SUPREME COURT OF INDIA

ANIL R. DAVE , J & ADARSH KUMAR GOEL, J.

CIVIL APPEAL NO. 7217 OF 2013 (WITH BATCH)

PRAKASH & ORS. .....…Appellants

.Vrs.

PHULAVATI & ORS. ……..Respondents

(A) HINDU SUCCESSION ACT, 1956 – S.6 (As amended in 2005)

Whether Hindu succession (Amendment) Act 2005 will have retrospective effect ? Held, No.

The text of the amendment itself clearly provides that the right conferred on a daughter of a coparcener is on and from the commencement of Hindu succession (Amendment) Act, 2005 – An amendment of a substantive provision is always prospective unless either expressly or by necessary intendment it is retrospective – In the present case there is neither any express provision for giving retrospective effect to the amended provision nor necessary intendment to that effect – In the other hand proviso to section 6 (I) and section 6 (5) clearly intend to exclude the transactions referred to therein which may have taken place prior to 20.12.2004 on which date the bill was introduced – Object of giving finality to transactions prior to 20.12.2004 is not to make the main provision retrospective – Held, the above amendment is prospective in nature – Rights under the amendment are applicable to living daughters of living coparceners as on 09.09.2005 irrespective of when such daughters are born – Disposition or alienation including partitions which may have taken place before 20.12.2004 as per law applicable prior to the said date will remain unaffected – Any transaction of partition effected thereafter will be governed by the explanation – The impugned order passed by the High court is set aside. (Paras 22,23,24)

(B) INTERPRETATION OF STATUTE – Interpretation of a provision depends on the text and the context – Normal rule is to read the words of a statute in ordinary sense – In case of ambiguity, rational meaning has to be given – In case of apparent conflict, harmonious meaning to advance the object and intention of legislature has to be given.

(Para 19)

For Appellants : Mr. Anil C. Nishant,Adv. Mr. S.N. Bhat,
Mr. A.K. Joseph,Mrs. Sudha Gupta,
Mrs.S. Usha Reddy,Mr. Nanda Kishore,
Mr. P.R.Kovilan,.Ms. Geetha Kovilan,
Mr. Shanth Kumar V. Mahale,.
Mr.Amith J..
Mr. Rajesh Mahale, Mr. Raghavendra
S. Srivatsa..
Mr. Charudatta Mohindrakar,
Mr. A. Selvin Raja,Mr. Aniruddha
P. Mayee,
Mr. P.R. Ramasesh,
Mr. Ankolekar Gurudatta,
Mr. K.N. Rai, Mrs. Vaijayanthi Girish,
Mr. G. Balaji,

For Respondent : M/s. S.M. Jadhav & Company,
Mr. Rauf Rahim,Mr. Sumeet Lall,
Mr. Balaji Srinivasan, Mr. Mayank
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Ms. Srishti Govil, Ms. Vaishnavi
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Mr. Tushar Singh,Mr. Virendra Sharma,
Mr. Manjunath Meled,Mr. Vijaylaxmi,
Mr. Anil Kumar,Mr. Somiran Sharma,.
Mr. B. Subrahmanya Prasad,
Mr. Anirudh Sanganeria,
Mr. Chinmay Deshpande,
Mr. Amjid MaQBOOL,
Mr. Shashibhushan
Mr. P. Adgaonkar,Mr. T. Mahipal,
Mr. G.N. Reddy,
Mr. Rajinder Mathur,Mr. Shankar Divate,
Mrs. K. Sarada Devi,
Ms. Garima Prashad,

Date of judgment 16.10.15

JUDGMENT

ADARSH KUMAR GOEL, J.

1. The only issue which has been raised in this batch of matters is whether Hindu Succession (Amendment) Act, 2005 ('the Amendment Act') will have retrospective effect. In the impugned judgment (reported in AIR

2011 Kar. 78 Phulavati vs. Prakash), plea of restrospectivity has been upheld in favour of the respondents by which the appellants are aggrieved.

2. Connected matters have been entertained in this Court mainly on account of the said legal issue particularly when there are said to be differing views of High Courts which makes it necessary that the issue is decided by this Court. It is not necessary to go into the facts of the individual case or the correctness of the findings recorded by the courts below on various other issues. It was made clear during the hearing that after deciding the legal issue, all other aspects may be decided separately in the light of the judgment of this Court.

3. Only for the purpose of deciding the above legal question, we refer to the brief facts in Civil Appeal No.7217 of 2013. The respondent-plaintiff, Phulavati filed suit being O.S. No.12/1992 before Additional Civil Judge (Senior Division), Belgaum for partition and separate possession to the extent of 1/7th share in the suit properties in Schedule 'A' to 'G' except property bearing CTS No.3241 mentioned in Schedule 'A' in which the share sought was 1/28th.

4. According to the case of the plaintiff, the suit properties were acquired by her late father Yeshwanth Chandrakant Upadhye by inheritance from his adoptive mother Smt. Sunanda Bai. After the death of her father on 18th February, 1988, she acquired the share in the property as claimed.

5. The suit was contested mainly with the plea that the plaintiff could claim share only in the self acquired property of her deceased father and not in the entire property. During pendency of the suit, the plaintiff amended the plaint so as to claim share as per the Amended Act 39 of 2005. The trial court partly decreed the suit to the extent of 1/28th share in certain properties on the basis of notional partition on the death of her father and in some of the items of property, no share was given, while 1/7th share was given in some other properties as mentioned in detail in the judgment of the trial court.

6. The respondent-plaintiff preferred first appeal before the High Court with the grievance that the plaintiff became coparcener under the Amendment Act 39 of 2005 and was entitled to inherit the coparcenary property equal to her brothers, apart from contentions based on individual claims in certain items of property.

7. The stand of the defendants-appellants was that the plaintiff could not claim any share in self acquired property of the members of the joint family and that the claim of the plaintiff had to be dealt with only under Section 6 of

the Hindu Succession Act, 1956 as it stood prior to the amendment by Act 39 of 2005. The defendants relied upon a division bench judgment of the High Court in ***M. Prithviraj vs. Neelamma N.1*** laying down that if father of a plaintiff had died prior to commencement of Act 39 of 2005, the amended provision could not apply. It was only the law applicable on the date of opening of succession which was to apply.

8. The High Court framed following question for consideration on this aspect :

> *"(ii) Whether the plaintiff is entitled to a share in terms of Section 6 of the Hindu Succession Act as amended by Act No.39 of 2005?"*

9. It was held that the amendment was applicable to pending proceedings even if it is taken to be prospective. The High Court held that :

> *"61. The law in this regard is too well settled in terms of the judgment of the Supreme Court in the case of G. Sekar Vs. Geetha and others reported in (2009) 6 SCC 99. Any development of law inevitably applies to a pending proceeding and in fact it is not even to be taken as a retrospective applicability of the law but only the law as it stands on the day being made applicable.*
>
> *62. The suit, no doubt, might have been instituted in the year 1992 and even assuming that it was four years after the demise of Yeshwanth Chandrakant Upadhye, the position so far as the parties are concerned who are all members of the joint family, in terms of Section 6 as amended by Act No.39 of 2005 is that a female member is, by a fiction of law created in terms of the amended provision also becomes a coparcener and has a right in joint family property by birth. They are also sharermembers of the coparcenary property at par with all male members. When a partition takes place, coparceners succeed to the property in equal measure. Such is the legal position in terms of Section 6 of the Hindu Succession Act as amended by Act No.39 of 2005 and as declared by the Supreme Court in the case of G.S. Sekar (supra). The only exception carved out to the applicability and operation of Section 6 of the Hindu Succession Act as amended by Act No.39 of 2005 being a situation or a factual position where there was a partition which had been effected by a registered partition deed or by a decree of the court which has attained finality prior to 20.12.2004 in terms of sub-section (5) to Section 6.*

63. In the present case such beingnot the factual position, the exception availableunder sub-section (5) to Section 6 cannot becalled in aid by the defendants and therefore,the liability in terms of the amended provisions operates. It is not necessary for us to multiplythe judgment by going into details or discussingother judgments referred to and relied upon by the learned counsel for the parties at the Bar as one judgment of the Supreme Court if clinches the issue on the point, it is good enough for us, as a binding authority to apply that law and dispose of the case as declared in that judgment."

10. The respondent-plaintiff was accordingly held entitled to 1/7th share in all items in Schedules 'A' to 'D'. In respect of Schedule 'F', first item was given up by the plaintiff. Out of the other two items, she was held entitled to 1/7th share in Item No.2 and 1/7th share in 40% ownership in Item No.3.

11. The defendants-appellants have questioned the judgment and order of the High Court with the contention that the amended provision of Section 6 has no application in the present case. Father of the plaintiff died on 18th February, 1988and was thus, not a coparcener on the date of commencement of the Amendment Act. The plaintiff could not claim to be "the daughter of a coparcener" at the time of commencement of the Act which was the necessary condition for claiming the benefit. On the death of plaintiff's father on 18th February, 1988, notional partition took place and shares of the heirs were crystallized which created vested right in the parties. Such vested right could not have been taken away by a subsequent amendment in absence of express provision or necessary intendment to that effect. Moreover, the amending provision itself was expressly applicable "on and from" the commencement of the Amendment Act, i.e., 9th September, 2005. The High Court held that even if the provision was prospective, it could certainly apply to pending proceedings as has been held in some decisions of this Court. It is pointed out that the amendment could apply to pending proceedings, only if the amendment was applicable at all.

12. Learned counsel for the respondents would support the view taken by the High Court.

13. We have heard learned counsel for the parties in the present appeal as well as in connected matters for the rival view points which will be noticed hereinafter.

14. The contention raised on behalf of the appellants and other learned counsel supporting the said view is that the 2005 Amendment was not applicable to the claim of a daughter when her father who was a coparcener in the joint hindu family died prior to 9th September, 2005. This submission is based on the plain language of the statute and the established principle that in absence of express provision or implied intention to the contrary, an amendment dealing with a substantive right is prospective and does not affect the vested rights2. If such a coparcener had died prior to the commencement of the Amendment Act, succession opens out on the date of the death as per the prevailing provision of the succession law and the rights of the heirs get crystalised even if partition by metes and bounds does not take place. It was pointed out that apparently conflicting provision in Explanation to Section 6(5) and the said Section was required to be given harmonious construction with the main provision. The explanation could not be read in conflict with the main provision. Main provision of Section 6(1) confers right of coparcener on a daughter only from commencement of the Act and not for any period prior to that. The proviso to Section 6(1) also applies only where the main provision of Section 6(5) applies. Since Section 6(5) applies to partition effected after 20th December, 2004, the said proviso and the Explanation also applies only when Section 6(1) applies. It is also submitted that the Explanation was merely a rule of evidence and not a substantive provision determining the rights of the parties. Date of a daughter becoming coparcener is on and from the commencement of the Act. Partitions effected before 20th December, 2004 remain unaffected as expressly provided. The Explanation defines partition, as partition made by a registered deed or effected by decree of a court. Its effect is not to wipe out a legal and valid partition prior to the said date, but to place burden of proof of genuineness of such partition on the party alleging it. In any case, statutory notional partition remains valid and effective.

15. On the contrary, stand on behalf of the respondents is that the amendment being piece of social legislation to remove discrimination against women in the light of 174th Report of the Law Commission, the amendment should be read as being retrospective as interpreted by the High Court in the impugned judgment. A daughter acquired right by birth and even if her father, who was a coparcener, had died prior to coming into force of the amendment, the shares of the parties were required to be redefined. It was submitted that any partition which may have taken place even prior to 20th December, 2004 was liable to be ignored unless it was by a registered deed of

partition or by a decree of the Court. If no registered partition had taken place, share of the daughter will stand enhanced by virtue of the amendment.

16. We have given due consideration to the rival submissions. We may refer to the provision of Section 6 of the Hindu Succession Act as it stood prior to the 2005 Amendment and as amended :

Section 6 of the Hindu Succession Act	**Section 6 on and from the commencement of the Hindu Succession (Amendment) Act,2005**
6. Devolution of interest of coparcenary property. When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act: PROVIDED that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship. Explanation I: For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been.	**6. Devolution of interest in coparcenary property.-**(1) On and from the commencement of the Hindu Succession (Amendment) Act,2005**,** in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,- a) by birth become a coparcener in her own right in the same manner as the son; (b) have the same rights in the coparcenary property as she would have had if she had been a son; (c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener: Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

allotted to him if a partition of the property had taken place immediately before his death, irrespective of hether he was entitled to claim partition or not. Explanation 2: Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein. 7. Devolution of interest in the property of a tarwad,	2) Any property to which a female Hindu becomes entitled by virtue of sub-section -(1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act, or any other law for the time being in force, as property capable of being disposed of by her by testamentary disposition. (3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,- (a) the daughter is allotted the same share as is allotted to a son; (b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such predeceased son or of such pre-deceased daughter; and (c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of suchpre-deceased child of the pre-deceased

	son or a pre-deceased daughter, as the case may be. Explanation.- For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not. (4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt: Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect- (a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or (b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner

	and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted. Explanation.-For the purposes of clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005. (5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004. Explanation.- For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.'

17. The text of the amendment itself clearly provides that the right conferred on a 'daughter of a coparcener' is 'on and from the commencement of Hindu Succession (Amendment) Act, 2005'. Section 6(3) talks of death after the amendment for its applicability. In view of plain language of the statute, there is no scope for a different interpretation than the one suggested by the text of the amendment. An amendment of a substantive provision is always prospective unless either expressly or by necessary intendment it is retrospective3. In the present case, there is neither any express provision for giving retrospective effect to the amended provision nor necessary intendment to that effect. Requirement of partition being registered can have

no application to statutory notional partition on opening of succession as per unamended provision, having regard to nature of such partition which is by operation of law. The intent and effect of the Amendment will be considered a little later. On this finding, the view of the High Court cannot be sustained.

18. Contention of the respondents that the Amendment should be read as retrospective being a piece of social legislation cannot be accepted. Even a social legislation cannot be given retrospective effect unless so provided for or so intended by the legislature. In the present case, the legislature has expressly made the Amendment applicable on and from its commencement and only if death of the coparcener in question is after the Amendment. Thus, no other interpretation is possible in view of express language of the statute. The proviso keeping dispositions or alienations or partitions prior to 20th December, 2004 unaffected can also not lead to the inference that the daughter could be a coparcener prior to the commencement of the Act. The proviso only means that the transactions not covered thereby will not affect the extent of coparcenary property which may be available when the main provision is applicable. Similarly, Explanation has to be read harmoniously with the substantive provision of Section 6(5) by being limited to a transaction of partition effected after 20th December, 2004. Notional partition, by its very nature, is not covered either under proviso or under sub-section 5 or under the Explanation.

19. Interpretation of a provision depends on the text and the context4. Normal rule is to read the words of a statute in ordinary sense. In case of ambiguity, rational meaning has to be given5. In case of apparent conflict, harmonious meaning to advance the object and intention of legislature has to be given6.

20. There have been number of occasions when a proviso or an explanation came up for interpretation. Depending on the text, context and the purpose, different rules of interpretation have been applied7.

21. Normal rule is that a proviso excepts something out of the enactment which would otherwise be within the purview of the enactment but if the text, context or purpose so require a different rule may apply. Similarly, an explanation is to explain the meaning of words of the section but if the language or purpose so require, the explanation can be so interpreted. Rules of interpretation of statutes are useful servants but difficult masters8.Object of interpretation is to discover the intention of legislature.

22. In this background, we find that the proviso to Section 6(1) and sub-section (5) of Section 6 clearly intend to exclude the transactions referred to therein which may have taken place prior to 20th December, 2004 on which date the Bill was introduced. Explanation cannot permit reopening of partitions which were valid when effected. Object of giving finality to transactions prior to 20th December, 2004 is not to make the main provision retrospective in any manner. The object is that by fake transactions available property at the introduction of the Bill is not taken away and remains available as and when right conferred by the statute becomes available and is to be enforced. Main provision of the Amendment in Section 6(1) and (3) is not in any manner intended to be affected but strengthened in this way. Settled principles governing such transactions relied upon by the appellants are not intended to be done away with for period prior to 20th December, 2004. In no case statutory notional partition even after 20th December, 2004 could be covered by the Explanation or the proviso in question.

23. Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20th December, 2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation.

24. On above interpretation, Civil Appeal No.7217 of 2013 is allowed. The order of the High Court is set aside. The matter is remanded to the High Court for a fresh decision in accordance with law. All other matters may be listed for hearing separately for consideration on 24th November, 2015.

25. The view which we have taken above is consistent with and not in conflict with any of the earlier decisions. We may now refer to the decisions cited by the parties. Main decisions cited by the respondents are: ***Prema vs. Nanje Gowda9***, ***Ganduri Koteshwaramma vs. Chakiri Yanadi10***, ***V.K. Surendra vs. V.K. Thimmaiah11, Ram Sarup vs. Munshi12, Dayawati vs. Inderjit13, Amarjit Kaur vs. Pritam Singh14, Lakshmi Narayan Guin vs. Niranjan Modak***15***, S. Sai Reddy vs. S. Narayana Reddy***16 and ***State of Maharashtra vs. Narayan Rao17.*** Many of these decisions deal with situations where change in law is held to be applicable to pending proceedings having regard to intention of legislature in a particular law. There is no dispute with the propositions laid down in the said decisions. Question is of application of the said principle in the light of a particular

amending law. The decisions relied upon do not apply to the present case to support the stand of the respondents.

25.1. In ***Ram Sarup case (supra),*** the question for consideration was of amendment to the Punjab Pre-emption Act, 1930 by Punjab Act 10 of 1960 restricting the pre-emption right. Section 31 inserted by way of amendment prohibited passing of a decree which was inconsistent with the amended provisions. It was held that the amendment was retrospective and had retrospective operation in view of language employed in the said provision.

25.2. In ***Dayawati case (supra),*** Section 6 of the Punjab Relief of Indebtedness Act, 1956 expressly gave retrospective effect and made the statute applicable to all pending suits on the commencement of the Act. The Act sought to reduce the rate of interest in certain transactions to give relief against indebtedness to certain specified persons.

25.3. In ***Lakshmi Narayan Guin case (supra),*** the question was of applicability of Section 13 of the West Bengal Premises Tenancy Act, 1956 which expressly provided that no order could be passed by the Court contrary to the scheme of the new law.

25.4. In ***Amarjit Kaur case (supra),*** Section 3 of the Punjab Pre-emption (Repeal) Act, 1973 was considered which expressly prohibited the Court from passing any pre-emption decree after the commencement of the Act.

25.5. There is also no conflict with the principle laid down in ***V.K. Surendra case (supra)*** which deals with a presumption about the nature of a joint family property and burden of proof being on the person claiming such property to be separate. The said decision only lays down a rule of evidence.

25.6. In ***S. Sai Reddy case (supra)***, the question for consideration was whether even after a preliminary decree is passed determining the shares in partition, such shares could be varied on account of intervening events at the time of passing of the final decree. In the said case, partition suit was filed by a son against his father in which a preliminary decree was passed determining share of the parties. Before final decree could be passed, there was an amendment in the Hindu Succession Act (vide A.P. Amendment Act, 1986) allowing share to the unmarried daughters. Accordingly, the unmarried daughters applied to the court for their shares which plea was upheld. The said judgment does not deal with the issue involved in the present matter. It

was not a case where the coparcener whose daughter claimed right was not alive on the date of the commencement of the Act nor a case where shares of the parties stood already crystalised by operation of law to which the amending law had no application. Same is the position in ***Prema and Ganduri cases (supra)***.

25.7. In ***Narayan Rao case (supra)***, it was observed that even after notional partition, the joint family continues. The proposition laid down in this judgment is also not helpful in deciding the question involved herein. The text of the Amendment itself shows that the right conferred by the Amendment is on a 'daughter of a coparcener' who is member of a coparcenary and alive on commencement of the Act.

25.8. We also do not find any relevance of decisions in ***State of Rajasthan vs. Mangilal Pindwal18*** and ***West U.P. Sugar Mills Asson. vs. State of U.P.19*** or other similar decisions for deciding the issue involved herein. The said decisions deal with the effect of repeal of a provision and not the issue of restrospectivity with which the Court is concerned in the present case.

26. We now come to the decisions relied upon by the appellants. In ***M. Prithviraj case (supra),*** the view taken appears to be consistent with what has been said above. It appears that this was a binding precedent before the Bench of the High Court which passed the impugned order but does not appear to have been referred to in the impugned judgment. Judgments of this Court in ***Sheela Devi vs. Lal Chand20*** and ***G. Sekar vs. Geetha21*** and the judgment of Madras High Court in ***Bagirathi vs. S. Manivanan22*** have been relied upon therein. In ***Sheela Devi case (supra),*** this Court observed:

> *21. The Act indisputably would prevail over the old Hindu Law. We may notice that the Parliament, with a view to confer right upon the female heirs, even in relation to the joint family property, enacted Hindu Succession Act, 2005. Such a provision was enacted as far back in 1987 by the State of Andhra Pradesh. The succession having opened in 1989, evidently, the provisions of Amendment Act, 2005 would have no application. Sub-section (1) of Section 6 of the Act governs the law relating to succession on the death of a coparcener in the event the heirs are only male descendants. But, the proviso appended to Sub-section (1) of Section 6 of the Act creates an exception. First son of Babu Lal, viz., Lal Chand, was, thus, a coparcener. Section 6 is exception to the general rules. It was,*

therefore, obligatory on the part of the respondents-plaintiffs to show that apart from Lal Chand, Sohan Lal will also derive the benefit thereof. So far as the Second son, Sohan Lal is concerned, no evidence has been brought on records to show that he was born prior to coming into force of Hindu Succession Act, 1956."

Full Bench judgment of Bombay High Court in ***Badrinarayan Shankar Bhandari Vs. Ompraskash Shankar Bhandari23*** also appears to be consistent with the view taken hereinabove.

26.1. In ***Gurupad Khandappa Magdum vs. Hirabai Khandappa Magdum***24, ***Shyama Devi vs. Manju Shukla25*** and ***Anar Devi vs. Parmeshwari Devi26 cases*** this Court interpreted the Explanation 1 to Section 6 (prior to 2005 Amendment) of the Hindu Succession Act. It was held that the deeming provision referring to partition of the property immediately before the death of the coparcener was to be given due and full effect in view of settled principle of interpretation of a provision incorporating a deeming fiction. In ***Shyama Devi and Anar Devi cases,*** same view was followed.

26.2. In ***Vaishali Satish Ganorkar vs. Satish Keshaorao Ganorkar27,*** the Bombay High Court held that the amendment will not apply unless the daughter is born after the 2005 Amendment, but on this aspect a different view has been taken in the later larger Bench judgment. We are unable to find any reason to hold that birth of the daughter after the amendment was a necessary condition for its applicability. All that is required is that daughter should be alive and her father should also be alive on the date of the amendment.

26.3. ***Kale vs. Dy. Director of Consolidation28*** and ***Digambar Adhar Patil vs. Devram Girdhar Patil29*** have been cited to submit that the family settlement was not required to be registered. ***Santosh Hazari vs. Purushottam Tiwari30*** lays down that the Appellate Court must deal with reasons of the trial court while reversing its findings.

26.4 ***Kannaiyan vs. The Assistant Collector of Central Excise31, C.I.T. Gujarat vs. Keshavlal Lallubhai Patel32, Umayal Achi vs. Lakshmi Achi33*** and ***Shivappa Laxman vs. Yellawa Shivappa Shivagannavar34*** have been cited to canvass that partition was recognition of pre-existing rights and did not create new rights.

26.5 This would normally have ended our order with the operative part being in para 24 which disposes of Civil Appeal No.7217 of 2013 and directs listing of other matters for being dealt with separately. However, one more aspect relating to gender discrimination against muslim women which came up for consideration needs to be gone into as Part II of this order.

Part II

27. An important issue of gender discrimination which though not directly involved in this appeal, has been raised by some of the learned counsel for the parties which concerns rights to muslim women. Discussions on gender discrimination led to this issue also. It was pointed out that inspite of guarantee of the Constitution, muslim women are subjected to discrimination. There is no safeguard against arbitrary divorce and second marriage by her husband during currency of the first marriage, resulting in denial of dignity and security to her. Although the issue was raised before this Court in ***Ahmedabad Women Action Group(AWAG) vs. Union of India35,*** this Court did not go into the merits of the discrimination with the observation that the issue involved state policy to be dealt with by the legislature36. It was observed that challenge to the Muslim Women (Protection of Rights on Divorce) Act, 1986 was pending before the Constitution Bench and there was no reason to multiply proceedings on such an issue.

28. It is pointed out that the matter needs consideration by this Court as the issue relates not merely to a policy matter but to fundamental rights of women under Articles 14, 15 and 21 and international conventions and covenants. One of the reasons for the court having not gone into the matter was pendency of an issue before the Constitution Bench which has since been decided by this Court in ***Danial Latifi vs. Union of India37.*** The Constitution Bench did not address the said issue but the Court held that Article 21 included right to live with dignity38 which supports the plea that a muslim woman could invoke fundamental rights in such matters. In ***Javed vs. State of Haryana39,*** a Bench of three judges observed that practice of polygamy is injurious to public morals and can be superseded by the State just as practice of '*sati' 40*. It was further observed that conduct rules providing for monogamy irrespective of religion are valid and could not be struck down on the ground of violation of personal law of muslims41. In ***John Vallamattom vs. UOI42,*** it was observed that Section 118 of Indian Succession Act, 1925 restricting right of christians to make Will for charitable purpose was without any rational basis, was discriminatory against

Christians and violated Article 1443. Laws dealing with marriage and succession are not part of religion44. Law has to change with time45. International covenants and treaties could be referred to examine validity and reasonableness of a provision46.

29. In ***Charu Khurana vs. UOI47,*** this Court considered the issue of gender discrimination in the matter of denial of membership of "Cine Costume Make-up Artists and Hair Dressers Association" in film industry. It was held that such discrimination violates basic constitutional rights.

30. It was thus submitted that this aspect of the matter may be gone into by separately registering the matter as Public Interest Litigation (PIL). We are of the view that the suggestion needs consideration in view of earlier decisions of this Court. The issue has also been highlighted in recent Articles appearing in the press on this subject48.

31. For this purpose, a PIL be separately registered and put up before the appropriate Bench as per orders of Hon'ble the Chief Justice of India.

32. Notice be issued to learned Attorney General and National Legal Services Authority, New Delhi returnable on 23rd November, 2015. We give liberty to learned counsel already appearing in this matter to assist the Court on this aspect of the matter, if they wish to volunteer, for either view point.

Appeal allowed.

2015 (II) ILR - CUT- 1064

FULL BENCH

D.H.WAGHELA, C.J, PRADIP MOHANTY, J. & R.DASH, J.

W.A. NO. 122 OF 2014

KASINATH NAYAK ……..Petitioner

.Vrs.

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

LETTERS PATENT APPEAL – Whether a writ appeal under clause 10 of the Letters Patent before a Division Bench is maintainable against the judgment of the learned single judge in a writ petition wherein direction for further investigation in a criminal case was sought for ? Held, No.

Filing of intra-court appeal to a Division Bench of this Court is debarred against judgment of the learned single judge if it is passed in exercise of (i) revisional jurisdiction, (ii) the power of superintendence and (iii) the criminal jurisdiction – So it is to be seen, whether the writ petition, from which this appeal arises was filed invoking the "Criminal Jurisdiction" of this Court and the impugned order was passed "in exercise of Criminal Jurisdiction" ? In this case the appellant being the informant filed the writ petition challenging the action of the I.I.C. Khaira P.S., Balasore who filed charge sheet deliberately omitting three accused persons named in the F.I.R – So the writ petition was filed invoking "Criminal Jurisdiction" of the learned single Judge and the learned Single Judge has passed the impugned order "in exercise of Criminal Jurisdiction" – Held, since the instant writ appeal clearly comes under the third excluded category of clause-10 of the letters patent the same is not maintainable, hence dismissed.

(Paras 12, 13, 14)

Case Laws Referred to :-

1. AIR 1965 SC 1818 : S.A.L. Narayan Row v. Ishwarlal Bhagwandas.
2. 1999 Cr.L.J. 338 : Sanjeev Rajendrabhai Bhatt v. State of Gujarat
3. AIR 1996 BOM 180 : M/s Nagpur Cable Operators Association v. Commissioner of Police Nagpur
4. (2011) ILR 6 DELHI 701 : C.S.Agarwal v. State
5. AIR 1992 SC 604 State of Haryana v. Bhajan Lal.
6. 2012 CRL.L.J. 886 : C.S. Agarwal (supra). In Nitin Shantilal Bhagat v. State of Gujarat
7. 2000 (2) ALT 448 : Gangaram Kandaram v. Sunder Chhkha Amin &Ors.
8. 2013 (I) OLR 341 : Bholanath Rout v. State of Orissa & others

For Petitioner : M/s. Nilamadhaba Sarkar & S. Mahanta

For Opp. Parties : Mr. S.P.Mishra, Advocate General and Mr. Goutam Mishra, Amicus Curiae

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Date of hearing : 09.10. 2015
Date of judgment : 19 .11.2015

JUDGMENT

PRADIP MOHANTY,J.

Is the instant writ appeal, filed against the judgment of the learned Single Judge rendered in a writ petition in which direction for further investigation in a criminal case was sought for, maintainable? This is the short question required to be answered in the reference.

2. When the writ appeal came up for hearing before a Division Bench of this Court, the State Government raised serious objection regarding its maintainability. Feeling that the question of maintainability may have a far reaching effect, the Division Bench was inclined to examine the matter in depth and accordingly vide order dated 20.08.2014 appointed Mr. Goutam Mishra as amicus curiae to assist the Court. As the learned amicus curiae apprised the Court that there are divergent views by different High Courts on the issue, vide order dated 11.09.2014 the Division Bench of this Court referred the matter to the Full Bench. Hence, this Full Bench has been constituted and called upon to answer the following question:

> "Whether any decision rendered by a Single Judge of this Court vis-à-vis a criminal matter in exercise of the writ jurisdiction under Article 226 of the Constitution of India is appealable under Clause-10 of the Letters Patent before a Division bench of this Court or not?"

3. While Mr. Sarkar, learned counsel for the appellant contended that an appeal under clause 10 of the Letters Patent is maintainable against a judgment passed by the learned Single Judge in a petition under Article 226, according to Mr. Misra, learned Advocate General appearing for the State an appeal under clause 10 of Letters Patent Appeal is not maintainable against the judgment of learned Single Judge even when passed under Article 226, if the power is exercised under criminal jurisdiction.

4. It is worthwhile to mention here that at the commencement of the 20th Century, Bengal Presidency was a vast province including Assam, Bihar and Orissa. Administrative exigencies required separation of such areas which originally did not form part of Bengal. Bihar and Orissa were separated from Bengal Presidency to form new province of Bihar. By a notification dated 22.03.1912 new province of Bihar and Orissa was formed. However, still the said new province of Bihar and Orissa was under the jurisdiction of Calcutta High Court.On 09.02.1916, in exercise of the powers under section 113 of the Government of India Act, 1915, the King of England issued Letters Patent constituting High Court of Patna. Orissa was placed under the jurisdiction of Patna High Court. On 01.04.1936 Orissa was made a separate province but no separate High Court was provided for it. In exercise of the powers conferred by Section 229(1) of the Government of India Act, 1935, the Government of India, on 30.04.1948, issued Orissa High Court Order, 1948 declaring that from 05.07.1948 there shall be a Court of the Province of Orissa which shall be a Court of Record. Subsequently by Orissa

High Court (Amendment) Order, 1948 issued on 08.06.1948, the date of establishment of High Court was changed from 05.07.1948 to 26.07.1948. Hence, on 26.07.1948 Orissa High Court was inaugurated by H.J.Kania, the then Chief Justice of the Federal Court of India. Since the bifurcation of Orissa High Court, the Letters Patent Appeals (present writ appeals) are being filed under Clause 10 of the Letters Patent Constituting the High Court of Judicature at Patna read with Article 4 of the Orissa High Court (Amendment) Order, 1948, which provided inter alia that the law in force regarding practice and procedure in the High Court in Patna shall be applicable to the Orissa High Court.

5. Clause-10 of the Letters Patent Constituting the High Court of Judicature at Patna, under which the writ appeal has been filed, reads thus:

> "**Clause-10**. And we do further ordain that an appeal shall lie to the said High Court of Judicature at Patna from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act, **or in the exercise of criminal jurisdiction**) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of Government of India Act and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, made [on or after the first day of February one thousand nine hundred and twenty nine] in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided."

From a bare reading of the clause, as quoted above, it would be evident that a Letters Patent appeal can be laid to a Division Bench of this High Court from a judgment of a learned Single Judge, if it is not covered by the excluded

category of cases as specified in the bracketed portion of the clause. In other words, filing of intra-Court appeal to a Division Bench of this Court is debarred against judgment of learned Single Judge if it is passed in exercise of (i) revisional jurisdiction, (ii) the power of superintendence and (iii) the criminal jurisdiction. Therefore, it is to be seen whether the impugned judgment passed by the learned Single Judge comes under any of these three excluded categories.

6. During the course of hearing, learned counsel for both the parties in support of their respective submissions placed reliance upon a large number of judgments of various High Courts in India. Mr. Goutam Mishra, learned amicus curiae also placed before this Court the judgments wherein conflicting views have been expressed by different High Courts. Before delving into those judgments, it is pertinent to mention here that Clause-10 of the Letters Patent Constituting the High Court of Judicature at Patna, which is applicable to Orissa High Court, is *pari materia* to the corresponding clause followed in the respective High Courts.

7. The controversy that a writ proceeding under Article 226 of the Constitution of India is a "civil proceeding" or "criminal proceeding" was considered at great length by the Constitution Bench of the apex Court in ***S.A.L. Narayan Row v. Ishwarlal Bhagwandas,*** AIR 1965 SC 1818. In the said case, the apex Court opined that whether the proceedings are civil or not depends upon the nature of the right violated and the appropriate relief which may be claimed and not upon the nature of the Tribunal which is invested with authority to grant relief. While so opining, the apex Court in Para-8 of the judgment observed as follows:

> "……The expression "civil proceedings" is not defined in the Constitution, nor in the General Clauses Act. The expression in our judgment covers all proceedings in which a party asserts the existence of a civil right conferred by the civil law or by statute, and claims relief for breach thereof. A criminal proceeding on the other hand is ordinarily one in which if carried to its conclusion it may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property. It also includes proceedings in which in the larger interest of the State, orders to prevent apprehended breach of the peace, orders to bind down persons who are danger to the maintenance of peace and order, or orders aimed at preventing vagrancy are contemplated to be passed…."
>
> *(Emphasis Supplied)*

From the aforesaid it follows that a civil proceeding is one in which a person seeks to redress by appropriate relief the alleged infringement of his civil rights against another person or the State. A criminal proceeding is one in which the proceeding, if ultimately carried to its conclusion, may result in imposition of sentences such as death, imprisonment, fine or forfeiture of property. The term "criminal proceeding" has also been defined in Black's Law Dictionary as "one instituted and conducted for the purpose either of preventing the commission of crime, or for fixing the guilt of a crime already committed and punishing the offender; as distinguished from a "civil proceeding", which is for the redress of a private injury."

