper documentation and ignoring the opinion of the retainer of the Corporation. After availing the loan, the co-accused - S.R.K.K. Rajabahadur absconded by abandoning the project and the real landowner cancelled the power of attorney and the present liability in respect of the loan is Rs.95 lacs. The above accused persons were charge-sheeted under Section 13(2) read with Section 13(1)(d) of the P.C. Act and under Sections 120-B/420 of I.P.C.

The present petitioner filed one petition before the learned Special Judge, Vigilance, Bhubaneswar praying for his discharge and the learned Special Judge, Vigilance considering the materials on record held that there was prima-facie allegation against the present petitioner. But, so far question of sanction under Section 197 Cr.P.C., learned Special Judge, Vigilance, Bhubaneswar held that the order dated 18.05.2006 taking cognizance against the present petitioner and others, had not been challenged and discharging the petitioner at the stage of consideration of charge amounts to quashing the order taking cognizance which is beyond jurisdiction. The Court also held that it was not proper stage and the matter relating to sanction under Section 197 Cr.P.C. is to be decided at the stage of trial.

4. During course of hearing of this revision petition, learned counsel for the petitioner submitted that the order of the lower Court is self-contradictory and the very order of cognizance in absence of sanction under Section 197 Cr.P.C. is not sustainable in law and question of sanction can be raised at any stage of the proceeding. That apart, the allegations are false, fabricated and groundless. Moreover, the materials on record taken at the face value, even if taken to be true, do not make out any offence against the present petitioner. So, the impugned order should be set-aside.

5. On the other hand, learned senior standing counsel appearing for the Vigilance Department supported the impugned order.

6. Perused the materials on record. Admittedly, there is no sanction order under Section 19 of the Prevention of Corruption Act or under Section 197 Cr.P.C. for proceeding against the present petitioner. Fact remains that as on the date of taking cognizance, i.e., 18.05.2006, the present petitioner had already retired from service. The Apex Court in the case of ***State of M.P. vrs. Sheetla Sahai,*** (2009) 8 SCC 617 has held as follows :-

> "…… There exists a distinction between a sanction for prosecution under Section 19 of the Act and Section 197 of the Cr.P.C. Whereas

> in terms of Section 19, it would not be necessary to obtain sanction in respect of those who had ceased to be a public servant, Section 197 of the Code of Criminal Procedure requires sanction both for those who were or are public servants."

So, in view of such position of law, no sanction under Section 19 of the Prevention of Corruption Act is required.

7. The learned Special Judge, Vigilance, Bhubaneswar in the impugned order has observed that when the order taking cognizance was not challenged, the question of requirement of sanction under Section 197 Cr.P.C. was not to be considered at the stage of consideration of charge. In this regard, it would be appropriate to refer to a decision of the Apex Court in the case of ***Parkash Singh Badal and another vrs. State of Punjab and others,*** (2007) 1 SCC 1, wherein in paragraph-38 it has been held as follows :-

> "38. The question relating to the need of sanction under Section 197 of the Code is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage."

In view of such settled position of law, the learned Special Judge, Vigilance, Bhubaneswar should have considered the question of sanction by the time of considering the question of charge. This is a case of the year 2005. Already more than one decade has elapsed. So, in the interest of justice, this Court thinks it proper to consider and decide the question of requirement of sanction in this revision petition, moresover when both the counsels have addressed the said issue.

8. Learned counsel for the petitioner contended that even though the petitioner has ceased to be a public servant, sanction under Section 197 Cr.P.C. for his prosecution is a legal requirement. In this context, it would be appropriate to refer to a decision of the Apex Court in the case of ***Rajib Ranjan and others vrs. R. Vijaykumar,*** (2015) 1 SCC 513, at paragraph-18 held as follows :-

> "18. The ratio of the aforesaid cases, which is clearly discernible, is that even while discharging his official duties, if a public servant enters into a criminal conspiracy or indulges in criminal misconduct, such misdemeanor on his part is not to be treated as an act in

> discharge of his official duties and, therefore, provisions of Section 197 of the Code will not be attracted. In fact, the High Court has dismissed the petitions filed by the appellant precisely with these observations, namely, the allegations pertain to fabricating the false records which cannot be treated as part of the appellants' normal official duties. The High Court has, thus, correctly spelt out the proposition of law. The only question is as to whether on the facts of the present case, the same has been correctly applied."

In view of such settled position of law, no sanction under Section 197 Cr.P.C. was required for prosecution of the present petitioner who had been charge-sheeted for commission of offence under Sections 120-B/420 of IPC.

9. Coming to the factual aspects, it is noticed that the present petitioner was working as Executive Director (Finance) of the Corporation. It is alleged that the co-accused - S.R.K.K. Rajabahadur applied for housing loan of Rs.20 lacs for construction of a multistoried apartment in the schedule property which belonged to one Manash Ranjan Ray and Gouri Ray who had executed an unregistered General Power of Attorney in favour of the co-accused - S.R.K.K. Rajabahadur for construction of apartment. The loan proposal was scrutinized by the retainer of the Corporation who in his legal opinion dated 26.03.1997 had suggested that; (1) the land owners as well as the Developers may be asked to submit affidavit declaring that they are the owners in peaceful possession of the property and the same is free from litigation and they had neither encumbered the property nor shall encumber the same till all the dues of the Corporation are cleared; (2) taking shortage of the aforesaid property, the Developer may be asked to submit the collateral security over and above the shortage. The then C.M.D. of the Corporation had sanctioned the loan on 02.04.1997 with conditions that; (1) Tripartite agreement should be executed by the owner of the Project land, S.R.K.K. Rajabahadur and ORHDC; (2) Landowners to join as confirming party to the loan transaction with the Builder; (3) Owner of the land should furnish affidavits declaring his "No Objection"; and (4) Guarantee be obtained from the collateral surety. But, ignoring the legal opinion and the conditions imposed by the C.M.D., the final installment of loan of Rs.10 lacs was released on 01.05.1997 and the present petitioner had approved the proposal of co-accused - S.R.K.K. Rajabahadur. Similarly, without spot verification, the co-accused recommended for release of the final installment and the present petitioner approved the proposal and released the loan to the owner on 09.06.1997.

10. The learned Special Judge, Vigilance, Bhubaneswar on consideration of the materials on record has rightly held that there is prima-facie material against the present petitioner. So, I do not find any illegality in the impugned order requiring interference by this Court in this revision petition.

11. Hence, this revision petition being devoid of any merit stands dismissed. L.C.R. received be sent back forthwith along with a copy of this order.

Revision dismissed.

2016 (II) ILR - CUT-1092

BISWANATH RATH, J.

O.J.C. NO. 6278 OF 2000

JAMINIKANTA DAS .....Petitioner

.Vrs.

R.D.C, CENTRAL DIVISION, CUTTACK & ORS. .....Opp. Parties

ODISHA PREVENTION OF LAND ENCROACHMENT ACT, 1972 – S.12(2)(3)

Whether after availing the revisional remedy U/s. 12(2) of the O.P.L.E. Act, it was open to the parties to again resort to a revisional remedy U/s. 12(3) of the said Act ? Held, No – Only option left with a party to file a writ petition. (Para 10)

Case Laws Referred to :-

1. 1977 CLT-665 Vol.XLIII : Chaitan Mohapatra -V- Member, Board of Revenue.

For Petitioner : M/s. P.K.Nanda, G.D.Singh & P.K.Nanda
For O.Ps.1 to 5 : Addl. Standing Counsel
For O.Ps.6 to 20 : None

Date of hearing : 07.10.2016
Date of Judgment : 07.10.2016

JUDGMENT

BISWANATH RATH, J.

In filing this writ application, the petitioner has challenged the orders under Annexures-4, 6 & 7.

2. In assailing the impugned orders, particularly, in respect of the orders under Annexures-6 & 7, Sri Nanda, learned counsel for the petitioner, vehemently urged that in view of first round of litigation under the O.P.L.E. Act ended in an outcome in the revision at the instance of the petitioner, the second round of proceeding at the instance of the villagers taking resort to the provision under Section 12(3) of the O.P.L.E. Act as well as the order in appeal following the direction in the revision were not maintainable. The petitioner consequently claimed that the impugned orders under Annexures-6 & 7 are all without jurisdiction as contrary to the provisions of the O.P.L.E. Act, 1972.

3. There is no appearance on behalf of the private opposite parties in spite of the fact that there is already appearance of a set of counsel on their behalf pursuant to the notice in the writ application.

4. Short background involved in this case is that in the first round of litigation challenging the recording of the name of the petitioner in Annexure-3, as against the disputed plot, a set of people claiming to be the residents of the locality initiated a proceeding, vide Encroachment Appeal No.17/1991 on the file of the Sub-Collector, Jagatsinghpur. This matter, as appears, was finally concluded with an order favouring the present private opposite parties, as appearing at Annexure-4.

Being aggrieved by the order in Annexure-4, the petitioner preferred a revision under Section 12(2) of the Act, 1972 registered as Encroachment Revision No.1/1993. This revision was concluded considering the rival contentions of the parties with an order allowing the revision, setting aside the order passed by the appellate authority and confirming the order recording the name of the petitioner in Annexure-3.