8. Referring to the above Constitution Bench judgment of the apex Court in ***S.A.L. Narayan Row*** (supra), the High Court of Judicature at Gujarat in ***Sanjeev Rajendrabhai Bhatt v. State of Gujarat***, 1999 Cr.L.J. 338 came to hold as follows:

> "80. In our considered opinion, in the instant case, the proceedings can be said to be criminal proceedings inasmuch as, carried to its conclusion, they may result into imprisonment, fine etc. as observed by the Supreme Court in Narayana Row.
>
> 81. From the totality of facts and circumstances, we have no hesitation in holding that the learned single Judge has passed an order in exercise of criminal jurisdiction. At the cost of repetition, we reiterate what we have already stated earlier that the proceedings were of a criminal nature. Whether a criminal Court takes cognizance of an offence or sends a complaint for investigation under Sub-section (3) of Section 156 of the Code of Criminal Procedure, 1973 does not make difference so far as the nature of proceedings is concerned. Even if cognizance is not taken, that fact would not take out the case from the purview of criminal jurisdiction.
>
> 82. In our judgment, a proceeding under Article 226 of the Constitution arising from an order passed or made by a Court in exercise or purported exercise of power under the Code of Criminal Procedure is still a 'criminal proceeding' within the meaning of Clause 15 of the Letters Patent. A proceeding seeking to avoid the consequences of a criminal proceeding initiated under the Code of Criminal Procedure will continue to remain 'criminal proceeding' covered by the bracketed portion of Clause 15 of the Letters Patent.

83. As Clause 15 of the Letters Patent expressly bars an appeal against the order passed by a single Judge of the High Court in exercise of criminal jurisdiction, LPAs are not maintainable and deserve to be dismissed only on that ground. We accordingly hold that the Letters Patent Appeals are not maintainable at law and they are liable to be dismissed."

9. The issue raised herein also fell for consideration before a Division Bench of Bombay High Court in ***M/s Nagpur Cable Operators Association v. Commissioner of Police Nagpur*** reported in AIR 1996 BOM 180. The said Division Bench, after taking note of various cases decided by other High Courts and the apex Court, observed thus:

"21. ….Applying the tests laid down by the Apex Court in Narayan Row's case (supra), we are of the view that if the writ petition/application under Articles 226 and/or 227 of the Constitution arises out of or relates to a proceeding in which, if carried to its conclusion ultimately it may result in sentence of death or by way of imprisonment, fine or forfeiture of the property then such writ petition/application under Article 226 of the Constitution of India and / or under Article 227 of the Constitution, should be treated as a "criminal writ petition" and styled as such. For hearing and decision of such petition, it should be listed before the Division Bench allocated such business by Hon'ble the Chief Justice or if it pertains to the single Judge jurisdiction, before the Bench assigned such work. As regards petitions/applications under Article 226 of the Constitution seeking writs or orders in the nature of habeas corpus, Rule 1 of Chapter XXVIII of Appellate Side Rules, also provides only allocation of such writ petitions to the Division Bench taking criminal business of the Appellate Side of the High Court. Obviously, since the petitions/applications under Article 226 of the Constitution of India for issuance of writs of habeas corpus arise out of the unlawful detention, in its very nature, such petitions too should be styled as criminal writ petitions. Criminal writ petitions would also cover those writ petitions which arise out of the orders and the matters relating to prevention or breach of peace or maintenance of peace and order or such orders aimed at preventing vagrancy contemplated to be passed. 'Criminal writ petition' shall also take in its embrace the petitions/applications under Article 226 or 227 of the Constitution of India if it arises out of or relates to investigation,

> enquiry or trial of the offences either under special or general statute…. However, such cases are to be distinguished from the cases where an act may be prohibited or commanded by the statute in such a manner that the person contravening the provision is liable to pecuniary penalty and such recovery is to be made a civil debt. In such type of cases the contravention would not be a crime and, therefore, petitions/applications* under Articles 226 and 227 of the Constitution of India arising therefrom would not be criminal proceeding." (Emphasis supplied)

10. Apart from the above, in ***C.S. Agarwal v. State***, (2011) ILR 6 DELHI 701, a Full Bench of the Delhi High Court, after making elaborate discussions, followed the above view of the Division Bench of the Gujarat High Court in the case of ***Sanjeev Rajendrabhai Bhatt*** (supra). It is of relevance to note, while holding writ appeals to be not maintainable, the Full Bench of the Delhi High Court in ***C.S. Agarwal*** (supra) took note of the decision of the apex Court in ***State of Haryana v. Bhajan Lal***, AIR 1992 SC 604. Subsequently, a Division Bench of the Delhi High Court in ***Vipul Gupta v. State***, 208(2014) DLT 468, reiterated the view taken in ***C.S. Agarwal*** (supra). In ***Nitin Shantilal Bhagat v. State of Gujarat***, 2012 CRL.L.J. 886, the Full Bench of the Gujarat High Court relying on the Constitution Bench judgment of the apex Court in ***S.A.L. Narayan Row*** (supra) came to hold that the writ appeal was not maintainable.

11. The following are the cases, cited before this Court at the time of hearing, in which some of the High Courts have taken a divergent view on the issue which falls for consideration before this Court.

(i) In ***Gangaram Kandaram v. Sunder Chhkha Amin and others***, 2000 (2) ALT 448, where the learned Single Judge while exercising extraordinary jurisdiction under Article 226 quashed the criminal proceedings, the Full Bench of the Andhra Pradesh High Court held that such exercise of powers is not in exercise of "criminal jurisdiction".

(ii) In the case of ***Adishwar Jain v. U.O.I***. reported in 2006 Crl.L.J. 3193, the High Court of Judicature at Punjab and Haryana while dealing with the question of maintainability held that an appeal under the Letters Patent is maintainable against the judgment of a learned

Single Judge in the petition under Article 226 of the Constitution praying for issuance of Habeas Corpus.

(iii) This Court in the case of ***Bholanath Rout v. State of Orissa & others*** reported in 2013 (I) OLR 341, while entertaining a writ appeal (Letters Patent Appeal) filed against the judgment of the learned Single Judge refusing to direct investigation by an independent agency, set aside the judgment and directed that the case should be re-investigated by an independent agency like the Crime Branch.

On careful perusal of these judgments, this Court finds that the view taken by the Full Bench of the Andhra Pradesh High Court in ***Gangaram Kandaram*** (supra) is not acceptable inasmuch, as the same is not in consonance with the ratio laid down in the case of ***S.A.L. Narayan Row*** (supra). Similarly, since in the case of ***Bholanath Rout*** (supra) the question of maintainability was not raised and in the case of ***Adishwar Jain*** (supra) dealt with habeas corpus petition, those judgments are not relevant for the purpose of the present reference.

12. From the above analysis of the decisions of the apex Court and other High Courts, this Court arrives at the conclusion that the question, whether an order passed by learned Single Judge in a writ petition under Article 226 of the Constitution of India is a proceeding under civil jurisdiction or criminal jurisdiction, can be determined by taking into consideration the nature of proceeding. That means, if the relief asked for in a writ petition is against exercise of power under criminal law or the proceeding would be a criminal proceeding, or the proceeding if carried to its conclusion ultimately may result in sentence of death or imprisonment or fine or forfeiture of property, such writ petition should be treated as filed against a proceeding under criminal jurisdiction. In such a case, the Letters Patent Appeal/Writ Appeal is not maintainable.

13. In view of the above settled position of law, it is to be seen whether the writ petition, from which this appeal arises, was filed invoking the "criminal jurisdiction" of this Court and/or the impugned order was passed "in exercise of criminal jurisdiction". As it appears from the records produced before this Court, the appellant being the informant filed a writ petition {W.P.(Crl.) No.1066 of 2013} challenging the action of the I.I.C., Khaira Police Station, Balasore. His grievance was that he lodged an FIR, which was registered as Khaira P.S. Case No.61 of 2011 under Sections 498-A, 302, 304-B and 34, I.P.C. read with Section 4 of the Dowry Prohibition

Act. But, the I.I.C. filed charge-sheet deliberately omitting three other accused persons named in the FIR. Therefore, alleging that the investigation conducted by the IIC was not fair and proper, the appellant in the aforesaid writ application prayed for further investigation. The learned Single Judge ultimately found that there was no serious irregularity or mala fides in the investigation and was pleased to dismiss the writ petition vide order dated 06.03.2014. Aggrieved by the said order, the appellant has filed this appeal. If this appeal is allowed and relief sought for in the writ petition is acceded to, it would amount to directing further investigation to Khaira P.S. Case No.61 of 2011. In such event, it may lead to filing of charge-sheet by the Investigating Officer, framing of charge and can result in conviction and order of sentence. Therefore, in terms of the ratio laid down in ***S.A.L. Narayan Row*** (supra), it can be safely held that in the instant case the writ petition was filed invoking "criminal jurisdiction" of the learned Single Judge and the learned Single Judge has passed the impugned order "in exercise of criminal jurisdiction". As such, the instant writ appeal clearly comes under the third excluded category of Clause-10 of the Letters Patent which bars filing of a writ appeal.

14. For the foregoing discussions, the reference is answered in negative and the writ appeal is required to be dismissed as not maintainable.

15. Before parting with the case, this Court deems it proper to place on record its appreciation for the assistance rendered by learned amicus curiae Mr. Goutam Mishra in deciding the reference. The matter may be placed before the Bench concerned for appropriate final orders.

Reference answered.

2015 (II) ILR - CUT-1073

D.H.WAGHELA, C.J. & B.P.RAY, J.

W.P.(C) NO. 6467 OF 2012

STATE OF ODISHA & ANR. ……..Petitioners

.Vrs.

ASHOK KUMAR SETHI & ANR. ……..Opp. Parties

SERVICE LAW – O.P. No.1 belongs to S.C. Community working as Asst. Horticulture Officer Group-B (Class II) – On recommendation by DPC he was promoted to the rank of Junior Class I – After one year he was reverted to his former post on the ground that the promotional post meant for S.T. candidate was not available – Order challenged before the Tribunal – Tribunal quashed the order of reversion – Hence the writ petition – Section 6 of the Odisha Reservation of Vacancies in posts and Services (for S.C. and S.T.) Act, 1975 authorises the competent authority to resort to the modality of exchange in the matter of reservation between S.C. & S.T. in the event of non-availability of candidates from the respective communities and O.P. No. 1 was illegally reverted by applying the 2nd proviso to section 7 of the said Act – Held, the promotion of O.P. No. 1 to the rank of Junior class I cannot be faulted with – Order passed by the Tribunal is confirmed.

(Paras 5 to 7)

For Petitioner : Additional Government Advocate

For Opp. Parties : M/s. B.Mohanty, J.B.Swain, K.Pradhan, J.R.Rath & B.Barik
M/s. S. Mallik & P.C.Das

Date of Judgment : 13.11.2015

JUDGMENT

B.P.RAY, J.

This writ petition under Articles 226 & 227 of the Constitution of India has been filed by the State of Odisha and its functionary challenging the judgment dated 29.4.2011 passed by the learned Orissa Administrative Tribunal, Bhubaneswar in O.A.No.752/2009 quashing the order dated 23.7.2009 passed by the Additional Secretary to Government in Agriculture Department reverting opposite party no.1, Sri Ashok Kumar Sethi from the post of Special Officer, Office of the Director of Horticulture to the rank of Group-B (Class-II) Horticulture Service and directing to reinstate Sri Sethi in the promotional rank/post forthwith along with other ancillary directions, vide Annexure-1.

2. The case of the petitioner is that the present opposite party no.1, Sri Ashok Kumar Sethi approached the learned Tribunal by filing O.A. No.752/2009 challenging the order of his reversion. According to Sri Sethi, he belongs to Scheduled Caste community and while working as Assistant Horticulture Officer, Group-B (Class-II), his name was recommended by the

D.P.C. for promotion to the rank of Junior Class-I. It appears, on the basis of the said recommendation of the D.P.C., opposite party no.1 was promoted to the rank of Junior Class-I of Horticulture Service, vide order dated 30.5.2008. After about one year, opposite party no.1 was reverted to his former post by order dated 23.7.2009. Challenging the order of reversion, he filed Original Application No.752/2009 before the Tribunal.

3. The State of Odisha filed its counter affidavit in the Original Application stating therein that the D.P.C. in its meeting held on 11.3.2008 decided that the present opposite party no.1 would be considered for promotion against the vacancy meant for Scheduled Tribe Category as no Scheduled Tribe candidates were available for the zone of consideration. It was further stated that in pursuance of such recommendation of the D.P.C., opposite party no.1 was promoted to the rank of Junior Class-I and the recommendation was sent to the Orissa Public Service Commission for its concurrence. Since the Orissa Public Service Commission refused to accept the recommendation of the D.P.C. on the reasoning that the principle of exchange of vacancy between the Scheduled Castes and Scheduled Tribes category was not applicable to the instant promotion, the impugned order directing the reversion of opposite party no.1 was passed.

It was further stated that in view of the 2nd proviso to Section 7 of the Orissa Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 (in short, "the Act") read with Sub-Rule (3) of Rule-5 of the Rules framed under the Act, the D.P.C. could not have recommended the case of opposite party no.1 for promotion. In other words, it was stated that the post having been earmarked for Scheduled Tribe candidates and in case of non-availability of such category of candidates, the candidates belonging to Scheduled Caste community could not be filled up against such promotional post.

However, on the basis of these averments of the State of Odisha, the Orissa Public Service Commission, which had submitted its advice in the aforesaid manner, had chosen not to file any counter affidavit before the Tribunal.

4. Learned Tribunal after hearing learned counsel for the parties by judgment dated 29.4.2011 under Annexure-3 has quashed the order of reversion and also granted the necessary consequential relief to opposite party no.1.

5. We have perused the records and also the order impugned in this writ petition, wherefrom we find that the learned Tribunal relying upon the provision of Section 6 of the Act has passed the said judgment.

We ourselves have also perused the provision to Section 6 of the Act, which authorizes the competent authority to resort to the modality of the exchange in the matter of reservation between Scheduled Castes and Scheduled Tribes in the event of non-availability of candidates from the respective communities.

Admittedly, opposite party no.1 belongs to a Scheduled Caste community and the post, to which he was promoted, was reserved for the candidate belonging to Scheduled Tribe community. The records reveal that no Scheduled Tribe candidate was available for the zone of consideration. In such circumstances, by application of the provision of Section 6 of the Act, opposite party no.1 was promoted to the rank of Junior Class-I inasmuch as Section 6 of the Act empowers the authority for exchange of post between Scheduled Castes and Scheduled Tribes. We find, such modality has been adhered to while according promotion to opposite party no.1 to the rank of Junior Class-1. Therefore, the promotion of opposite party no.1 from the rank of Junior Class-II to Junior Class-I cannot be faulted with.

6. However, opposite party no.1 was reverted by applying the 2nd provision to Section 7 of the Act. Learned Tribunal has held that the promotion in question would be governed by the provision of Section 6 of the Act and not Section 7 of the Act. Therefore, we are in complete agreement with the finding and conclusion reached by the learned Tribunal in the impugned judgment under Annexure-3.

7. In that view of the matter, we do not find any infirmity or illegality in the impugned judgment dated 29.4.2011 passed by the learned Orissa Administrative Tribunal, Bhubaneswar in O.A.No.752/2009 to be interfered with in the present writ petition.

8. The writ petition is accordingly dismissed being devoid of merit.

Writ petition dismissed.

2015 (II) ILR - CUT- 1077

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

W.P.(C) NO. 10712 OF 2009

RENUKA MAJHI & ORS. ……...Petitioners

.Vrs.

STATE OF ORISSA & ORS. ……Opp. Parties

SERVICE LAW – Persons, who have entered services through back door, must vacate the same through back door.

In this case father of the petitioners obtained fake scheduled tribe certificate by tampering school admission register and took unfair advantage in securing employment – Petitioner Nos. 1 & 2 also entered into government service basing on the said certificate – Whether services of the petitioners can be protected ? Held, extraordinary and equitable jurisdiction of the Court under article 226 of the Constitution of India can not be exercised in favour of the persons who have approached this Court with unclean hands. (Para 17)

Case Laws Referred to :-

1. AIR 2001 SC 393 : State of Maharashtra -V- Milind
2. 2013 (15) SCALE 273 : Shalini -V- New English High Sch. Assn. & Ors.
3. (2008) 13 SCC 170 : Regional Manager, Central Bank of India -V- Madhulika Guruprasad Dahir & Ors.

For Petitioners : Mr. Gautam Mukherji
For Opp.Parties : Mr. R.K.Mohapatra, Govt. Adv

Date of Hearing : 10.12.2014
Date of Judgment : 22.12.2014

JUDGMENT

DR. A.K.RATH, J.

In this writ petition under Article 226 and 227 of the Constitution of India, the petitioners have prayed, inter alia, to quash the order dated 14.7.2009 passed by the Director (ST/SC)-cum-Additional Secretary to Government, opposite party no.3, directing the Collector, Bolangir to take action on the order dated 30.6.2009 passed by the State Level Scrutiny Committee. By order dated 30.6.2009, the State Level Scrutiny Committee (hereinafter referred to as "the Committee") came to a conclusion that the petitioners do not belong to Gond Community (Scheduled Tribe).

2. The factual matrix of the case is as follows:-

Lochan Majhi is the father of the petitioners. By tampering the school admission register, he obtained a fake Scheduled Tribe Certificate and took unfair advantage of the same in securing employment in the Office of the Executive Engineer, Lower Suktel Dam Division, Bolangir. While the matter stood thus, show cause notice was issued by the opposite party no.3 enclosing therein a copy of the report of the Inspector of Police, Vigilance Cell, Bolangir to him and the petitioners. Thereafter, Lochan Mahi and the petitioners filed their show cause. In a detailed order dated 30.9.2006, the Committee came to hold that Lochan Majhi had tampered the school register by changing the surname, name of the village, name of the father and caste. The Committee further held that the persons do not belong to Gond (Scheduled Tribe) and directed the Tahasildar, Kantabanjhi, opposite party no.9 to cancel the caste certificate issued to Lochan Majhi and the petitioners. A further direction was issued by the Committee to lodge the F.I.R. and to take appropriate action for removal of services of Lochan Majhi and petitioner no.1. Lochan Majhi challenged the order dated 30.6.2009 of the Committee before this Court in W.P.(C) No.10649 of 2009. A Division Bench of this Court in a well discussed judgment dated 30.4.2010 dismissed the writ petition. Thereafter, he filed Special Leave Petition No.17515 of 2010 before the apex Court and the same was also dismissed.

3. The petitioners have assailed the self-same order of the Committee, vide Annexure-7, on the ground that the order is an infraction of principle of natural justice inasmuch as no opportunity of hearing was provided to them. Alternatively it is pleaded that service of petitioner no.1 may be protected since she was no way responsible in obtaining the certificate. During pendency of the writ petition, an affidavit was filed on 19.8.2014 by the petitioners wherein it is stated that after dismissal of the writ petition, they have stopped using the caste certificate. At present petitioner nos.3 and 4 are not enjoying any reservation facilities provided by the Government and they will not enjoy the same in future. Thus, the petitioner no.1 may be protected.

4. A counter affidavit has been filed by opposite party no.9. It is stated that the petitioners by suppressing the material facts had obtained fake caste certificate in their favour. The same was ascertained in the inquiry conducted by the appropriate authorities. There is no infirmity in the order passed by the Committee. It is further stated that petitioners 1, 2 and 3 are the

daughters and petitioner no.4 is the son of Lochan Majhi. By suppressing the original caste, Lochan Majhi obtained the caste certificate claiming to be the Scheduled Tribe. He was appointed as Peon in the erstwhile Irrigation Department. By utilizing the said fake certificate, petitioner no.1 was appointed as Junior Clerk in the Office of the Civil Court, Bolangir. Similarly, petitioner no.2 has been appointed as Sikhya Sahayak in the Rengali U.P. School in the district of Bolangir. When the allegation of fake caste certificate and utilization of the same was received, an inquiry was conducted by the State Vigilance Department, which produced a comprehensive report showing fake caste certificate obtained by a number of persons including the petitioners. The matter was reported to the Committee for further verification and necessary action. The Committee examined the matter and passed a final order for cancellation of the certificates of the petitioners and directed the authorities to take necessary action.

5. Heard Mr.G.Mukherji, learned counsel for the petitioners and Mr.R.K.Mohapatra, learned Government Advocate for the opposite parties.

6. Really two points arise for our consideration :-

1. Whether the order dated 30.6.2009 of the State Level Scrutiny Committee, vide Annexure-7, is an infraction of the principle of natural justice ?

2. Whether the service of the petitioner nos.1 and 2 can be protected?

POINT NO.1.

7. The submission of Mr. Mukherji that the order dated 30.6.2009 is infraction of principle of natural justice is difficult to fathom. Admittedly, the order passed by the Committee was the subject matter of challenge in W.P.(C) No.10649 of 2009, which was dismissed on 30.4.2010. Thereafter, the Special Leave Petition No.17515 of 2010 filed by the father of the petitioners before the apex Court had met the same fate. Thus, the order attained finality.

8. Be it noted that the Committee had issued show cause notices to the father of the petitioners as well as the petitioners. Thus, it cannot be said that no opportunity of hearing was provided to the petitioners to defend their case. After considering the show cause, the report of the Investigating Officer, school admission register of the father of the petitioners and the caste certificates issued by the two different authorities, the Committee came to hold that the persons do not belong to Gond (S.T.) and, accordingly, direction

was issued to the concerned authorities, where father of the petitioners and petitioner no.1 are serving, to take steps for removal of their services.

POINT NO.2.

9. In the ***State of Maharashtra Vrs. Milind,*** AIR 2001 SC 393, the Constitution Bench of the Supreme Court was examining whether Koshti was a sub-tribe within the meaning of Halba/Halbi as appearing in the Constitution (Scheduled Tribes) Order, 1950. The respondent in that case had obtained a Caste Certificate from the Executive Magistrate to the effect that he belonged to 'Halba' Scheduled Tribe. He was on that basis selected for appointment to the MBBS degree Course in the Government Medical College for the session 1985-86 against a seat reserved for Scheduled Tribe candidates. The certificate relied upon by the respondent-Milind was sent to the Scrutiny Committee, the Committee recorded a finding after inquiry to the effect that the respondent did not belong to Scheduled Tribe. In an appeal against the said Order, the Appellate Authority concurred with the view taken by the Committee and declared that the respondent Milind belonged to 'Koshti Caste' and not to 'Halba Caste' Schedule Tribe.

10. In a writ petition filed against the said order by Milind, the High Court held that it was permissible to examine whether any sub-division of a tribe was a part and parcel of the tribe mentioned therein and whether 'Halba-Koshti' was a sub-division of the main tribe 'Halba' within the meaning of Entry 19 in the Constitution (Scheduled Tribes) Order, 1950. The High Court further held that Halba-Koshti was indeed a sub-tribe of Halba appearing in the Presidential Order.

11. In an appeal filed against the above order of the High Court, the apex Court held that the Courts cannot and should not expand their jurisdiction while dealing with the question as to whether a particular caste or sub-caste, tribe or sub-tribe is included in any one of the Entries mentioned in the Presidential Orders issued under Articles 341 and 342. Allowing the State Government or the Courts or other authorities or tribunals to hold an inquiry as to whether a particular caste or tribe should be considered as one included in the Schedule to the Presidential Order, when it is not so specifically included would lead to problems. The apex Court declared that the holding of an inquiry or production of any evidence to decide or declare whether any tribe or tribal community or part thereof or a group or part of a group is included in the general name, even though it is not specifically found in the

entry concerned would not be permissible and that the Presidential Order must be read as it is.

12. Having said so, the apex Court noticed the stand taken by the Government on the issue of 'Halba-Koshti' from time to time and the circulars, resolutions, instructions but held that even though the said circulars, instruction had shown varying stands taken by the Government from time to time relating to 'Halba-Koshti' yet the power of judicial review exercised by the High Court did not extend to interfering with the conclusions of the competent authorities drawn on the basis of proper and admissible evidence before it. The apex Court observed:-

> *"…….The jurisdiction of the High Court would be much more restricted while dealing with the question whether a particular caste or tribe would come within the purview of the notified Presidential Order, considering the language of Articles 341 and 342 of the Constitution. These being the parameters and in the case in hand, the Committee conducting the inquiry as well as the Appellate Authority, having examined all relevant materials and having recorded a finding that Respondent 1 belonged to "Koshti" caste and has no identity with "Halba/Halbi" which is the Scheduled Tribe under Entry 19 of the Presidential Order, relating to the State of Maharashtra, the High Court exceeded its supervisory jurisdiction by making a roving and indepth examination of the materials afresh and in coming to the conclusion that "Koshtis" could be treated as "Halbas". In this view the High Court could not upset the finding of fact in exercise of its writ jurisdiction."*

13. The Constitution Bench had in Milind's case noticed the background in which the confusion had prevailed for many years and the fact that appointments and admissions were made for a long time treating 'Koshti' as a Scheduled Tribe and directed that such admissions and appointments wherever the same had attained finality will not be affected by the decision taken by the apex Court.

14. In ***Shalini Vrs. New English High Sch. Assn. and others,*** *2013 (15) SCALE 273,* the apex Court culled out the principles which would be relevant for deciding such like conundrums. The same are quoted hereunder:-

> "(a) If any person has fraudulently claimed to belong to a Scheduled Caste or Scheduled Tribe and has thereby obtained employment, he would be disentitled from continuing in employment. The rigour of

this conclusion has been diluted only in instance where the Court is confronted with the case of students who have already completed their studies or are on the verge of doing so, towards whom sympathy is understandably extended; (b) Where there is some confusion concerning the eligibility to the benefits flowing from Scheduled Caste or Scheduled Tribe status, such as issuance of relevant certificate to persons claiming to be 'Koshtis' or 'Halba Koshtis' under the broadband of 'Halbas', protection of employment will be available with the rider that these persons will thereafter be adjusted in the general category thereby rendering them ineligible to further benefits in the category of Scheduled Caste or Scheduled Tribe as the case may be."

15. So far as petitioners 1 and 2 are concerned, they have completed their studies. Thereafter, they have been appointed in service. Let us see if their services can be protected by invoking the principle enunciated by the apex Court. Admittedly, the father of the petitioners by tampering school admission register obtained a fake scheduled caste certificate and took unfair advantage of the same in securing an employment in a Government office. The direction of the Committee to cancel the caste certificate has been upheld by the apex Court. The petitioner nos.1 and 2 have also entered into the Government service on the basis of the said certificate. Thus, they are disentitled from continuing in service. Since there is some confusion concerning the eligibility to the benefits flowing from Scheduled Caste or Scheduled Tribe status such as issuance of relevant certificates to persons claiming to be 'Koshtis' or 'Halba Koshtis' under the broadband of 'Halbas', protection of employment had been given to the petitioners therein with the rider that those persons will be adjusted in the general category and thereby rendering them ineligible to the further benefits. Thus, the case of the petitioners is not covered under the principles enunciated by the apex Court in Shalini (supra). A bare reading of the said decision, however, shows that there is a significant difference in the factual matrix in which the said case arose for consideration. Thus, the said decision is of no assistance to the petitioners.

16. In ***Regional Manager, Central Bank of India Vrs. Madhulika Guruprasad Dahir and Others,*** (2008) 13 SCC 170, the apex Court had again considered the identical issues involved in the present writ petition. The apex Court held that equity, sympathy and generosity have no place where the original appointment rests on a false caste certificate. A person, who

enters the service by producing a false caste certificate and obtains appointment to the post meant for a Scheduled Caste or Scheduled Tribe or OBC, as the case may be, deprives a genuine candidate falling in either of the said categories of appointment to that post, and does not deserve any sympathy or indulgence of the Court. Paragraphs-14 and 18 of the said report are quoted hereunder:-

> "14. Similarly, the plea regarding rendering of services for a long period has been considered and rejected in a series of decisions of this Court and we deem it unnecessary to launch an exhaustive dissertation on principles in this context. It would suffice to state that except in a few decisions where the admission/appointment was not cancelled because of peculiar factual matrix obtaining therein, the consensus of judicial opinion is that equity, sympathy and generosity have no place where the original appointment rests on a false caste certificate. A person who enters the service by producing a false caste certificate and obtains appointment to the post meant for a Scheduled Caste or Scheduled Tribe or OBC, as the case may be, deprives a genuine candidate falling in either of the said categories of appointment to that post, and does not deserve any sympathy or indulgence of the Court. He who comes to the Court with a claim based on falsity and deception cannot plead equity nor the Court would be justified to exercise equity jurisdiction in his favour.
>
> 18. Having considered the matter in the light of the aforestated legal position, in our judgment, the decision of the High Court is untenable. As noted supra, the employee having accepted the finding of the Scrutiny Committee, holding that the caste certificate furnished by the employee was false, the very foundation of her appointment vanished and her appointment was rendered illegal. Her conduct renders her unfit to be continued in service and must necessarily entail termination of her service. Under these circumstances, there is absolutely no justification for her claim in respect of the post merely on the ground that she had worked on the post for over twenty years. The post was meant for a reserved candidate but she usurped the same by misrepresentation and deception. In our opinion, the fact that caste certificate was referred to the Scrutiny Committee for verification after ten years of her joining the service and a long time was taken by the Scrutiny Committee to verify the same is of no

consequence inasmuch as delay on both the counts does not validate the caste certificate and the consequent illegal appointment."

17. The extraordinary and equitable jurisdiction of this Court under Article 226 cannot be exercised in favour of the persons who have approached this Court with a pair of unclean hands. Those persons, who have entered services through backdoor, must vacate the same through back door.

18. The ratio of the judgment, *in Regional Manager, Central Bank of India (supra),* applies with full force to the facts and circumstances of the present case and, accordingly, we dismiss the writ petition.

Writ petition dismissed.

2015 (II) ILR - CUT-1084

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

CRLA NO. 268 OF 2011

TIKERAM BAG …….. Appellant

.Vrs.

STATE OF ORISSA …… Respondent

INDIAN PENAL CODE, 1860 – S. 304-I

Culpable homicide not amounting to murder – When a single blow was inflicted by the appellant without repeating the same, it is difficult to conclusively conclude that the appellant had intention to commit the murder of the deceased – No blood stain on the weapon of offence – Appellant had no Criminal Proclivity or any criminal background – Since the incident occurred at the spur of the moment and the blow was given out of sheer anxiety and anger the appellant's conviction U/s. 302 I.P.C. and sentence of life imprisonment with fine of Rs. 10, 000/- is scored out and instead he is convicted for the offence U/s. 304 part (1) I.P.C. and is sentenced to the period of imprisonment already undergone by him. (Paras 14 to 20)

For Appellant : M/s. S.K.Joshi , J.K.Panda, P.C.Mohapatra, R.K.Dash & G.C.Swain
For Respondent : Mr. J.Katikia (A.G.A)

Date of hearing : 05.05.2015
Date of judgment: 11.05.2015

JUDGMENT

VINOD PRASAD, J.

Appellant Tikeram Bag with five of his other socio criminises including his three uterine sibling brothers, namely, Bholanath Bag, Radheyshayam Bag @ Radhe and Raju Bag with two others Debeswar Bag and Gobinda Bag, were prosecuted for offences u/s 302/34, 294/34 and 323/34 relating to police station Boden district Nuapada by Additional Sessions Judge, in C.T.Case No.5 of 2010, The State versus Tikeram Bag and others and since the appellant only was adjudged guilty of offence u/s 302 I.P.C. and was convicted and sentenced to life imprisonment and to pay a fine of Rs. 10000/- only and in default of payment of fine to serve additional 1 year imprisonment vide impugned judgment and order dated 28.3.2011, that he has preferred instant appeal challenging his aforesaid conviction and sentence. Albeit needless to mention but recapitulated here is the fact that rest of his associates, who were members of unlawful assembly, were acquitted by the learned trial Judge which opinion of acquittal has now attained finality as not being challenged from any quarter.

2. Occurrence in question, as was unfurled during the trial by the fact witnesses had occurred in village Dahanapali, P.S.Boden district Nuapada where a Banyan tree is situated at *Baragachha Chhak* by the east side, at the north bend of a east –west village metalled road. Banyan tree is encircled by a cemented brick pedestal and the incident in question occurred near this Banyan tree on the metalled road. House of Balkrishna Bhoi, the informant/PW1 and his father Nityananda Bhoi, the deceased in the incident, lies a little more than 100 meters from the tree in Bhoi Pada, while house of the appellant is situated about 150 meters in Harijan Pada. Nearby also lies a primary school at a distance of 50 meters. From near the place of the incident another road goes to the village Takkersor.

3. Both the rival inimical sides are residents of the same village Dahanapali and genealogy of the prosecution sides reveals that one Chakradhar Bhoi of that village had three sons Nityananda (deceased)

Bhardwaj Bhoi/ PW3 and one Narsingh Bhoi(injured in the incident but not examined by the prosecution). Informant Balkrishan Bhoi/ PW1 and Radhakrishna Bhoi/PW4 are the sons of the deceased Nitaynanada, where as Gharmani Bhoi/ PW10 is the wife of the informant/ PW1. So also it transpires that one Mangal Bag of the same village Dahanapali had four sons Tikeram(appellant), Bholanath, Radheyshayam @ Radhe, and Raju (all were accused but since acquitted). It is not decipherable from testimonies of witnesses as to whether other two acquitted accused Debeswar Bag and Gobinda Bag belonged to the same family tree or not but it is apparently unambiguous, from their statements u/s 313 of the Code, that that they were also co villagers.

4. Monday (24.8.2009) was the festive occasion of *Nuakhai,* and to rejoice the feast of that day, the villagers gathered under the Banyan tree on Tuesday the 25.8.2009. When at 2 p.m. two acquitted accused Debeswar and Gobinda, in an inebriated state, engaged themselves in a triadic obscene altercation with Raddhakrishna/ PW4 and Bharadwaj Bhoi/ PW3 which was desisted by PW4, and resultantly both PW4 and PW3 were assaulted by the abusers. Verbal commotion attracted Narsingh Bhoi at the incident scene but he was also not spared and was inflicted with injuries. Deceased also arrived at the spot hearing the sputtering and commotion and intervened in scuffle and tried to separate both the aforesaid accused. Meanwhile rest of the four accused including the appellant, who alone was armed with a 'GEDA' (a club), came at the incident spot and the appellant gave a single GEDA blow on the head of Nityananada(deceased) who, sustaining profuse bleeding head injury squatted on the ground. Thereafter, accused left the incident scene. Informant and the injured relatives lifted Nityananad (deceased) to their house where they tried to administer him water, but he was unable to drink. Sensing that Nityananad had lost his life because of the inflicted injury, the informant/PW1 dictated incident FIR to a co-villager Rajat Kumar Patnaik/ PW9 and after verifying its contents signed on it and after tramping to a distance of 13 KMs to the police station Boden he lodged his FIR (Ext.1) same day at 3.30 p.m. just after one and half hours which was registered by Akshaya Kumar Dhadei/ PW11, O.I.C. Boden as Crime No. 56 of 2009, u/s 294/323/302/34 I.P.C.

5. Investigation was set a foot immediately by the I.O./ PW11, who after registering formal FIR Ext.1/4, examined the informant, deputed constable no. 203 H. Mahananda to guard the cadaver and then sketched site

plan Ext.13. Appointing witnesses inquest on the dead body was conducted and inquest memo Ext.3 was slated and thereafter the corpse was dispatched to P.H.C. Boden for post mortem examination along with dead body chalan Ext.14. On production by the informant/PW1 branch of a Ankal tree, which was the weapon of assault, M.O.I, was seized vide seizure memo Ext.2. Blood stained and sample earth was collected as per Ext.4. Thereafter, accused appellant and Dabeswar Bag and Gobinda Bag were arrested and their attires were seized vide seizure memos Ext. 5, 6 & 7. Query regarding weapon of offence was made vide Ext.10 and subsequent to autopsy, on production by the constable, clothes of the deceased were seized vide seizure list Ext. 15. Injured were got medically examined and thereafter rest of the accused were arrested. Nail clippings of accused were seized vide Ext.8. Expert opinion from R.F.S.L. Berhampur was called for vide Ext.16 and after receipt, the same is proved as Ext. 17. Completing investigation all the accused were charge sheeted for the registered crimes to stand their trial.

6. Against the charge sheeted accused G.R.Case No. 37 was registered before J.M.F.C. Khariar, who finding offence prosecutable by Sessions Court committed accused case to the Sessions Court for trial vide his committal order dated 8.1.2010 and before the Session's court it was registered as C.T.5 of 2010, State versus Tikeram Bag and others, and learned trial court/ Additional Sessions Judge Nuapada charged all the accused with offences u/s 302/34, 294/34 and 323/34 on 29.4.2010. Since all the accused denied those charges and pleaded not guilty and claimed be tried resultantly to establish their guilt and prove the charges their trial commenced.

7. Prosecution in its endeavour to establish the charge examined in all eleven witnesses out of whom, Balakrushna Bhoi, infrormant/PW 1, Bharadwaj Bhoi/PW 3, Radhakrushna Bhoi/PW 4 and Gharamani Bhoi/PW 10 are eyewitnesses. Bhubaneswar Hans/PW 2 is a witness of inquest, whereas Bhosgar Salma/PW 5 and Hrudaya Mahanand are two police constables. Dr. Smruti Ranjan Samal/PW 7 is the autopsy doctor. Rajat Kumar Pattnaik/PW 9 is the scribe of the FIR and Braja Kishore Duria/PW 8 is the ASI of Boden P.S. and a seizure witness. Investigating Officer Akshaya Kumar Ghadei is PW 11. Prosecution had also tendered thirteen documentary evidences as exhibits. The weapon of assault MO-I and Lungi MO-II are two material exhibits.

8. The defence of all the accused was that of total denial and their false implication but they did not produce any oral or documentary evidence.

9. After vetting through the evidences, learned trial judge vide impugned judgment and order concluded that prosecution had remained unsuccessful in bringing home the charges qua rest of the accused except the appellant and, therefore, while acquitting all others it concluded that the prosecution has successfully been able to prove its case beyond all reasonable doubt against the appellant Tikeram Bag under Section 302 IPC and therefore, finding him guilty, convicted and sentenced him as stated herein above, which judgement has generated the present appeal.

10. In the aforesaid back-ground that we have heard Mr. G.C.Swain, learned counsel for the appellant and Mr. J.Katikia, learned Additional Government Advocate for the respondent-State and perused the record.

11. Sri Swain raised various points castigating the impugned judgment such as non-examination of any independent witness although present at the scene of the incident and hence prosecution case not being reliable, the weapon of assault(Geda) not containing any blood stain and, therefore, it not being the weapon of assault, weapon of assault not being shown to the Dr. Smruti Ranjan Samal/PW 7, while he was in the witness box which is fatal to the prosecution version, absence any previous enmity between rival factions so as to prompt the appellant to commit the crime etc. but his penultimate contention remained only on the nature of crime committed by the appellant , which according to learned counsel will not traverse the ambit of section 304 part(I)I.P.C. and certainly not fall within the purview of intentional murder punishable u/s 302 I.P.C. and articulating his said contention reference was made to various depositions of fact witnesses as well as that of the doctor. Since the appellant is already in jail from the date of his arrest i.e., 27.08.2009, the concluding argument was that his crime be altered to culpable homicide not amounting to murder and his sentence be reduced to the period of imprisonment already undergone considering palliative circumstances of his not having any criminal history and the incident occurring at the spur of the moment in the midst of a scuffle and only a single blow only to the deceased being hurled with nobody else being assaulted nor repetition of blow was made.

12. Learned Additional Government Advocate submitting to the contrary contended that the prosecution has successfully anointed appellant's guilt, who had given the fatal blow to the deceased without any provocation and he being the sole perpetrator of the crime, the impugned judgment does not

require any modification/alteration. Therefore, the appeal be dismissed and conviction and sentence of the appellant be affirmed.

13. We have given our thoughtful considerations to the rival submission. Before deliberating over rivals contentions and scanning the submission raised, it will be appropriate to mention that there cannot be any dispute regarding the deceased being met with a homicidal death. According to the autopsy doctor, who had conducted P.M. examination on 26.08.2009 at 9.30 a.m., the deceased had sustained wound on scalp and his left parietal bone had fractured. He had also sustained another abrasion on upper eye lid left side, which injury is simple and insignificant and consequently deceased had sustained only a single fatal injury. His body was stout, pupil fixed, eyes closed and teeth locked. On internal dissection, doctor had found intra-carnial haemorrhage on left parietal region. Lungs of both sides were congested and 24 to 72 hours elapsed since the deceased had demised. Cause of death was due to syncope caused by injury on head which had led to intra-cranial haemorrage. Autopsy report of the deceased is Ext.9. Regarding weapon of assault MO-I, the doctor vide Ext.10 had opined that the same could have caused the injury sustained by the deceased. During cross-examination, the defence has not at all challenged findings recorded by the doctor in the autopsy examination report Ext.9 and thus, there is little or no doubt in opining that the deceased met with a homicidal death by infliction of a single injury on the head resulting in fracture of his left temporal bone.

This being the position, the only question remains to be adjudicated is as to whether the appellant had participated in the crime and had inflicted that injury or not? Examining the said aspects, it is manifest from the evidence of the eyewitnesses, corroborated by the evidence of the doctor that the appellant was the sole accused, who was armed with a weapon during the incident and it was he, who had given a single blow on the head of the deceased. Two injured witnesses, namely, Bharadwaj Bhoi/PW 3 and Radha Krushna Bhoi/PW 4 have clearly named the appellant as the sole inflictor of the injury. These injured witnesses were also medically examined on the same day i.e., 26.08.2009 by PW 7. Bharadwaj Bhoi/PW 3 had sustained the following injuries:-

(i) Two bruises of size 1 cm x 1 cm on both the legs.
(ii) One bruise of size 1 cm x 1 cm on the middle of the chest.

Both the aforesaid injuries were simple in nature and were caused by hard and blunt object. Injury report of Bharadwaj Bhoi is Ext.11. Radha Krushna Bhoi/PW 4 had no visible external injury and his medical examination report is Ext.12. Presence of these two witnesses at the scene of the incident could not be disputed at all. No suggestion has been given which can dislodge their testimonies. The informant has also corroborated the statement of the injured witnesses and therefore, the concluding residue is that the appellant was one of the participants in the incident and had caused injury to the deceased. Gharamani Bhoi/PW 10, who is the wife of the informant, has also convincingly corroborated the three earlier fact witnesses and had anointed role to the appellant of giving a single blow to the deceased. There was no occasion for all these persons to make a false story against the appellant of his being the sole inflictor of the injury. In such a view, prosecution has successfully established the case of participation of the appellant in the incident and in giving a single blow on the head of the deceased by a Geda.

14. Now, we advert to the contention as to whether the guilt of the appellant falls within the ambit of Section 302 IPC or it will be only under Section 304, Part-I IPC of culpable homicide not amounting to murder. The circumstances in this connection tendered during the trial has got mollifying evidences to indicate that at no point of time the appellant had any intention to commit murder of the deceased. His crime therefore, will not fall within the purview of Section 302 IPC and we hereby proceed to register the evidences, which support our said conclusion. Informant Bala Krushna Bhoi/PW 1 in his examination in chief has clearly stated that the incident started between Debeswar and Gobinda by hurling obscene words at Radha Krushna and Bharadwaj in a state of intoxication, which was objected to by PW 4 and then both the accused persons assaulted PW 3 as well as PW 4. Narasingh Bhoi, a paternal uncle of the informant, although arrived at the incidence scene, he was not assaulted by the appellant, but by two acquitted accused Debeswar and Gobinda. It was at that moment that the deceased had arrived at the spot after hearing the commotion and he intervened into the said incident and tried to separate both the aforesaid Debeswar and Gobinda. At this point of time, according to the informant PW1, the appellant with rest of his brothers, namely, Bholanath, Radheshyam and Raju came to the scene of the incident and the appellant is alleged to have inflicted a single blow on the head of the deceased causing him profuse bleeding injury. During cross-examination, the informant has deposed that the incident had occurred on the metal road near a banyan tree and his specific statement is "*At the time of the*

occurrence, there was a huge gathering of the villagers. The entire occurrence had taken place near the Banyan tree. But due to tussle of the parties, there was some movement. By the time the accused persons namely Tikeram, Bhoanath, Radheshyam and Raju came to the spot, some outsiders had already reached to the spot but they were witnessing the occurrence standing at a little distance." Such a testimony by the informant clearly indicates that the appellant had arrived at the scene of the incident when many other people had gathered and the incident was already in the offing and both the sides were engaged in a brawl. In such a view, when a single blow was inflicted by the appellant without repeating the same, it is difficult to conclusively conclude that the appellant had intended to commit the murder of the deceased. It is quite clear that to stop the fight, a single blow was given to the deceased, which unfortunately proved fatal. No other blow was repeated either on the deceased or anybody else. The Geda was also left at the scene of the incident and was not taken away by the appellant, who in the natural course of event, had he possessed intention to commit murder, would have taken it along with him while escaping from the spot. The Geda was taken away by the informant to his house, who had handed it over it to the police. Chemical examiner's report does not indicate any blood stain on the said Geda. Thus the overall picture which emerges from such facts and evidences is that the appellant had no intention to commit murder of the deceased at all and he only inflicted a single blow at the spur of the moment in the midst of the quarrel arriving at the scene of the incident much later.

15. Bharadwaj Bhoi/PW3, another eyewitness also divulged somewhat diluting the crime evidence. His examination in chief reads "*On the day of occurrence at about 2.00 to 2.30 P.M. I saw a quarrel going on in between Radhakrushna and accused Debeswar and went near the spot i.e Baragachha Chhak. When I intervened and tried to separate them, accused Debeswar assaulted me on my chest and left knee by means of his hand as a result I fell down on the ground. At that time my elder brother Nrusinha came to the spot and accused Debeswar and Gobinda assaulted him. Then deceased Nityananda came to the spot and intervened and tried to separate accused Debeswar and Gobinda. At that time accused Tikeram came with a Geda and gave a blow on the head of Nityananda by means of that Geda. After the said assault accused Bholanath, Radheshyam and Raju came to the spot and they were abusing us in obscene words like MAGHYENKU MARIDEMU.*" Such a narration makes it manifest that appellant had arrived at the incident scene subsequent to the genesis of the incident and had given

a single blow. Thus, how the incident started is not known. It may be because of the fault of the prosecution side. Genesis of the incident seems to be clouded with mystery as hurling of abusive words by the two accused in a tizzy condition has not been satisfactorily established and acquittal of those two accused supports such a conclusion. A single blow at the spur of the moment by the appellant who arrived at the incident scene much later cannot be taken to be a clinching evidence anointing his guilt under Section 302 IPC and therefore, the guilt of the appellant is to fall within the mischief of Section 304, Part-I and not Section 302 IPC. In the cross-examination nothing has been got elicited from this witness so as to aggravate the crime dragging it within the ambit of murder. Significant to note it that in cross-examination PW 3 has stated that "*When I reached at the spot accused Debeswar and Radhakrshna (injured) were holding each other and accused Debeswar made Radhakrushna fall on the ground on the edge of the concrete road. I cannot say the duration of the entire occurrence. When accused Debeswar assaulted me I fell down and got a shock*." Thus, it is clearly manifest that the incident of assault had preceded by a tussle and jostling between both the factions. In such an event a single blow by a Geda by the appellant will not bring the case within the scope of murder punishable under 302 IPC.

16. Likewise from the depositions of PW 4 also it does not emerges that the appellant had any intention to commit murder. In his examination in chief PW 4 has deposed that "*At that time my father Nityananda came to the spot and he tried to separate the said two accused persons. Then accused Tikeram came to the spot by holding a Geda and assaulted on the head of my father by means of that Geda as a result, my father sustained bleeding injury on his head and fell down on the ground.*" Thus, the unambiguous story divulged during the trial was that the appellant had arrived at the scene of the incident subsequent to the jostling and muscle flexing by both the side and while the deceased was already a participant in the incident that the appellant is alleged to have inflicted a single blow. In such a view it is very difficult to convincingly opine that the accused had an intention to commit murder of the deceased.

17. At this juncture, we would like to advert to the impugned judgment and the view slated by the learned trial judge. We are of the opinion that the learned trial judge has not paid due attention to the evidences referred to above and in a very slipshod manner by pedantically accepting the

prosecution case has convicted the appellant for the charge of murder while acquitting all other co-accused persons of all the crime. We express our displeasure over such an analysis by the learned trial Judge. We also note here that the trial Judge has committed apparently a manifest error in charging six appellants with the offence of murder with the aid of Section 34 IPC. If the learned trial judge was framing charge against six of the accused, we are unable to fathom any viable reason as to why he has applied Section 34 IPC instead of Section 149 IPC. It was a clear case of forming of an unlawful assembly of six persons and therefore, when the trial Judge was charging all the accused with identical offences, he should have framed the charges under Sections 302/149,294/149 and 323/149 IPC instead of applying Section 34 IPC. The entire analysis by the trial Judge does not indicate that he was interested in separating grain from the chaff and to exhume the real truth. Appellant was not at the scene of the incident from the very beginning. The genesis of the incident is unknown and lies in mystery as held herein above. A single blow by Geda in the midst of the muscle flexing is all what has been alleged against the appellant. All the significant aspects completely escaped the notice of the learned trial judge and therefore, his opinion qua the crime committed by the appellant is fallacious, incipient and wholly unacceptable. In our opinion, the appellant can be held to be guilty only under Section 304, Part-I IPC and not under Section 302 IPC. No other point was deliberated or urged by the learned counsel for the appellant.

18. In view of our aforesaid analysis, we allow the appeal in part. Conviction of the appellant for offence under Section 302 IPC is hereby set aside and instead the appellant is convicted under Section 304 Part (I) IPC.

19. Now adverting to the question of sentence, we find that the incident had occurred on 25.08.2009. Six years have gone by. Appellant was arrested on 27.08.2009 and since that date he is in jail. His brothers were in peril and intervening in the quarrel, he had given a single blow on the head of the deceased, when both parties were engaged in muscle flexing with each other and the deceased was already an intervener. In such a view, the period of incarceration under gone by the appellant, in our view, would serve the ends of justice as nowhere it has been brought on record that the appellant had any criminal proclivity or any crime background. It has also not been shown to us that the appellant is an outlaw and was a dangerous person. He has got a family and the incident had occurred at the spur of the moment and the blow was given out of sheer anxiety and anger.

20. Epilogue of the discussion is that the appeal is allowed in part. Appellant's conviction under Section 302 IPC and sentence of life imprisonment with fine of Rs.10,000/-(Rupees ten thousand) is hereby scored out and instead he is convicted for offence under Section 304 Part(I) IPC and is sentenced to the period of imprisonment already undergone by him. The appellant is in jail. He is directed to be set at liberty forthwith unless and until he is required in any other crime.

21. The appeal is partly allowed as above.

22. Let the trial Judge be informed accordingly.

Appeal allowed in part.

2015 (II) ILR - CUT-1094

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

CRLA NO. 323 OF 2008/G.A. NO. 1 OF 2015

MD. AYUB KHAN @ YUNUS KHAN …….. Appellant

.Vrs.

STATE OF ORISSA ……...Respondent

EVIDENCE ACT, 1872 – S.9

T.I. PARADE – OBJECT – To test the memory and capacity of the witness to recapitulate what he has seen earlier – If a witness identifies the accused in court for the first time and it is not corroborated by the earlier T.I. parade, the probative value of such un corroborated evidence becomes minimal and it is unsafe to rely on such evidence.

In this case accused-appellant Md. Ayub Khan was arrested on 24.08.2005 and T.I. parade was conducted on 29.08.2005 – Forwarding report of the Magistrate does not disclose any instruction to the I.O. to conceal the accused under the covers from the sight of the public after arrest or while produced before the Court, till conduct of T.I. parade – In such circumstances the possibility of P.W. 22 the sole identifying

witness, noticing the appellant after arrest and before the T.I Parade can not be ruled out – It is unsafe to convict the appellant on the evidence of P.W.22 who identified the appellant in T.I Parade but failed to identify him in Court – Prosecution failed to establish the case against appellant Md. Ayub Khan beyond all reasonable doubt – Conviction of the said appellant by the trial court relying upon the evidence of P.Ws.22 & 26 and T.I parade report is setaside.

(Para 8)

Case Laws Rreffered to :-

1. AIR 1972 SC 283 : Hasib -V- State of Bihar.
2. AIR 1960 SC.1340 : Vaikuntam Chandrappa -V- State of Andhra Pradesh
3. 2005 SC (Criminal) 1218 : Umesh Kamat -V- State of Bihar

For Appellant : M/s. Debasis Panda
For Respondent : M/s. A.K. Mishra (S.C)
Mr. Dharanidhar Nayak Sr. Advocate

Date of Argument :12. 1. 2015
Date of Judgment : 20.01.2015

JUDGMENT

S.K.SAHOO, J.

The appellant in Criminal Appeal No.323 of 2008, namely Md. Ayub Khan @ Yunus Khan and the respondents in Government Appeal No.1 of 2015, namely Papu @ Sahajan Khan, Gulam Alli, Murshid Khan @ Murshid Alli Khan, Bablu Ahmad and Muna Khan @ Md. Sidque Allam faced trial in the Court of learned Addl. Sessions Judge, Rourkela in Sessions Trial No. 66 of 2006 for offences punishable under sections 302/34, 307/34, 326/34, 364/511 Indian Penal Code and section 25(1-B) and section 27 (2) of Arms Act.

The learned trial Court vide impugned judgment and order dated 14.7.2008 acquitted the respondents in Government Appeal No.1 of 2015 of all the charges. So far as the appellant Md. Ayub Khan @ Yunus Khan is concerned, he was also acquitted of the charge under section 25/27 of the Arms but was found guilty 302, 307, 326 and 364 read with section 34 Indian Penal Code .

The appellant Md. Ayub Khan @ Yunus Khan was sentenced to undergo rigorous imprisonment for life and to pay fine of Rs.20,000/-, in default, to undergo rigorous imprisonment for two years for offence under section 302 IPC, to undergo rigorous imprisonment for ten years and to pay a

fine Rs.5000/-, in default, to undergo rigorous imprisonment for one year for offence under section 307 IPC, rigorous imprisonment for ten years and to pay a fine of Rs.5000/-, in default, to undergo rigorous imprisonment for one year under section 364/34 IPC. No separate sentence was passed under section 326 IPC against the appellant in view of the sentence passed under section 307 IPC. All the substantive sentences were directed to run concurrently.

2. The prosecution case as per the FIR lodged by Jaihind Lal Sahu (P.W.1) before Inspector-in-charge, Raghunathpalli police station on 24.7.2005 is that he had a gold jewellery shop at the Main road, Rourkela. On 24.7.2005 at about 9.30 p.m. the elder son of the informant namely Rajesh Kumar Sahoo (P.W.22) closed the shop and was coming to the house in a Santro Car bearing Registration No. OR-14-H-5555 via Hanuman Vatika Road which was driven by driver Samir Lohar (hereafter "the deceased"). When the Car entered Civil Township, 'M' Block road, in front of the house of one Rajanikant, some persons came in a vehicle and stopped the Santro Car of P.W.22 and asked him to sit in their vehicle. When P.W.22 refused to sit, he was assaulted by means fist blows and the accused persons also opened fire by means of Pistol. P.W.22 received injuries on his right shoulder, right waist back. The accused persons dragged the deceased and fired at him for which he died at the spot. After the incident, P.W.22 came to his house by driving the Car and informed his father (P.W.1) about the incident at 9.45 p.m. P.W.1 carried P.W.22 to the Hospital where the injured was advised for treatment at I.G. Hospital, Rourkela and accordingly P.W.1 took him and got P.W.22 admitted there. The FIR was lodged against unknown persons on 24.7.2005 at 10.15 p.m. at I.G. Hospital, Rourkela which was subsequently registered on the very same day at 11.50 p.m.

3. P.W. 28 Pravat Chandra Routray was the Inspector-in-charge of Raguhunathpalli police station. On 24.7.2005 at 9.45 p.m. on receipt of telephonic message that one person was lying on the ground with bleeding injuries due to firing near House No.M-17 of Civil Township, he proceeded to the spot after making station diary entry. At the spot, he found the dead body of the deceased and deputed his staff to guard the dead body and intimated the incident to the Superintendent of Police, Rourkela and also sought for the requisition of Scientific Officer, D.F.S.L, Rourkela. At about 10.15 p.m. on 24.7.2005, the IIC received the report of P.W.1 and took up investigation. He conducted inquest over the dead body and sent it for post mortem examination to S.D. Hospital, Panposh. He conducted some seizures

at the spot on the date of incident and also seized the Santro Car and one Nokia Mobile set. He seized the wearing apparels of the deceased, released the seized Santro Car in the Zima of P.W.1 under Zimanama Ext.2. P.W.28 recorded the statements of the witnesses. He also arrested the accused persons and forwarded them to Court. He prayed before the learned SDJM, Panposh for conducting Test Identification Parade which was conducted on 29.8.2005. P.W.28 sent the seized articles to S.F.S.L, Rasulgarh through S.D.J.M., Panposh for chemical examination and received the chemical examination report. On completion of investigation, he submitted charge sheet.

4. The defence plea is one of denial.

5. In order to prove its case, the prosecution examined 31 witnesses.

P.W.1 Jaihind Lal Sahu is the informant in the case and he carried his son (P.W.22) who was injured during course of the occurrence to the hospital for treatment. He also took the zima of his Car from police under zimanama Ext.2.

P.W.2 Dukhabandhu Majhi was the A.S.I. of police posted at Raghunathpalli police station who stated about the seizure of some materials by the Investigating Officer from the spot being produced by the Scientific Officer under seizure list Ext.3.

P.W.3 Gopal Sona is another driver of the informant who is a formal witness.

P.W.4 Kailash Chandra Singh was the constable attached to Raghunathpalli police station who carried the dead body for post mortem examination and after post mortem produced the wearing apparels of the deceased before the Investigating Officer.

P.W.5 Gouranga Charan Mohapatra is another constable of Raghunathpalli police station who stated about the seizure of wearing apparels of the deceased on being produced by P.W.4 by the I.O. under seizure list Ext.4.

P.W.6 Abdul Shakur did not support the prosecution case and he was declared hostile

P.W.7 Jagdev Singh is a witness to the seizure of entry register of Hotel Chandralok under seizure list Ext.5.

P.W.8 Narayan Chandra Ghosh is a witness to the seizure of room register of Hotel Shyam by the police under seizure list Ext.6.

P.W.9 Dillip Kumar Das was the Medical Officer attached to I.G.H, Rourkela who stated about the seizure of two bullets under seizure list Ext.7.

P.W.10 Soumya Ranjan Ray stated about the seizure of occupation register of Hotel Sukhasagar under seizure list Ext. 8

P.W.11 Dr. Rashmi Ranjan Mohanty examined the injured (P.W.22) and proved his injury report vide Ext.9. According to him, P.W.22 sustained grievous injuries which can be caused by fire arm weapon or bullet.

P.W.12 Basanta Kumar Rout was the ASI of Police, Raghunathpalli police station, Rourkela and he also stated about the seizure of two numbers of bullets recovered from the body of P.W.22 under seizure list Ext.7.

P.W.13 Prabhakar Pati was the Havildar attached to Raghunathpali police station who stated about the seizure of six packets produced by the Scientific Officer before the I.O. under seizure list Ext.3.

P.W.14 Subash Minz was the constable attached to Raghunathpalli police station and he stated about the seizure of one seal packet and two X-ray plates under seizure list Ext.11.

P.W.15 Subhendu Mishra found the deceased lying dead in front of his house and he is a witness to the inquest and seizure of pairs of Chappals and also a chain and locket etc. at the spot under seizure list Ext.14.

P.W.16 Manoranjan Panda is a witness to the seizure of visitors' book at Panthanivas under seizure list Ext.15.

P.W.17 Deepak Kumar Sahu is a sales man in the shop of the informant who stated about the seizure of cash memo register, stock register, purchase register and seal register of the shop on being produced by the injured (P.W.22) under seizure list Ext.16.

P.W.18 Jagdish Prasad Agarwal is an eye witness to the occurrence.

P.W.19 Prasant Kumar Pradhan was the Scientific Officer, DFSL, Rourkela who along with his team visited the spot on police requisition and collected some materials from the spot. He prepared the spot visit report vide Ext.17.

P.W.20 Dr. Rajat Ranjan Sadwal conducted post mortem over the dead body and according to him the cause of death was due to shock and

hemorrhage resulting from the gun shot injuries. He also recovered two bullets from the body of the deceased. He proved the post mortem report vide Ext. 19.

P.W.21 Firoz Khan @ Bunty did not support the prosecution case and he was declared to hostile.

P.W.22 Rajesh Kumar Sahoo is the injured eye witness. He also identified the appellant in the T.I. parade.

P.W.23 Khurshid Ali Khan did not support the prosecution case and he was declared hostile.

P.W.24 Amulya Kumar Behera stated about the seizure of guest register of Sukhasagar Hotel vide seizure list Ext.8.

P.W.25 Tanveer Khan is a witness to the seizure of bed head ticket of the injured (P.W.22) from the I.G. Hospital under seizure list Ext.21.

P.W.26 Sangram Keshari Pattnaik was the JMFC, Panposh who conducted Test Identification parade in respect of the suspects on 29.08.2005 inside Special Jail, Rourkela. He stated that P.W.22 correctly identified the appellant Md. Ayub Khan @ Yunus Khan and proved the T.I. parade report vide Ext.20/1.

P.W.27 Bibhuti Bhusan Nayak was working at Panth Nivas, Rourkela and he stated about the seizure of visitors' book of Panth Nivas by the I.O.

P.W.28 Prabhat Chandra Routray was the IIC, Raghunathpalli police station who conducted investigation and submitted charge sheet.

P.W.29 Nanda Kishore Mallik was the Superintendent of Special Judge, Rourkela and he stated about the taking of handwriting and finger prints of the accused persons in the Special Jail.

P.W.30 Nirmal Kumar Mohapatra was the S.I. of Police, Plant Site Police Station, Rourkela who is the Investigating Officer in another case instituted against the appellant and others.

P.W.31 Hadibandhu Swain was the IIC of Police, Plant Site Police Station who investigated another case against the appellant and others.

No witness was examined on behalf of the defence.

The prosecution exhibited 32 documents and also marked nine material objects. Ext.1 is the FIR, Exts. 2, 24, 26 , 27, 28, 29 and 30 are zimanama, Exts.3, 4, 5, 6, 7, 8, 11, 13, 14, 15, 16, 21, 23 and 25 are seizure lists, Ext.9 is the injury report of P.W.22, Ext.10 is the Admission Sheet in the casualty, Ext.12 is the inquest report, Ext.17 is the spot visit report prepared by P.W.19, Ext.18 is the report of P.W.19, Ext.19 is the post mortem report, Ext.20/1 is the T.I. parade report, Ext.22 is the Visitors' register, Ext.31 is the Chemical Examination Report and Ext.32 is the sanction order.

6. Now it is to be seen how far the prosecution has established that the death of the deceased Samir Lohar is homicidal in nature.

In order to establish such aspect, apart from the inquest report (Ext.12), the prosecution has examined doctor (P.W.20) who conducted autopsy over the dead body on 25.7.2005 as Asst. Surgeon of S.D. Hospital, Panposh. He found a bullet injury on the anterior chest wall. The bullet had pierced into the right ventricle and pericardium through the muscles of posterior surface of anterior chest wall and lacerated the spleen, left ninth rib on the lower lateral side of the left chest wall and remained there. The bullet was recovered by the doctor. Similarly another bullet injury was found over the midline of the sternum at the junction between attachment of 4^{th} and 5^{th} rib. The bullet after passing the pericardium pierced through diaphragm peritoneum, large and small intestine, left lobe of liver and has caused a hole on the antero-lateral of iliac crest of left side of pelvis and halted just outside the bone below the subcutaneous fat. Both the injuries were opined to be ante mortem in nature. The second bullet was also recovered by the doctor and after post mortem both the recovered bullets were kept inside one plastic pet jar and handed over to the A.S.I. of Police. The cause of death was opined due to shock and haemorrhage on account of gunshot injuries. The post mortem report has been marked as Ext. 19.

The learned counsel for the appellant has not challenged the evidence of P.W.20 or the findings in the post mortem examination report (Ext.19). The Scientific Officer (P.W.19) has also stated that on 24/25.7.2005 on police requisition he along with his team visited the spot and inspected the body of the deceased and found two gunshot entry wounds, one on the middle part of chest and another on the right upper part of the chest. He also found a deep injury on the inner side of the right arm and a swelling on the left back of the deceased.

After perusing the evidence on record, the post mortem examination report (Ext.19) and the statements of P.W.20 Dr. Rajat Ranjan Saduwal and Scientific Officer P.W.19 Prasant Ku. Pradhan, we are of the view that the prosecution has proved the death of the deceased to be homicidal in nature.

7. So far as the place of occurrence is concerned, it is the prosecution case that the occurrence took place on the road in 'M' Block of Civil Township, Rourkela. Apart from the evidence of the two eye-witnesses examined by the prosecution i.e. P.W. 18 & P.W. 22, the Scientific Officer (P.W. 19) has also categorically stated that the scene of the case was the pitch road in between plot No. M/20 and F/7 in the Civil Township, Rourkela and the dead body was found lying in a pool of blood on the pitch surface of the road at a distance of four and half feet from the northern end. The Investigating Officer (P.W. 28) also visited the spot on 24.7.2005 at about 9.55 p.m. which according to him was near the House No. M-17, Civil Township and he found the dead body lying on the pitch road. The I.O. also collected two pairs of Chappals, one Reynold Pen and one Gold Chain and one gold locket from the spot in presence of the witnesses.

The learned counsel for the appellant has not disputed the place of occurrence. After going through the evidence of P.W. 18, P.W. 19, P.W. 22 and P.W. 28, the spot visit report (Ext. 17), we are of the view that the prosecution has established that the incident had taken place on the road of 'M' Block, Civil Township, Rourkela.

8. The prosecution case in order to establish the complicity of the accused persons is mainly based on the evidence of the two eye witnesses namely P.W.18 Jagdish Prasad Agrawal and P.W.22 Rajesh Kumar Sahoo so also P.W.26 Sangram Keshari Mohapatra, JMFC, Panposh who conducted Test Identification parade.

Evidence of P.W.18

P.W.18 has stated that on 24.7.2005 in the night at about 9.45 p.m. he was present in his house and taking dinner and hearing hullah, he came to the balcony and noticed one person fell down on the ground and he heard the fire sound and another person also fell down near a car. He also noticed that there were five other persons present there and amongst them two were armed with fire arms and other two were standing there. P.W.18 identified the accused persons present in the dock to be present at the spot. He further stated that when there was fire in the air, out of fear he entered inside his house. He

further stated that the person who fell down near the car got up and drove the car away and the accused persons fled away. It has been confronted to P.W.18 and proved through the I.O. (P.W.28) that he stated before him that he cannot identify the person who fired the gun. He has also not stated before him that he can identify the culprits. P.W.18 has not stated about the individual role played by the accused persons at the spot at the time of incident before the I.O. He has also not participated in the test identification parade as an identifying witness. He further stated that he has not given specific identification mark regarding height, colour and complexion of the accused persons to the police. He has stated that he cannot say the registration number of the car which was driven by the injured since it was not visible to him from the balcony. Though P.W.18 has stated that Jaihind Jewellery shop owner was known to him since last 20 to 25 years but he has not identified him (P.W.22) to have received gunshot injuries in front of his house on the date of occurrence.

The learned trial Court has analyzed the evidence of P.W.18 and held that his identification of the accused person in the dock for the first time in Court cannot be stated as proper identification and accordingly excluded his evidence regarding identification.

In case of **Dana Yadav @ Dahu and Ors. -Vs.- State of Bihar reported in AIR 2002 SC 3325**, it is held as follows:-

> "6……..Ordinarily identification of an accused for the first time in court by a witness should not be relied upon, the same being from its very nature, inherently of a weak character, unless it is corroborated by his previous identification in the test identification parade or any other evidence. The purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what a witness has seen earlier, strength or trustworthiness of the evidence of identification of an accused and to ascertain if it can be used as reliable corroborative evidence of the witness identifying the accused at his trial in court. If a witness identifies the accused in court for the first time, the probative value of such uncorroborated evidence becomes minimal so much so that it becomes, as a rule of prudence and not law, unsafe to rely on such a piece of evidence".