While the matter stood thus, a set of villagers filed a revision taking resort to Section 12(3) of the O.P.L.E. Act registered as O.P.L.E.Revision Case No.3/1995. This revision was disposed of by the Revenue Divisional Commissioner, Central Division, Cuttack, by Annexure-6 with an order of remand to the revisional authority. Based on the order of remand, the A.D.M., Jagatsinghpur, functioning as the revisional authority, re-opened the Encroachment Revision No.1/1993 and by the final order under Annexure-7, held against the petitioner.

In assailing the impugned orders in Annexures-6 & 7, Sri Nanda, learned counsel for the petitioner, contended that a revision under Section 12(2) of the O.P.L.E. Act was disposed of at the first instance favouring the

petitioner. This order having not been challenged by any concern in higher forum, the order not only remained final but remaining the order in the revision under Section 12(2) of the Act, a revision under Section 12(3) of the Act was not maintainable and thus, a request is being made for setting aside both the orders under Annexures-6 & 7.

5. Sri Dash, learned Additional Standing Counsel appearing for O.Ps.1 to 5, defending the orders under Annexures-6 & 7 raised two points; one that the petitioner has not approached the Courts with clean hand, for which the writ application should be dismissed and secondly, the petitioner having not challenged the order of remand passed by the Revenue Divisional Commissioner, Central Division, Cuttack, in exercise of power under Section 12(3) of the O.P.L.E. Act, vide Annexure-6, and surrendering to the exercise of the revisional authority is precluded from taking such ground at this level. Sri Dash also contended that the proposition led by the learned counsel for the petitioner is also hit by a decision of this Court in Vol.XLIII (1977) CLT Page-664.

6. Considering the rival contentions of the parties, this Court finds, there is no denial to the fact that the order passed in the Encroachment Revision No.1/1993, vide Annexure-5, remained unassailed, and therefore, remained confirmed.

7. Now the question remains as to whether the proceeding, vide O.P.L.E. Revision Case No.3/1995 is maintainable firstly remaining the order passed in the revision under Section 12(2) of the Act unchallenged and secondly, if a revision can be filed assailing the order in the revision under Section 12(2) of the Act and thirdly, if O.P.L.E. Revision Case No.3/1995 is maintainable in view of the provisions contained in Section 12(3) of the O.P.L.E. Act ?

8. Section 12(3) of the O.P.L.E. Act reads as follows :-

> "Sections-12(3)- The Revenue Divisional Commissioner having jurisdiction may call for and examine the records of any proceedings under this Act before any officer in which no appeal or revision lies and if such officer appears-
>
> a) to have exercised a jurisdiction not vested in him by law ; or
> b) to have failed to exercise a jurisdiction so vested ; or
> c) while acting in the exercise of his jurisdiction to have contravened some express provision of law affecting the decision on the merits, where such contravention has resulted in serious miscarriage of justice, it may after giving the parties concerned a reasonable opportunity of being heard pass such order as it deems fit."

Reading of the aforesaid provision makes it clear that the Revenue Divisional Commissioner having jurisdiction may call for and examine record of any proceeding in the case where no appeal or revision lies and pass the consequential order looking to the niceties indicated therein.

9. Taking into consideration the entire dispute involved in this case, this Court finds, the dispute involved has already got the attention of appeal and revision under the O.P.L.E. Act and the revisional order in exercise of power under Section 12(2) of the Act has not been challenged by either the State or the private opposite parties, in any higher forum and as such, the order, vide Annexure-5 remained final. Having already availed a revisional remedy, it was not open to the parties to again resort to a revisional remedy taking aid of Section 12(3) of the O.P.L.E. Act. Looking to the provisions quoted herein above, this Court finds private O.P. had the only option of a writ petition and this Court finds, the second round of litigation in O.P.L.E. Revision Case No.3/1995 was not maintainable. Consequently, the order passed in Anenxure-6 is also not maintainable and the order, vide Annexure-7 being an order arising out of the direction in Annexure-6, also becomes bad.

10. Now considering the contentions of Mr.S.Dash, learned State Counsel referring to a decision reported in Vol.XLIII-1977 CLT-665 a decision of the Division Bench in the matter of ***Chaitan Mohapatra –vrs- Member, Board of Revenue*** that the second Revision was very much maintainable in view of the decision rendered by the Division Bench therein, considering the same, this Court finds, there is no question of involvement of two revisions in the said case. The fact available therein discloses that a revision being preferred by the petitioner therein before the Revenue Divisional Commissioner for the first time, by order dated 19.01.1976, the Commissioner returned the petition for its presentation before the competent authority and when the petitioner placed the revision before the Board of Revenue, the Board of Revenue also returned the same directing the parties to present the case before the competent authority, the R.D.C. Thus, the question involved therein was that whether the revision under Section 12(3) of the Act lie before the R.D.C. or the Board of Revenue ? For the ratio made therein involving particular fact therein, the Division Bench held that it is the Board of Revenue and not the Revenue Divisional Commissioner has the jurisdiction to deal with the revision under Section 12(3) of the Act. Above is not the case here. The case at hand involves as to whether after availing the revisional remedy under Section 12(2) of the O.L.R. Act, if parties to the proceeding still have a right to carry a revision under Section 12(3) of the O.L.R. Act ? Thus, the decision

cited by Mr.Dash is clearly distinguishable and inapplicable to the present case.

Under the circumstances, this Court finds, both the impugned orders challenged herein above in Annexures-6 & 7 are not sustainable in the eye of law and while setting aside both the orders, vide Annexures-6 & 7, this Court restores the order vide Annexure-5. The writ application stands allowed. Parties to bear their respective cost.

Writ application allowed.

2016 (II) ILR - CUT-1096

S. K. SAHOO, J.

CRREV NO. 491 OF 2000

RADHAKRUSHNA BEHERA .....Petitioner

.Vrs.

STATE OF ORISSA .....Opp. party

PENAL CODE, 1860 – S.366

Kidnapping – Evidence shows that the victim was more than eighteen years at the time of occurrence – Victim accompanied the petitioner from place to place, without protest, despite ample opportunity – She took vermilion on her forehead and went for joint photograph with the petitioner – No evidence that she was moving with the petitioner by force or inducement – prosecution failed to establish the ingredients of the offence U/s 366 I.P.C. against the petitioner beyond all reasonable doubt – Held, impugned judgment of conviction and sentence U/s 366 I.P.C. is setaside. (para 11)

Case Laws Referred to :-

1. AIR 1965 (SC) 942 : S. Varadarajan –Vrs.- State of Madras
2. AIR 1995 (SC) 2169 : Shyam –Vrs.- State of Maharashtra
3. AIR 1994 (SC) 966 : State of Karnataka -Vrs.- Sureshbabu Puk Raj Porral

For Petitioner : Hemanta Kumar Behera
For Opp. Party : Mr. Dillip Kumar Mishra, Addl. Govt. Adv.

Date of Hearing : 22.09.2016
Date of Judgment : 22.09.2016

JUDGMENT

S. K. SAHOO, J.

The petitioner Radhakrushna Behera faced trial in the Court of learned Chief Judicial Magistrate -cum- Asst. Sessions Judge, Mayurbhaj, Baripada in Sessions Trial Case No.29/133 of 1992 for offences punishable under sections 366 and 376 of the Indian Penal Code for kidnapping the victim "AB" on 06.12.1991 at about 8.00 a.m. with intention that she may be compelled to marry against her will and also committed rape on her.

The learned Trial Court found the appellant guilty under both the offences and sentenced him to undergo rigorous imprisonment for a term of seven years on each count and to pay a fine of Rs.1000/- on each count, in default, to undergo R.I. for a term of three months on each count and the substantial sentences were directed to run concurrently. The petitioner carried an appeal to the Court of Session which was heard by learned Sessions Judge, Mayurbhanj, Baripada in Criminal Appeal No.153 of 1993. The learned Appellate Court acquitted the appellant under section 376 of the Indian Penal Code but uphold the conviction and sentence passed by the learned Trial Court under section 366 of the Indian Penal Code.

2. The prosecution case, in short, as per the First Information Report (Ext.1) lodged by Bipin Behera (P.W.1), the father of the victim is that the victim was aged about 14 years at the time of occurrence which took place on 06.12.1991 at about 8 a.m. She had been to a homeopathy doctor along with one Smt. Jayanti Behera @ Dukhini Behera (P.W.2). At about 10.00 a.m. the P.W.2 came and informed the informant that while she and the victim were returning after purchasing medicine, the petitioner obstructed them on the way and asked the victim to accompany him. When the victim did not agree, the petitioner threatened him with dire consequences and forcibly took her. After getting such message from P.W.2, the informant and his son immediately went in search of the victim but could not locate her and accordingly returned home. On 09.12.1991 the informant got the message that the petitioner had kept the victim in the house of his brother-in-law Chitaranjan Behera. Immediately the informant went there and reached at the house of Chitaranjan Behera. At that point of time, Chitaranjan Behera was not in the house but his wife is present and she told that the petitioner had come with the victim in the afternoon on 06.12.1991 and after taking tiffin, they had left. Accordingly, the informant returned back home where he came to know from the villagers that the petitioner had already returned to his house with the victim and had confined the victim.