We find no infirmity in the analysis of the evidence of P.W.18 by the learned trial Court. P.W.18 identified the appellant for the first time in Court more than one and half years after the occurrence. His evidence relating to

identification of the appellant in Court has not been previously tested in the T.I. Parade. When P.W.18 was aged about 65 years at the time of occurrence and his evidence is self-contradictory, we feel it unsafe to rely on such evidence and accordingly discard the same.

Evidence of P.W.22 Rajesh Kumar Sahoo

P.W.22 who is an injured eye witness stated that on 24.7.2005 at 9.15 p.m. while he was returning home after closing his jewellery shop in a Santro car being driven by the deceased, on the road in Civil Town Shop area, one Bolero vehicle obstructed his vehicle and one man got down from that vehicle and pointed a pistol to him and instructed him to come out of his vehicle and to sit in the vehicle. P.W.22 raised alarm and the deceased also came out and he also shouted. At that time the driver was shot dead and P.W.22 was assaulted. He has further stated that those persons also shot at him for which he sustained injuries and fell down in his vehicle but after some time he regained his sense and with much difficulty drove his vehicle and reached his house. P.W.22 has further stated that he had only seen two persons and they were not known to him. He further stated that during test identification parade by the Magistrate, he was mentally unsound and he cannot say to whom he had identified in the test identification parade. He specifically stated that he does not remember if any person standing in the dock was present at the time of incident and took part in the occurrence.

P.W.26 Sangram Keshari Pattnaik, JMFC, Panposh has stated that on 29.8.2005 he conducted test identification parade in respect of appellant Md. Ayub Khan @ Yunus Khan and respondents Papu @ Sahajan Khan, Gulam Alli, Murshid Khan, Bablu Ahmad, Muna Khan and one Brajakishore Singh inside the Special Jail, Rourkela. He further stated that the identifying witness P.W.22 correctly identified only appellant Md. Ayub Khan @ Yunus Khan but failed to identify any other suspects and accordingly he prepared the T.I. parade report Ext.20/1.

The learned trial Court relying upon the T.I. parade report and the evidence of P.W.22 held that the identifying witness has correctly identified appellant Md. Ayub Khan @ Yunus Khan being the assailant.

There are ample materials available on record to indicate that P.W.22 has received injuries during course of occurrence. P.W.11 who as the Medical Officer in casualty, IGH, Rourkela examined P.W.22 noticed number of penetrating wounds and one lacerated wound on his person and he has opined that all the injuries sustained by P.W.22 are grievous in nature and

caused by fire arm weapon or bullet. Being an injured person, the presence of P.W.22 at the spot at the time of incident cannot be doubted.

P.W.22 has stated that he had not given any specific mark of identification to the police about the criminals who attacked him and his deceased driver. He has also not given any mark of identification of the criminals to his father (P.W.1). When P.W.22 has not identified any of the accused persons during trial and identified only appellant Md. Ayub Khan @ Yunus Khan in the test identification parade, whether it would be proper to convict the appellant on the basis of such single identification?

The main object of holding test identification parade during investigation stage is to test the memory of the identifying witnesses based upon first impression and also for the purpose of helping the investigating agency to assure that the investigation is proceeding on the right lines. Test identification does not constitute substantive evidence and the substantive evidence is the identification in Court. Law is well settled that mere identification of the accused person at the trial for the first time without being tested by prior test identification where the accused persons are unknown is inherently a weak type of evidence and it cannot be accepted. The purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what a witness has seen earlier. The sworn testimony of the witness in Court as to the identity of the accused requires corroboration in the form of an earlier identification proceeding. Where there is no such substantive evidence at all as to identity of the accused, the earlier identification parade cannot be of any assistance to the prosecution. If a witness identifies the accused in Court for the first time and it is not corroborated by the earlier test identification parade, the probative value of such uncorroborated evidence becomes minimal and it is unsafe to rely on such evidence.

In case of **Hasib -v- State of Bihar reported in AIR 1972 SC 283,** it is held as follows:-

> "5….It is noteworthy that in the trial court, the witness did not identify the appellant as one of the dacoits whom he had seen at the time and place of the occurrence. If that is so then the question arises if the evidence of the test identification parade can form legal basis for the appellant's conviction.

6. As observed by this Court in **Vaikuntam Chandrappa –v- State of Andhra Pradesh, AIR 1960 SC 1340** the substantive evidence is the statement of a witness in Court and the purpose of test identification is to test that evidence, the safe rule being that the sworn testimony of the witness in Court as to identity of the accused who is a stranger to him, as a general rule, requires corroboration in the form of an earlier identification proceeding. If there is no substantive evidence about the appellant having been one of the dacoits when P.W.10 saw them on January 28, 1963 then the T.I. parade as against him cannot be of any assistance to the prosecution".

In case of **Ramadhar Thakur –v- State of Bihar reported in 1988 Criminal Law Journal 264**, it is held as follows:-

"6. Thus, it is evident that what is substantive evidence is the sworn testimony of the witness in Court and not the testimony of the Magistrate conducting the test identification parade. The test identification chart or the evidence of Magistrate conducting the test identification can only corroborate or contradict the witness, but, they cannot replace the evidence of the identifying witness on the question of identification as substantive evidence. When the witness fails to identify the accused in Court, there remains no evidence at all on which a conviction can be based and in such a situation the test identification parade cannot be of any assistance to the prosecution".

In case of **Umesh Kamat –v- State of Bihar reported in 2005 Supreme Cases (Criminal) 1218**, it is held as follows:-

"9……The appellant, as already noticed, is not a person known to the prosecution witnesses. As far as P.W.3 is concerned, she did not identify the appellant in the Court as he was not present. Though the trial court and High Court proceeded on the basis that four accused including the appellant were identified in the Court by P.W.3, in fact there was no such identification…..As pointed out in **Malkhan Singh –v- State of M.P. reported in (2003) 5 SCC 746**, the identification parades belong to the stage of investigation and they do not constitute substantive evidence. Substantive evidence is the evidence of identification in Court because the facts which establish the identity of the accused persons are relevant under Section 9 of the Evidence Act. This Court further observed that failure to hold a test

identification parade would not make inadmissible the evidence of identification in Court. Thus, in the absence of identification in the Court at the time tendering evidence, the results of test identification parade will be of little value…..Therefore the testimony of P.W.3 does not advance the prosecution case".

In this case the accused persons were not known to P.W.22 and accordingly he did not disclose anything regarding their identity before his father (P.W.1) who is informant in this case and that is how the FIR was lodged against unknown persons. The occurrence stated to have taken place during night hours on 24.7.2005. The I.O (P.W.28) arrested the appellant Md. Ayub Khan @ Yunus Khan on 24.8.2005 and on 29.8.2005 P.W.26, JMFC, Panposh conducted test identification parade. P.W.26 has stated that his order does not disclose as to whether instruction was given to the I.O for concealment of the suspect from the sight of the public till the conduct of T.I. parade. The forwarding report dated 24.8.2005 and the order sheet dated 25.8.2005 of the learned S.D.J.M., Panposh, Rourkela does not indicate that the appellant was kept under the covers after arrest or when he was produced before the Magistrate. The I.O. (P.W.28) has stated that in the forwarding reports submitted by him he has not mentioned that the accused person forwarded were kept concealed from the view of the public. He further states that in the case diary also he has not mentioned that appearance of the apprehended accused persons was kept concealed from the view of the public during investigation. In a case of this nature where the accused persons are unknown and the sole evidence against the accused hinges on identification, burden lies on the prosecution to establish satisfactorily that after the arrest, the accused was kept in Baparda (under covers) till the time of his lodging in the jail. There is no evidence that any precaution has been taken either by the Investigating Officer or by the Court in that respect to conceal the identity of the suspects before the identification parade. It is the duty of the prosecution to prove affirmatively that there was no possibility of the accused being shown to anybody as it is not possible on the part of the accused to know if he has been seen by the witnesses. In such circumstances, the possibility of the identifying witness P.W.22 noticing the appellant after arrest and before the T.I. parade cannot be ruled out and therefore the identification in the T.I parade also loses its sanctity and it would be hazardous to rely upon such report of identification to convict the appellant.

The learned trial Court relying upon the evidence of P.W.22, P.W.26 and test identification parade report (Ext.20/1) has convicted the appellant.

We have already discussed as to how the evidence are not acceptable. Where other circumstances are not incriminating, it is unsafe to convict the appellant on the evidence of a single witness like P.W.22 who identified the appellant in the T.I. parade but failed to identify him in Court. There are no other materials against the appellant. In view of our discussions and in view of the facts and circumstances as discussed above, we are unable to agree with the findings of the trial Court in accepting the evidence of P.W.22. We hold that the prosecution has not established the case against the appellant Md. Ayub Khan @ Yunus Khan beyond all reasonable doubt.

9. So far as the respondents in Government Appeal No.1 of 2015 are concerned, the learned trial Court has taken into account the evidence of the two eye witnesses i.e., P.W.18 and P.W.22 so also the evidence of P.W.26, the Magistrate who conducted the T.I. parade. None of these respondents have been identified in the T.I. parade. P.W.22 has also not identified any of the respondents in Court. The evidence of P.W.18 regarding identification of the respondents for the first time in Court without being tested by the test identification parade is not at all acceptable as already discussed. There are no other materials available against the respondents.

It is the settled law that in appeal against acquittal, ordinarily the appellate Court should not interfere with the conclusions arrived at by the trial Court. Even if another view is possible, unless the conclusions arrived at by the trial Court are not possible, the appellate Court should be slow in disturbing the finding of fact of the trial Court in as much as the trial judge has the advantage of seeing and hearing the witnesses and initial presumption of innocence in favour of the accused is not weakened by his acquittal.

In view of the discussion made above, we hold that the impugned judgment and order of acquittal passed by the trial Court does not suffer from any infirmity or illegality. The conclusions drawn by the trial Court in acquitting the respondents are neither perverse nor against weight of evidence. The view taken by the trial Court against the respondents is reasonable and plausible and accordingly the impugned judgment and order of acquittal is upheld.

10. In the result, Criminal Appeal No.323 of 2008 is allowed and the impugned judgment and order of conviction of the appellant Md. Ayub Khan @ Yunus Khan is hereby set aside and the appellant is acquitted of the charge under sections 302, 307, 326 and 364/34 I.P.C. The appellant is in custody. He is directed to be set at liberty forthwith if he is not required in any other case.

Government Appeal No.1 of 2015 preferred by the State of Orissa challenging the impugned judgment and order of acquittal of the respondents Papu @ Sahajan Khan, Gulam Alli, Murshid Khan @ Murshid Alli Khan, Bablu Ahmad and Muna Khan @ Md. Sidque Allam is dismissed and order of acquittal passed by the learned trial Court is upheld.

Appeals disposed of.

2015 (II) ILR - CUT-1108

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

W.P.(C) NO. 2971 OF 2009

M/S. DELHI FOOT WEAR, SHIV BAZAR, CUTTAK ……..Petitioner

.Vrs.

SALES TAX OFFICER., VIGILANCE, CUTTACK & ORS. …….Opp. Parties

ODISHA VAT ACT, 2004 – S.42(2)

Notice for assessment of tax basing on the audit visit report issued on 30.12.2006 requiring petitioner to appear before the assessing officer on 12.1.2007 and produce books of account and documents for the period from 1.4.2005 to 31.7.2006 – Notice in Form VAT-306 shows that minimum time as provided U/s. 42(2) of the OVAT Act has not been granted to the petitioner – There is no explanation for inordinate delay of 24 months caused in issuing the assessment order to the petitioner – There is clear violation of mandatory provisions of section 42(2) of the Act – Notice for assessment of tax pursuant to audit visit report is invalid – Held, impugned order of assessment Dt. 12.1.2007 and consequential demand notice for the period from 1.4.05 to 31.7.06 are quashed. (Paras 14 to 17)

Case Laws Referred to :-

1. 1994 93 STC 406 (SC) : State of Andhra Pradesh Vs. M.Ramakishtaiah & Co.
2. 2005 142 STC 496 : Sanka Agencies Vs. Commissioner of Commercial Taxes, Hyderabad,

For Petitioner : M/s.P.K. Jena & S.C.Sahoo
For Opp.Parties : Mr. R.P.Kar, Standing Counsel
[For O.P. – Revenue]

Date of Judgment: 25.09.2014

JUDGMENT

B.N. MAHAPATRA, J.

This writ petition has been filed with a prayer for quashing the order of assessment dated 12.01.2007 passed by the Sales Tax Officer, Cuttack-1 Range, Cuttack under Annexure-1 on the ground that the said order is barred by limitation and has been passed without complying with the statutory requirement of Section 42(2) of the OVAT Act.

2. Petitioner's case in a nutshell is that it is a proprietorship concern dealing with Foot Wear on wholesale basis. It is a registered dealer under the Orissa Value Added Tax Act, 2004 (for short, 'OVAT Act'). The Sales Tax Officer, Vigilance, Cuttack Division, Cuttack conducted audit investigation at the business premises of the petitioner for the tax period from 01.04.2005 to 31.07.2006 on 12.07.2006. Audit visit report dated 21.07.2006 was submitted before the opposite party No.3-Assistant Commissioner of Sales Tax, Cuttack-1 Range, Cuttack vide letter No.317 dated 22.07.2006 for completion of assessment under Section 42 of the OVAT Act. Basing upon such report, a proceeding under Section 42 of the OVAT Act was initiated by opposite party No.2-Sales Tax Officer, Cuttack I Range, Cuttack by issuing notice in Form VAT 306 dated 30.12.2006 enclosing the audit visit report for the tax period from 01.04.2005 to 31.07.2006 fixing the date to 12.01.2007. Thereafter, opposite party No.2-STO passed the assessment order on 12.01.2007 under Section 42 of the OVAT Act for the tax period from 01.04.2005 to 31.07.2006 and the said order was issued vide Memo No.8041 dated 31.12.2008, which was received by the petitioner on 03.01.2009. Hence, the present writ petition.

3. Mr.P.K. Jena, learned counsel for the petitioner submitted that the impugned order of assessment passed under Annexure-1 is not sustainable in law as the said order of assessment has been antedated and that the notice was issued to produce the books of account to make the audit assessment without allowing the statutory period of 30 days as provided under Section 42(2) of the OVAT Act. It was submitted that if the statute requires to do a thing in a particular manner, the authority is to follow the same. In support of

his contention that the assessment order was passed beyond the period of limitation, Mr. Jena relied upon the judgment of the Hon'ble Supreme Court and the Andhra Pradesh High Court.

4. Mr. Kar, learned Standing Counsel for Commercial Taxes Department supported the order of assessment to be valid and legal.

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

(i) Whether the order of assessment has been antedated and passed beyond the period of limitation?

(ii) Whether notice dated 30.12.2006 issued in Form VAT-306 for production of books of account and documents for assessment of the tax without complying with the mandate of sub-section (2) of Section 42 of the OVAT Act by not allowing the minimum period of 30 days for production of books of account and documents vitiates the assessment proceeding?

(iii) What order?

6. Question No.(i) is whether the order of assessment has been antedated and passed beyond the period of limitation.

To deal with this question, the following facts may be relevant.

The Audit Visit Report was submitted on 22.07.2006 before the Assessing Officer; the last date for completion of audit assessment under Section 42 was expiring on 21.01.2007 and the order of assessment is dated 12.01.2007. Allegation of petitioner is that the order of assessment has been antedated. In support of his contention, it was vehemently argued that the order of assessment was issued vide Memo No.8041 dated 31.12.2008 which was received by the petitioner on 03.01.2009. Thus, there is inordinate delay of 24 months approximately in issuing the order of assessment. When this Court called upon Mr. Kar, learned Standing Counsel for the opposite party-Department to explain the delay of 24 months between the purported date on which the impugned assessment order was passed and the date on which it was issued and served on the petitioner, Mr. Kar failed to satisfy this Court the cause of delay.

7. At this juncture, it would be appropriate to rely on some of the judicial pronouncements, which are referred to hereunder.

The Hon'ble Supreme Court in the case of ***State of Andhra Pradesh Vs. M.Ramakishtaiah & Co.*** [1994] 93 STC 406 (SC) held as follows:

> "We are of the opinion that this appeal has to be dismissed on the ground urged by the assessee himself. As stated above, the order of the Deputy Commissioner is said to have been made on January 6, 1973, but it was served upon the assessee on November 21, 1973, i.e., precisely 10 ½ months later. There is no explanation from the Deputy Commissioner why it was so delayed. If there had been a proper examination, it would have been a different matter. But, in the absence of any explanation whatsoever, we must presume that the order was not made on the date it purports to have been made. It would have been made after the expiry of the prescribed four years' period. The civil appeal is accordingly dismissed."

8. Following the aforementioned decision of the Hon'ble Supreme Court (supra), the High Court of Andhra Pradesh in the case of ***Sanka Agencies Vs. Commissioner of Commercial Taxes, Hyderabad***, [2005] 142 STC 496 held as under:

> "We have seen the record. Record also shows that while the impugned order bears the date May 17, 1996, the order was sent to the appellant by dispatching it only on November 1, 1996. There is no explanation in the record nor any explanation has been given by the respondent, as no counter is filed. Therefore, there is a strong apprehension that in order to give an impression that the impugned order was passed within the period of limitation; the order bears the date May 17, 1996, whereas it has been passed much after that. In this connection, the learned Counsel for the appellants has placed reliance on a judgment of the Hon'ble Supreme Court in State of *Andhra Pradesh Vs. M.Ramakishtaiah & Co.* [1994] 93 STC 406, wherein under similar circumstances, the Supreme Court held that in the absence of any explanation, whatsoever, for delayed service on the petitioner, of the order, the court should presume that the order was not made on the date it was purported to have been made."

9. In the instant case, there is no explanation for inordinate delay of 24 months caused in issuing the assessment order to the petitioner. Therefore, we have no hesitation to hold that the order of assessment under Annexure-1 was not made on the date it was purported to have been made. In order to

give impression that the impugned order of assessment was passed within the period of limitation, the order bears the date 12.01.2007, whereas it has been passed much after that.

10. So far as question No.(ii) is concerned, it is necessary to extract sub-sections (1) and (2) of Section 42 of the OVAT Act.

> "**42.Audit assessment**.—(1) Where the tax audit conducted under Sub-section (3) of Section 41 results in the detection of suppression of purchases or sales, or both, erroneous claims of deductions including input tax credit, evasion of tax or contravention of any provision of this Act affecting the tax liability of the dealer, the assessing authority may, notwithstanding the fact that the dealer may have been assessed under Section 39 or Section 40, serve on such dealer a notice in the form and manner prescribed along with a copy of the audit Visit Report, requiring him to appear in person or through his authorized representative on a date and place specified therein and produce or cause to be produced such books of account and documents relying on which he intends to rebut the findings and estimated loss of revenue in respect of any tax period or periods as determined on such audit and incorporated in the Audit Visit Report.
> (2) where a notice is issued to a dealer under Sub-section (1), he shall be allowed time for a period of not less than thirty days for production of relevant books of account and documents."
>
> *(underlined for emphasis)*

11. As per sub-section (1) of Section 42 of the OVAT Act, where the tax audit conducted under Section 41 of the OVAT Act results in the detection of suppression of purchases or sales, or both, erroneous claims of deductions, evasion of tax or contravention of any provisions of this Act affecting the tax liability of the dealer, the assessing authority serves on such dealer a notice in the form and manner prescribed along with a copy of the Audit Visit Report, requiring him to appear in person and produce or cause to be produced such books of account and documents relying on which he intends to rebut the findings and estimated loss of revenue in respect of any tax period or periods as determined on such audit and incorporated in the Audit Visit Report.

12. Sub-section (2) of Section 42 provides that where a notice is issued to a dealer under sub-section (1) he shall be allowed time for a period not less

than thirty days for production of relevant books of account. The use of the expressions "shall" and "not less than thirty days" make it amply clear that the Assessing Officer is bound to allow minimum thirty days time for production of books of account and documents. On a plain reading of sub-section (2), it further reveals that discretion is vested on the Assessing Officer to allow time more than thirty days for production of books of account, but he has no jurisdiction to allow less than thirty days' time for production of books of account.

13. Law is well-settled that when the statute requires to do certain thing in certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "*Expressio unius est exclusion alteris*" meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following other course is not permissible. [*See Taylor v. Taylor, (1876) 1 Ch.D.426; Nazir Ahmed v. King Emperor, AIR 1936 PC 253; Ram Phal Kundu v. Kamal Sharma; and Indian Bank's Association v. Devkala Consultancy Service, AIR 2004 SC 2615, Gujarat Urja Vikas Nigam Ltd. –v- Essar Power Ltd., (2008) 4 SCC 755)]*.

14. If the notice issued is invalid for any reason, then the proceeding initiated in pursuance of such notice would be illegal and invalid. Section 42 (2) of the OVAT ACT is a mandatory provision not with regard to any procedural law, but with regard to a substantive right. Any infirmity or invalidity in the notice under Section 42(2) of the OVAT Act goes to the root of jurisdiction of the Assessing Authority. Issue of notice under Section 42(2) of the OVAT Act is a condition precedent to the validity of any assessment under Section 42 of the OVAT Act. Therefore, if the notice issued for assessment is invalid, the assessment would be bad in law. Hence, the notice for assessment of tax without allowing the minimum period of 30 days for production of the books of account and documents is invalid in law and consequentially, the order of assessment and demand notice passed/issued are not sustainable in law.

15. In the instant case, notice for assessment of tax basing on the audit visit report was issued in Form VAT-306 dated 30.12.2006 requiring the petitioner to appear in person or through his authorized agent before the Assessing Officer on 12.01.2007 and produce or cause to be produced the books of account and documents for the period from 01.04.2005 to

31.07.2006. Thus, notice in Form VAT-306 shows that minimum time as provided under sub-section (2) of Section 42 of the OVAT Act has not been granted to the petitioner. Thus, it is a clear case of violation/infraction of mandatory provisions of Section 42(2) of the OVAT Act. Therefore, the notice for assessment of tax in pursuance of audit visit report is invalid.

16. In view of the above, order of assessment passed in pursuance of notice in Form VAT-306 issued in violation of requirement of Section 42(2) of the OVAT Act is bad in law.

17. For the reasons stated above, we quash the impugned order of assessment dated 12.01.2007 passed under Annexure-1 and consequential demand notice for the period from 01.04.2005 to 31.07.2006.

18. In the result, the writ petition is allowed, but in the circumstances without any order as to costs.

Writ petition allowed.

2015 (II) ILR - CUT-1114

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

I.T.A. NO. 11 OF 2012

THE COMMISSIONER OF I.T, AYAKAR BHAWAN, BBSR. .....Appellant

.Vrs.

M/S. SILICON INSTITUTE OF TECHNOLOGY, SILICON HILLS, PATIA, BHUBANESWAR. .....Respondent

(A) INCOME TAX ACT, 1961 – S.11

Capital expenditure incurred by an educational institution for attainment of the object of the society would be entitled to exemption U/s. 11 of the Act. (Para 25)

(B) INCOME TAX ACT, 1961 – S.260-A

Substantial question of law – How to determine –

(i) Whether it is of general public importance, or

(ii) Whether it directly and substantially affects the rights of the parties, and if so,

(iii) Whether it is either an open question in the sense that it is not finally settled by the Supreme Court or by the Privy Council or Federal Court, or

(iv) **It is not free from difficulty or calls for discussion of alternative views**. (Para 9)

Case Laws Referred to :-

1. AIR 1962 SC 1314 : Sir Chunilal V. Mehta and Sons Ltd. v. Century Spinning & Manufacturing Co. Ltd.
2. (1999) 3 SCC 722 : Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and others.
3. (1979) 13 CTR (SC) 378 : Addl. CIT Vs. Surat Art Silk Cloth Manufacturers Association,
4. (1997) 139 CTR (SC) 7 : Aditanar Educational Institution etc.vs. Add. CIT
5. (2008) 301 ITR 86 (SC) : American Hotel & Lodging Association Educational Institute Vs. CBDT & Ors.
6. (1998) 230 ITR 636 (SC) : S.RM. M.CT.M. Tiruppani Trust Vs. CIT.
7. (1982) 133 ITR 779 : CIT Vs. Kannika Parameswari Devasthanam & Charities.
8. (2010) 190 TAXMAN 338 : CIT Vs. Mool Chand Sharbati Devi Hospital Trust.

For Appellant : Mr. Akhil K. Mohapatra, Sr. Standing Counsel, I.T.
For Respondent : Mr. J.Sahoo, Sr. Advocate
M/s. H.M.Dhal, P.K.Mohanty & B.B.Swain

Date of Judgment: 10.11.2014

JUDGMENT

B.N.MAHAPATRA,J.

The present Income Tax Appeal under section 260A of the Income Tax Act, 1961 (hereinafter referred to as the "IT Act"), which arises out of the order passed in ITA No.316/CTK/2011 and C.O. No.18/CTK/2011 dated 23.09.2011 passed by the Income Tax Appellate Tribunal, Cuttack Bench, Cuttack for the assessment year 2007-08, has been filed at the instance of the Commissioner of Income Tax, Ayakar Bhawan, Rajaswa Vihar, Bhubaneswar, Dist. Khurda.

2. According to the appellant, the following substantial questions of law are involved in the present Income Tax Appeal:

(i) Whether in the facts and circumstances of the case and in view of the decision of the Hon'ble High Court of *Uttarakhand in the case of CIT Vs. Queens Educational Society* reported in 319 ITR 160, the learned Income Tax Appellate Tribunal is correct in law in holding that the assessee Trust is not running with profit motive and is eligible for exemption under Section 11 of the I.T. Act, 1961?

(ii) Whether in the facts and circumstances of the case and when the assessee Trust is not eligible for exemption under Section 11 of the Act, the learned ITAT is correct in law in holding that capital expenditure incurred by the assessee Trust shall be allowed as application of income?

3. The facts leading to filing of the present appeal are that the assessee is a Trust registered under Section 12A of the IT Act with effect from 02.09.2002. It filed its return of income on 31.10.2007 for the assessment year 2007-08 disclosing its total loss at Rs.3,96,54,653/-. On 03.12.2009, the Assessing Officer completed the assessment under Section 143(3) of the IT Act determining the total income at Rs.03,06,53,610/-. In the assessment order, the Assessing Officer did not allow the benefit of exemption under Section 11 of the IT Act to the Trust on the ground that the assessee-Trust is making systematic profit year after year; incurred capital expenditure of Rs.51,24,483/- and diverted income to capital funds amounting to Rs.28,75,204/- which did not amount to application of income as per Section 11(1) of the IT Act. Depreciation of Rs.95,90,956/- was also added to the income of the Trust. To support his view, the Assessing Officer relied upon the decision of Uttarakhand High Court in the case of *Queens Education Society (supra)*.

4. Being aggrieved by the assessment order, the assessee went in appeal before the Commissioner of Income Tax (Appeal), who after considering the submissions of the assessee, allowed the appeal by deleting all the additions made in the assessment order and directed the Assessing Officer to allow the benefit of exemption to the trust under Section 11 of the IT Act.

5. Against the order of CIT(A), the Department went in appeal before the Income Tax Appellate Tribunal, Cuttack Bench, Cuttack (for short, 'ITAT') and the learned ITAT in its order dated 23.09.2011 in ITA No.316/CTK/2011 has upheld the order of the CIT(A). Hence, the present appeal.

6. Mr. A. Mohapatra, learned Senior Standing Counsel for the Income Tax Department, submitted that the Trust deed of the assessee never had the condition that the assessee will run the institution and invest the surplus to expand its activity out of the fees collected from the students who are pursuing their course. Assessee's activity of collecting the fees from the students as their course fee for studying in the assessee's institution do not find place in the Trust deed, aims and objectives or the notes on the activity, which had been submitted to the CIT for the purpose of registration under Section 12AA. Therefore, the registration granted in favour of the assessee by the CIT on the premise of the Trust deed, aims and objectives and notes on the activity has no relevance regarding the real activity carried on by the assessee after obtaining the registration. Year after year, the assessee had been generating profit and creating fixed assets. For the said purpose, huge amount of loans have been availed from Banks and financial charges had been claimed as expenditure out of the students' fees. As the assessee had been collecting fees much more than the amount required for imparting education, collection of the said excess amount fits to the definition of capitation fees, which is illegal. The Hon'ble Supreme Court held that the Educational Institutions are set up for charitable purpose and banned the collection of capitation fees and such decision of the Hon'ble Supreme Court is binding on all authorities. The order of the ITAT is not based either on facts or correct application of law. Placing reliance on the judgment of Jharkhand High Court in the case of *Queens Education Society* (supra), Mr. Mohapatra submitted that the reasons given by the Tribunal for granting exemption to respondent Educational Institution is not sustainable in law. Therefore, Mr. Mohapatra prayed to admit the Tax Appeal for adjudication on the substantial questions of law as stated hereinabove.

7. Mr.J. Sahoo, learned Senior Advocate appearing for the respondent-Educational Institution submitted that no substantial question of law is involved in the case. The Tribunal is fully justified in granting exemption under Section 11 of the IT Act, 1961 for the assessment year 2007-08 for the reasons stated therein. The learned Assessing Officer is not correct in applying the ratio of *Queens Education Society* (supra), as that case is not in the context of the Organizations registered under Section 11 of the IT Act. The said judgment was rendered in the context of Section 10(23C) of the IT Act. Non-applicability of the ratio of *Queens Education Society* (supra) has been considered and decided by a number of High Courts and Tribunals and the Revenue has not been able to sustain its plea even in a single judgment in the light of plethora of decisions in favour of the assessee. There is strong reason for not applying the ratio of

Queens Education Society (supra) in the case of the appellant. In support of the above contentions, Mr. Sahoo relied upon the decisions of different High Courts, viz., *Pinegrove International Charitable Trust vs. Union of India, (2010) 188 Taxman 402 (Punj & Har); S.T. Lawrence Educational Society (Regd.) vs. CIT, (2011) 197 Taxman 504 (Delhi); Vanita Vishram Trust vs. Chief CIT, (2010) 327 ITR 121 (Bombay); Maa Saraswati Educational Trust vs. Union of India, (2010) 194 Taxman 84 (Himachal Pradesh); Kashtriya Sabha Maharana Pratap Bhawan vs. Union of India, (2010) 194 Taxman 442 (Punj & Har.); Sanatan Dharam Shiksha Samiti vs. Chief Commissioner of Income Tax, Panchakula (Writ Petition No.4155 of 2011 disposed of on 03.10.2011 by Punjab & Haryana High Court); Commissioner of Income Tax vs. Manav Mangal Society, (2009) 184 Taxman 502 (Punj & Har.)*

Placing reliance upon the judgment of the Hon'ble Supreme Court in the case of *CIT Bangalore Vs. B.C. Srinivas Setty and others* (1981) 128 ITR 294 (SC) and *CIT Vs. P J Chemicals* (1994) 210 ITR 830 (SC), it was submitted that the pre-ponderance of judicial views in favour of the assessee should be honoured. Placing reliance upon the judgment of Punjab & Haryana High Court in the case of *Pinegrove International Charitable Trust (supra)*, Mr. Sahoo submitted that the assessee having valid registration under Section 12AA is required to be assessed by applying all the provisions of Section 11 and 13 of the IT Act. The Assessing Officer having not done so, the order is bad in law. Mr.Sahoo further submitted that since the registration was not withdrawn on the date of assessment order, the income of the assessee was exempted in entirety. The learned Assessing Officer is wrong in holding that the capital expenditure is not applicable for charitable purpose. Concluding his argument, Mr. Sahoo submitted for dismissal of the appeal.

8. Before proceeding to examine whether Question Nos. (i) and (ii) as raised by the Revenue in the present case are substantial questions of law or not, it would be appropriate to know as to what is **"substantial question of law".**

9. The Hon'ble Supreme Court in the case of ***Sir Chunilal V. Mehta and Sons Ltd. v. Century Spinning & Manufacturing Co. Ltd., AIR 1962 SC 1314,*** held as under:

> **"6.** .....The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether if directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by

the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

10. The Hon'ble Supreme Court in the case of ***Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and others, (1999) 3 SCC 722*****,** held as under:

> **"6.** If the question of law termed as a substantial question stands already decided by a larger Bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, its merely wrong application on the facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as a substantial question of law. Where the first appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal. This Court in *Reserve Bank of India* v. *Ramkrishna Govind Morey*[2] held that whether the trial court should not have exercised its jurisdiction differently is not a question of law justifying interference."

11. Now coming to the case at hand, undisputed facts are that the assessee is a Trust registered under Section 12A of the IT Act with effect from 02.09.2003. The main object of the respondent is to impart education. Year after year the respondent-assessee has been generating profit and creating fixed assets. The assessee claims capital expenditure as application of income in terms of Section 11 of the IT Act. On the date of assessment, registration granted under Section 12AA was not withdrawn. The learned Assessing Officer held that the respondent-educational institution is not

entitled to exemption under Section 11 of the I.T. Act but both the first appellate authority and the learned ITAT held that the respondent-educational institution is eligible for exemption under Section 11 of the Act.

12. In this context, it would be relevant to refer to the following decisions of the Hon'ble Supreme Court.

A five-Judge Constitution Bench of the Hon'ble Supreme Court in the case of ***Addl. CIT Vs. Surat Art Silk Cloth Manufacturers Association***, (1979) 13 CTR (SC) 378, dealt with the question of interpretation of clause (15) of Section 2 of the Act. In the said case it has been held as follows:

> ".... The test which has, therefore, now to be applied is whether the predominant object of the activity involved in carrying out the object of general public utility is to subserve the charitable purpose or to earn profit. Where profit making is the predominant object of the activity, the purpose, though an object of general public utility, would cease to be a charitable purpose. But where the predominant object of the activity is to carry out the charitable purpose and not to earn profit, it would not lose its character of a charitable purpose merely because some profit arises from the activity. The exclusionary clause does not require that the activity must be carried on in such a manner that it does not result in any profit. It would indeed be difficult for a person in charge of a trust or institution to so carry on the activity that the expenditure balances the income and there is no resulting profit. That would not only be difficult of practical realization but would also reflect unsound principle of management. We, therefore, agree with Beg, J. when he said in *Sole Trustee, Loka Shikshana Trust Vs. CIT* 1975 CTR (SC) 281 : (1975) 101 ITR 234 (SC), 256 that: 'If the profits must necessarily feed a charitable purpose under the terms of the trust, the mere fact that the activities of the trust yield profit will not alter charitable character of the trust. The test now is, more clearly than in the past, the genuineness of the purpose tested by the obligation created to spend the money exclusively or essentially on charity'."

13. The aforesaid view has been cited with approval by the Hon'ble Supreme Court in the case of ***American Hotel & Lodging Association Educational Institute Vs. CBDT & Others,*** (2008) 301 ITR 86 (SC).

14. The Hon'ble Supreme Court in the case of ***Aditanar Educational Institution etc. vs. Add. CIT*** (1997) 139 CTR (SC) 7 held that in case of an

educational institution, after meeting the expenditure, if any surplus results incidentally, then the institution will not cease to be one existing solely for educational purposes and when the surplus is utilized for educational purpose, i.e., for infrastructure development it cannot be said that the institution was having object to make profit. Thus, surpluses used for management and betterment of institution could not be termed as profit.

15. Strong reliance has been placed by the Revenue on the judgment of the Uttarakhand High Court in *Queens Education Society (supra)* by the learned Senior Standing Counsel for the appellant to canvas that the Trust is running with profit motive and therefore it is not eligible for exemption under Section 11 of the IT Act.

The decision in the case of *Queens Education Society (supra)* is misplaced by the Department. The said case is not applicable to the case of respondent-educational Society claiming exemption under Section 11 as the judgment in the case of *Queens Education Society (supra)* was delivered in the context of Section 10 (23C) (iii ad) and not in the context of availing exemption under Section 11 of the I.T. Act by the institutions registered under Section 12A/12AA of the I.T. Act.

16. It may be profitable to extract here the following relevant observations of Punjab and Harayana High Court in the case of *Pinegrove International Charitable Trust (supra):-*

> "We have not been able to persuade ourselves to accept the view expressed by the Division Bench of the Uttarakahand High Court in the case of Queens Educational Society (supra). There are variety of reasons to support our opinion.
>
> Firstly, the scope of the third proviso was not under consideration, in as much as, the case before the Uttarakhand High Court pertained to section 10(23C)(iii ad) of the Act. The third proviso to section 10(23C)(vi) is not applicable to the cases falling within the purview of section 10(23C) (iii ad).
>
> Secondly, the judgment rendered by the Uttarakhand High Court runs contrary to the provisions of section 10(23C)(vi) of the Act including the provisos thereunder. Section 10(23C)(vi) of the Act is equivalent to the provisions of section 10(22) existing earlier, which were introduced w.e.f. 1-4-1999 and it ignores the speech of the Finance Minister made before the introduction of the said provisions, namely,

section 10(23C) of the Act [See observations in American Hotel & Lodging Association, Educational Institute's case (supra)].

Thirdly, the Uttarakhand High Court has not appreciated correctly the ratio of the judgment rendered by Hon'ble the Supreme Court in the case of Aditanar Educational Institution (supra) and while applying the said judgment including the judgment which had been rendered by the Hon'ble Supreme Court in the case of Children Book Trust (supra), it lost sight of the amendment which had been carried out w.e.f. 1-4-1999 leading to the introduction of the provisions of section 10(23C) of the Act. Lastly, that view is not consistent with the law laid down by Hon'ble the Supreme Court in American Hotel & Lodging Association, Educational Institute (supra)."

17. Apart from the above, perusal of the assessment order reveals that, for withdrawal of exemption, the Assessing Officer assigned various reasons, viz., (i) Limitation in the objects of the Trust Deed; (ii) Assessee generating profit year after year; (iii) Capital expenses are not application of income; (iv) Income or property of the trust is applied/used for the benefit of persons specified in Section 13(3) [section 13(1)(c) read with section 13(2) and 13(3)]; (v) Valuation of old vehicles purchased; (vi) Collection of fees out of canteen expenses of students; (vii) Miscellaneous placement expenses; (viii) Claim of transport expenses against outside vehicle; and (ix) Collection from students over and above the prescribed fees.

The CIT (Appeal) has considered every aspect of the assessment order with reference to the reasons given by the learned Assessing Officer for disallowing exemption and relying upon the latest judicial pronouncements expressed in similar facts that are involved in the present case, came to the conclusion that the Assessing Officer's approach denying exemption to the respondent-educational institution is not in accordance with law and held that the respondent-educational institution is entitled to claim exemption under Section 11 of the Act.

18. The learned Tribunal, which is the final fact finding authority, after hearing the appeal filed by the Department did not incline to interfere with the order of the first appellate authority, *inter alia*, with the following observations and findings:

"Apart from that on going through the impugned order, it is found that the learned CIT(A) has thread bare considered the issues in question with reference to the admitted facts that the assessee is

registered under Section 12A of the Act and running the educational institution, imparting education in the fields of technical engineering and computer applications with the parameters laid down by the AICTE and the guidelines given by Ministry of Human Resource Development, Government of India, New Delhi and the fees collected by the assessee from the students for imparting such education having been approved by the AICTE. The assessee is spending the amount received by it by way of collection of tuition fees or collection of hostel fees is being spent for building necessary infrastructure for imparting the education in various fields which is the charitable purpose for which the trust was established. The assessee has also spent the said amount for raising the infrastructure necessary for carrying out the object of imparting education and thereby the assessee was found to be entitled for exemption under Section 11 of the I.T. Act and the view of the Assessing Officer that there is contravention of Section 13 of the I.T. Act is found to be baseless by the CIT(A) after thread bare considering all the relevant facts. On the overall consideration of the impugned orders, we found that the order of the leaned CIT(A) is in accordance of the majority views of judicial pronouncements that were rendered by various judicial forums stated in the impugned order. Hence, we find no infirmity in the order of the learned CIT(A) requiring no interference."

19. In view of the above, question No.(i) is not a substantial question of law.

20. Question No. (ii) is also not a substantial question of law as the respondent -Educational Institution is eligible for exemption under Section 11 of the IT Act for the reasons stated hereinabove and it is a settled position of law that capital expenditure incurred by an Educational Institution is the basic necessity if such expenditure promotes the object of the Trust.

21. The Hon'ble Supreme Court in the case of ***S.RM. M.CT.M. Tiruppani Trust Vs. CIT***, (1998) 230 ITR 636 (SC) and the High Court of Delhi in the case of ***CIT Vs. Divine Light Mission***, (2005) 196 CTR (Del) 135 have held that capital expenditure incurred by a Trust for acquiring/ constructing capital asset would be application of money and the assessee would be entitled to exemption under Section 11(1) of the Act.

22. The Madras High Court in the case of ***CIT Vs. Kannika Parameswari Devasthanam & Charities***, (1982) 133 ITR 779 (Mad.) held as under:-

> "The income from the trust properties has to be applied on the objects of the trust. As far as objects of the trust are concerned, the application of the amount can be for revenue or capital purposes. So long as the expenditure had to be incurred out of the income earned by the trust, even if such expenditure is for capital purposes on the objects of the trust, the income would be exempt. The Tribunal is, therefore, wrong in proceeding on the basis that improvement of a property held under the trust would by itself come within the scope of application of the income for charitable purposes. However, facts will have to be investigated to find out whether the assessee had, in incurring the expenditure of a capital nature, promoted the objects of the trust by applying the income to those objects. The ITO will have to go into this question, as the assessment itself has been set aside by the Tribunal and restored to his file. The result is that the question referred to us would have to be answered as follows: So long as the income derived from the property held under the trust had been expended on the objects of the trust, the income would be exempt under section 11 of the Act. If this was not done, then the income would not be exempt."

23. The High Court of Uttarakhand in the case of ***CIT Vs. Jyoti Prabha Society***, (2009) 177 Taxman 429 (Uttarakhand) has held that the educational society which had utilized rental income for the purposes of imparting education by maintaining the buildings and constructing new building for the same purpose, would be entitled to the exemption claimed under Section 11 of the Act. Section 11(1)(a) is *pari materia* to the third proviso to Section 10(23C)(vi) of the Act and the only difference is with regard to the percentage of income and the period for which it can be carried forward.

24. The Allahabad High Court applied the legal ratio of the Hon'ble Supreme Court in ***CIT Vs. Mool Chand Sharbati Devi Hospital Trust***, (2010) 190 TAXMAN 338 and held that capital expenditure on building and infrastructure are basic necessity and therefore, it should be treated as expenditure under Section 11(1) of the IT Act.

25. In view of the above, capital expenditure if incurred by an Educational Institution for attainment of the object of the Society, it would be entitled to exemption under Section 11 of the I.T. Act.

26. For the reasons stated above, issues involved in the present case are no more *res integra* and therefore, no question of law arises for adjudication in the present appeal.

27. In the result, the appeal is dismissed.

Appeal dismissed.

2015 (II) ILR - CUT-1125

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

STREV NO. 71 OF 2014

STATE OF ODISHA .....Petitioner

.Vrs.

M/S. AURO PLASTICS, BHUBANESWAR .....Opp. Party

ODISHA SALES TAX ACT, 1947 – S.12(4)

Assessment of Sales Tax – Commodity not coming under any of the entry under the Act and creating doubt about the rate of tax – Benefit of such doubt will go to the dealer by assessing the same under the entry assessable to low rate of tax as he has submitted return on such rate – When two views are possible, the view favourable to the assessee must prevail – Held, direction issued to the Assessing Authority to assess the commodity manufactured by the opposite party under entry No. 129 at the rate of 4% of Sales Tax instead of 8% of tax under entry No. 136 of list "e" under the Act. (Paras 15, 16, 17)

Case Laws Referred to :-

1. 2005 (181) ELT 154 S.C : CCE Vrs. Sunder Steels Ltd.
2. O.J.C.2755 of 1988 : Soosree Plastic Industry Pvt. Ltd. Vrs.Union of India.
3. 1999 (1) Supp. SCR 192 : Mysore Minerals Ltd. Vs. Commissioner of Income Tax".

For Petitioner : Mr. M.S. Raman (S.S.C.)(C.T.)
For Opp. Party : None

Date of Argument: 09.09.2015
Date of Judgment : 25.09.2015

JUDGMENT

DR. D.P. CHOUDHURY, J.

The petitioner assails the impugned order dtd.12.11.2013 U/s.24 of the Orissa Sales Tax Act (hereinafter called the Act) passed by Orissa Sales Tax Tribunal, Cuttack in S.A. No.706 of 2008-09.

2. Succinctly, the case of the petitioner is that the opposite party being a registered dealer carries on business in manufacturing and sale of Linear Low Density Polythene Bags (in short L.L.D.P.E) during the year 2002 to 2003. It is alleged inter alia that the opposite party filed Sales Tax return U/s.12(4) of the Act showing said material vide Entry No.129 of list "C". The learned Assessing Authority by observing in its Assessment Order that such commodity being fallen to Entry No.136 under list 'C' is exigible to sale tax at the rate of 8% under Entry No.136 of the Act instead of Entry No.129 of the Act.

3. It is further alleged by the petitioner that opposite party preferred 1st Appeal before the Assistant Commissioner of Sales Tax (Appeal) (in short A.C.S.T). The First Appellate Authority confirmed the Assessment Order ex-parte on 25.11.2008. Against the order of the First Appellate Authority the opposite party filed Second Appeal before the Orissa Sales Tax Tribunal. The learned Tribunal did not interpret the entry in question and wrongly decided by setting aside the order of the Assessing Authority. It is the case of the petitioner that the Second Appellate Authority has no authority to issue direction to the Assessing Authority to assess de novo the entry of the material after expert opinion obtained.

4. The further case of the petitioner that Entry No.129 spells about packing material, i.e., to say gunny bags, H.D.P.E. bags, charade bags, containers and glass bottles. But entry No.136 contains polythene, polyethylene, High density polyethylene, woven fabric, (PP) HDPE woven sacks, PVC bags and other plastic goods except those specified elsewhere in the notification. It is the case of the petitioner that since L.L.D.P.E. the manufactured commodity of the petitioner is a component of polythene, is covered by entry No.136 but not entry No.129 of sale tax list "C". So petitioner alleges that the commodity of the opposite party is assessable to 8% of Sales Tax list but not to 4% of sales tax list for which the opposite party is liable to pay the sales tax @ 8% on sales. It is also the case of the petitioner that the Tribunal has mis-directed itself and came to the wrong

conclusion for which the said impugned order should be set aside and the order of the Assessing Authority should be restored.

5. The case of the opposite party is that they are manufacturers of LLDPE bags. According to them H.D.P.E. and LLDPE bags are the same. They are used as packing materials. It is the further case of the opposite party that during the relevant year such commodity being under entry No.129 of the Schedule of the Sales Tax Act is not assessable @ 8% on sales under Entry No.136 but at the rate of 4% on sales. For this the Assessing Authority should have made assessment on the goods by making it taxable at the rate of 4% under Entry No.129. Opposite party submits that order of the Tribunal being legal, proper and correct should be upheld.

SUBMISSIONS:-

6. Learned Senior Standing Counsel for the Revenue submitted that the interpretation made by the learned Tribunal is beyond the purview of the power conferred inasmuch as the notification has to be interpreted on its original words and no words used in the notification can be substituted. He relied on the decision reported in **2005 (181) ELT 154 Supreme Court (CCE Vrs. Sunder Steels Ltd.)**. It is further submitted that the commodity, namely, "LLDPE" being not specifically mentioned in taxable list, learned Tribunal ought not to have interfered with the adjudication made by the Authorities below. He further submitted that the word, "that is to say" in entry No.129 should be interpreted to the goods given in list but not otherwise. According to him, entry No.129 does not contain LLDPE bag although other kinds of bags are included. Learned Tribunal has erred in law by not accepting the entry No.136 and mis-directed itself by remanding the matter to the learned Assessing Authority for fresh opinion to be obtained with regard to correct identification of the commodity manufactured by the opposite party. Learned Tribunal has failed to appreciate that on bare perusal of entry No.136 of the taxable list without any confusion leads to the conclusion that commodity in question, i.e., LLDPE falls within the scope of "plastic groups" as per judgment rendered in **Soosree Plastic Industry Pvt. Ltd. Vrs. Union of India, O.J.C.2755 of 1988** disposed of by this court on 28.8.1992. He submitted to set aside the judgment of the learned Tribunal and to allow the revision by restoring order of the Assessing Authority.

7. None appeared for opposite party. However, it was submitted on behalf of the opposite party before the Learned Tribunal as appearing from the impugned order that neither the Assessing Authority nor the First

Appellant Authority have got expertise in recognizing the commodity in question. Moreover, LLDPE bag is similar to H.D.P.E. bag under Entry No.129 of the taxable list for which it is taxable at the rate of 4% of gross sales and under no circumstances LLDPE bag is coming under the taxable list under entry No.136 of the Act.

POINTS FOR DETERMINATION:-

8. The main point for consideration is whether the commodity of the opposite party, i.e., Linear Low Density Polyethylene (L.L.D.P.E.) bags are taxable @ 4% under Entry No.129 or taxable to 8% of sales vide Entry No.136 under the Act.

DISCUSSION:-

9. We have heard both the counsels. Perused the documents filed before us. It is not disputed that petitioner is a dealer in manufacturing and sale of Linear Low Density Polyethylene (in short called L.L.D.P.E.) bags and sheets. After examining the books of account the Assessing Authority revealed that the opposite party has collected Orissa Sales Tax @ 4% on the sale price of L.L.D.P.E. bags produced out of raw materials, i.e., L.D.P.E. and L.L.D.P.E. granules. Learned Assessing Authority observed that the words, "that is to say" used in Entry No.129 confined to only gunny bags, H.D.P.E. bags, charade bags, tin containers and glass bottles but not the L.L.D.P.E. materials. At the same time he observed that the L.L.D.P.E. manufactured by the O.P. is assessable at the rate of 8% of sales under Entry no.136. He has not assigned the reason in the Assessment Order why this material will be assessable @ 8% tax rate when the said material also does not find place in Entry No.136.

10. The Assistant Commissioner of Sales Tax (Appeal) (A.C.S.T.) found that the O.P. did not appear and he was set ex-parte. His observation was equally on the line of the learned Assessing Authority. Without assigning any reason why the entry No.136 will be accepted, learned First Appellate Authority gave decision that the commodity of the O.P. is coming under Entry No.136.

11. Learned Tribunal framed the issue whether the packing materials as notified in Entry 129 the H.D.P.E. bags include L.L.D.P.E. bags; It noted that L.L.D.P.E. and H.D.P.E. may belong to same family for which he set aside the order of both the authorities below and remanded the case to the

Assessing Authority for fresh assessment after collecting opinion of Expert with a direction to complete the assessment within 3 months from date of receipt of the order. Here also learned Tribunal without expressing any definite opinion sent back to the learned Assessing Officer for de novo assessment within 3 months.

12. At Chapter-III under rate of sales tax list 'C' Entry No.129 says that 4% Sales Tax should be payable in the event of sale of packing materials, "that is to say" gunny bags, H.D.P.E. bags, charade bags, tin containers and glass bottles. Similarly Entry No.136 therein speaks that Polythene, polypropylene (P.P.) High density polyethylene (H.D.P.E.) woven fabrics, woven sacks, PVC products and other plastic goods except those specified elsewhere in the notification. It thus does not include L.L.D.P.E. and it has to be interpreted properly so as to bring the same under either of the category. At the same time the Assessing Authority and First Appellate Authority have not assigned any reason as to why L.L.D.P.E. bags and sheets will come under Entry No.136 being assessable to 8% of sales tax on the sales by repelling the contention of the opposite party. The learned Tribunal simply noted the arguments of both the sides and found the authorities below without applying expert opinion have disposed of the manufactured commodity of the opposite party by making same assessable under Entry No.136 of the Orissa Sales Tax Act. So, learned Tribunal remanded the matter to the Assessing Authority to make fresh assessment on the basis of the expert opinion obtained. Learned Tribunal should have applied judicial mind and given the decision instead of remanding the matter for de novo assessment.

13. It is the contention of learned Senior Standing Counsel for Revenue that the issue has already been decided by this Court in the decision reported in **Soosree Plastic Industry (P) Ltd. Vrs. Union of India, OJC 2755 of 1988**, disposed of on 28.8.1992 where this Court held that H.D.P.E. woven sacks/ fabrics are plastic goods, the order of the Tribunal suffers from vice of illegality and non application of mind. It is also admitted by learned counsel for Revenue that the material under Entry No.136 came to be substituted on 1.3.2002 and the present case relates to the assessment year 2002-03. Thus this decision being prior to 2002 cannot be applicable in the present case. At the same time it is submitted on behalf of the petitioner that the commodity plastic goods have been subjected to payment of sales tax under Entry No.136 during the relevant period and the commodity of the opposite party being under the family of plastic goods should be assessable to such entry No.136. On the other hand, learned counsel for opposite party submitted that

the plastic goods as enumerated in Entry No.136 relates to High Density Polyethylene (H.D.P.E.) woven fabric and woven sacks but not to the materials of opposite party. From the Assessment Order it appears that the commodity in question is L.L.D.P.E. bags produced out of raw materials, i.e., H.D.P.E. and L.L.D.P.E. granules. There is nothing found from the Assessment Order that the L.L.D.P.E. bags are plastic goods and they are also the woven fabric or woven sacks as detailed in Entry No.136.

14. Entry No.129 also does not contain L.L.D.P.E. bags but said entry being substituted w.e.f. 1.3.2002 contains the packing materials of course confining to gunny bags, H.D.P.E. bags, charade bags, tin containers and glass bottles. In both the entries H.D.P.E. materials has been used but the entry No.136 contains H.D.P.E. woven fabrics and H.D.P.E. woven sacks. But the entry No.129 contains H.D.P.E. bags. So, definitely there is difference between bags on one hand and woven fabrics and woven sacks on the other. Even if the L.L.D.P.E. is not included in any of the entries but the category or container prepared out of such materials is the crucial question to decide the issue in question. As per Webster's Encyclopedic Unabridged Dictionary "bag" means container or receptacle of leather, cloth, paper, etc capable of being closed at the mouth. According to such dictionary "fabric" means the structure of a woven, knitted or felted material. Similarly, according to the above dictionary "sacks" means a large bag of strong, coarsely woven material, as for grain, coals, etc. From the above description it appears bags can neither be fabrics nor be sacks. So, High density polyethylene (H.D.P.E.) bag is different from H.D.P.E. woven fabrics and H.D.P.E. woven sacks. Moreover the books of accounts under Assessing Order revealed that the dealer had collected Orissa Sales Tax by selling the L.L.D.P.E. bags being produced from raw materials L.D.P.E. and L.L.D.P.E granules. The fact remains apparently that High density polyethylene (H.D.P.E.) bag is in the Entry No.129 whereas H.D.P.E. woven fabrics and H.D.P.E. woven sacks are purportedly under Entry No.136. On analogy, it is considered that Polyethylene is family in both entry Nos.129 and 136 of Sales Tax List 'C' under Chapter-III of the Act. Under Polyethylene family density is being considered as genus with High or Linear Low as sub-division under such genus. But bag or fabric or sacks are considered as species being different from each other items. So, Linear Low Density Polyethylene (L.L.D.P.E.) bag is absolutely different from H.D.P.E. fabrics or sacks being under species 'bag', resultantly under Entry No.129. We are, therefore of

considered view that L.L.D.P.E. is under entry No.129 but not under Entry No.136 of the taxable list 'C' under the Act.

15. Assuming that the L.L.D.P.E. is not covered under Entry No.129 and 136 creating a doubt in the mind of the Assessing Authority but the fact remains that L.L.D.P.E. bag is nothing but Linear Low Density Polyethylene (L.L.D.P.E.) bags sold by the opposite party. It is settled by catena of decisions of Hon'ble Apex Court that in interpreting a fiscal statute the Court can not proceed to make good the deficiencies, if there be any, in the statute. It shall interpret the statute as it stands and in case of doubt it shall interpret it in a manner favourable to the tax payer. In considering a taxing Act, the Court is not justified in straining the language in order to hold a subject liable to tax. (See "***17 S.T.C. 326 SC The State of Punjab Vs. Jullundur Vegetables Syndicate"*** and ***"41 S.T.C. 394 SC Alladi Venkateswarlu and others Vs. Government of Andhra Pradesh and another")***. It is also settled that even if two views are possible the view which is favourable to the assessee must be accepted, while construing the provisions of a taxing statute. (See "***77 I.T.R. 518 (SC) C.I.T. Vs. Kulu Valley Transport Co. Pvt. Limited"*** and "***1999 (1) Supp. SCR 192 Mysore Minerals Ltd. Vs. Commissioner of Income Tax").***

16. Thus, It is well settled law that a commodity not being coming under any of the entry but creating a doubt in the mind about rate of tax, as to its entry under the Act, the benefit of such doubt will go to the dealer by assessing the same under the entry assessable of low rate of tax as he has submitted the return on such rate on which statute has given authority to Department Revenue to assess same under the Statute. The creature of fiscal statute can neither add a word nor delete a word from statute as held in decision reported vide **2005 (181) ELT 154 (Supreme Court) (supra)**. Be that as it may, we hold in either of the way that the L.L.D.P.E. bags sold by the opposite party is undoubtedly coming under Entry No.129 of the Act. The conclusion of the learned Tribunal that the material should be decided by the Assessing Authority after obtaining expert opinion is untenable. Similarly, it is not necessary to remand the matter to the Assessing Authority for final opinion. At the same time the order of learned Assessing Authority and the First Appellate Authority being not reasoned order and sans to the provision of law, they are equally not countenanced. Thus the commodity manufactured by the opposite party is assessable at the rate of 4% sales tax instead of 8% rate of tax. This point is answered accordingly.

CONCLUSION:-

17. Thus, it is the contention of learned counsel for Revenue that L.L.D.P.E. bag being not under any entry should be left open to the Department to evaluate the same for the purpose of its assessibility. On the other hand the learned counsel for opposite party submitted that the sales tax being paid on such material, the Court is competent to decide the matter in question. It is reiterated that under no circumstances the learned Tribunal should have given the finding on the material available before it and they should have obtained the opinion of the expert in the second appeal as the appeal is continuous of proceeding and being an appellate authority they can seek expert opinion to reach any conclusion. Thus we are of the considered view that the impugned order suffers from inadequacy and having failed to exercise the jurisdiction vested on them are liable to be modified. We, therefore, of the view that the commodity of the opposite party being assessable at the rate of 4% of sales tax under Entry No.129 of the Act, we, hereby, direct learned Assessing Authority to assess the tax liability after considering the commodity of the opposite party under entry No.129, exigible at the rate of 4% of sales tax. Revision petition is disposed of accordingly.

Revision disposed of.

2015 (II) ILR - CUT-1132

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

W.P.(C) NO. 12171 OF 2015

SASMITA JAMUDA ……..Petitioner

.Vrs.

UTKAL UNIVERSITY & ORS. ……..Opp. Parties

EDUCATION – Admission to P.G. Course – Denial of admission to petitioner – Ground is clause-III(B)(xv) of the information bulletin provides that no admission shall be given to a candidate for P.G. Course for second time – Action challenged – Quest for knowledge more and more is always to be encouraged and under no circumstances it is to be discouraged – Clause (xv) should not be

interpreted to discourage additional qualifications basing on technicality – Held, since the petitioner has no P.G. Degree by the time of admission and similarly situated persons got admission the impugned order refusing admission to the petitioner is quashed – Direction issued to O.P. No.s 1 to 4 to give admission to the petitioner into P.G. Course in PMIR. (Paras 6 to 9)

For Petitioner : Mr. Siba Prasad Sethy
For Opp. Parties : M/s. A.K.Mohapatra & S.K.Barik

Date of Argument :22. 9. 2015
Date of Judgment : 05.10.2015

JUDGMENT

DR. D.P. CHOUDHURY, J.

Challenge has been made to the arbitrary action by the opp. Parties in not allowing admission to the petitioner in the Post-Graduate Course by the opp. Party in the opp. Party no.1 University.

FACTS & SUBMISSIONS:

2. Learned counsel for the petitioner supporting the petition submitted that the petitioner has passed +3 Commerce Degree Examinations in the year 2014 from B.J.B. Autonomous College, Bhubaneswar being placed in First Division. Thereafter she underwent one Post-Graduate Diploma Course under opp. Party no.5. Since the opp. Parties 1 to 4 invited applications vide Annexure-1 to various Post-Graduate Courses in the year 2015-16, the petitioner applied to prosecute her study in Post-Graduate Degree Course in Personnel Management and Industrial Relations (PMIR) in the opp. Party no.1-Unversity. It is further contended that the petitioner got intimation to get admission on 29.6.2015. When she approached opp. Party no.4 for admission, the latter refused to admit her in the P.G. Course in the subject PMIR. She submitted a representation before the Heads of the Department of PMIR, but it was rejected on the ground that she has completed Post-Graduate in Indian Institute of Mass Communication, Dhenkanal and as per information bulletin in Clause-III (B)(xv) she is not entitled to get admission in the Post-Graduate Degree course. Thereafter the petitioner ventilated her grievance before the higher authority, but all were in vain.

3. It is further alleged inter alia by the learned counsel for the petitioner that after the Graduation in Commerce, the petitioner only attended one year

Diploma Course in Journalism and not any other P.G. Degree course, but the opp. Parties illegally rejected her candidature and did not allow to admit her in the P.G. Degree Course. She being a Scheduled Tribe girl was refused to get admission although other persons in the similar circumstances got admission, her fundamental right as per the Constitution has been violated. So, learned counsel for the petitioner submitted that the order or remark date d 29.6.2015 made by the opp. Party no.4 in rejecting the representation or refusing to give admission to the petitioner should be quashed and necessary direction be given to the opp. Parties 1 to 4 to admit the petitioner in the P.G. Course in the Department of PMIR.

4. Learned counsel for the opp. Party supporting the counter submitted that the petitioner could not produce the C.L.C. at the time of ad mission and more over at the time of admission she has already completed P.G. Course. He further submitted that Clause-III(B) (xv) of the information bulletin vide Annexure-B/1 shows that no admission shall be given to a candidate for P.G. course for second time and since the petitioner had passed the P.G. Diploma in Journalism in Indian Institute of Mass Communication (IIMC), Dhenkanal, she is disqualified to get admission in the P.G. Course in PMIR at opp. Party no.1-University. It is contended by the learned counsel for the opp. Party that the action of the opp. Party no.4 is legal and proper and in no way her right has been abridged by the opp. parties. So he prayed to dismiss the writ petition.

POINT FOR DISCUSSION:

5. After going through the contentions of both parties, the only point emerges to find out whether the petitioner is disqualified by the information bulletin issued by the opp. Parties in getting her admission in P.G. course in Personnel Management and Industrial Relations (PMIR).

DISCUSSIONS

6. Annexure-1 shows that in the year 2015-16 the information bulletin has been issued by opp. Party no.1-University seeking applications for admission into different P.G. Disciplines. It further shows that the subject "Personnel Management and Industrial Relations" is a Post-Graduate Degree Course (in short PMIR) and for such course applications were invited from the candidates of Scheduled Tribe category who have secured 50% in the Bachelor Degree. This programme is a Four Semester Programme. It reveals from the petition accompanied with affidavit that the petitioner has passed B.Com. and has undergone one year Post-Graduate Diploma in Journalism

(Odiya) and applied for prosecuting the P.G. course in PMIR. She has also stated in her affidavit that she has qualified to get admission. In support of her contention she produced Annexure-2, which shows that she being selected provisionally to get her admission vide Roll No.1018405 was directed to appear before the Heads of Department at 11.00 A.M. on 29.6.2015 with her original documents. It appears from Annexure-3 that she appeared before the Heads of Department, but due to stipulation in Clause-III(B)(xv) that the candidate can be denied admission if he or she has already P.G. course by the time of admission. It is the contention of the opp. Parties that since she has no College Leaving Certificate and has already got P.G. Course she was not entitled to get admission in the P.G. course in PMIR. Not a single document or any endorsement of the Heads of Department produced by the opp. Party could show that she has failed to produce the College Leaving Certificate. So the plea of the opp. Party that the petitioner failed to produce the College Leaving Certificate yet to be proved.

7. Annexure-5 shows that the Indian Institute of Mass Communication, Dhenkanal offers different courses including P.G. Diploma course in Journalism with duration from August, 2014 to May, 2015. Thus, the said course is one year Diploma course, but this course is only after Graduation Degree obtained by the candidate. Annexure-6 shows that the petitioner has completed such P.G. Diploma course in Odiya Journalism in IIMC, Dhenkanal having successfully secured 61% of marks. This certificate has been given by the Professor and Head of IIMC, Dhenkanal. Annexure-6 also shows that that this course is a 10 months course not being even one year and it is not a Master Programme. So, we are of the considered view that this P.G. Diploma course in Odiya Journalism underwent by the petitioner is neither a P.G. Degree nor a two year Master Programme and petitioner has only after Graduation undergone such Diploma Programme.

8. On further scrutiny of Annexure-1 it appears that Clause-III(B)(xv) of the information bulletin purportedly states that no admission should be given to a candidate to P.G. Course for the second time. If any candidate completing the P.G. course, takes admission into any P.G. course providing wrong/false information his/her admission will be cancelled when detected. Under this ground, the Head of department has disqualified the petitioner. It is necessary to scrutinize the said Clause (xv). There is nothing found from the counter under what basis such clause has been incorporated in the information bulletin vide Annexure-1. Quest for knowledge more and more is always encouraged, but under no circumstances be discouraged. After giving

much though over the said clause, we are of the view that the admission for the second time to a P.G. course is banned because a person having passed P.G. in one discipline, should not be allowed to prosecute study again in such discipline. For example, a person having passed P.G. in Chemistry cannot be permitted to take admission again in that subject. But at no stretch of imagination it can be said that a candidate having passed M.A. in English cannot prosecute study P.G. in Odiya. The academic institution should always encourage the students to acquire more and more educational qualifications. So clause (xv) should not be interpreted to discourage such additional qualifications to be obtained by the candidates. Moreover, if we go for plain reading of clause (xv) it is only found that the previous Degree must be a P.G. Degree, but not a Diploma. There is difference between Degree and Diploma. In view of the Annexure-6 that the petitioner only passed a one year Diploma which is not a P.G. degree course as per the certificate of the Heads of the Department of the IIMC, Dhenkanal, under such circumstances it can not be assumed that she has completed P.G. Degree in Journalism so as to disqualify herself in taking admission in P.G. course in PMIR. We are of the considered view that the petitioner having no P.G. Degree cannot be denied admission into P.G. in PMIR. The endorsement by the Heads of the Department in Annexure-3 is unfortunately juxtapose to the legal consequence of such clause (xv) issued in the information bulletin.

CONCLUSION

9. Be that as it may, we are of the considered view that clause (xv) should be understood always to encourage to acquire knowledge and in no case it should be seen with jaundice eye. The purpose of intention of such clause to promote education without going into technicality. In fact when the petitioner has no P.G. Degree by the time of admission, we are of the considered view that she should be given admission to P.G. course in PMIR. On the other hand, the remark or order of opp. Party no.4 and other contentions as to invalidity of candidature of petitioner is liable to be interfered with. Hence, we are satisfied with the fact that the petitioner's fundamental right has been violated by not allowing her to get admission although she was provisionally selected. We, therefore, hereby quash the order or the endorsement of the Heads of Department towards refusal to give admission to the petitioner and at the same time we direct the opp. Parties 1 to 4 to give admission to the petitioner to the P.G. in PMIR within a period of two weeks from today. The writ petition is allowed accordingly.

Writ petition allowed.

2015 (II) ILR - CUT-1137

S. C. PARIJA, J.

ARBP NO. 11 OF 2008

KESHAB CHARAN MOHANTY .....Petitioner

.*Vrs.*

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

ARBITRATION AND CONCILIATION ACT, 1996 – S.11

Appointment of arbitrator – Non-payment of pending bills after execution of contract work – Petitioner served notice to Superintending Engineer for settlement of dispute – Claim rejected on the ground of fraud and denial of Arbitration clause – An arbitration agreement is not required to be in any particular form – The essential requirements are that the parties have intended to make a reference to arbitration and treat the decision of the arbitrator as final – The intention of the parties to enter into an arbitration agreement shall have to be gathered from the forms of the agreement – In the present case clause 10 of the agreement provides for settlement of disputes is an arbitration agreement between the parties and the Superintending Engineer who has already expressed his opinion with regard to the claims made by the petitioner, is disqualified to act as the arbitrator as he is not expected to adjudicate the matter in an independent and impartial manner – Held, this Court appointed Shri Justice B.P.Das as the sole arbitrator to adjudicate the dispute between the parties.

(Paras 22 to 26)

Case Laws Referred to :-

1. (1998) 3 SCC 573 : K.K. Modi v. K.N. Modi
2. AIR 2003 SC 3688 : Bihar State Mineral Development Corporation and another v. Encon Builders (I) Pvt. Ltd.
3. (2007) 5 SCC 719 : Jagdish Chander v. Ramesh Chander
4. (2007) 5 SCC 28 : Panjab State and others v. Dina Nath
5. AIR 1981 SC 479 : Rukmanibai Gupta vs. Collector of Jabalpur
6. (2014) 11 SCC 148 : Karnataka Power Transmission Corporation Limited and another v. Deepak Cables (India) Ltd.
7. (2011) 7 SCC 406 : State of Orissa and Others v. Bhagyadhar Dash
8. (2014)2 SCC 201 : P. Dasaratharama Reddy Complex v. Government of Karnataka and another

For Petitioner : Shri R.K. Rath, Senior Advocate

For Opp. Parties : Addl. Standing Counsel

Date of Judgment: **05**.11.2015

JUDGMENT

S.C. PARIJA, J.