Accordingly, the FIR was lodged before the Officer in Charge of Jharpokharia Police Station, on the basis of which Jharpokharia P.S. Case No. 62 of 1991 was registered under section 366 of the Indian Penal Code against the appellant.

3. P.W.6 Basant Kumar Patra who was the A.S.I. of Police attached to Jharpokharia Police Station took up investigation of the case and during course of investigation, he examined the informant, visited the spot, examined other witnesses and rescued the victim girl from the house of the petitioner. The petitioner and victim were sent for medical examination to the District Headquarters Hospital, Baripada and the petitioner was arrested and forwarded to the Court. P.W.6 examined some more witnesses, seized the In and Out Register of Kalika Lodging of Baripada and released the same in the zima of the owner of the lodge under Zimanama Ext.3. He also seized the school leaving certificate of the victim on 04.01.1992 under seizure list Ext.4 and after completion of investigation, charge sheet was submitted against the petitioner under section 366 of the Indian Penal Code on 17.01.1992..

4. After submission of charge sheet, the case was committed to the Court of Session for trial after observing due committal procedure and it was transferred to the Court of Assistant Sessions Judge, Mayurbhanj, Baripada for trial where the learned Trial Court charged the petitioner under sections 366 and 376 of the Indian Penal Code on 14.09.1993 and since the petitioner refuted the charge, pleaded not guilty and claimed to be tried, the Sessions trial procedure was resorted to prosecute him and establish his guilt.

5. During course of trial, in order to prove its case, the prosecution examined nine witnesses.

P.W.1 Bipin Behera is the informant in the case and father of the victim. He stated about the information received from P.W.2 regarding kidnapping of the victim by the petitioner.

P.W.2 Dukhini Behera stated to have accompanied the victim to bring homeopathy medicine on the date of occurrence and she stated about the overt act committed by the appellant with the victim which she disclosed before the mother of the victim.

P.W.3 Dayal Guru Mahanta and P.W.4 Bulu Babu Mahata did not support the prosecution case.

P.W.5 is the victim.

P.W.6 Basanta Kumar Patra was the A.S.I. attached to Jharpokharia Police Station who is also the Investigating Officer.

P.W.7 Dr. Minati Majhi was attached to the District Headquarters Hospital, Baripada who examined the victim on 11.12.1991 and proved her medical report vide Ext.6

P.W.8 Dr. Shankarlal Thakkar was the Radiologist attached to District Headquarters Hospital, Baripada who conducted ossification test of the victim to determine her age and he opined that the age of the victim was fifteen to sixteen and half years and accordingly proved the report Ext.7.

P.W.9 Manoranjan Mahanta was the Manager of Kalika Lodge at Baripada and he stated about the seizure of the guest register of the lodge by the police under seizure list Ext.2.

The prosecution exhibited eight documents. Ext.1 is the written report, Ext.2 is the seizure list, Ext.3 is the zimanama, Ext.4 is the seizure list, Ext.5 is the school leaving certificate, Ext.6 is the report of P.W.7, Ext.7 is the report of P.W.8 and Ext.8 is the report of Dr. P.C. Praharaj.

The prosecution proved one joint photograph as the material object which was marked as M.O.I.

6. The defence plea of the petitioner is one of denial.

7. The learned Trial Court on analysis of the evidence on record came to hold that at best the age of the victim girl can never be more than seventeen years. It was further held that the evidence of P.W.5, the victim is believable. Accordingly, the learned Trial Court held that on careful scrutiny of the evidence brought on record, the irresistible conclusion is that the prosecution has been able to bring home the charge under sections 366 and 376 of the Indian Penal Code against the petitioner beyond all reasonable doubt.

The learned Appellate Court discussed in paragraph-6 of the judgment about the age of the victim and has been pleased to observe that the victim had crossed 18 years and she was major at the time of occurrence. Learned Appellate Court further held that the facts and circumstances of the case go a long way to show that the petitioner had abducted the victim with intent to compel her to marry him against her will and it was not a voluntary move on her part. The learned Appellate Court mainly relying on the evidence of the doctor which indicates that there was no sign of recent sexual intercourse has been pleased to acquit the petitioner of the charge under section 376 of the Indian Penal Code while upholding the conviction under section 366 of the Indian Penal Code.

8. Learned counsel for the petitioner, Mr. Hemanta Kumar Behera contended that when the learned Appellate Court has held the victim to be

major at the time of occurrence and the statement of the victim indicates that she had moved from place to place with the petitioner without raising any hullah or complaining against the petitioner at any point of time though she had ample scope and opportunity, it cannot be said that there was any abduction. The learned counsel further submitted that the victim was a consenting party and she has stayed with the petitioner not only in the relation's house of the petitioner but also in the Lodge and in the house of the petitioner when she was rescued and therefore, the ingredients of the offence under section 366 of the Indian Penal Code are not attracted.

Mr. Dillip Kumar Mishra, learned Additional Government Advocate on the other hand contended that if the evidence of the victim at the threshold should be taken into consideration, it is apparent that she was kidnapped by force and the learned Appellate Court was not justified in holding that the victim was aged about eighteen years when from the statement her mother, school leaving certificate, it appears that she was fourteen to fifteen years at the time of occurrence.

9. Section 366 of the Indian Penal Code deals with kidnapping, abducting or inducing woman to compel her for marriage to any person against her will or that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse.

For kidnapping from the lawful guardianship, section 361 of the Indian Penal Code is relevant which indicates that not only the female victim should be under the age of eighteen years but there must be material that she had been taken away or enticed by the accused out of the keeping of the lawful guardianship. The word "take" means to cause to go, to escort or to get into possession. The word "entice" involves an idea of inducement of exciting hope or desire in the other.

'Abduction' has been defined under section 362 of the Indian Penal Code which indicates that there must be compulsion by force or any deceitful means for inducing any person to go from any place. Where no force or deceitful means is practised on the person stated to have been abducted, no conviction for abduction shall stand. In other words, if there is consent of the person moved, that to freely and voluntarily then the ingredients of abduction will not be attracted.

Kidnapping from lawful guardianship is committed only in respect of a minor or person of unsound mind whereas abduction is in respect of any person. If the girl is eighteen or over and if the boy is sixteen or over, she or he could only be abducted and not kidnapped. If she was under the age of

eighteen or the boy was under the age of sixteen, she or he could be kidnapped as well as abducted if the taking was by force or if the inducement was by any deceitful means.

10. In this case, the evidence of the victim who has been examined as P.W.5 is very relevant. In the chief examination, she has stated that while she was returning with P.W.2 after bringing some homeopathy medicine at about 10.00 a.m., the petitioner came from the opposite direction and directed them not to move further and directed P.W.2 to go away so that he can take her. The victim has further stated that she along with P.W.2 and her minor daughter entered into the house of a man and since the petitioner threatened to stab the house owner, he drove her out of his house and then the petitioner forcibly dragged her and dealt a slap on her cheek and threatened P.W.2 with a knife and then took her to different places.

However, in the cross-examination, the victim has stated that there are houses of other persons at Manabhanja near the house inside which she entered with P.W.2. She has further stated that though there were some villagers at that place while she was running to the house of a man but she did not tell anything to those persons. The victim further stated that the petitioner was holding her hand at Manabhanja Crossing. She further stated that she along with the petitioner went to Bombay Chhak in a truck by sitting in the cabin where the driver, cleaner and one labourer were present. The victim has further stated that at Bombay Chhak, there were number of shops and they stayed there for about five minutes and then in a car both of them went to Rairangpur and at Rairangpur, the petitioner left her at Nisamani Lodging and went to bring tiffin and there were some more person in that hotel at that time. The victim further stated that she had taken a photograph with the petitioner in a photo studio and she stayed in the sister's house of the petitioner at Rairangpur for about half an hour and then she came from Rairangpur to Baripada with the petitioner in a bus where she has sitting in the ladies' seat of the bus along with other ladies and after getting down at Baripada Bus Stand, both of them went to Kalika Lodge. She further stated that while they were staying at Kalika Lodge, the petitioner was going out to bring tiffin and meal for her and at that time she was staying in that Lodge and the Manager and servants of that Lodge were then present in the Lodge. The victim has further stated that at Baripada, the petitioner gave her another saree and she was using vermillion during her stay with the petitioner and that the parents and other family members of the petitioner were present while he took her to his house. It has been confronted to the victim and

proved through the Investigating Officer that she has not stated before police that at the time of returning, out of fear she along with P.W.2 returned back to village Manabhanja and entered inside the house of a man but due to threatening made by the petitioner, the said house owner drove them out. The victim has also not stated before the Investigating Officer that the petitioner threatened P.W.2 with a knife due to which P.W.2 fled away and also threatened her to murder in case she does not follow him. The victim has also not stated before police that at Nisamani Lodge of Rairangpur, the petitioner forced her to sleep with him and committed sexual intercourse with her. She has also not stated before police that as per the instruction of the petitioner, she did not disclose the fact to anybody either at Bombay Chhak or in the house of the sister of the petitioner at Rairangpur.

Thus the evidence on record clearly indicates that the victim had got ample opportunity at different places either while moving on the road or in the bus or in the car or staying at the Lodging to complain against the petitioner or to protest against the activities of the petitioner but nowhere she had made any complain or protest. She not only accompanied the petitioner from place to place freely without any hitch but took vermilion on her forehead and went to the photo studio for taking joint photograph with the petitioner. All these circumstances indicate that the victim had not only attended the age of discretion but she was acting freely and there was no compulsion or force on her to move from one place to another. There is also absence of any material on record that any deceitful means or any inducement was given to the victim for moving from one place to the other, which is one of the ingredients of the offence of abduction.

In case of **State of Karnataka -Vrs.- Sureshbabu Puk Raj Porral reported in AIR 1994 Supreme Court 966**, it is held as follows:-

> "7. Now coming to the evidence of PW 7, she deposed that she went along with the sister of the accused to the bus stand and got into the bus and went to several places and stayed with the accused in lodges and that the accused had intercourse with her. She, however, added that the accused was having intercourse against her will. She was cross-examined at length and we find several omissions in her previous statement. In the cross-examination the defence tried to elicit from her as to what exactly the accused did to her in those places during night. She went on saying that the accused did something to her which he ought not to have done. She admitted that her statement was the same before the police also. The learned Single Judge of the

High Court especially pointed out this aspect and observed that it is very difficult to infer that the accused had intercourse with her. Therefore in the absence of some other evidence to support the prosecution case that the accused had intercourse with her, in our view, the High Court was not wrong in holding that the offence under Section 376 I.P.C. is not made out. Now, coming to the offence of kidnapping punishable under Section 366 I.P.C., again her age is doubtful. That apart, PW 7's evidence shows that she went with the accused voluntarily. When the age is in doubt, then the question of taking her away from lawful guardianship does not arise. However, the second requirement that taking or enticing away a minor out of the keeping of the lawful guardian is an essential ingredient of the offence of kidnapping. In the instant case, we are not concerned with enticement. But what we have to find out is whether the part played by the accused amounts to taking out of the keeping of the lawful guardian. From the evidence of PW 7, it is clear that she was also anxious to go with the accused to see places. In such a case, it is difficult to hold that the accused had taken her away from the keeping of her lawful guardian and something more has to be shown in a case of this nature like inducement."

In case of **Shyam –Vrs.- State of Maharashtra reported in AIR 1995 Supreme Court 2169** while dealing with a case under section 366 of the Indian Penal Code, it was held as follows:-

"3. In her statement in Court, the prosecutrix has put blame on the appellants. She has deposed that she was threatened right from the beginning when being kidnapped and she was kept under threat till the police ultimately recovered her. Normally, her statement in that regard would be difficult to dislodge, but having regard to her conduct, as also the manner of the so-called "taking", it does not seem that the prosecutrix was truthful in that regard. In the first place, it is too much of a coincidence that the prosecutrix on her visit to a common tap, catering to many, would be found alone, or that her whereabouts would be under check by both the appellants/accused and that they would emerge at the scene abruptly to commit the offence of kidnapping by "taking" her out of the lawful guardianship of her mother. Secondly, it is difficult to believe that to the strata of society to which the parties belong, they would have gone unnoticed while proceeding to the house of that other. The prosecutrix cannot be

said to have been tied to the bicycle as if a load while sitting on the carrier thereof. She could have easily jumped off. She was a fully grown up girl may be one who had yet not touched 18 years of age, but, still she was in the age of discretion, sensible and aware of the intention of the accused Shyam, That he was taking her away for a purpose. It was not unknown to her with whom she was going in view of his earlier proposal. It was expected of her then to jump down from the bicycle, or put up a struggle and, in any case, raise an alarm to protect herself. No such steps were taken by her. It seems she was a willing party to go with Shyam- the appellant on her own and in that sense there was no "taking" out of the guardianship of her mother. The culpability of neither Shyam, A-1 nor that of Suresh, A-2, in these circumstances, appears to us established. The charge against the appellants/accused under Section 366, I.P.C. would thus fail. Accordingly, the appellants deserve acquittal."

In case of **S. Varadarajan –Vrs.- State of Madras reported in AIR 1965 Supreme Court 942** it is held as follows:-

"Taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping.

xxx xxx xxx xxx

But when the girl (who though a minor had attained the age of discretion and is on the verge of attaining majority and is a senior college student) from the house of the relative of the father where she is kept, herself telephones the accused to meet her at a certain place, and goes there to meet him and finding him waiting with his car gets into that car of her own accord, and the accused takes her to various places and ultimately to the Sub-Register's Office where they get an agreement to marry registered, and there is no suggestion that this was done by force or blandishment or anything like that on the part of the accused but it is clear from the evidence that the insistence of marriage came from her side, the accused by complying with her wishes can by no stretch of imagination be said to have "taken" her out of the keeping of her lawful guardianship, that is, the father.

The fact of her accompanying the accused all along is quite consistent with her own desire to be the wife of the accused in which the desire of accompanying him wherever he went is of course implicit. Under these circumstances no inference can be drawn that the accused is

> guilty of taking away the girl out of the keeping of her father. She has willingly accompanied him and the law does not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him.
>
> There is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though it cannot be laid down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of S.361. Where the minor leaves her father's protection knowing and having capacity to know the full import of what she is doing, voluntarily joins the accused person, the accused cannot be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.
>
> It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection, no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. If evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl. But that part falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking"."

11. Coming to the age of the victim (P.W.5), the doctor conducting ossification test has stated that her age would be fifteen to sixteen and half years. The school leaving certificate vide Ext.5 indicates her age to be 06.05.1977. The father of the victim has stated her age to be fourteen years.

The victim on the other hand has stated in her cross-examination that her elder brother was aged about twenty four to twenty five years and she was the third issue of her parents and the second issue was a son who was two years younger to the eldest issue and that she was three years younger to

the second issue. If this evidence of the victim is taken into consideration then the age of the victim can be said to be about nineteen years. No doubt in view of the school admission register, the age of the victim was less than eighteen years but when the birth certificate has not been proved and P.W.1 who was the most competent witness to state about the age of the victim has not stated the exact date of birth of the victim and when the statement of the victim indicates that she was nineteen years, no fault can be found with the findings of the learned Appellate Court that the victim was more than eighteen years at the time of occurrence.

The finding of the learned Appellate Court that the move of the victim (P.W.5) was not voluntary is negatived by what has been elicited in her cross-examination. When the prosecution has failed to bring any material on record that there was any force or compulsion or inducement to the victim or any deceitful means was adopted on her by the petitioner to move from one place to another and when the surrounding circumstances indicate that the victim had attended the age of discretion and being sensible and aware of the intention of the petitioner moved with him on her freewill and no where raised any complain or objection against the petitioner, since all these aspects have not been duly considered by the learned Trial Court as well as Appellate Court, I am of the view that accepting the concurrent findings of fact will lead to miscarriage of justice and perversity and therefore, as special and exceptional circumstances and in the interest of justice, I am inclined to hold that the prosecution has utterly failed to establish the ingredients of the offence under section 366 of the Indian Penal Code against the petitioner beyond all reasonable doubt.

In the result, the Criminal Revision petition is allowed and the impugned judgments and order of conviction and sentence passed there under is hereby set aside and the petitioner is acquitted of the charge under section 366 of the Indian Penal Code. The petitioner is on bail by virtue of the order of this Court. He is discharged from liability of his bail bond. The personal bond and the surety bond stand cancelled.

Revision allowed.

2016 (II) ILR - CUT-1107

S. K. SAHOO, J.

RPFAM NO. 21 OF 2014

SUBASH DARJEE ……..Petitioner

.Vrs.

BASANTI DARJEE ……..Opp. Party

CRIMINAL PROCEDURE CODE, 1973 – S.125

Mother's application for maintenance against one of her sons – Maintainability – Whether other sons and daughters are required to be made parties and their living standard is to be adjudicated in the proceeding ? – Nothing on record that her other sons are physically incapable and not able-bodied – Held, for proper adjudication, other sons should be arrayed as opposite parties in the proceeding – However its not necessary to make daughters as parities who are married. (Para 8)

Case Laws Referred to :-

1. 1988 (CLJ) 6 : A. Ahathinamiligai -Vrs.- Arumughnam
2. 2001 (CLJ) 2111 : Mahendrakumar -Vrs.- Gulabbai
3. 1995 MPLJ 319 : Bharat Lal -Vrs.- Bhanumati
4. (2005) 2 CALLT 553 Anima Majhi -Vrs.- Arun Majhi
5. 2013 (II) Orissa Law Reviews 599 : Smt. Kuni Dei @ Kuni Behadi -Vrs.- Pabitra Mohan Behadi
6. Vol.53 (1982) Cuttack Law Times 53 : Basanta Kumari Mohanty -Vrs.- Sarat Kumar Mohanty

For Petitioner : Mr. H.S. Mishra, P, Agarawal, A.Parida, K.Badhal

For Opp. Party : Mr. Trilochan Nanda, K. Dash, B.K.Panda

Date of hearing : 21.09.2016

Date of judgment : 21.09.2016

JUDGMENT

S. K. SAHOO, J.

This revision petition has been filed by the petitioner Subash Darjee challenging the impugned order dated 30.11.2013 passed by the learned Judge, Family Court, Balangir in C.M.C. No. 1/37 of 2012-13 in rejecting the application filed by the petitioner to hold that the application filed by the opposite party Basanti Darjee, the mother of the petitioner under section 125 of Cr.P.C. as not maintainable for not impleading the other sons and daughters of the opposite party as parties in the application.