This is an application filed under Section 11 of the Arbitration and Conciliation Act, 1996, for appointment of Arbitrator.

2. The brief facts of the case is that the petitioner had entered into a contract with the State Government-opposite party no.1, for execution of the work "Excavation of Gania (Paisapaka) Nalla under drainage congestion in rivers Daya, Bhargavi, Luna & Makara Outfalling to Chilika Lagoon and remedial measures", vide Agreement No.1116 F2/06-07, for an estimated value of Rs.73,09,903/-. The date of commencement of the work was 21.3.2007 and the stipulated date of completion was 20.6.2007. The Agreement had a clause for settlement of dispute which reads as under:-

"10. SETTLEMENT OF DISPUTE:

If the contractor considers any work demanded of him to be outside the requirements of the contract or considers any drawing record or ruling of the Engineer-in-charge, on any matter in connection with or arising out of the contract or carrying out of work to be unacceptable, he shall promptly ask the Engineer-in-charge in writing for written instruction or decision. There upon the Engineer-in-charge shall give his written instructions or decision within a period of thirty days of such request. Upon receipt of the written instruction or decision, the Contractor shall promptly proceed without delays to comply with such instruction or decision. If the Engineer-in-charge fails to give his instructions or decision in writing within a period of thirty days after being requested or if the contractor is dissatisfied with the instruction or decision of the Engineer-in-charge the contractor may within thirty days after receiving instruction or decision of the Engineer-in-charge will approach to the higher authority who shall afford an opportunity to the contractor to be heard and to offer evidence in support of his appeal. The Authority shall give his decision within a period of thirty days after the contractor has given the said evidence in support of his appeal, which shall be binding upon the contractor."

3. The case of the petitioner is that inspite of various impediments and indifference shown by the departmental authorities, he completed the contract

work within the stipulated period. During execution of the contract work, the petitioner had to execute several extra items and additional works because of change in the alignment and shifting of the work site. After completion of the contract work, as no payments had been made towards running account bills during execution of the contract work, the petitioner made several requests to the Executive Engineer, Drainage Division, Bhubaneswar, who is the Engineer-in-charge of the contract work, for payment of his pending bills.

4. The Executive Engineer, Drainage Division, Bhubaneswar, vide his letter dated 28.8.2007, intimated the petitioner that he has not completed the work as per the approved design and disputed the claim made by the petitioner. Subsequently, vide letter dated 03.10.2007, the Executive Engineer requested the petitioner to attend the office for settlement of the matter. The petitioner was also requested to attend the office and sign the bills and accept the measurement recorded in the measurement book, to facilitate payment.

5. The case of the petitioner is that inspite of repeated approach, as the claim of the petitioner was not settled and instead several objections and allegations were made with regard to the execution of the contract work and signing of the measurement book, the petitioner served a notice on the Superintending Engineer, Drainage Circle, Cuttack, who is the higher authority, vide his letter dated 07.11.2007, for settlement of the dispute with regard to the payment of pending bills for the work executed by him, as per Clause-10 of the Agreement. The Superintending Engineer vide his letter dated 20.12.2007, rejected the claims of the petitioner with regard to the execution of the extra item of work, extra rate for extra item etc., on the ground that the same were found to be false and fabricated. Subsequently, on receipt of communication from the Executive Engineer dated 26.12.2007, making allegations against the petitioner with regard to the non-execution of the contract work as per the terms of the Agreement and fabrication of records and threatening to impose penalty, the petitioner vide his letter dated 03.1.2008, made an appeal to the Superintending Engineer to look into the matter and ensure payment of the pending bills. Having received no response, the petitioner has approached this Court under Section 11 of the Arbitration and Conciliation Act, 1996, ("the Act" for short), for appointment of Arbitrator to adjudicate the dispute between the parties.

6. Learned counsel for the petitioner submits that the Clause-10 of the Agreement, as detailed above, is essentially an arbitration clause and

therefore, this Court has the jurisdiction to appointment the Arbitrator to adjudicate the dispute between the parties. In this regard, learned counsel for the petitioner has relied upon a decision of the apex Court in ***K.K. Modi v. K.N. Modi,*** (1998) 3 SCC 573, wherein the Hon'ble Court had enumerated the attributes of a valid arbitration agreement as follows:-

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

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

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

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

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

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

7. Learned counsel for the petitioner has also relied upon the decision of the apex Court in ***Bihar State Mineral Development Corporation and another v. Encon Builders (I) Pvt. Ltd.,*** AIR 2003 SC 3688, wherein the Hon'ble Court has listed the following as the essential elements of an arbitration agreement:-

"(1) There must be a present or a future difference in connection with some contemplated affair,

(2) There must be the intention of the parties to settle such difference by a private tribunal,

(3) The parties must agree in writing to be bound by the decision of such tribunal,

(4) The parties must be ad idem."

8. A reference has also been made to the decision of the apex Court in ***Jagdish Chander v. Ramesh Chander,*** (2007) 5 SCC 719, wherein the Hon'ble Court after referring to the earlier decisions, culled out certain principles with regard to the term "arbitration agreement". The said principles basically emphasise on certain core aspects, namely, (*i*) that though there is no specific form of an arbitration agreement, yet the intention of the parties which can be gathered from the terms of the agreement should disclose a determination and obligation to go to arbitration; (*ii*) non-use of the words "arbitration" and "arbitral tribunal" or "arbitrator" would not detract from a clause being interpreted as an arbitration agreement if the attributes or elements of arbitration agreement are established i.e., (*a*) The agreement should be in writing. (*b*) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (*c*) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (*d*) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them; and (*iii*) where there is specific exclusion of any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it would not be an arbitration agreement.

9. Reliance has also been placed on the decision of the apex Court in ***Panjab State and others v. Dina Nath,*** (2007) 5 SCC 28, wherein the Hon'ble Court has held as under:-

> "7. A bare perusal of the definition of arbitration agreement would clearly show that an arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if any dispute arises between them in respect of the subject matter of the contract, such dispute shall be referred to arbitration. In that case such agreement would certainly spell out an arbitration agreement. [See ***Rukmanibai Gupta vs. Collector of Jabalpur, AIR 1981 SC 479***]. However, from the definition of the arbitration agreement, it is also clear that the agreement must be in writing and to interpret the agreement as an 'arbitration agreement' one has to ascertain the intention of the parties and also treatment of the decision as final. If the parties had desired and intended that a dispute must be referred to arbitration for decision and they would undertake to abide by that decision, there cannot be any difficulty to hold that the intention of the parties was to

have an arbitration agreement; that is to say, an arbitration agreement immediately comes into existences."

10. Learned counsel for the petitioner has also relied upon the decision of the apex Court in ***Karnataka Power Transmission Corporation Limited and another v. Deepak Cables (India) Limited,*** (2014) 11 SCC 148, wherein the Hon'ble Court has reiterated the aforesaid principles relating to interpretation of an arbitration agreement.

11. Learned counsel for the petitioner further submits that as per the Clause-10 of the Agreement, the Superintending Engineer is the higher authority, who is required to adjudicate the dispute raised in connection with the execution of the contract work, after hearing the parties and giving them opportunity of hearing. It is submitted that as the Superintending Engineer is a Government official in-charge of the contract work and has already expressed his opinion in the matter by rejecting the claims made by the petitioner and has raised several allegations against him with regard to the execution of the contract work, the dispute cannot be referred to him for adjudication, as he cannot be expected to act in a unbiased and impartial manner. Reference in this regard has been made to the observations of the apex Court in *Encon Builders* (supra), wherein it has been held that a person cannot a judge of his own cause and that justice should not only be done but manifestly seen to be done. Reference has also been made to a decision of the apex Court in ***Union of India v. Singh Builders Syndicate,*** (2009) 4 SCC 523, wherein the Hon'ble Court has held that ordinarily the Court should appoint the Arbitrator in the manner provided for in the arbitration agreement. But where the independence and impartiality of the Arbitrator named in the arbitration agreement is in doubt, the Chief Justice or his designate is not powerless to make appropriate alternative arrangements to give effect to the provision for arbitration.

12. It is accordingly submitted that as Clause-10 of the Agreement is an arbitration clause and the higher authority referred to therein being the Superintending Engineer, who has already expressed his views in the matter, he is disqualified to act as the Arbitrator. Therefore, it is only just and proper, in the interest of justice, that this Court should appoint an Arbitrator, in exercise of its powers conferred under Section 11(6) of the Act, to adjudicate the dispute between the parties.

13. Learned counsel for the State with reference to the counter affidavit submits that the petitioner had not completed the contract work as per the

terms of the Agreement. It is submitted that inspite of several requests and reminders by the Engineer-in-charge, no steps were taken by the petitioner to rectify the defects. It is further submitted that there being no instructions by the Engineer-in-charge for execution of any extra work at any point of time, the claim raised by the petitioner with regard to the extra item of work and for payment of extra rate are wholly false and frivolous. It is further submitted that as per the letter of the Executive Engineer dated 26.12.2007, it is amply clear that the petitioner had attempted to fabricate the entries made in the level book.

14. It is further submitted that as there was no change in the specification of the work item and no instructions or any directions has been issued to the petitioner for execution of any extra item of work, the claims raised by him with regard to the execution of additional items of work are false and have been raised to avoid imposition of penalty for non-completion of the contract work, as per the terms of the Agreement.

15. Learned counsel for the State further submits that Clause-10 of the Agreement, as detailed above, is not an arbitration clause and the Superintending Engineer, in terms of the said clause, is required to adjudicate the dispute between the parties to the contract with regard to the rate towards execution of the non-schedule items, which have not been quoted at the time of submission of tender in respect of the contract work. In this regard, learned counsel for the State submits that a similar clause in the F2 agreement came up for consideration before the apex Court in ***State of Orissa and Others v. Bhagyadhar Dash,*** (2011) 7 SCC 406, wherein the Hon'ble Court while interpreting the said Clause-10 of the conditions of contract, has held that the same cannot be considered to be an arbitration agreement.

16. Learned counsel for the State has also relied upon a decision of the apex Court in ***P. Dasaratharama Reddy Complex v. Government of Karnataka and another,*** (2014) 2 SCC 201, wherein the Hon'ble Court while referring to its earlier decisions, has come to hold that Clause-66 therein was not an arbitration clause. It is accordingly submitted that as Clause-10 of the Agreement is not an arbitration clause, the present application under Section 11 of the Act is erroneous and misconceived.

17. From the discussions made above, the question which falls for consideration is whether Clause-10 of the Agreement, as detailed above, can be construed as an arbitration agreement between the parties. It is well known that under the Act, Section 2(b) provides that an arbitration agreement

means an arbitration agreement referred to in Section 7. The expression 'arbitration agreement' as has been explained in Section 7 of the said Act, reads as follows:-

"7.(1) In this Part, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of a arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in –

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(d) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

18. It is well settled that when a Court has to interpret whether a contract contains an arbitration clause or not, such interpretation has to be done on a slightly different basis. A contract that provides for arbitration is a commercial agreement inter-parties and has to be interpreted in such a manner as to give an efficacy to the agreement rather than to invalidate it. So for interpreting, such an agreement strict rules of construction which are applicable to interpret any conveyance or such other formal documents should not be applied. The meaning of such an agreement must be gathered by commonsense and such construction must not be defeated by any pedantic and rule of strict interpretation.

19. It is also now well settled in law that in order to become an arbitration agreement it is not required in the agreement between the parties, the word 'arbitration' should be mentioned. Further an arbitration agreement is not required to be in any particular form. The essential requirements are that the parties have intended to make a reference to arbitration and treat the

decision of the Arbitrator as final. In *Jagdish Chander* (supra), the apex Court after referring to the cases on the issue, set out the following principles with regard to what would constitute an arbitration agreement:-

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

(ii) Even if the words 'arbitration' and 'arbitral tribunal (or arbitrator)' are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are: (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically exclude any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration

agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

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

20. In *Bhagyadhar Dash* (supra), the question which fell for consideration before the apex Court was whether Clause-10 of the conditions of the contract (forming part of the agreements between the State Government and the contractors), is an arbitration agreement. The said Clause-10 of the conditions of the contract, which was the subject matter of the controversy, reads as under:-

"10. The Engineer-in-Charge shall have power to make any alterations in or additions to the original specifications, drawings, designs and instructions that may appear to him necessary and advisable during the progress of work, and the contractor shall be

bound to carry out the work in accordance with any instructions which may be given to him in writing signed by the Engineer-in-Charge and such alterations shall not invalidate the contract, and any additional work which the contractor may be directed to do in the manner above specified as part of the work shall be carried out by the contractor on the same conditions in all respects on which he agreed to do the main work, and at the same rates as are specified in the tender for the main work. The time for the completion of the work shall be extended in the proportion that the additional work bears to the original contract work and the certificate of the Engineer-in-Charge shall be conclusive as to such proportion. And if the additional work includes any class of work for which no rate is specified in this contract, then such class of work shall be carried out at the rates entered in the sanctioned schedule of rates of the locality during the period when the work is being carried on and if such last mentioned class of work is not entered in the schedule of rates of the district then the contractor shall within seven days of the date of the rate which it is his intention to charge for such class of work, and if the Engineer-in-Charge does not agree to this rate he shall be noticed in writing be at liberty to cancel his order to carry out such class of work and arrange to carry it out in such manner as he may consider advisable.

No deviations from the specifications stipulated in the contract nor additional items of work shall ordinarily be carried out by the contractor, nor shall any altered, additional or substituted work be carried out by him, unless the rates of the substituted, altered or additional items have been approved and fixed in writing by the Engineer-in-Charge, the contractor shall be bound to submit his claim for any additional work done during any month on or before the 15th days of the following month accompanied by a copy of the order in writing of the Engineer-in-Charge for the additional work and that the contractor shall not be entitled of any payment in respect of such additional work if he fails to submit his claim within the aforesaid period:

Provided always that if the contractor shall commence work or incur any expenditure in respect thereof before the rates shall have been determined as lastly hereinbefore mentioned, in such case he shall

only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the date of the determination of the rates as aforesaid according to such rate or rates as shall be fixed by the Engineer-in-Charge. *In the event of a dispute, the decision of the Superintending Engineer of the Circle will be final."*

21. Referring to its earlier decisions on the issue, the apex Court came to the conclusion that it is a clause relating to power of the Engineer-in-charge to make additions and alterations in the drawings and the specifications and execution of non-tendered additional items of work, which are not found in the bill of quantities or schedule of work. Accordingly, Hon'ble Court proceeded to hold as under:-

"We may next examine whether the last sentence of the proviso to Clause 10 could be considered to be an arbitration agreement. It does not refer to arbitration as the mode of settlement of disputes. It does not provide for reference of disputes between the parties to arbitration. It does not make the decision of the Superintending Engineer binding on either party. It does not provide or refer to any procedure which would show that the Superintending Engineer is to act judicially after considering the submissions of both parties. It does not disclose any intention to make the Superintending Engineer an arbitrator in respect of disputes that may arise between the Engineer-in-Charge and the contractor. It does not make the decision of the Superintending Engineer final on any dispute, other than the claim for increase in rates for non-tendered items. It operates in a limited sphere, that is, where in regard to a non-tendered additional work executed by the contractor, if the contractor is not satisfied with the unilateral determination of the rate therefor by the Engineer-in-Charge the rate for such work will be finally determined by the Superintending Engineer. xxx"

22. In the present case, Clause-10 of the Agreement, as detailed above, clearly provides that if the contractor is dissatisfied with the instructions or decisions of the Engineer-in-charge, the contactor may within 30 days after receiving such instructions or decisions of the Engineer-in-charge, approach to the higher authority, who shall afford an opportunity to the contractor to be heard and offer evidence in support of his appeal. The higher authority shall give its decisions within a period of 30 days after the contractor has given the said evidence in respect of his appeal, which shall be binding upon the contractor.

23. Keeping in view the essential ingredients which would constitute an arbitration agreement, as has been laid down by the Supreme Court in the decisions referred to above, the conclusion is irresistible that the aforesaid provisions of Clause-10 of the Agreement, which provides for settlement of dispute, is an arbitration agreement.

24. Coming to the next question with regard to the reference of dispute to the Arbitrator as per Clause-10 of the Agreement, it is seen that the higher authority referred to in the said clause is the Superintending Engineer, who was in overall charge of the contract work and has already expressed his opinion with regard to the claims made by the petitioner. Therefore, he is disqualified to act as the Arbitrator, as he cannot be expected to adjudicate the matter in an independent and impartial manner. This facet of the problem was highlighted by the apex Court in *Encon Builders* (supra), wherein the Hon'ble Court has observed as under:-

> "There cannot be any doubt whatsoever that an arbitration agreement must contain the broad consensus between the parties that the disputes and differences should be referred to a domestic tribunal. The said domestic tribunal must be an impartial one. It is a well-settled principle of law that a person cannot be a judge of his own cause. It is further well settled that justice should not only be done but manifestly seen to be done.
>
> Actual bias would lead to an automatic disqualification where the decision-maker is shown to have an interest in the outcome of the case. Actual bias denotes an arbitrator who allows a decision to be influenced by partiality or prejudice and thereby deprives the litigant of the fundamental right to a fair trial by an impartial tribunal.
>
> As the acts of bias on the part of the second appellant arose during execution of the agreement, the question as to whether the respondent herein entered into the agreement with his eyes wide open or not takes a back seat. An order which lacks inherent jurisdiction would be a nullity and, thus, the procedural law of waiver or estoppel would have no application in such a situation.
>
> It will bear repetition to state that the action of the second appellant itself was in question and, thus, indisputably, he could not have adjudicated thereupon in terms of the principle that nobody can be a judge of his own cause."

25. The aforesaid propositions has been highlighted by the apex Court in *Singh Builders Syndicate* (supra), wherein the Hon'ble Court after referring to earlier decisions, has observed as under:-

"We find that a provision for serving officers of one party being appointed as arbitrator/s brings out considerable resistance from the other party, when disputes arise. Having regard to the emphasis on independence and impartiality in the new Act, government, statutory authorities and government companies should think of phasing out arbitration clauses providing for serving officers and encourage professionalism in arbitration."

26. For the reasons as aforestated, I have no hesitation in holding that Clause-10 of the Agreement, as detailed above, is an arbitration agreement between the parties and as the higher authority referred to in the said clause is the Superintending Engineer, who is disqualified to deal with the matter, I hereby appoint Shri Justice B. P. Das, a former Judge of this Court, as the sole Arbitrator to adjudicate the dispute between the parties. The venue of the arbitration shall be at the High Court of Orissa Arbitration Centre and the proceeding shall be conducted by the learned Arbitrator as per the High Court of Orissa Arbitration Centre (Arbitration Proceedings) Rules, 2014. ARBP is accordingly allowed. This order be communicated to Shri Justice B.P. Das, forthwith.

Petition allowed.

2015 (II) ILR - CUT- 1150

B.K.NAYAK, J.

W.P.(C) NO.1409 OF 2014

BANAMALI SA & ORS. ……..Petitioners.

.Vrs.

STATE OF ODISHA & ORS. ……Opp.Parties

CONSTITUTION OF INDIA, 1950 – ART. 226

Sub-Register refused to register sale deed executed by the petitioners on the ground that they belong to "Khandayat Bhuyan" caste which comes under Scheduled Tribe category and sale is prohibited under Regulation 2 of 1956 as amended in the year, 2002 –

Order confirmed by A.D.M. – Hence the writ petition – The presidential Scheduled Tribes order for the state of Odisha includes only "Bhuya" and "Bhuyan" as Scheduled Tribes in the state of Odisha and it does not include "Khandayat Bhuyan" as a Scheduled Tribe – Held, the impugned orders are unsustainable in law – Direction Issued to the Sub-Registrar to register the sale deed executed by the petitioner.

Case laws Relled on :-

1. (1990) 3 SCC 130 : Merri Chandra Shekhar Rao v. The Dean, Seth G.S. Medical College & Ors.
2. AIR 1995 (S.C) : Kumari Madhuri Patil and another v. Additional Commissioner Tribal Development and Ors.

For Petitioner : Mr. Bharat Ku. Mishra
For Opp. Parties :

Date of order : 31.07.14

ORDER

B.K.NAYAK, J.

Heard learned counsel for the petitioners and learned State counsel. Perused the records.

Order dated 3.5.2013 passed by the Sub-Registrar, Panposh-opposite party no.2 refusing to register the sale deed executed by the petitioners in favour of Scheduled Caste persons on the ground that the petitioners who are "Khandayat Bhuyan" by caste are coming under the Scheduled Tribe category, and therefore, the sale is prohibited under Regulation 2 of 1956 as amended in the year 2002, and also the order dated 21.5.2013 under Annexure-7 passed by the Additional District Magistrate-cum-District Registrar, Sundergarh in misc. appeal no.3 of 2013 confirming the order passed by the Sub-Registrar, have been challenged in this writ petition.

The petitioners jointly executed a sale deed in favour of Manoj Kumar Behera and Rajkumar Behera, who are persons belonging to Scheduled Caste and presented the document for registration before opposite party no.2 – Sub-Registrar. Admittedly, the caste of the petitioners is "Khandayat Bhuyan." Opposite party no.2 by his impugned order under Annexure-5 refused to register the sale deed holding that the petitioner is a sub-tribe of the tribe "Bhuyan" which is included in the Presidential Scheduled Tribes Order for the State of Orissa, and therefore, sale by

Scheduled Tribe in Scheduled Area is prohibited under provisions of Regulation 2 of 1956 as amended in 2000, having effect from 2002. For holding as such he referred to the decision of this court in OJC no.2123 of 1984 in which it was held that the name by which a Tribe or Sub-tribe, Caste or sub-caste is known is not decisive and that even if Tribe/Caste of the person is different from the name included in the Presidential order, it may be shown that the name included in the order is general name which includes sub-tribe/sub-caste. He also referred to Chapter-III of the Odisha District Gazette of Sundergarh of the year 1961 where the tribe "Bhuyan" is shown to have four principal sub-classes namely "Pahadi Bhuyan", "Khandayat Bhuyan", "Rajkoli Bhuyan" and "Paraja Bhuyan".

Law as decided in O.J.C. No.2123 of 1984 which has been relied upon by the Sub-Registrar as well as the ADM has already undergone change and it is no more good law in view of the pronouncement of the Apex Court in several decisions. In the case reported in **(1990) 3 SCC 130 – Merri Chandra Shekhar Rao v. The Dean, Seth G.S. Medical College & others, the Apex Court** declared that subject to law made by the Parliament under Article-342, the tribes of tribal communities or parts of or groups within tribes or tribal communities specified by the President by public notification shall be final for the purpose of the constitution. They are the tribes in relation to that State or Union Territory and that any tribe or tribes or tribal communities or parts of or groups within such tribe or tribal communities, not specified therein in relation to that State, shall not be scheduled tribes for the purpose of the constitution.

The view as aforesaid has also been approved in the case of **Kumari Madhuri Patil and another v. Additional Commissioner Tribal Development and others:- AIR 1995 Supreme Court**. It is therefore clear that the name of a particular tribe or sub-tribe which has not been specifically included in the Presidential Order cannot by application of analogy or otherwise be said to be included in a particular tribe specified in the Presidential Order.

The Presidential Schedule Tribes Order for the State of Orissa includes only "Bhuiya" and "Bhuyan" as schedule tribes in the State of Orissa. It does not mention or include "Khandayat Bhuyan" as a scheduled tribe. Therefore, "Khandayat Bhuyan" cannot be treated to be schedule tribe in the State of Orissa. The petitioner has also obtained information under RTI from the Tahasildar, Lephripara bearing no. 612 dated 4.5.2010 at

Annexture-8 series, in which the P.I.O., Lephripada Tahasil stated that "Khandayat Bhuyan" is not included in the list of 'scheduled tribe' for the State of Orissa.

In the aforesaid view of the matter the impugned orders passed by the Sub-Registrar as well as Additional District Magistrate under Annexures-5 and 7 respectively, are unsustainable in law. Accordingly the said orders are quashed and the writ petition is allowed. The Sub-Registrar- opposite party no.2 is directed to register the sale deed executed by the petitioner, if there is no impediments.

This order be communicated to the Sub-Registrar, Panposh- opposite party no.2 for which the requisites shall be filed by 5.8.2014.

In view of the disposal of the writ petition, the Misc. case bearing no.5757 of 2014 also stands disposed of.

Writ petition allowed.

2015 (II) ILR - CUT-1153

B. K. NAYAK, J.

W.P.(C) NO. 8479 OF 2004

PRAFULLA KU. MEHER & ANR. .....Petitioners

.Vrs.

ADDL. DISTRICT MAGISTRATE & ORS. .....Opp. Parties

ODISHA PREVENTION OF LAND ENCROACHMENT ACT, 1972 – S.6

Unauthorised occupation of Government land – Whether penalty can be imposed basing on the area occupied by the encroacher or on the basis of the value of the crops raised on the encroached land ? Held, penalty can be imposed basing on the area occupied by the encroacher but not on the basis of the value of the crop raised on the encroached land as has been done by the Tahasildar in the present case – Impugned orders passed by the Tahasildar and confirmed by the appellate as well as revisional courts are quashed.

(Para 6)

For Petitioner : M/s. Subash Ch. Lal, Sumit Lal & Sujit Lal
For Opp. Parties : Additional Standing Counsel

Date of hearing : 17.08.2015
Date of judgment: 17.08.2015

JUDGMENT

B.K.NAYAK, J.

The petitioners in this writ petition challenge the order dated 10.05.2004 (Annexure-10) passed by the Tahasildar, Titilagarh –opposite party no.3 in Encroachment Case No.909 of 2003 imposing penalty and the confirming orders of the Sub-Collector, Titilagarh and Additional District Magistrate, Bolangir (Annexures-13 and 15) passed respectively in Encroachment Appeal No.1 of 2004 and Encroachment Revision No.4 of 2004.

2. Encroachment Case No.909 of 2003 was initiated by opposite party no.3 against the petitioners in respect of Ac.6.05 in plot no.400 and Ac.0.50 in plot no.383 under holding no.60 in mouza-Muthanpala. The Tahasildar passed order of forfeiture of the crops (Safed Musali) standing on the encroached land after issuance of notice to the petitioners and directed R.I., Bijepur to seize the said standing crops. Challenging the order of forfeiture, the petitioners filed Encroachment Appeal No.1 of 2004 before the Sub-Collector, Titilagarh, who stayed the order of forfeiture pending disposal of the appeal. It is alleged that taking advantage of the stay order, the petitioners removed the crop from the encroached land. The R.I. having reported this fact to the Tahasildar, the latter passed the impugned order under Annexure-10 dated 10.05.2004 imposing penalty of Rs.1,31,000/- on the petitioners. The petitioners paid Rs.50,000/-, but at the same time being aggrieved by the order of penalty filed petition in the appeal itself praying for reduction of the penalty amount. The Sub-Collector dismissed the appeal by order dated 29.05.2004 (Annexure-13) and upheld the penalty order of the Tahasildar holding that he has no power to reduce the penalty amount imposed by the Tahasildar.

The petitioners challenged the appellate order under Annexure-13 before the Additional District Magistrate in Encroachment Revision No.4 of 2004 and the Additional District Magistrate dismissed the revision and upheld the original as well as the appellate orders imposing penalty, by his order under Annexure-15.

3. In assailing the impugned orders, the learned counsel for the petitioners submits that the imposition of penalty of Rs.1,31,000/- by the Tahasildar as confirmed by the appellate and the revisional authorities is pulpably illegal, since the Tahasildar has failed to take note of the provisions of Sections 6 and 7 (3) of the Orissa Prevention of Land Encroachment Act,1972 (in short 'the Act') and has assessed the penalty with reference to the commercial nature of the crop, which is contrary to the said provisions. It is also submitted by him that in the meantime, the petitioners have already vacated the encroached land and are no more in possession of the same.

The learned Additional Government Advocate, on the other hand, submits that there is no infirmity in the impugned orders as the petitioners, taking advantage of the stay order passed by the Sub-Collector in appeal, illegally removed the crop, which had been forfeited by the Tahasildar.

4. It is not known whether any eviction order in terms of Section 7(1) of the Act was passed by the Tahasildar against the petitioners or not in the encroachment case. However, it appears from the show cause notice (Annexure-4) issued to the petitioners in terms of Section 9 of the Act that they were asked to show cause as to why action shall not be taken under Section 4(6) and (7) of the Act but pending submission of show cause, order for forfeiture of the crop standing on the encroached land was passed under Section 7 of the Act.

5. Section 4 of the Act makes provision with regard to liability of the encroacher for assessment of rent. Section 6 of the Act provides for liability of the encroacher to penalty of a sum calculated at the rate not exceeding hundred rupees per acre of land for each year of unauthorized occupation; provided that where the encroacher is a landless person, he shall not be liable to pay any penalty under the Section.

Section 7 contemplates passing of three types of orders against the encroacher, namely, eviction of the encroacher from the encroached land and forfeiture of the crop or other product raised on the land, or any building or construction raised thereon as per sub-section (1) thereof, and, in case of failure to remove the encroachment within the specified time for imposition of fine which may extend to fifty rupees and a daily fine of rupees ten until the encroachment has been removed.

Sub-section (3) of Section 7 makes provision for imposition of fine on the encroacher who has failed to remove the encroachment within the time specified in the notice, which runs as under:

"(3) If such a person fails to remove the encroachment within the time specified in the notice, [the Tahasildar] may in his discretion, in addition to the order of forfeiture, impose a fine which may extend to fifty rupees and a daily fine of rupees ten until the encroachment has been removed:

[Provided that the aggregate of the fines payable under this sub-section shall in no event exceed an amount equal to twice the market value of the encroached land;

Provided further that subject to such conditions as may be prescribed, the Collector may, in suitable cases, either reduce or remit the amount payable by the way of fine under this sub-section]."

6. It is apparent from the provision of sub-section (3) of Section 7 that a fine can be imposed in case of failure to comply with the eviction order within the time stipulated in the notice. Therefore, the imposition of penalty in the instant case cannot be termed as a fine within the meaning of sub-section (3) of Section 7. It can, however, be said to be an order of penalty in terms of Section 6 of the Act, according to which the quantum of penalty shall not exceed Rs.100/- per acre of land for each year of unauthorized occupation. Therefore, no penalty can be imposed on the basis of value of the crop raised on the encroached land as has been done by the Tahasildar in the instant case.

7. In the aforesaid view of the matter the order of the penalty passed by the Tahasildar as well as the appellate and revisional orders confirming the same are unsustainable and I quash the same. The matter is remitted back to the Tahasildar, Titilagarh to calculate the penalty strictly within the parameter of Section 6 of the Act. In case the penalty amount on re-calculation comes to less than Rs.50,000/-, after adjustment of the same against the amount already deposited by the petitioners towards part payment of the penalty, the balance amount shall be refunded to them. In case, the penalty comes to more than Rs.50,000/-, the amount in excess of Rs.50,000/- be recovered from the petitioners The writ petition is accordingly disposed of.

Writ petition disposed of.

2015 (II) ILR - CUT-1157

C. R. DASH, J.

W.P.(C) NO. 131 OF 2009

BENUDHAR DAS ……..Petitioner

.Vrs.

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

ODISHA AIDED EDUCATIONAL INSTITUTIONS EMPLOYEES RETIREMENT BENEFITS RULES, 1981 – RULE 8(2)(a)

Petitioner was a teacher in a non-government fully aided School – After working more than 10 years he resigned from service on 19.12.1970 – Whether he is entitled to minimum pension under the above Rules ? Held, the petitioner is not entitled to any pension as he has resigned from service much before the above Rules came into force and his resignation can not be equated with retirement.

(Para 10)

Case Laws Referred to :-

1. A.I.R. 1983 SC 130 : D.S. Nakara and others *vrs.* Union of India
2. A.I.R. 1991 SC 1724 : Nand Kishore Nayak *vrs.* State of Orissa and anr.
3. A.I.R. 1978 SC 694 : Union of India *vrs.* Gopal Chandra Misra & Ors.
4. A.I.R. 1990 SC 1808 : M/s. J.K. Cotton Spg. & Wvg. Mills Company Ltd., Kanpur *vrs.* State of U.P. and Ors
5. (2005) 8 SCC 314 : Srikantha S.M. *vrs.* Bharath Earth Movers Ltd.

For Petitioners : M/s. Prafulla Ku.Mohapatra & S.K.Nath
For Opp. Parties : Additional Govt. Advocate.

Date of Judgment : 23.09.2015

JUDGMENT

C.R. DASH, J.

Whether the teacher of a non-government fully aided high school, who had resigned from service when the school was not a pensionable establishment, is entitled to pension under the provisions of the Orissa Aided Educational Institutions Employees' Retirement Benefits Rules, 1981 ("1981 Rules" for short) is the sole question that arises for consideration in the present writ petition.

2. The petitioner, in this case, impugns the order dated 15.11.2008 passed by the then Inspector of Schools, Mayurbhanj Circle, Baripada vide Annexure-7, rejecting the claim of his pension on different grounds. The petitioner was working as a teacher in Kaptipada Girls High School in the district of Mayurbhanj. He entered into service on 01.11.1960 and resigned from service on 19.12.1970. The "1981 Rules" came into force w.e.f. 01.04.1982. Admittedly, a teacher, who has rendered minimum 10 (ten) years of service is entitled to minimum pension under the 1981 Rules. After coming into force of the aforesaid Rules, the petitioner claimed pension in accordance with the provisions of Rule 8 (2)(a) of the 1981 Rules, as he had already rendered service for more than 10 years by the date of his resignation on 19.12.1970.

3. Learned counsel for the petitioner submits that the petitioner is entitled to pension in view of the decision of this Court in Civil Appeal No.73 of 1992 and O.J.C. No.6344 of 1994. It is further submitted that, Hon'ble Supreme Court in the case of **D.S. Nakara and others *vrs.* Union of India,** A.I.R. 1983 SC 130 having held that no artificial discrimination can be made for grant of liberalized pension between one homogeneous class, the benefit of pension is to be granted to the petitioner.

4. Opposite party nos.1, 2 and 3 have filed their counter, denying the claim of the petitioner. It is specifically averred by the opposite parties that the ratio in the cases of Civil Appeal No.73 of 1992, O.J.C. No.6344 of 1994 and **D.S. Nakra and others *vrs.* Union of India** (supra) does not apply to the facts of the present case. It is the specific case of the opposite parties that the petitioner having resigned from service when the school in question was not a pensionable establishment, and 1981 Rules having come into force subsequently, he is not entitled to any pension.

5. In the case of **D.S. Nakara and others *vrs.* Union of India** (supra), the following points were raised for consideration.

> "Do pensioners entitled to receive superannuation or retiring pension under Central Civil Services (Pension) Rules, 1972 ("1972 Rules" for short) form a class as a whole ? Is the date of retirement a relevant consideration for eligibility when a revised formula for computation of pension is ushered in and made effective from a specified date ? Would differential treatment to pensioners related to the date of retirement qua the revised formula for computation of pension attract Article 14 of the Constitution and the element of discrimination liable

> to be declared unconstitutional as being violative of Article 14 ? These and the related questions debated in this group of petitions call for an answer in the backdrop of a welfare State and bearing in mind that pension is a socio-economic justice measure providing relief when advancing age gradually but irrevocably impairs capacity to stand on one's one feet."

Taking into consideration the facts and submission advanced by the parties, Hon'ble Supreme Court held that, no artificial discrimination can be made for grant of liberalized pension between one homogeneous class. In the aforesaid case, the action of the Union Government revising the pension of a group of pensioners fixing a cut off date discriminating other pensioners who had retired before the cut off date, was an issue. The fact and ratio of the said case has no application so far as the present petitioner's claim is concerned.

6. So far as O.J.C. No.6344 of 1994 is concerned, the petitioner, who was a retired primary school teacher and was superannuated by attaining the 58th years of age, had raised his grievance that he is entitled to be retained in service till 60th year and since he has retired long since, he is entitled to enhancement of pension by notionally increasing his service period by two years or till 15.03.1986, whichever is earlier, in accordance with the judgment of the Hon'ble Supreme Court in **Nand Kishore Nayak *vrs.* State of Orissa and another,** A.I.R. 1991 SC 1724. He further claimed that he is entitled to family pension under the provisions of the Orissa Aided Educational Institutions (Non-government Fully Aided Primary School Teachers) Retirement Benefit Rules, 1986 ("1986 Rules" for short), which came into force w.e.f. 1st September, 1988.

Taking into consideration the grievance of the petitioner and the assertions of the opposite parties, this Court held that the petitioner is entitled to the relief of notional enhancement of his service by two years and recalculation of the pension on such basis, as has been held by the Hon'ble Supreme Court in **Nand Kishore Nayak *vrs.* State of Orissa and another** (supra).

7. So far as grant of pension and family pension under the 1986 Rules is concerned, this Court in Civil Review No.73 of 1992 arising out of O.J.C. No.1781 of 1989 had already held that primary school teachers, who retired from service before the relevant rules coming into force, are entitled to the benefit of pension mentioned in 1986 Rules, though they have retired prior to

the rules came into force. Relying on the ratio of the Civil Review No.73 of 1992, this Court in O.J.C. No.6344 of 1994 allowed the prayer of the petitioner. However, the facts in Civil Review No.73 of 1992, O.J.C. No.6344 of 1994 and the case of **Nand Kishore Nayak** (supra) are different. Those facts relate to retirement of primary school teachers, who are governed under a different rules, i.e. 1986 Rules. Claim in the aforesaid cases was also different from the present petitioner. Therefore, the ratios of the aforesaid cases, as relied upon by the learned counsel for the petitioner have no application to the facts of the present case.

8. In the present case, the petitioner has admittedly resigned from service. The resignation of the petitioner was also accepted by the authorities vide Resolution No.61, dated 19.12.1970 of the Managing Committee of Kaptipada Girls High School (Annexure – A/3 to the Counter Affidavit). Admittedly, when the petitioner resigned from service, Kaptipada Girls High School was not a pensionable establishment. Benefit of pension came to be introduced by 1981 Rules only. It is to be seen whether a person, who has resigned from service can be equated with a person, who has retired on superannuation. Irrespective of the date of retirement, the benefit of 1986 Rules has been granted to the primary school teachers as per the decision in Civil Review No.73 of 1992. I have to see, whether there lies any difference between 'resignation' and 'retirement on superannuation'.

Hon'ble Supreme Court, in the case of **Union of India *vrs.* Gopal Chandra Misra and others,** A.I.R. 1978 SC 694, has fixed the meaning of 'resignation', as the term 'resignation' has not been defined in any Service Rules. It has been held thus in paragraphs 24, 25 & 26 of the judgment :-

"24. 'Resignation' in the Dictionary sense, means the spontaneous relinquishment of one's own right. This is conveyed by the maxim : Resionationest juria propii spontanea refutatio (See Earl Jowitt's Dictionary of English Law). In relation to an office, it connotes the act of giving up or relinquishing the office. To "relinquish an office" means to "cease to hold" the office, or to "loose hold of" the office (cf. Shorter Oxford Dictionary); and to "loose hold of office", implies to "detach", "unfasten", "undo or untie the binding knot or link" which holds one to the office and the obligations and privileges that go with it.

25. In the general juristic sense, also, the meaning of "resigning office" is not different. There also, as a rule, both, the intention to give up or

relinquish the office and the concomitant act of its relinquishment, are necessary to constitute a complete and operative resignation (see, e.g. American Jurisprudence, 2nd Edition, Volume 15A, page 80) although the act of relinquishment may take different forms or assume a unilateral or bilateral character, depending on the nature of the office and the conditions governing it. Thus, resigning office necessarily involves relinquishment of the office, which implies cessation or termination of, or cutting asunder from the office. Indeed, the completion of the resignation and the vacation of the office, are the causal and effectual aspects of one and the same event.

26. From the above dissertation, it emerges that a complete and effective act of resigning office is one which severs the link of the resignor with his office and terminate its tenure. In the context of Art. 217 (I), this test assumes the character of a decisive test, because the expression "resign his office" – the construction of which is under consideration – occurs in a Proviso which excepts or qualifies the substantive clause fixing the office tenure of a Judge up to the age of 62 years."

Further, Hon'ble Supreme Court in the case of **M/s. J.K. Cotton Spg. & Wvg. Mills Company Ltd., Kanpur *vrs.* State of U.P. and others,** A.I.R. 1990 SC 1808, in paragraphs 6 and 7 has explained the meaning of the term 'resign' and 'retirement' in different Dictionaries as under :-

Name of the Dictionary	Meaning of 'Resign'	Meaning of 'Retire'
Black's Law Dictionary (5th Edn.)	Formal renouncement or relinquishment of an office.	To terminate employment or service upon reaching retirement age.
Shorter Oxford English Dictionary(Revised Edn. of 1973)	To relinquish, surrender, give up or hand over (something); esp;, an office, position, right, claim, etc. To give up an office or position; to retire.	The act of retiring or withdrawing to or from a place or position.
The Random House Dictionary(College Edn.)	To give up an office, position etc.; to relinquish (right, claim, agreement etc.)	To withdraw from office, business or active life.

7. From the aforesaid dictionary meanings it becomes clear that when an employee resigns his office, he formally relinquishes or withdraws from his office. It implies that he has taken a mental decision to sever his relationship with his employer and thereby put an end to the contract or service.……"

Again, Hon'ble Supreme Court in the case of **Srikantha S.M. *vrs.* Bharath Earth Movers Ltd.,** (2005) 8 SCC 314, in paragraphs 12, 13 & 14 of the judgment, has held thus :-

> "12. Now, let us consider the controversy on merits. The term "resignation" has not been defined in the Service Rules. According to the dictionary meaning, however, "resignation" means spontaneous relinquishment of one's own right. It is conveyed by the Latin maxim *Resignatio est juris propii spontanea refutation.* (Resignation is a spontaneous relinquishment of one's own right.) In relation to an office, resignation connotes the act of giving up or relinquishing the office. "To relinquish an office" means "to cease to hold the office" or "to leave the job" or "to leave the position". "To cease to hold office" or "to lose hold of the office" implies to "detach", "unfasten", "undo" or "untie" "the binding knot or link" which holds one to the office and the obligations and privileges that go with it.
>
> 13. In *Union of India v. Gopal Chandra Misra, (1)* this Court held that a complete and effective act of resigning an office is one which severs the link of the resignor with his office and terminates its tenure.
>
> 14. In *Balaram Gupta v. Union of India, (2)* this Court reiterated the principle in *Gopal Chandra Misra* and ruled that though that case related to resignation by a Judge of the High Court, the general rule equally applied to government servants."

(1) **Union of India *vs.* Gopal Chandra Mishra**
(1978) 2 SCC 301 / A.I.R. 1978 SC 694

(2) **Balaram Gupta *vs.* Union of India** 1987 Supp. SCC 228.

9. From the aforesaid decisions, it is clear that the petitioner severed his link with the employer and put an end to his service by resigning voluntarily on 19.12.1970, when Kaptipada Girls High School was not a pensionable establishment. Subsequently, after about a decade the 1981 Rules came into force. True it is that, this Court has held that those teachers, who have retired

even earlier to the 1986 Rules came into force, shall also get the benefit of pension prospectively. But the present petitioner having resigned from service cannot be equated with the person or a teacher who has retired from service on superannuation. Therefore, the petitioner is not entitled to any pension under the 1981 Rules.

10. Viewed otherwise from the perspective of the 1981 Rules, Rule 4 provides for eligibility for pension. The Rule reads thus :-

> "4. Subject to the conditions in other rules under this Chapter, an employee shall be, eligible for pension or gratuity, as the case may be;
>
> (1) on retirement by reason of his attaining the age of superannuation, or
>
> (2) on voluntary retirement or retirement by the appointing authority after completion of thirty years of qualifying service or the age of fifty years; or
>
> (3) on retirement before the superannuation on medical certificate of permanent incapacity for further service; or
>
> (4) on termination of service due to the abolition of the post; or
>
> (5) on closure of the College or school, as the case may be, due to withdrawal of recognition of the said College or School or other causes."

From the above Rule, it is clear that nowhere it has provided for pension to a person, who has resigned from service when the institution was not a pensionable establishment.

Viewed from this angle also, the petitioner is not entitled to any pension, as he has resigned from service much prior to coming into force of the 1981 Rules and his resignation cannot be equated with retirement, as discussed supra.

11. In the result, the writ petition is accordingly dismissed.

Writ petition dismissed.

2015 (II) ILR - CUT- 1164

DR. A. K. RATH, J.

W.P.(C) NO. 9246 OF 2008

FAKIRA MISHRA ……..Petitioner

.Vrs.

BISWANATH MISHRA & ORS ……..Opp. Parties

CIVIL PROCEDURE CODE,1908 – S. 2 (2)

Weather an appeal field along with an application for condonation of delay in filing that appeal when dismissed on refusal to condone the delay is a decree within the meaning of section 2 (2) of C,P.C. – Held, yes. (Para 7)

Case Law Overruled: -

1. 58 (1984) CLT 248 (F.B) : Ainthu Charan Parida v. Sitaram Jayanarayan Firm represented by Ramnibas & Anr.

Case Law Referred to : -

1. AIR 2005 SC 226 : Shyam Sunder Sarma v. Pannalal Jaiswal & Ors.

For Petitioner : Mr. Bikram Senapati
For Opp. Party : Mr. N.P. Parija

Date of hearing : 18.08.2015
Date of judgment : 26.08.2015

JUDGMENT

DR. A.K.RATH, J

The seminal question that hinges for consideration of this Court is as to whether an appeal filed along with an application for condonation of delay in filing that appeal when dismissed on refusal to condone the delay is a decree ?

2. Opposite party no.1 as plaintiff filed a suit for partition, for a declaration that neither the will nor the order of mutation passed in favour of defendant no.1 has conferred any right on him and for permanent injunction restraining the defendants from interfering with his peaceful possession of the plaint schedule properties in the court learned Civil Judge (Junior Division), Puri, which was registered as Title Suit No.349/434-2001/95. The suit was decreed preliminarily. Assailing the judgment and decree, the petitioner, who

was defendant no.1, filed R.F.A. No.122 of 2006 in the court of learned District Judge, Puri. Since there was a delay in filing the appeal, an application under Section 5 of the Limitation Act was filed. By order dated 14.3.2008, learned District Judge, Puri dismissed the application for condonation of delay. Consequently the first appeal was dismissed. With this factual background, the instant petition has been filed under Article 227 of the Constitution of India to lacinate the said order.

3. A Full Bench of this Court, in the case of Ainthu Charan Parida v. Sitaram Jayanarayan Firm represented by Ramnibas and another, 58 (1984) CLT 248 (F.B), held that an order rejecting a memorandum of appeal or dismissing an appeal following the rejection of an application under Section 5 of the Limitation Act for condonation of delay in preferring the appeal is not a decree within the meaning of Section 2(2) of the Code of Civil Procedure. But then, the apex Court, in the case of Shyam Sunder Sarma v. Pannalal Jaiswal and others, AIR 2005 SC 226, held that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal.

4. In Shyam Sunder Sarma (supra), the view of the Full Bench of the Calcutta High Court, in the case of Mamuda Khateen and others v. Beniyan Bibi and others, AIR 1976 Calcutta 415, that an order rejecting a time barred memorandum of appeal consequent upon refusal to condone the delay in filing that appeal was neither a decree nor an appellable order, was held to be not laying down a correct law.

5. Further, the Full Bench decision of the Kerala High Court, in the case of Thambi v. Mathew, 1987 (2) KLT 848, that an appeal presented out of time was nevertheless an appeal in the eye of law for all purposes and an order dismissing the appeal was a decree that could be the subject of a second appeal, was approved by the apex Court.

Be it noted that the aforesaid decision of the Calcutta High Court was approved by the Full Bench of the Orissa High Court in the case of Ainthu Charan Parida (supra).

6. In view of the authoritative pronouncement of the apex Court in the case of Shyam Sunder Sarma (supra), the Full Bench decision of this Court in the case of Ainthu Charan Parida (supra) has been impliedly overruled, the same being contrary to the enunciation of law laid down by the apex Court.

7. Thus the logical sequitur of the analysis made in the preceding paragraphs is that an appeal filed along with an application for condonation of delay in filing that appeal when dismissed on refusal to condone the delay is a decree within the meaning of Section 2(2) of the Code of Civil Procedure. In the ultimate analysis the petition fails, as the same is not maintainable. Accordingly, the petition is dismissed.

Writ petition dismissed.

2015 (II) ILR - CUT-1166

Dr. A.K. RATH, J.

W.P.(C). NO.11565 OF 2008

DR. BIMAL KANTA TRIPATHY ……..Petitioner.

.Vrs.

SATYA NARAYAN MISHRA & ANR. ……Opp. Parties

CIVIL PROCEDURE CODE, 1908 – O - 26, R – 9

Appointment of survey knowing commissioner – Legislature has not prescribed the stage of appointment – Discretion of the court – Power of the court cannot be cabined, cribbed or confined – Survey knowing commissioner can be appointed by the court at any stage of the suit provided pre-conditions enumerated in order 26, Rule 9 C.P.C. exists.

In this case the suit is for perpetual injuction and the dispute relates to boundary wall – Plaintiff's earlier application for appointment of survey knowing commissioner was allowed but when both the parties objected to its report the same was rejected by the court – Plaintiff filed fresh application when the suit posted for argument – Application rejected – Hence the writ petition – Held, the impugned order is quashed – Application of the plaintiff under 26, Rule 9 C.P.C. is allowed. (Para 7.8.9.)

For petitioner : M/s. D.Bhuyan, B.N.Bhuyan & U.Padhi
For Opp. Parties : M/s. R. Mohapatra & N. Sarkar

Date of Hearing : 01.10. 2015
Date of Judgment: 01.10. 2015

JUDGMENT

DR. A.K. RATH, J.

Aggrieved by and dissatisfied with the order dated 2.8.2008 passed by the learned Civil Judge (Jr. Divn.), 1st Court, Cuttack in C.S. No.213 of 2003, the instant petition is filed under Article 227 of the Constitution of India. By the said order, learned trial court rejected the application of the plaintiff filed under Order 26 Rule 9 C.P.C. to depute a survey knowing civil court commissioner.

02. The petitioner as plaintiff filed a suit for perpetual injunction restraining the defendant-opposite parties from interfering with the peaceful possession of the suit land or making any construction over the same in the court of the learned Civil Judge (Jr. Divn.), 1st Court, Cuttack, which is registered as C.S. No.213 of 2003. Pursuant to issuance of summons, the defendants entered appearance and filed their written statement denying the assertions made in the plaint. While the matter stood thus, an application was filed by the plaintiff under Order 26 Rule 9 C.P.C. for deputing a civil court commissioner to resolve the dispute. Learned trial court allowed the same and accordingly deputed a survey knowing civil court commissioner to measure the land and submit a report. The commissioner submitted the report on 12.3.2008. The plaintiff filed objection to the same. By order dated 15.7.2008, learned trial court rejected the report of the commissioner. Thereafter, the plaintiff filed an application on 21.7.2008 for deputing a fresh survey knowing civil court commissioner vide Annexure-3. The defendants filed objection to the same, vide Annexure-4. By order dated 2.8.2008, learned trial court rejected the petition vide Annexure-5. The operative part of the impugned order is quoted hereunder.

> "xxx xxx xxx
>
> ……Then in such circumstances, after closer of evidence from both the sides and without considering the actual factum of dispute among the parties in the suit regarding the actual existence of the suit boundary wall at the spot on consideration of the evidence already adduced on record, a party like the plaintiff cannot be assisted by this court to collect any evidence in it's favour by allowing the present petition and therefore in consideration of all such discussed facts, this

court is of the humble view that at this stage the present petition filed by the plaintiff merits no consideration, when the suit posted for hearing argument from both the sides and therefore the same is liable to be rejected at this stage with further observation that, if the court would arrive at a conclusion that neither parties has been able to produce evidence to that effect, then the same can be considered thereof by the court only.

xxx xxx xxx"

03. Heard learned counsel for the parties.

04. Learned trial court came to hold that when the suit was posted for argument, the petition was filed for deputing a survey knowing civil court commissioner. It was further held that both the parties have adduced evidence in support of their respective claims. The court should not assist the parties to collect the evidence on its behalf. The earlier report of the civil court commissioner was ignored. Thus after closure of evidence and without considering that factum of dispute and existence of boundary wall, the court cannot assist the party to collect evidence.

05. Order 26 Rule 9 C.P.C. is quoted hereunder.

"**9. Commissions to make local investigations—**In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any *mesne* profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court :

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules."

06. In *Bhabesh Kumar Das v. Mohan Das Agrawal,* **2015 (II) CLR 603,** this Court held as under:

"In the case of ***Prasanta Kumar Jena Vrs. Choudhury Purna Ch. Das Adhikari,*** 99 (2005) CLT 720, the learned Single Judge of this Court held that an application under Order 26 Rule 9 C.P.C. can be considered only after closure of the evidence when the court finds difficult to pass an effective decree on the existing evidence. Relying

> on the said decision, learned Single Judge of this Court set aside the order of appointment of Survey Knowing Commissioner for measurement and demarcation of the land passed by the learned trial court. The same was challenged before this Court in the case of ***Ram Prasad Mishra Vrs. Dinabandhu Patri and another***. The Bench speaking through Mr.V.Gopala Gowda, C.J.(as he then was) held that the learned Single Judge has interfered with the order passed by the learned trial court in appointing the Survey Knowing Commissioner ignoring the decision of this Court in the case of ***Mahendranath Parida Vrs. Purnananda Pardia and others,*** AIR 1988 ORISSA 248. Thus, the decision in the case of *Prasanta Kumar Jena (supra)* has been impliedly overruled by the Division Bench of this Court.
>
> In ***Mahendranath Parida*** *(supra)*, this Court held that when the controversy is as to identification, location or measurement of the land or premise or object, local investigation should be done at an early stage so that the parties can be aware of the report of the Commissioner and can go to trial prepared.
>
> In ***Ramakant Naik and others Vrs. Bhanja Dalabehera***, 2015 AIR CC 1724 (ORI), this Court held that issuance of a Commission for local investigation is the discretion of the Court. While considering the prayer for appointment of Commission, the Court must apply its mind to the facts and circumstances of the case and pass order. No straight jacket formula can be laid down. Before issuance of Commission, the Court must be satisfied that there is prima facie case in favour of the applicant.
>
> On a reading of Order 26 Rule 9 C.P.C., it is manifest that the stage of appointment of Survey Knowing Commissioner has not been prescribed. When the legislature in its wisdom has not prescribed the stage of appointment of Survey Knowing Commissioner, the power of the Court to appoint the Survey Knowing Commissioner can not be cabined, cribbed or confined."

07. On a conspectus of the plaint, it is evident that the dispute pertains to boundary wall. The application was filed by the plaintiff to depute a civil court commissioner to find out the existence of the boundary wall. The earlier application filed by the plaintiff for deputing a survey knowing civil court commissioner under Order 26 Rule 9 C.P.C. was allowed by the learned trial

court. The commissioner submitted its report. Since both the parties objected to the same, learned trial court rejected the report.

08. As has been held by this Court in *Bhabesh Kumar Das* cited supra, when the legislature in its wisdom has not prescribed the stage of appointment of survey knowing commissioner, the power of the Court cannot be cabined, cribbed or confined. The survey knowing commissioner at any stage of the suit provided the pre-conditions enumerated in Order 26 Rule 9 C.P.C. exists.

09. In view of the same, this Court has no hesitation to quash the order dated 2.8.2008 passed by the learned Civil Judge (Jr. Divn.), 1st Court, Cuttack in C.S. No.213 of 2003. Accordingly, the said order is quashed. The application filed by the plaintiff under Order 26 Rule 9 C.P.C. is allowed. Learned trial court shall do well to appoint a survey knowing civil court commissioner within a period of fifteen days after receipt of the order. Since the evidence is closed, learned trial court shall do well to deliver the judgment after receipt of the report of the commissioner. The petition is allowed.

Writ petition allowed.

2015 (II) ILR - CUT- 1170

DR. B.R. SARANGI, J.

W.P.(C) NO.14423 OF 2007

NIGAMANANDA MANGAAL ……..Petitioner

.Vrs.

THE CHAIRMAN-CUM-DISCIPLINARY AUTHORITY, KORAPUT
PANCHABATI GRAMYA BANK ……Opp.Party

SERVICE LAW – Petitioner working as cashier in Gramya Bank – He was convicted for bigamy – Dismissal form service on the ground that offence involved 'Moral Turpitude' under Regulation 29 (3) of the erstwhile K.P.G. Bank Staff Service Regulation, 1980 – Though conviction confirmed in appeal he was acquitted by this Court in revision – Petition filed for reinstatement – Petition dismissed on the ground that the petitioner was not "honourably acquitted" as per

Regulation 29 (4) – Hence the writ petition – Offence of bigamy does not come within the perview of "moral turpitude" – Held, the impugned order rejecting the petition of the petitioner for reinstatement in service is quashed – The petitioner is entitled to service benefit as well as all consequential service benefits as admissible under law.

(Paras 18,19)

CONSTITUTION OF INDIA, 1950 – Art.226

Writ of certiorari – Limits of jurisdiction – It can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals – It can also be issued where the Court or Tribunal acts illegally or improperly without giving an opportunity to be heard to the party affected by the order.

Case Laws Rreffered to :-

1. AIR 1957 Punjab 97: Durga Singh V. The State of Punjab
2. AIR 1959 All 71 : Baleshwar Singh v. District Magistrate and Collector
3. AIR 1996 SC 3300= (1996) 4 SCC 17 :Pawan Kumar v. State of Haryana
4. (1997) 4 SCC 1 : Allahabad Bank v. Deepak Kumar Bhola
5. (2010) 8 SCC 573 : Sushil Kumar Singhal v. Punjab National Bank
6. 1972 SLR 915(SC) : The State of Assam and another vrs. Raghava Rajgopalchari
7. AIR 1994 SC 552= (1994) 1 SCC 541 : The Management of Reserve Bank of India vrs. Bhopal Singh Panchal

For Petitioner : M/s. R.N.Das Mohapatra, S.K.Biswal, M.N.Ray & B.Mohanty (5)

For Opp. Partties : M/s. P.V.Ramadas & P.V. Balakrishnan.

Date of hearing : 26.06.2014
Date of judgment : 04.07.2014

JUDGMENT

DR. B.R. SARANGI, J.

The petitioner, who was an employee of Koraput Panchabati Gramya Bank, has filed this application challenging the order dated 18.09.2007 in Annexure-6 passed by the Chairman, Utkal Gramya Bank, Bolangir rejecting his prayer to reinstate him in service.

2. The factual background of this case is that the petitioner was initially selected and appointed as a Clerk-cum-Cashier in Koraput Panchabati

Gramya Bank, pursuant to which he joined on 13.04.1981. In 1988 he was involved in a criminal case, i.e. I.C.C. No.9/1988, for offences under Sections 494/109 I.P.C. filed by his wife before the learned S.D.J.M., Nayagarh wherein by order dated 09.02.1988 he was convicted and sentenced to R.I. for two years and to pay a fine of Rs.1,000/- in default to undergo imprisonment for six months. Against the said order the petitioner preferred Criminal Appeal No.64/24 of 1989/88 wherein learned Additional Sessions Judge, Puri by order dated 22.09.1995 confirmed the order of conviction by the trial court and as a consequence thereof he was dismissed from service on 31.07.1995. Against the said order, the petitioner preferred Criminal Revision bearing No.520/1995 before this Court in which he was acquitted of the charges vide order dated 25.04.2001. After being acquitted of the charges, the petitioner moved the authority on 22.06.2002, 11.10.2002 and 07.11.2002 claiming his reinstatement in service, but the authority did not pass any order on his representation in that regard. Thereafter, the petitioner approached this Court by filing W.P.(C) No.7372/2003 seeking direction to the Chairman of the Bank to reinstate him in service with all service and consequential benefits within a stipulated time. On consideration of his grievance, this Court by order dated 02.07.2007 disposed of the writ petition directing the Chairman to take a decision on the representation of the petitioner dated 11.10.2002 within a period of two months from the date of communication of the order.

3. In exercise of powers conferred under Section 23-A (1) of the Regional Rural Banks Act, 1976 the Department of Economic Affairs, Ministry of Finance, Government of India issued a notification on 31.07.2005 for amalgamation of Bolangir Anchalika Gramya Bank, Kalahandi Anchalika Gramya Bank and Koraput Panchabati Gramya Bank which were sponsored by the State Bank of India, into one rural bank namely, Utkal Gramya Bank, having its Head Office at Bolangir. Therefore, by the time the order dated 02.07.2007 was passed in W.P.(C) No.7372/2003, the amalgamation of three Rural Banks had already taken place. Consequent upon that the petitioner brought the said fact to the notice of this Court with a prayer to direct the Chairman of Utkal Gramya Bank to consider his claim in conformity with the provisions of law.

In compliance with the said order, the Chairman passed the impugned order dated 18.09.2007 as per Annexure-6 with the following grounds :

(i) You have been dismissed from Bank's service in terms of Regulation 29(3)(a) of erstwhile K.P.G. Bank Staff Service Regulations 1980.

(ii) Now you are claiming reinstatement in Bank's service in terms of clause 29(4) of erstwhile K.P.G. Bank Staff Service Regulations.

(iii) In your case, you have not been honourably acquitted by the Hon'ble Court. As such the provisions of clause 24 (4) of erstwhile K.P.G. Bank Staff Service Regulation 1980 is not applicable to you".

As the petitioner's claim for reinstatement in service was turned down, he has approached this Court by filing the present writ application assailing the impugned order dated 18.09.2007, Annexure-6.

4. On being noticed, opposite party entered appearance and filed his counter affidavit reiterating the fact that the petitioner was involved in a criminal case, i.e. an offence of bigamy, under Section 494 I.P.C. for which he has been convicted by the learned S.D.J.M., Nayagarh in I.C.C. No. 9/1988, vide order dated 09.02.1988 and the said order was also upheld by the learned Additional Sessions Judge, Puri in Criminal Appeal No. 64/24 of 1989/88 vide order dated 22.09.1995. But, subsequently, in Criminal Revision No.520/1995, this Court acquitted him of the charge vide order dated 25.04.2001 subject to payment of Rs.30,000/- to the complainant-wife. It is the admitted fact that due to conviction by a criminal court, the petitioner was dismissed from his service and when he claimed for reinstatement, the same was rejected by the competent authority vide Annexure-6. It is further urged that the petitioner and the members of the aforesaid Gramya Bank are governed by the Staff Service Regulation of the Koraput Panchabati Gramya Bank. This Regulation was passed in exercise of powers conferred by Section 30 of the RRB Act and thus, the said Regulation is statutory in nature and the same is binding upon the Staff of the Bank. As per Regulation 29(4) only when an accused employee is honourably acquitted, he is entitled to the benefit of reinstatement in service. It is further stated that "honourably acquitted" means the acquittal should be after full consideration of evidence and that the prosecution failed to prove the charges. Since the case of the petitioner does not come under the purview of "honourably acquitted" as per Regulation 29(4), he is not entitled to the relief claimed by him and the consequential benefits thereof.

5. With reference to the aforesaid factual backdrop, the following point emerges for consideration.

(i) Whether the authority is justified in rejecting the claim of the petitioner for reinstatement in service after being acquitted of the charges in the criminal case.

(ii) To what order ?

6. It is the admitted case of the parties that the petitioner was duly selected and appointed by the competent authority and was discharging his responsibility as a Clerk-cum-Cashier in Koraput Panchabati Gramya Bank. To regulate the service condition of the petitioner in exercise of power conferred by Section 30 of the RRB Act, a Regulation has been framed called "Koraput Panchabati Gramya Bank Service Regulation 1980". For better appreciation Regulation 29(3)(4) is quoted below:

> "29(3)(a) – An officer or employee shall be liable to dismissal or to any of other penalties referred to in Regulation 30 if he is committed to prison for debt or is convicted of an offence, which is the opinion of the competent authority either involves in "Moral Turpitude" has a bearing on any of the affairs of the Bank or on the discharge by the officer or employees of his duties in the Bank, the opinion in this respect, of the competent authority shall be conclusive and binding on the employees.
>
> (b) – Such dismissal or other penalty may be imposed, as from the date of his committal to prison or conviction and nothing in regulation 30 shall apply to such imposition.
>
> 29(4)- Where an officer or employee has been dismissed in pursuance of sub-Regulation (2) and the relative conviction is set aside by a higher court and the officer or employee is honourably acquitted shall be reinstated in service"

7. On perusal of the provisions contained in Regulation 29(3)(a), it is stated that an officer or employee shall be liable for dismissal or to any of other penalties referred to in Regulation 30 if he is committed to prison for debt or is convicted of an offence which is in the opinion of the competent authority either involves in "Moral Turpitude" having a bearing on any of the affairs of the Bank or on the discharge by the officer or employee of his duties in the Bank. On the allegation as it appears that the petitioner was not committed to prison for debt or was convicted of an offence which was the opinion of the competent authority either involved "moral turpitude" or had a bearing on any of the affairs of the Bank or on the discharge by the officer or

employees of his duties in the Bank. Therefore, the main question has to be considered what constitutes "moral turpitude".

8. One of the most serious offences involving "moral turpitude" would be where a person employed in a banking company dealing with money of the general public, commits forgery and wrongfully withdraws money which he is not entitled to withdraw. In common parlance "moral turpitude" means baseness of character. Concise Oxford Dictionary defines 'moral'- 'Concerned with goodness or badness of character of disposition or with distinction between right and wrong….virtuous in general conduct…….'Turpitude' means "baseness" depravity, wickedness". Thus any act which is contrary to good morals from society's point of view will come within the ambit of "moral turpitude".

9. In ***Durga Singh V. The State of Punjab***, AIR 1957 Punjab 97, the Court expressed the meaning of "moral turpitude" as follows:

> "The term "moral turpitude" is rather a vague one and it may have different meanings in different contexts. The term has generally been taken to mean to be a conduct contrary to justice, honesty, modesty or good morals and contrary to what a man owes to a fellow-man or to society in general. It has never been held that gravity of punishment is to be considered in determining whether the misconduct involved moral turpitude or not".

10. The expression "moral turpitude" has been more elaborately explained in ***Baleshwar Singh v. District Magistrate and Collector***, AIR 1959 All 71 wherein it was observed as follows:

> "The expression 'moral turpitude' is not defined anywhere. But it means anything done contrary to justice, honesty, modesty or good morals. It implies depravity and wickedness of character or disposition of the person charged with the particular conduct. Every false statement made by a person may not be moral turpitude, but it would be so if it discloses vileness or depravity in the doing of any private and social duty which a person owes to his fellowmen or to the society in general. If therefore the individual charge with a certain conduct owes a duty, either to another individual or to the society in general, to act in a specific manner or not to so act and he still acts contrary to it and does so knowingly, his conduct must be held to be due to vileness and depravity. It will be contrary to accepted customary rule and duty between man and man".

11. The apex Court in ***Pawan Kumar v. State of Haryana***, AIR 1996 SC 3300= (1996) 4 SCC 17 dealt with the question as to what was the meaning of the expression "moral turpitude" and it was observed as follows:

> " 'Moral turpitude' is an expression which is used in legal as also societal parlance to describe conduct which is inherently base, vile, depraved or having any connection showing depravity".

12. One of the most serious offences involving "moral turpitude" would be where a person employed in a banking company dealing with money of the general public, commits forgery and wrongfully withdraws money which he is not entitled to withdraw. In **Allahabad Bank v. Deepak Kumar Bhola**, (1997) 4 SCC 1, the apex Court while dealing with "moral turpitude" has held as follows :

> "In common parlance "moral turpitude" means baseness of character. Concise Oxford Dictionary defines 'moral'-'Concerned with goodness or badness of character of disposition or with distinction between right and wrong….virtuous in general conduct…….'Turpitude' means "baseness" deprivity, wickedness". Thus any act which is contrary to good morals from society's point of view will come within the ambit of "moral turpitude".

13. In ***Sushil Kumar Singhal v. Punjab National Bank***, (2010) 8 SCC 573 the apex Court held that "moral turpitude" means anything contrary to honesty, modesty or good morals. It means evilness and depravity. In fact, the conviction of a person in a crime involving moral turpitude impeaches his credibility, as he has been found to have indulged in shameful, wicked and base activities.

14. Taking into consideration the meaning of "moral turpitude" in the context of Regulation 29(3) (a) the fact that petitioner was convicted and subsequently acquitted does not come within its purview, rather the petitioner having been involved in an offence against his wife under Section 494 IPC and subsequently acquitted that cannot be construed to be an offence involving "moral turpitude" and does not come within the meaning of Regulation 29(3) (a) and as such the conduct of the petitioner indicated no loss to the bank which involved "moral turpitude". To attract the provision of Regulation 29 (3)(a) if the petitioner has been dismissed from service other than the provision of 29(a) and subsequently acquitted, there is no valid and justifiable reason available to the authority not to reinstate him in service.