2. The opposite party Basanti Darjee filed an application under section 125 of Cr.P.C. claiming maintenance against the petitioner Subash Darjee. It is her case that she is a widow and the petitioner is her eldest son and her husband died on 21.04.2008 and she is blessed with two other sons and two daughters but the other sons are living hand to mouth for which they were not made parties in the proceeding. It is her further case that the late husband of the opposite party left behind some properties which have been forcibly occupied by the petitioner and there are also rented houses and shop rooms and the petitioner is appropriating all the rents and profits of the house properties. It is her further case that the opposite party and her daughter have filed Civil Suit No. 144 of 2011 in the Court of the learned Civil Judge (Senior Division), Balangir for partition and other reliefs and the petitioner and other children of the opposite party are parties to the said suit. It is the case of the opposite party that the petitioner drove her out of the ancestral house and she was not provided with food and clothing and abusive language was hurled at all times and the petitioner had no respect for her. It is her further case that she is an old lady and suffering from various ailments and the petitioner has denied food and clothing to her and she is unable to maintain herself out of the properties left behind by her late husband because of the high handed and illegal action of the petitioner and that the petitioner had gone to the extent of assaulting her for which she approached the police on several occasions for protection. It is further stated in her application that the petitioner is a man of means and he is in forcible possession of all the properties left behind by his father and also working as a lecturer in Dahimal College, Tusura and he is also running a coaching centre and his monthly income is around Rs.70,000/-. In spite of having sufficient means, the petitioner is refusing and neglecting to maintain her and accordingly, the monthly maintenance of Rs.7,000/- from the date of application i.e. 02.01.2012 was claimed by the opposite party against the petitioner.

3. On being noticed, the petitioner filed his show cause, inter alia, disputing the averments made in the 125 Cr.P.C. application. It is the case of the petitioner that another son of the opposite party namely Bikash Ranjan Darjee is having flower shop nearer to the Samaleswari Temple namely "Mahalaxmi Pushpa Bhandar" and his monthly income is not less than Rs.20,000/- and that he is also a Railway and Air E-ticket travel agent and his income is not less than Rs.5000/- per month. It is further stated in the show cause that the opposite party and her son Bikash and daughter Kamalini were jointly residing in the dwelling house which measures an area of 3440 Sq. feet. It is further stated in the show cause that the petitioner has got no

objection if the opposite party stays with his family but she is adamant and stays with her other son Bikash and daughter Kamalini and the later works as an Assistant Teacher in Khamarmunda Government Primary School and getting a salary of Rs.20,603/-. While disputing his own income, the petitioner stated in his show cause that he only gets Rs.3000/- while working as a lecturer in Political Science in the Privately Managed College of Dahimal. It is further stated that Nalini, Kamalini and Bikash have joined hands for not providing basic necessities of life to the opposite party.

4. The petitioner filed an application with a prayer to dismiss the 125 Cr.P.C. application on the ground that the other sons and daughters have not been arrayed as opposite parties and that the petitioner has been singled out by the opposite party with an ulterior motive. The opposite party filed her objection that the application filed by the petitioner regarding maintainability is a frivolous one and liable to be dismissal.

5. The learned Judge, Family Court, Balangir vide impugned order has been pleased to hold that the petitioner is the master of litigation and he/she would decide against whom he/she would fight out the litigation. It is further held that the opposite party has not arrayed her other sons and daughters except her eldest son (petitioner) as a party and there is nothing provided under section 125 Cr.P.C. that such a prayer of the opposite party against the petitioner is not maintainable in law and accordingly, the petition filed by the petitioner challenging the maintainability of the 125 of Cr.P.C. application on the ground that the other sons and daughters have not been arrayed as opposite parties was turned down.

6. The learned counsel for the petitioner contended that the other sons and daughters are equally liable to maintain the opposite party and in the objection, the petitioner has specifically stated that the other son and daughter of the opposite party have sufficient means to maintain the opposite party and therefore, in the fitness of things, the learned Judge, Family Court, Balangir should have directed the opposite party to at least implead her other sons as parties. He further contended that what would be the quantum of maintenance against the other sons is a complete different aspect which is to be adjudicated at the appropriate stage but the other sons of the opposite party being the necessary parties for better adjudication of application under section 125 Cr.P.C., they should have been arrayed as opposite parties along with the petitioner.

Learned counsel for the opposite party on the other hand placed reliance in case of **A. Ahathinamiligai -Vrs.- Arumughnam reported in**

1988 Criminal Law Journal 6 wherein it is held that it cannot be accepted as a proposition of law that unless all the children are made parties in a claim for maintenance by the parents, the latter would not be entitled for an order of maintenance. Learned counsel for the opposite party further placed reliance in case of **Mahendrakumar -Vrs.- Gulabbai reported in 2001 Criminal Law Journal 2111** wherein the decision of the Madras High Court in case of **A. Ahathinamiligai** (Supra) was relied upon and similar view was taken. Learned counsel for the opposite party further relied upon in case of **Bharat Lal -Vrs.- Bhanumati reported in 1995 MPLJ 319** wherein it is observed that it was not desirable even though a son or a daughter has sufficient means, his or her parents would starve. It is also their duty to look after their parents when they become old and infirm. The learned counsel for the opposite party further placed reliance in case of **Anima Majhi -Vrs.- Arun Majhi reported in (2005) 2 CALLT 553** wherein it is held that the mother is residing at the charity and mercy of her daughter at the latter's house will not absolve the son of his solemn legal duty to maintain her.

Learned counsel for the petitioner on the other hand placed reliance in case of **Smt. Kuni Dei @ Kuni Behadi -Vrs.- Pabitra Mohan Behadi reported in 2013 (II) Orissa Law Reviews 599** in which a Division Bench of this Court has been pleased to observe that in a proceeding under section 125 Cr.P.C., the major sons have equal responsibility to maintain the parents and therefore, both Pabitra and his three sons are duty bound under the provisions of law to maintain Kuni by paying maintenance for her sustenance.

7. Section 125(1)(d) of Cr.P.C., inter alia, indicates that if any person having sufficient means neglects or refuses to maintain his father or mother who is unable to maintain himself or herself then a Magistrate of the First Class upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his father or mother.

Proceedings under Chapter-IX of the Code are in the nature of civil proceeding. Proceedings of the Civil Court are substantial whereas the proceedings under Chapter-IX of the Code are of a summary nature. The strict formula applied for adjudication of a civil proceeding or petition filed therein cannot and should not be mutatis and mutandis applied in proceeding under section 125 of Cr.P.C. Before passing an order of maintenance under section 125 of Cr.P.C., the Court has to be satisfied that the person against whom the maintenance is claimed has sufficient means and the person claiming maintenance is unable to maintain herself or himself and that the

person against whom maintenance is claimed is neglecting or refusing to maintain the person enumerated under clause (a), (b), (c) and (d).

In case of **Basanta Kumari Mohanty -Vrs.- Sarat Kumar Mohanty reported in Vol.53 (1982) Cuttack Law Times 53**, it is held as follows:-

> "7. No doubt an order under section 125 can be passed only if a person having sufficient means neglects or refuses to maintain his wife, child, parents etc. It is, however, well settled that the expression 'means' occurring in section 125 does not signify only visible means, such as, real property or definite employment and if a man is healthy and able-bodied, he must be held to be possessed of means to support his wife, child etc. The Courts have gone to the extent of laying down that the husband may be insolvent or a professional beggar or a minor or a monk, but he must support his wife so long as he is able-bodied and can eke out his livelihood."

8. In the present case, admittedly the other sons and daughters of the opposite party have not been impleaded as parties to the proceeding under section 125 of Cr.P.C. Though it is stated by the opposite party in her maintenance application that the other sons are living from hand to mouth but in the show cause, the petitioner has denied the same and stated specifically what one of the other sons of the opposite party was doing and what is his income. It is not disputed that the daughters of the opposite party are married. Whether the other sons of the petitioner are living from hand to mouth and whether they have got sufficient means are to be adjudicated at the appropriate stage of the proceeding by the Magistrate. Since there is nothing on record that the other sons of the opposite party are physically incapable and not able-bodied, therefore, it is necessary that they should be made as opposite parties in the 125 Cr.P.C. application as they have equal responsibility to maintain the opposite party. The opposite party is at liberty to claim or not to claim any maintenance amount against the other sons and similarly whether those sons are liable to pay maintenance to the opposite party or not in view of their means and what would be the quantum of maintenance against each of the opposite parties has to be decided by the Magistrate at the appropriate stage. I am of the view that by impleading the other sons as opposite parties in the 125 Cr.P.C. application, the opposite party will not be prejudiced in any way rather if they are not made as opposite parties and the petitioner succeeded in establishing by way of evidence that they are also having sufficient means and that they are also equally liable to maintain the opposite party, in that event the Magistrate

cannot pass any order of maintenance against the other sons if they not made parties in the 125 Cr.P.C. application.

Therefore, I am of the view that even though the option lies with the opposite party to claim maintenance against one of the sons amongst all her children but in the interest of justice and in peculiar facts and circumstances of the case, I am of the view that for proper adjudication of the maintenance proceeding, it is necessary that the other two sons namely Bikash Ranjan Darjee and Rasbihari Darjee should also be arrayed as opposite parties in the 125 Cr.P.C. proceeding. It is not necessary to make the daughters as opposite parties as they are married.

At this juncture, the learned counsel for the opposite party submits that the opposite party shall make an application before the learned Judge, Family Court, Balangir within fifteen days to implead the other two sons of the opposite party namely Bikash Ranjan Darjee and Rasbihari Darjee as opposite parties. If such an application is filed, the learned Judge, Family Court, Balangir shall allow such application, implead them as parties, issue notice to them and then proceed in accordance with law.

It is made clear that this Court has not expressed any opinion on the merits of the prayer of the opposite party to claim maintenance either against the petitioner or against the other sons which is to be decided strictly as per of the evidence adduced by the respective parties during course of proceedings under section 125 of Cr.P.C.

It is submitted by the learned counsel for the opposite party that the maintenance proceeding is of the year 2012 and therefore, direction may be given for expeditious disposal. Considering the submission, the learned Judge, Family Court, Balangir is directed to expedite the matter and try to dispose of the 125 Cr.P.C. proceeding within a period of six months from the date of service of notice on Bikash Ranjan Darjee and Rasbihari Darjee. With the aforesaid observation, the RPFAM is allowed.

RPFAM is allowed.

2016 (II) ILR - CUT-1113

S. N. PRASAD, J.

W.P.(C) NO. 3639 OF 2004

PROF. MOHAMMAD QUAMURUDDIN KHAN ……Petitioner

.Vrs.

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

SERVICE LAW – Recovery of excess payment of public money – Discretion of the Court – Amount paid/received without authority of law can always be recovered, barring few exceptions of extreme hardships but not as a matter of right.

In this case petitioner has withdrawn excess amount which is contrary to the statutory provisions as contained in statute 10(1)(a) of statute, 1996 – It can not be expected from the petitioner, who was holding the post of Vice Chancellor, that he was not aware of the statutory provision – Since petitioner is getting handsome pension, recovery from him will not be arbitrary, harsh or iniquitous – Held, the impugned decision to recover excess amount drawn by the petitioner can not be said to be illegal.

Case Laws Relied on :-

1. (2012) 8 SCC 417 : Chandi Prasad Uniyal & Ors. -V- State of Uttarakhand & Ors.
2. (2015) 4 SCC 334 : State of Punjab & Ors. -V- Rafiq Masih (White Washer) & Ors.

Case Laws Referred to :-

1. (1994) 2 SC 521 : Shyam Babu Verma v. Union of India
2. (2006) 11 SCC 709 : B.J Akkara v Govt. of India
3. (2009) 3 SCC 475 : Syed Abdul Qadir V. State of Bihar

For Petitioner : M/s. Milan Kanungo, Y.S.P.Babu, Y.Mohanty, S.Nanda & D.Pradhan.

For Opp. Parties : Mr. Amit Pattnaik, Addl.Govt.Adv. M/s.A.K.Mohapatra, R.C.Sahoo, J.M.Rout & B.P.Behera

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Date of Judgment: 28.07.2016

JUDGMENT

S.N. PRASAD, J.

This writ petition has been filed seeking for the following reliefs:

(i) To quash Annexure-8
(ii) To direct the opposite parties to pay fixed salary of Rs. 25, 000/- along with D.A as admissible from to time without deduction of pension during the said period.

2. The fact of the case of the petitioner as per the pleading made in the writ petition is that the petitioner joined as Professor under Revenshaw College on 24.8.1995. While working, State Bureau of Text Book Production and preparation, Bhubaneswar, he was appointed as Vice-chancellor of Berhampur University. He retired from Government service w.e.f 31.01.1996. The petitioner's service for the period from 31.01.1996 till 23.08.1998 has been treated as deputation on foreign service terms and conditions on his grade pay of Rs. 4500-6300/-. The petitioner has drawn his pay as Vice- Chancellor, @ Rs. 7600/- per month along with admission D.A. as per the provisions contained in Statute 10(1)(a) of the Orissa University (Amendment) Statute,(hereinafter to be referred to a "Statute,1996") from 1.2.1996 to 23.8.1998, i.e. the date of making over charge of the office of Vice-Chancellor. The petitioner while serving as Vice- Chancellor, the pay scale was revised by virtue of the recommendation of 5th pay Commission, which was implemented w.e.f. 1.1.1996 and according to the said recommendation, the salary for the post of Vice-Chancellor was fixed at Rs. 25,000/- per month. From time to time the authorities have paid the salary/ consolidated amount according to the post to which the petitioner was holding during the relevant time, but all on a sudden the authorities have taken a decision to make recovery of certain amount, which according to the petitioner is absolutely without any application of mind and there cannot be any recovery since the petitioner has not misrepresented anything.

3. Learned counsel representing the petitioner has submitted that if the order recovery is allowed to stand, it would be very harsh for the petitioner since he has already retired from service and as such, on this ground, the impugned order of recovery should be quashed.

4. Opposite party No.1- State and opposite party No.3-University have appeared and filed their respective counter affidavits taking a common stand, inter alia, standing the petitioner while on Government service working as Director, State Bureau of Text Book Production and preparation, Bhubaneswar has been appointed as Vice-Chancellor of Berhampur University on 24.08.1995 and continued for period of three years of to 23.08.1998. The petitioner retired from Govt. service w.e.f. 31.01.1996. The

competent authority of the State Government has taken a decision to count the period of service of the petitioner from 24.8.1995 to 31.1.1996 as deputation on foreign service terms and conditions. The petitioner has withdrawn his pay for the post of Vice-Chancellor @ Rs. 7600/- per month along with admissible D.A. as per the provisions contained under Statute 10(1) (a) of Statute, 1996 from 1.2.1996 to 23.8.1998. The provision as contained in Statute 10(1)(a) of Statute, 1996 envisages that a person after retirement from pensionable service appointed as Vice-Chancellor shall be entitled to draw such pay as will be arrived at after reducing the pay fixed under these statutes by the gross amount of person before commutation without temporary increase subject to a minimum of rupees twenty five thousand per month. According to the opposite parties, the petitioner was entitled to be given the salary of re-employment in pursuance to the provisions of Statute 10(1)(a) of Statute, 1996, but on re-employment in addition to his salary, the Vice- Chancellor has also drawn his provisional pension (without temporary increase), which he should not have drawn in view of the express provision contained in Statute 10(1) (a) of Statute, 1996. It has been contended that since the petitioner was holding the post of Vice-Chancellor and as such, it was his duty to draw the salary of the post as per the statutory provision, but he even knowing about the statute has withdrawn excess money and hence, the amount received by the petitioner in excess of his entitlement has been directed to be recovered and as such, no illegality has been committed by the authorities in taking a decision vide Annexure-8.

5. Mr. Amit Pattnaik, learned counsel for the State-opposite party has submitted that the petitioner has challenged Annexure-8, but in Annexure-8 his pay has also been fixed at Rs.25,000/- + D.A. per month with other stipulation that he should not draw pension and temporary increase during his re-employment as Vice-Chancellor, but the petitioner has challenged the entire Annexure-8, which contains his pay scale of Rs, 25,000/-.

6. Heard learned counsel for the parties. On perusal of the documents available on record, it is evident that the petitioner was initially engaged as Professor in English under Berhampur University and thereafter he was given the assignment to work as Director, State Bureau of Text Book Production and Preparation, Bhubaneswar and while he was working as such, he has been offered with the appointment to perform as Vice-Chancellor of Berhampur University, which he has accepted and immediately he joined and remained there up to 23.8. 1998 Normally, the age of superannuation of the petitioner working under the State Government was 31.1.1996 and hence, his

service from 24.8.1995 till 31.1.1996 has been treated as deputation of foreign service terms and conditions with his grade pay of Rs. 4500-6300/-. The petitioner has also drawn his pay as Vice-Chancellor @ Rs. 7600/- per month along with admissible D.A. as per the provisions contained in Statute 10(1) (a) of Statute,1996 for the period from 1.2.1996 to 23.8.1998. The petitioner has drawn his salary as Vice-Chancellor along with his provisional pension (without temporary increase), which was not permissible in view of the provisions contained in Statute 10(1)(a) of Statute, 1996, which needs to be referred as hereunder:

> "The Vice-Chancellor shall be paid a fixed salary of rupees twenty five thousand per month or as determined by University Grant Commission from time to time and dearness allowances as admissible from time to time with effect from 01.01.1996.
>
> Provided that a person after retirement from a pensionable service appointed as Vice-Chancellor, shall be entitled to draw such pay as will be arrived at after reducing the pay fixed under these statutes by the gross amount of pension before commutation without temporary increase subject to the minimum of rupees twenty five thousand per month.
>
> Provided further that a retired person not holding a pensionable post including persons who are covered by contributory fund scheme, on appointment as Vice-Chancellor, shall be allowed a fixed salary of rupees twenty five thousand and dearness allowance as admissible on rupees twenty five thousand from time to time, and in case of a person continuing in service on appointment as Vice-Chancellor shall be paid a fixed salary of rupees twenty five thousand and dearness allowance as admissible on rupees twenty five thousand from time to time."

7. By going through the provisions of Statute 10(1)(a) of Statute, 1996, it is apparent that the petitioner is coming under the parameters of the first proviso of the said provisions, which was implemented w.e.f. 1.1.1996, which provides that a person after retirement from pensionable service appointed as Vice-Chancellor shall be entitled to draw such pay as will be arrived at after reducing the pay fixed under these statutes by the gross amount of pension before commutation without temporary increase subject to a minimum of rupees twenty five thousand per month. The admitted case of the petitioner is that although he is coming under the first proviso of Statute 10(1)(a) of Statute, 1996, but he his withdrawn salary while working as Vice-

Chancellor from 1.2.1996 to 13.8.1998 in addition to his provisional pension (without temporary increase). As such, the money which was withdrawn by the petitioner is contrary to the statutory provision as contained in Statute 10(1)(a) of Statute, 1996 and therefore, the authorities have passed order to deduct the amount excess taken by the petitioner. Hence, against that decision, the petitioner has filed this writ petition especially against the decision no.(iii) of the letter dated 15.11.2003. The sole ground taken by the petitioner while arguing the case is that whatever amount has been withdrawn by the petitioner that was in between 1.2.1996 to 23.8.1998, but the authorities had taken a decision after lapse of about 5 years that too after separation from service in the capacity of Vice-Chancellor, which will be absolutely harsh and the petitioner will have to bear excess financial burden and hence, the prayer has been made to ask the Government not to recover the said amount.

8. Admittedly, the petitioner has discharged his duties under the State Government in the capacity of Director, State Bureau of Text Book production and preparation, Bhubaeswar and under the University as Professor and thereafter as Vice-Chancellor and while working as Vice-Chancellor, he has withdrawn excess provisional pension contrary to the statutory provision and in the light of this, it is to be examined as to whether recovery as directed by the competent authority is proper or not ?

9. There was no dispute about the fact that there was divergent view of the Apex Court with to his decision as to whether recovery is to be made or not.

10. The Apex Court in **Shyam Babu Verma v. Union of India,** (1994) 2 SC 521 has held that it shall only be just and proper not to recover any excess amount which has already been paid to them.

11. Similar view has also been taken by the Apex Court in **Sahib Ram .v. Union of India,** 1995 Supp (1) SCC 18, wherein it has been held that the amount paid may not be recovered from the appellant.

12. An **B.J Akkara v Govt. of India,** (2006) 11 SCC 709, the Apex Court has held as follows :

> "x x x x A Government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeeps of his family. If he receives an excess payment for a long period, he would spend it genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause

undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recover. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery."

(emphasis supplied)

13. In **syed Abdul Qadir V. State of Bihar, (2009) 3 SCC 475** the Apex Court has held that the relief against recover is granted by courts not because of any right in the employees, but in equity exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered.

14. In **Chandi Prasad Uniyal and ors. V. State of uttarakhand and ors**, (2012) 8 SCC,417 their Lordships of the Apex Court has been pleased to hold that excess payment of public money which is often described as "tax payers money which belongs neither to the officers who have effected over-payment nor that of the recipients. Any amount paid/ received without authority of law can always be recovered barring few exceptions of extreme hardships but no as a matter of night, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment.

15. In the case of **State of Punjab and ors. V Rafiq Masih (White Washer) and Ors**. (2015) 4 SCC 334, the Apex Court has been pleased to held as under :

"18. It is not possible to postulate all situations of hardship which would govern employees on the issue or 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 hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law :

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

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

(iii) Recovery from the 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 rightly 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."

16. It is settled that the judgment having divergent view, the recent judgment is to be followed and as such, the guidelines which have been fixed by the Apex Court in the case of **Rafiq Masih (supra)** and also the proposition laid down in **Chandi Prasad Uniya (supra)** regarding exception of extreme hardship for recovery of excess amount paid, but not as a matter of right, are being taken into consideration in the case at hand.

17. In Rafiq Masif (supra) also some guidelines have been inserted in paragraph 18 and on perusal of the same, it is found that recovery from the employees belonging to Class III and Class IV service, recovery from the retired employees, or the employees who are due to retire within one year of the order of recovery, recovery from the employees, when the excess payment has been made for a period in excess of five years before the order of recovery is issued, and 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, has been said to be impermissible in law. The last situation, which is important for consideration in this case, is where the court arrives at a 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.

18. Now the fact of the present case is to be examined in the light of situation no.(iv) of paragraph 18. Admittedly, the petitioner all along in his service career has held post, which was higher in hierarchy, i.e. initially Professor in Revenshaw College, Cuttack, the Director of a Department under the State Government and thereafter Vice-Chancellor of Berhampur University. The dispute arose in this case is for period of his incumbency as

Vice-Chancellor or Berhampur University. The post of Vice-Chancellor is a creation of statute, who is the ultimate authority of the University just below Chancellor. Although the Chancellor is the ultimate authority of all the Universities, but the Vice-Chancellor is concerned with the day to day functioning of the University concerned and he is the ultimate authority to take all decision in this regard. The petitioner has withdrawn excess amount, which is contrary to the statutory provisions as contained in Statute 10(1)(a) of Statute, 1996. It cannot be expected from the petitioner, who was holding the post of Vice-Chancellor that he was not aware of the statutory provision, but even knowing the same, he has withdrawn the money and given excess burden to the State Exchequer for his gain. The authorities after considering all these aspects of the matter have taken a decision to recover the excess amount, which has been withdrawn by the petitioner. Since the petitioner is getting handsome pension by virtue of holding higher post under the State Government, if the recovery in question is made, it will not be said to be iniquitous or harsh or arbitrary, rather if there is no recovery, certainly the State will be put to loss and ultimately the people at large, Hence, in my considered view no case is made out the petitioner case of recovery, it would be iniquitous or harsh or arbitrary to such extent as would far outweigh the equitable balance of the employer's right to recover.

19. Taking into consideration the entire aspect of the matter as discussed hereinabove, in my considered view, the decision of the authority to recover excess amount drawn by the petitioner cannot be said to be illegal. According, the writ petition fails and the same is dismissed.

Writ petition dismissed.

2016 (II) ILR - CUT-1120

K.R. MOHAPATRA, J.

CRLMC NO. 512 OF 2013

RAMAKANTA SAHOO & ORS. ……..Petitioners.

.Vrs.

STATE OF ORISSA & ANR. ……..Opp.parties.

CRIMINAL PROCEDURE CODE, 1973 – Ss 203,256,300

Complaint case filed earlier was dismissed for default U/s 256 (1) Cr.P.C. and the accused was acquitted – Second complaint filed for

the self same facts/ occurrence – Maintainability – Second complaint on the same facts could be entertained only in exceptional circumstances, namely;

i) Where the previous order was passed on an incomplete record; or

ii) On a misunderstanding of the nature of complaint; or

iii) It was manifestly absurd or unjust; or

iv) Where new facts which could not, with reasonable diligence, have been brought on record in the previous proceedings, have been adduced

Held, Since the case at hand does not fall under any of the categories stated above, the impugned second complaint is not maintainable hence quashed. (Paras 11,12,13)

For Petitioners : M/s. Arijeet Mishra, S.K. Jena, S. Biswal, S.K. Panda,S.P. Mishra & P.C. Mishra

For Opp. Parties: Addl. Standing Counsel.

Date of Order : 16.09.2016

ORDER

K.R. MOHAPATRA, J.

The petitioners in this petition under Section 482 Cr.P.C. assail the order dated 24.12.2012 (Annexure-2) passed by the learned J.M.F.C., Jajpur Road in I.C.C. No. 209 of 2012 taking cognizance of the offence under Sections 294, 323, 341, 342, 506 and 34 I.P.C.

2. Though notice on the opposite party no.2 was made sufficient, none appears for the opposite party no. 2, when the matter was called.

3. It is submitted by Mr. Mishra, learned counsel for the petitioners that the opposite party no.2 had earlier filed I.C.C. No. 35 of 2010 before the learned J.M.F.C., Jajpur Road. After appearance of the petitioners in the aforesaid complaint case, the matter was posted for hearing. On 14.05.2012, when the matter was posted for hearing, though the petitioners appeared, neither opposite party no. 2 nor his counsel took any step. Hence, the complaint was dismissed for default for non-appearance of the complainant-opposite party no.2 and the petitioners were acquitted. Subsequently, the petitioners filed another complaint case (I.C.C. No. 209 of 2012) on the same set of allegations and stating that due to their illness, they could not appear on the date of hearing for which I.C.C. No. 35 of 2010 was dismissed for

default on 14.5.2012. It is the submission of Mr. Mishra that the second complaint (I.C.C. No. 209 of 2012) for the same offence is not maintainable and hence, the proceeding is liable to be quashed.

4. When the matter came up on 8.8.2016, this Court after hearing leaned counsel for the parties passed an order directing the learned counsel for the petitioners to check up whether after dismissal of the complaint under Section 256 (1) Cr.P.C. for non-appearance of the complainant and acquittal of the accused, a second complaint for the self-same occurrence would lie or not.

5. In view of the above, the only question remains to be decided in this case is whether the second complaint on the self-same allegation is maintainable, when earlier one was dismissed under Section 256 (1) of the Cr.P.C.

6. In support of his case, Mr. Mishra, learned counsel for the petitioners relied upon the decision in the case of ***Om Gayatri & Co. & others –v- State of Maharashtra & another***, 2006 CRI. L.J. 601, wherein it has been held as follows:

> "11. ……In the present case, the Magistrate found that the complainant was avoiding to lead evidence, therefore, relying on the ruling of this Court reported in 1998 Mah LJ 576: (1998 Cri LJ 3754) the Magistrate proceeded to pass an order acquitting the accused. Once this order has been passed, the remedy of the complainant is to prefer an appeal under Section 378 of the Code of Criminal Procedure after obtaining leave of the Court as required by Section 378 (4) of Cr.P.C..... …… There is one more distinction which will have to be kept in mind and that is, that once an order of acquittal under Section 256(1) of the Criminal Procedure Code, 1973 is passed, then the complainant is debarred from filing a second complaint on the same facts so long as the order of acquittal is not set aside. Therefore, the only course open to the complainant was to prefer an appeal in the High Court against the said order of the learned Magistrate by special leave of the Court under section 378 (5) of the Criminal Procedure Code, 1973."

7. Mr. Pani, learned Addl. Standing Counsel for the State, however, supported the impugned order of taking cognizance and submitted that earlier complaint having not been considered on merit and the petitioners having not faced the trial, a second complaint on the same set of allegations is maintainable.

8. Having heard Mr. Mishra, learned counsel for the petitioners and the learned Addl. Standing Counsel for the State (opposite party no. 1) and on perusal of the case record, it is abundantly clear that the learned J.M.F.C. has exercised his power conferred on him under Section 256 (1) of the Cr.P.C. and dismissed the complaint for default of the complainant and acquitted the accused person as well. Section 256 of the Cr.P.C. provides the procedure to be adopted by the Magistrate for non-appearance or death of the complainant. Sub-section (1) provides that if the summons has been issued on complainant, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing of the case may be adjourned, the complainant does not appear, the Magistrate shall acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day.

Three courses are open for the Magistrate in the event of non-appearance or death of the complainant on the date of hearing, such as:-

(a) shall acquit the accused; or

(b) adjourn the hearing of the case; or

(c) when the complainant is represented by a pleader or officer conducting prosecution, dispense with personal appearance of the complainant.

9. In the case at hand, the Magistrate in terms of Section 256 (1) of the Cr.P.C. acquitted the accused persons (petitioners herein) for non-appearance of the complainant by his order dated 14.5 .2012. The said order having not been challenged/modified or varied at any subsequent stage has reached its finality.Again on the same set of allegations, the complainant-opposite party no. 2 filed another complaint in I.C.C. No. 209 of 2012 stating therein that on 14.5.2012, the complainant was suddenly fell ill and could not attend the court.

Thus, the question arises whether an acquittal under Section 256 (1) of the Cr.P.C. would be covered under Section 300 (1) of the Cr.P.C. which provides that a person once has been tried by a competent Court for an offence and convicted or acquitted of such offence, shall not be, while such conviction or acquittal remains in force, liable to be tried again.

10. An exception may be taken to the words ‘has once been tried’ appearing in Section 300(1) Cr.P.C. When an order under Section 256 (1) is passed, an obvious question may arise that the accused has not faced the trial, so the order of acquittal may not be covered under Section 300 (1) of

the Cr.P.C. The said query has been answered in a decision of this Court in the case of ***Madan Mohan Tripathy –v- Rama Chandra Behera***, reported in 1988 (II) OLR 362. This Court placing reliance on several case laws including the case of State of Karnataka –v- K.H. Annegowda and another, reported in (1977) 1 SCC 417, held that 'tried' under Section 300 (1) Cr.P.C. would include all steps taken after taking of cognizance which includes the date of appearance of the accused after issuance of summons. Thus, this Court in the case of Madan Mohan Tripathy (supra) held that an acquittal under Section 256 (1) Cr.P.C. is squarely covered under the provisions of Section 300 (1) Cr.P.C.

In the case of ***Jatinder Singh and others –v- Ranjit Kaur***, reported in AIR 2001 SC 784, it has been held as under:

> "9. There is no provision in the Code or in any other statute which debar a complainant from preferring a second complaint on the same allegations if the first complaint did not result in a conviction or acquittal or even discharge. Section 300 of the Code, which debars a second trial, has taken care to explain that "the dismissal of a complaint or the discharge of an accused is not an acquittal for the purpose of this Section." However, when a Magistrate conducts an inquiry under Section 202 of the Code and dismisses the complaint on merits, a second complaint on the same facts cannot be made unless there are very exceptional circumstances. Even so, a second complaint is permissible depending upon how the complaint happened to be dismissed at the first instance.
>
> xxx xxx xxx
>
> 12. If the dismissal of the complaint was not on merit but on default of the complainant to be present there is no bar in the complainant moving the Magistrate again with a second complaint on the same facts. But if the dismissal of the complaint under Section 203 of the Code was on merits the position could be different. There appeared a difference of opinion earlier as to whether a second complaint could have been filed when the dismissal was under Section 203. The controversy was settled by this Court in Pramatha Nath Talukdar –v- Saroj Ranjan Sarkar, AIR 1962 SC 876 : (1962)(I) Cri LJ 770). A majority of Judges of the three Judge Bench held thus (Para 48):
>
> "An order of dismissal under S. 203, Criminal Procedure Code, is, however, no bar to the entertainment of a second complaint on the same facts but it will be entertained only in exceptional

> circumstances, e.g., where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings, have been adduced. It cannot be said to be in the interest of justice that after a decision has been given against the complainant upon a full consideration of his case, he or any other person should be given another opportunity to have his complaint enquired into."

In the aforesaid case law, the Hon'ble Apex Court was examining the maintainability of a second complaint for the same offence after dismissal of earlier one under Section 203 Cr.P.C. and came to a conclusion that a second complaint in such a circumstance is maintainable. But, considerations for dismissal of a complaint under Section 203 Cr.P.C. and that under Section 256(1) Cr.P.C. are completely different. The power under Section 256(1) of the Code can only be exercised at the stage of the trial. Thus, an acquittal under Section 256(1) of Cr.P.C. shall be covered under the principles of Section 300(I) of Cr.P.C.

11. At this stage, it is profitable to refer para-48 of the case of Pramatha Nath Talukdar quoted herein above. This view has been reaffirmed in the case of ***Mahesh Chand –v- B. Janardhan Reddy and another***, reported in (2003) 1 SCC 734, which subscribes that a second complaint on the same facts could be entertained only in exceptional circumstances, namely;

i) Where the previous order was passed on an incomplete record; or

ii) On a misunderstanding of the nature of complaint; or

iii) It was manifestly absurd or unjust; or

iv) Where new facts which could not, with reasonable diligence, have been brought on record in the previous proceedings, have been adduced.

The case at hand does not fall under any of the category stated above. Hence, the ratio decided in Jatinder Singh's case (supra) is not applicable here.

12. The only alternative available before the complainant was to prefer an appeal under Section 378 Cr.P.C. following due procedure of law against an order of acquittal under Section 256 (1) Cr.P.C. The said view also gets support from the decision in the case of *Om Gayatri* (*supra*), relied upon by Mr. Mishra. In that view of the matter, the second complaint on the same

allegation in I.C.C. No. 209 of 2012 pending before the learned J.M.F.C., Jajpur Road is not maintainable.

13. Accordingly, the CRLMC is allowed. The proceeding in I.C.C. No. 209 of 2012 pending before the learned J.M.F.C., Jajpur Road is quashed.

CRLMC allowed.