15. The ground of rejection of petitioner's request for his reinstatement in service under Clause-(iii) of Annexure-6 was that the petitioner had not been "honourably acquitted" by the Court and as such the provision of Regulation 29(3) of K.P.G. Bank Service 1980 was not applicable in the case of the petitioner. Rejection on that score cannot be sustained in the eye of law in view of the fact that as per Regulation 29(4) where an officer or employee has been dismissed in pursuance of Sub-Regulation (3) and the conviction is set aside by a higher court and the officer or employee is honourably acquitted, shall be reinstated in service.

As per the provision contained in the Criminal Procedure Code the word "honourably acquitted" has no where been defined nor has it been referred to any purpose and Regulation 29(4) states about "honourable acquittal", but it does not also define what is the meaning of such phrase.

16. The apex Court in ***The State of Assam and another vrs. Raghava Rajgopalchari***, 1972 SLR 915(SC) in paragraph-8 observed as follows:

> "The expression "honourably acquitted" is one which is unknown to Courts of justice. Apparently, it is a form of order used in court's martial and other extra-judicial tribunals. We said in our judgment that we accepted the explanation given by the appellant, believed it to be true and considered that it ought to have been accepted by the Government authorities and by the Magistrate. Further. We decided that the appellant had not misappropriated the monies referred to in the charge. It is thus clear that the effect of our judgment was that the appellant was acquitted as fully and completely as it was possible for him to be acquitted. Presumably, this is equivalent to what the Govt. Authorities term "honourably acquitted".

17. Similar question came up for consideration by the apex Court while interpreting Regulation 46(2) of the Reserve Bank of India (Staff Regulation 1948) in ***The Management of Reserve Bank of India vrs. Bhopal Singh Panchal***, AIR 1994 SC 552= (1994) 1 SCC 541 wherein it is held that only Regulation 46(4) provided for reinstatement of service of the employee who has been dismissed on account of his conviction which is set aside by the High Court and the employee is honourably acquitted.

18. There is no specific explanation given what constitutes "honourably acquitted" but the provisions contained in Regulation 29(4) has its relevance with the provisions contained in Regulation 29(3). If an employee is involved in any act of the "moral turpitude", in that case the provision contains in

Regulation 29 (4) may not come to the rescue of the said employee. On the other hand, if an employee is convicted other than the provisions contained in Regulation 29(3), in that case as per the provision of Regulation 29(4), the employee is entitled to be reinstated in service and also entitled to get all the service benefits and consequential service benefits.

19. In the aforesaid facts and circumstances, the order passed by the Chairman rejecting the request of the petitioner for reinstatement of service pursuant to Annexure-6 dated 18.09.2007 is hereby quashed. The petitioner is entitled to service benefit and all consequential service benefits as admissible under law.

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

Writ petition allowed.

2015 (II) ILR - CUT-1178

B. R. SARANGI, J

W.P.(C) NO.8082 OF 2008

MANAS KUMAR BEHERA ……..Petitioner

.Vrs.

UNION OF INDIA & ORS ……..Opp.Parties

SERVICE LAW – Compulsory retirement – Petitioner was appointed as constable in CISF – On completion of 30 years service Review committee held him not fit for future services – Action challenged – The petitioner having been promoted to the post of Head Constable after completion of 30 years the reason assigned that he is unfit beyond 30 years is the out-come of non-application of mind and also stigmatic one – Order being stigmatic the authority has failed to follow due procedure of law while granting compulsory retirement – Held, impugned order is quashed and the matter is remitted back to the authority to reconsider the same in accordance with law.

(Paras 10,11)

Case Laws Rreffered to :-

1. A.I.R. 2010 SC 151 : Swaran Sing Chand -V- Punjab State Electricity Board.
2.(2001) 3 SCC 314 : State of Gujarat -V- Umedbhai M.Patel.

For Petitioner : M/s. D.R.Pattnaiak,N.Biswal & Miss L.Pattanayak
For Opp.Parties : Mr. A.K.Bose, Assistant Solicitor General

Date of hearing : 05.12.2014
Date of judgment : 18.12.2014

JUDGMENT

DR. B.R.SARANGI, J.

The petitioner, who was working as Head Constable under the Central Industrial Security Force (in short hereinafter referred to as CISF), has filed this application seeking to quash the order of compulsory retirement passed by opposite party no.5-Senior Commandant, CISF Unit, Rourkela Steel Plant, Rourkela dated 13.05.2008 vide Annexure-1 and allow him to continue as Head Constable under the said organization as before.

2. The factual matrix of the case in hand is that the petitioner's date of birth being 27.02.54, he was appointed as Constable under CISF on 15.08.1972 by following due procedure of selection. Thereafter, he was promoted to the post of Head Constable on 19.05.2005 and is a member of "Force" within the meaning of Section 2 (9)(b) of the Central Industrial Security Force Act, 1968 (Hereinafter referred to as 1968 Act).

3. Mr. D.R. Pattnayak, learned counsel for the petitioner strenuously urged that the order impugned under Annexure-1 dated 23.05.2008 compulsorily retiring the petitioner from his service was not passed following a disciplinary proceeding initiated against him but on completion of 30 years of service following a review. It is stated that the petitioner's date of birth being 27.02.1954 he would have superannuated from service on attaining the age of retirement on 28.02.2014. While he was in service a review committee was held on 23.05.2008 after the petitioner completed 30 years of service and the order of compulsory retirement was passed. It is stated that such order was passed without application of mind. The petitioner completed 30 years of service on 15.08.2002. After completion of 30 years of service, the petitioner was allowed to continue in his service. Thereafter he was promoted to the post of Head Constable on 19.05.2005. Review Committee was held on 23.05.2008 and the impugned order was issued by opposite party no.5-Senior Commandant, CISF Unit, RSP, Rourkela under Rule-48(1)(b) of the C.C.S. (Pension) Rules, 1972 directing the petitioner for compulsory retirement, which is contrary to the provisions of law.

In order to substantiate his contention, Mr. D.R. Pattnayak, learned counsel for the petitioner, has relied upon ***Swaran Singh Chand v. Punjab State Electricity Board***, AIR 2010 SC 151.

4. Mr. A.K. Bose, learned Assistant Solicitor General appearing for the opposite parties, referring to counter affidavit specifically disputed the contentions raised by the learned counsel for the petitioner and stated that the order of premature retirement passed on 23.05.2008 by giving the petitioner three months' pay and allowance instead of three months notice in accordance with Rule FR-56(J) and Rule 48(1)(b) of CCS Pension Rules 1972 was sent along with banker's cheque bearing No.MCAB/688-475286 dated 23.05.2008 for Rs.28,287/-. But the petitioner refused to accept the same. He having refused to accept the same, the same was sent through Registered Post dated 24.05.2008, which was also returned back by the postal authority with remarks that addressee customer was absent on 28.05.2008, 29.05.2008, 30.05.2008, 31.05.2008 and 02.06.2008. The said banker's cheque was again sent to his permanent address through Registered Post dated 20.06.2008 in which acknowledgement copy is still awaited. It is stated that in terms of Rules-48(1)(b) of C.C.S.(Pension) Rules, 1972, a review committee under the Chairmanship of D.I.G., CISF Unit, RSP, Rourkela was constituted for determining his suitability or otherwise for continued retention of the petitioner in Govt. service after completion of 30 years of qualifying service. Taking into account his whole service records and last five years annual confidential report, the review committee held him not fit for future service and accordingly the impugned order was passed which is well within the provisions of law and this Court may not interfere with the same.

5. On the basis of the facts pleaded and on perusing the records the undisputed fact is that the petitioner was appointed as Constable thereafter he was promoted to the post of Head Constable. While he was continuing in service, the impugned order under Annexure-1 was communicated to him compulsorily retiring him from his service under Rule 48 (1)(b) of C.C.S.(Pension) Rules, 1972. Central Industrial Security Force is constituted as per Section 3 of the 1968 Act. Section 2(9)(b) defines "Force" and the petitioner is a member of the "Force". The impugned order was passed under Rule 48(1)(b) of the CCS (Pension) Rules, 1972 which reads as follows:

"48. Retirement on completion of 30 years' qualifying service;

(1) At any time after a Government servant has completed thirty year's qualifying service-

(a) he may retire from service, o

(b) he may be required by the Appointing Authority to retire in the public interest and in the case of such retirement the Government servant shall be entitled to a retiring pension, provided that

(a) a Government servant shall give a notice in writing to the Appointing Authority at least three months before the date on which he wishes to retire; and

(b) the Appointing Authority may also give a notice in writing to a Government servant at least three months before the date on which he is required to retire in the public interest or three months' pay and allowances in lieu of such notice;

Provided further that where the Government servant giving notice under Clause (a) of the proceeding proviso is under suspension, it shall be open to the Appointing Authority to withheld permission to such Government servant to retire under this rule;

Provided further that the provisions of Clause (a) of this sub-rule shall not apply to a Government servant, including scientist or technical expert who is-

(i) on assignments under the Indian Technical and Economic Co-operation (ITEC) Programme of the Ministry of External Affairs and other aid Programmes,

(ii) posted abroad in foreign based offices of the Ministries /Departments.

(iii) On a specific contract assignment to a foreign Government, unless, after having been transferred to India, he has resumed the charge of the post in India and served for a period of not less than one year".

6. Section 8 of the 1968 Act states that subject to the provisions of Article 311 of the Constitution of India and such Rules as Central Government may make under the Act any supervisory officer may

"(i) dismiss, (removal) (order for compulsory retirement of) or reduce in rank, any (enrolled member) of the Force whom he thinks remiss or negligent in the discharge of his duty, or unfit for the same; or

(ii) award anyone or more of the following punishments to any (enrolled member) of the Force who discharge his duty in a careless or negligent manner, or by any act of his own renders himself unfit for the discharge thereof, namely;

(a) fine to any amount not exceeding seven days' pay or reduction in pay scale;

(b) drill, extra guard, fatigue or other duty

(c) removal from any office of distinction or deprivation of any special emolument.

(d) Withholding of increment of pay with or without cumulative effect;

(e) Withholding of promotion;

(f) Censure".

7. In view of the aforementioned provisions, against the order of dismissal, removal, compulsory retirement and any other punishment under Rule-8 of the said Act, appeal and revision lies under Rule-9 of the above Act. Appeal under the above provision shall be filed within 30 days from the date of order. The order impugned having not been passed under Rule-8, neither any appeal nor any revision shall lie against the impugned order of compulsory retirement. As per the provisions contained in Section 34 of the 1968 Act, a rule has been framed called the Central Industrial Security Force Rules,2001 (hereinafter referred to 2001 Rules). Under the 2001 rules the following penalties may for good and sufficient reasons and herein as provided, be imposed on an enrolled member of the "Force", namely major penalties:

"(i) dismissal from service which shall ordinarily be a disqualification for future employment under the Government;

(ii) removal from service which shall not be a disqualification for future employment under the Government.

(iii) compulsory retirement".

8. It appears that compulsory retirement is prescribed as one of the major penalties which can be awarded to an enrolled member by way of a punishment in a disciplinary proceeding. In ***State of Gujarat v. Umedbhai M. Patel***, (2001) 3 SCC 314, the apex Court in paragraph-11 has summarized the law relating to compulsory retirement as follows:

"11. The law relating to compulsory retirement has now crystallized into definite principles, which could be broadly summarized thus:

(i) Whenever the services of a public servant are no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest.

(ii) Ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution.

(iii) For better administration, it is necessary to chop off dead wood, but the order of compulsory retirement can be passed after having due regard to the entire service record of the officer.

(iv) Any adverse entries made in the confidential record shall be taken note of and be given due weightage in passing such order.

(v) Even uncommunicated entries in the confidential record can also be taken into consideration.

(vi) The order of compulsory retirement shall not be passed as a short cut to avoid departmental enquiry when such course is more desirable.

(vii) Compulsory retirement shall not be imposed as a punitive measure."

9. Considering the same, it appears that even after completion of 30 years of service from the date of initial entry by 15.08.2002 the petitioner was promoted to the post of Head Constable on 19.05.2005 and on a review being made he is being compulsory retired taking into account his past service which has entitled him to continue beyond 30 years of qualifying services. It is urged that as per the service record the petitioner had been imposed three major and minor penalties for committing various misconduct and offences. In spite of such punishment he had got promotion to the post of Head Constable on 19.05.2005, but his colleagues who were appointed in the year 1974 are holding the rank of S.I. which establishes that promotion in respect of the petitioner is delayed due to the imposition of above punishment. But the fact remains that in spite of such punishment he was considered for promotion as Head Constable. Consequentially he is continuing in the said post w.e.f. 19.05.2005. Therefore, on the date of consideration of review that is 23.05.2008 the petitioner had already got promotion and more so he completed 30 years service long since i.e. w.e.f. 15.08.2002.The petitioner having been promoted to the post of Head Constable after completion of 30 years of qualifying service, nothing

remained to be considered to direct compulsory retirement of the petitioner in exercise of power conferred under Section 48 (1) (b) of C.C.S. (Pension) Rules, 1972. As it appears from the counter affidavit, the petitioner has been given compulsory retirement on the ground that he is unfit to continue beyond 30 years of service if he is unfit to retain in service and consequentially has been given compulsory retirement, the order impugned is a stigmatic one. If the order impugned is a stigmatic one then the authority has to follow due procedure of law while granting the compulsory retirement. The petitioner has already preferred W.P. No.1265-W/2005 and W.P. No.12262-W/2005, which are pending in the High Court of Calcutta against two major punishments.

10. In ***Swaran Singh Chand*** (supra) the apex Court held that the order of compulsory retirement was passed on the allegation that not only the petitioner lacked integrity but also unfit to be retained in service, therefore, the order is stigmatic one. Therefore the order suffers from malice in law and accordingly the same is liable to be set aside.

11. The petitioner was allowed to continue in service and was also given promotion to the post of Head Constable after completion of 30 years. The reason assigned that the petitioner is unfit beyond 30 years of service is the out-come of non-application of mind and also stigmatic one in view of the ratio decided by the apex Court referred to supra and the same has been passed without following due procedure of law as he has been given promotion after completion of 30 years of service. Therefore, the same is accordingly quashed and the matter is remitted back to the authority to reconsider the same in accordance with law within four months from the date of communication of this order.

12. With the above observation and direction, the writ petition is disposed of.

Writ petition disposed of.

2015 (II) ILR - CUT-1185

DR. B.R. SARANGI, J.

FAO. NO. 187 OF 2012

SATYAJIT SAHOO .....Petitioner

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART- 226

If the court passed an order having no jurisdiction, it amounts to a nullity in the eye of law and the same is liable to be quashed.

In this case the Director having no jurisdiction has passed order reinstating respondent No.4 in service and the state Education Tribunal released GIA in her favour without impleading the affected party i.e. the appellant as a party – Order obtained by playing fraud on court and more so by suppression of fact – The state Education Tribunal has committed gross error apparent on the face of the record in disentitling the appellant from receiving the benefits under law – Held, the impugned order being void ab initio, is a nullity in the eye of law, hence the same is liable to be quashed – Direction issued to respondent No. 2 to extend the benefit admissible to the appellant against the 1st post of lecturer in English in accordance with GIA principles.

(Para 15 to 19)

Case Laws Referred to :-

1. (2015) 3 SCC 177 : Kulwant Singh and others v. Dayaram &Ors.
2. (2012) 4 SCC 307 : Kanwar Singh Saini v. High Court of Delhi
3. JT 2011 (2) SC 164 : State of Orissa & Anr. v. Mamata Mohanty
4. 2010 (II) OLR SC 778 : Meghmala & Ors. v. G. Narasimha Reddy & Ors.
5. 2003 (I) OLR 438 : Smt. Rama Panigrahi v. State of Orissa & Ors.
6. J.T.1999 (6) SC 473 : Balraj Teneja & Anr. v. Sunil Madan and Anr.

For Petitioner : M/s. Dr.M.R.Panda & Associates
For Opp.Parties : M/s. K.K.Swain & Associates

Date of hearing : 03.09. 2015
Date of judgment: 08. 10.2015

JUDGMENT

DR. B.R.SARANGI, J.

The appellant, who is working as a Lecturer in English (1st post) in Indira Gandhi (Junior) Mohavidyalaya, Nimapara in the district of Puri, which is an aided educational institution within the meaning of Section 3 of the Orissa Education Act and Rules framed thereunder, files this appeal seeking to quash the order dated 29.2.2012 passed by the learned State Education Tribunal in GIA Case No. 36 of 2010 vide Annexure-5 dismissing his application for release of grant-in-aid in respect of the post held by him.

2. The short fact of the case in hand is that Indira Gandhi (Junior) Mohavidyalaya, Nimapara in the district of Puri was established as a Junior college with +2 wing in the year 1989. On completion of five years of its establishment, as per the Grant-in-aid Order, 2004, the college came within the fold of grant-in-aid. At the time of opening of the college, one Choudhury Ramakanta Das was appointed as Lecturer in English against 1st post in the year 1989 and he continued up to 15.12.1992. Respondent no.4, Smt.Swapna Mohanty was appointed against 2nd post of Lecturer in English on 25.11.1991 by the Governing Body. Due to resignation of Choudhury Ramakanta Das, the holder of 1st post, the Governing Body vide its resolution dated 16.12.1991 elevated the respondent no.4 to the 1st post of Lecturer in English. Taking into account the work load, warranting the 2nd post of Lecturer in English in +2 wing, the Governing Body following due procedure of selection appointed the appellant pursuant to which he joined against the post on 6.2.1993.

When the matter thus stood, there was disturbance in the Governing Body of the college and therefore, respondent no.2, the Director, Higher Education appointed one K.K.Raymohapatra, the then Principal of S.A.Mohavidyalaya, Balipatna as Special Officer for discharging the day to day affairs of the college vide order dated 25.4.2001. The Special Officer terminated the respondent no.4 on the charge of negligence in duty vide office order dated 14.5.2002. Thereafter, the appellant was elevated to the 1st post of Lecturer in English after termination of the services of respondent no.4 by the said Special Officer. The new Governing Body under the Presidentship of Sub-Collector, Puri was constituted vide notification of the Government dated 14.10.2001. Against the order of termination dated 14.5.2002 respondent no.4 preferred an appeal before the Director, Higher Education, Odisha. In the said proceeding appellant was not made a party. Without giving opportunity to the said appellant, the Director allowed the

appeal preferred by respondent no.4 and set aside the order of termination vide order dated 21.02.2006 and directed for reinstatement of respondent no.4 against the post she was holding at the time of termination. Pursuant to such order of the Director, Higher Education, Orissa dated 21.02.2006, respondent no.4 was reinstated in service on 28.02.2006 and has been discharging her duties against the 1st post of Lecturer in English. Thereafter, respondent no.4 filed GIA Case no. 120 of 2006 before the learned State Education Tribunal for approval of her appointment against the 1st post of Lecturer in English in which the appellant was not made a party. The learned Tribunal upon hearing the parties allowed the GIA case and directed for approval of her appointment against the 1st post of Lecturer in English and to release GIA by way of Block Grant in respect of the post w.e.f. 01.01.2004. Since the order passed by the learned Tribunal was not implemented, respondent no.4 filed W.P.(C) No. 17803 of 2009 before this Court. The Division Bench of this Court by order dated 25.11.2009 directed for implementation of the order passed by the learned Tribunal in GIA Case No. 120 of 2006. Against the said order, the State Government preferred FAO No. 589 of 2010 which was also dismissed by order dated 16.07.2011. After dismissal of FAO No. 589 of 2010, the State Government approved the appointment of respondent no.4 against the 1st post of Lecturer in English and released Block Grant in her favour w.e.f. 01.02.2009. Thereafter, claiming GIA the appellant filed GIA Case No. 36 of 2010 in which respondent no.4 has been arrayed as a party. Upon hearing the parties, the learned Tribunal dismissed the GIA Case holding therein that since respondent no.4 is senior to the appellant and pursuant to the order passed by the learned Tribunal in the earlier GIA Case No. 120 of 2006 and confirmed by this Court in W.P.(C) No. 17803 of 2009 and FAO No.589 of 2010, the matter has been set at rest and there is no scope for the appellant to claim the benefit any further. Hence, this appeal.

3. Dr.M.R.Panda, learned Senior Counsel for the appellant strenuously urged that the very initial appointment of respondent no.4 having no requisite qualification being bad, any action taken subsequent thereto is also a nullity in the eye of law. More so, it is urged that due to non-impletion of the appellant as a party in the appeal preferred by respondent no.4 before the Director and subsequent GIA No. 120 of 2006 filed by her, the orders so passed by the Director as well as the learned Tribunal cannot sustain in the eye of law and both the orders should be vitiated. He further submitted that the orders having been obtained by respondent no.4 by playing fraud on the

Court, the same is vitiated and therefore, any consequential action on the basis of the fraud played on the Court cannot sustain in the eye of law. Accordingly, the respondent no.4 is not entitled to get GIA and this fact has been suppressed before this Court in the writ application and therefore, any benefit accrued to respondent no.4 by suppressing the material fact and by playing fraud on the Court, is not admissible to her. He further submits that respondent no.4 had admitted that she was terminated from service and against that order she had preferred an appeal before the Director, who passed order of reinstatement on 21.02.2006. Since respondent no.4 has admitted that the college received GIA w.e.f. 01.01.2004 vide Notification dated 20.04.2004 and the institution being an aided one, the Director Higher Education has no jurisdiction to hear the appeal and pass the order of reinstatement. Therefore, the power of adjudication ipso facto would stand transferred by operation of statute to the learned Education Tribunal. Hence, the order of the Director reinstating respondent no.4 in service is without jurisdiction and void ab-initio and she is not entitled to get other consequential benefits as has been granted by the Director. This fact has been suppressed before the learned Tribunal in GIA Case No. 120 of 2006 and before this Court in W.P.(C) No. 17803 of 2009. He further submitted that since the termination of respondent no.4 has been given effect to by the Governing Body by following the principles of natural justice and the same having not been challenged before the appropriate forum, the order passed by the Governing Body remains unaltered. But the respondent no.4 misled this Court in OJC No. 3798 of 2001 and the order itself does not whisper about the words of "setting aside the order of termination". A proceeding was initiated against respondent no.4 for having remained absent from duty unauthorizedly from 06.04.1998 following the procedure prescribed and she was charge sheeted and was called upon to put in his written statement and on receipt of the written statement of defence, the enquiry officer was appointed who dealt with the entire case and after the charges stood proved against respondent no.4 she was terminated from service by Resolution dated 29.07.2001. Against the said order of termination dated 29.07.2001, respondent no.4 preferred an appeal on 07.07.2005, i.e., after lapse of four years before the Director Higher Education. By that time, the Director had no jurisdiction to entertain such appeal since the College in question had been declared as aided one. But while disposing of O.J.C No. 3798 of 2001, this Court directed the Director to take a decision and the Director has taken a decision on 26.12.2001 and therefore, neither this Court nor the Director has stated anything about the disciplinary proceeding initiated against respondent

no.4, which has been approved by the Governing Body vide Resolution dated 29.07.2001. After the College was declared as an aided one, the Director Higher Education had become functus officio and as such, any order passed by him cannot sustain in the eye of law. More so, in GIA Case No. 120 of 2006 the respondent no.4 has approached the learned Education Tribunal with unclean hands and suppressed the materials facts and intentionally has not made the Principal-cum-Secretary or the Sub-Collector, who became the President of the Governing body as a party after the college was notified as aided one w.e.f. 01.01.2004. But she made Mr. Baidhar Mallick as a party only to conceal, suppress and mislead the facts before the learned Tribunal. After termination of respondent no.4, the appellant was elevated to the 1st post of Lecturer in English on 14.10.2001, therefore, it was within the knowledge of respondent no.4 that he is a necessary party to the proceeding and that ultimately the appellant would be affected in the event any order is passed by the learned Tribunal. Even then deliberately he has not been made a party to the proceeding. More so, by the time respondent no.4 was appointed, she had no requisite qualification. Therefore, the very appointment of respondent no.4 against the 1st post of Lecturer in English having no requisite qualification was absolutely illegal. To substantiate his contentions, he has relied upon the judgments in **Kulwant Singh and others v. Dayaram and Others,** (2015) 3 SCC 177; **Kanwar Singh Saini v. High Court of Delhi,** (2012) 4 SCC 307; **State of Orissa & Anr. v. Mamata Mohanty,** JT 2011 (2) SC 164; **Meghmala & Ors. v. G. Narasimha Reddy & Ors.,** 2010 (II) OLR SC 778; **Smt. Rama Panigrahi v. State of Orissa & others** , 2003 (I) OLR 438; and in **Balraj Teneja & Anr. v. Sunil Madan and Anr.,** J.T.1999 (6) SC 473.

4. Mr. K.K. Swain, learned counsel for respondent no.4, per contra, stated that the order passed by the learned State Education Tribunal in GIA Case No. 120 of 2006 is wholly and fully justified. He further stated that the appellant has not challenged the judgment and order passed by the learned State Education Tribunal in GIA Case No. 120 of 2006 and the order of the Director dated 21.02.2006 and the consequential approval order dated 13.01.2011 approving the appointment of respondent no.4 against the 1st of post Lecturer in English as well as the consequential release of GIA in her favour in the present appeal. He further submitted that the learned Tribunal has rightly passed the impugned order in Annexure-5. It is further urged that the order passed by the learned Tribunal in GIA Case No.120 of 2006 has reached its finality after dismissal of FAO No. 589 of 2010 read with order

dated 25.11.2009 passed in W.P.(C) No. 17803 of 2009 wherein this Court directed for implementation of the judgment and order of the learned Tribunal passed in GIA Case No. 120 of 2006. Therefore, the contention raised by the appellant that the order passed by the learned Tribunal in GIA Case No. 120 of 2006 and the order of the Director dated 21.06.2006 are nullity and can be ignored, is not legally correct. To substantiate his contention he has relied upon the judgment in **Krishnadevi Malchand Kamathia & Ors. V. Bombay Environmental Action Group & Ors.,** AIR 2011 SC 1140, wherein the Apex Court has held that a void order is also required to be challenged in appropriate Court of law. So far as jurisdiction of the Director is concerned, he has relied upon the judgment in **Arjun Charan Jena v. Director, Secondary Education, Orissa,** 66(1988) CLT 293 which has been confirmed by the Full Bench of this Court in **Nityananda Lenka v. State of Orissa and Ors.,** 2011 (I) OLR 524 and has also relied upon the judgment in **State of Uttaranchal & Anr. V. Sri Shiv Charan Singh Bhandari & Ors.,** 2014 (I) SLJ 33.

5. On the basis of the facts pleaded above, the following questions emerge for consideration.

(i) Whether the order passed by the Director Higher Education dated 21.02.2006 and the order dated 05.12.2008 passed by the learned State Education Tribunal in GIA Case No. 120 of 2006 without impleading the appellant as a party can sustain in the eye of law?

(ii) If the orders have been passed by the authority on the basis of the fraud played on Court by respondent no.4, whether the same are vitiated and void ab-initio or not?

(iii) If the initial appointment of respondent no.4 has been made without having requisite qualification, whether such appointment can sustain in the eye of law or not?

(iv) To what relief the appellant is entitled to?

6. The admitted fact is that Indira Gandhi (Junior) Mohavidyalaya, Nimapara with +2 wing was established in the year 1989. Though on completion of five years of its establishment as on 01.06.1994, the institution ought to have been brought within the fold of grant-in-aid, but effectively the same has been brought into the grant-in-aid fold w.e.f. 01.01.2004 as per the GIA Order-2004 instead of GIA Order-1994. One Choudhury Ramakanta Das was initially appointed as 1st of post Lecturer in English in 1989 and he

continued up to 15.12.1992. Respondent no.4 having secured 39% of marks in her Post Graduation was appointed against the 2nd post of Lecturer in English on 25.11.1991. By the time she was appointed she had no requisite qualification to be appointed as a Lecturer in English. Choudhury Ramakanta Das, the holder of the 1st of post Lecturer in English submitted his resignation on 15.12.1992 and consequentially, respondent no.4 was elevated to the 1st of post Lecturer in English. The appellant was appointed as Lecturer in English on 06.03.1993. But due to the negligence in duty following a disciplinary proceeding, respondent no.4 was dismissed from service on 29.07.2001. Therefore, the appellant was elevated to the 1st of post Lecturer in English vide Resolution no.5 dated 14.10.2001. By the time respondent no.4 was terminated from service the college was not an aided one. Therefore, the respondent no.4 preferred appeal before the Director Higher Education. When the matter was pending before the Director, the College came within the GIA fold w.e.f. 20.02.2004 giving effect from 01.01.2004. This Court in OJC No. 3798 of 2001 vide order dated 09.07.2001 directed the Director to pass an order in consonance with law in respect of smooth management of the College. On receipt of the same the director appointed the Special Officer as per sub-Section (6) of Section-7 of the Orissa Education Act on 25.04.2001. The Special Officer served notice on Respondent No.4 on 19.05.2001 and in spite of such notice, since respondent no.4 did not respond, following a disciplinary proceeding, she has been terminated from service, against which she preferred an appeal. This Court vide order dated 15.10.2001 in OJC No. 11169 of 2001 extended the continuance of Special Officer and even though the respondent no.4 was terminated from service on 29.07.2001, she preferred an appeal before the Director on 07.07.2005 challenging such order of termination, after a long lapse of four years and by the time she filed the appeal, the Director has no jurisdiction to entertain the same and more so, the respondent no.4 has not impleaded the present appellant as a party in the said appeal. Consequently, the Director passed the order declaring the order of termination of respondent no.4 as illegal and directing her for reinstatement of service vide order dated 21.06.2006. Therefore, the order so passed by the Director is without jurisdiction, as by the time he passed the order, the College became an aided one and no appeal lay to him. Any such order passed by him cannot sustain in the eye of law. More so, the order has been passed without impleading the present appellant as party to the said proceeding. Therefore, any order passed by the Director is a nullity in the eye of law.

7. Mr. K.K. Swain, learned counsel for respondent no.4 strenuously urged that once the Director has passed the order of reinstatement, the same should be given effect to and the order cannot be said to be without jurisdiction as action has been taken by the Governing Body when the institution was an aided one. Relying on the judgment in Arjun Charan Jena(supra), he submitted that the termination having been made during the unaided period, the Director had got jurisdiction to consider the appeal preferred by respondent no.4 even if the college came within the fold of GIA when respondent no.4 preferred the appeal. The admitted fact is that the respondent no.4 was terminated from service on 29.07.2001 when the college was an unaided one and as such at the relevant point of time the Director might have jurisdiction to entertain the appeal, but knowing fully well that the Director had got the jurisdiction, the respondent no.4 did not prefer any appeal during the unaided period and admittedly, respondent no.4 preferred appeal on 07.07.2005 when the college had already come within the fold of GIA, pursuant to notification dated 20.04.2004 giving effect from 01.01.2004 by which time the Director had lost its jurisdiction to entertain any appeal preferred by any person. Therefore, the reliance placed on Arjun Charan Jena (supra) has no application to the present facts and circumstances of the case and the same is distinguishable. Even when the appeal was preferred, respondent no.4 was fully aware of the fact that the appellant has been elevated to the 1st of post Lecturer in English and knowing fully well he was not impleaded as a party in the said appeal. In course of hearing when a query was made by this Court to Mr. K.K. Swain, learned counsel for respondent no.4, that if the college has become an aided one, how respondent no.4 preferred an appeal before the Director without impleading the appellant as party to the proceeding itself. No satisfactory answer was offered from the side of respondent no.4. This clearly indicates that the respondent no.4 has played fraud on the Court itself and consequentially she has detained the order of reinstatement passed by the Director on 21.02.2006 when the Director had no jurisdiction to pass such order.

8. Respondent no.4 has also preferred GIA Case No. 120 of 2006 before the learned Education Tribunal without impleading the appellant as a party. Therefore, a right which has been accrued in favour of the appellant being the holder of 1st of post Lecturer in English by way of elevation after termination of respondent no.4 from service, the order so passed by the learned Tribunal is not binding on the appellant himself as he is not a party to the proceeding. Without complying with the principles of natural justice, the

learned Tribunal has passed the order in GIA Case No. 120 of 2006 allowing the application of respondent no.4 granting the benefits as against the 1st of post Lecturer in English. That itself jeopardize the claim of the appellant and as such, the order so passed by the learned Tribunal without impleading the appellant to the present proceeding cannot sustain in the eye of law.

9. In ***Kanwar Singh Saini****(supra)* the apex Court in paragraph-22 has held as follows:-

> "22. There can be no dispute regarding the settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes order/decree having no jurisdiction over the matter, it would amount to a nullity as the matter goes to the roots of the cause. Such an issue can be raised at any belated stage of the proceedings including in appeal or execution. The finding of a court or tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction. Acquiescence of a party equally should not be permitted to defeat the legislative animation. The court cannot derive jurisdiction apart from the statute.

10. In view of the law laid down by the apex Court mentioned above, if the order has been passed without complying wtih the principles of natural justice, it goes to the root of the cause and such an issue can be raised at any stage of the proceedings including in appeal or execution. Therefore, the finding of the Court or Tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction and as such, if the Court passes an order/decree having no jurisdiction over the matter, it amounts to a nullity. In that view of the matter, since the order has been passed by the Director reinstating respondent no.4 in service and consequential benefit has been granted by the learned State Education Tribunal by releasing GIA in her favour in GIA Case No. 120 of 2006 without impleading the appellant as a party, the same is without jurisdiction and as such, is a nullity in the eye of law and more so, if at a belated stage the appellant assails the same, it cannot be said that the appellant cannot raise the question at this point of time.

11. In **Kulwant Singh** (supra), the apex Court in paragraphs 45, 46 and 47 has held as follows:

"45. At this stage, we shall notice certain authorities which have been commended to us for adjudging the effect of such non-impleadment. In *Khetrabasi Biswal case, 2004 (1) SCC 317* Orissa Public Service Commission had issued an advertisement inviting applications in the prescribed form for twenty-five posts of temporary Munsif (Emergency Recruitment) in Class II of the Orissa Judicial Service. The appellants and the respondents had applied before the Commission. A written examination was held by the Commission, a list of successful candidates was prepared and selectees were later on interviewed by the Commission and in the said proceeding a sitting Judge of the High Court acted as an expert. Thereafter the select list was prepared on the basis of merit which contained 39 names. The names of the appellants before this Court found place therein. The said list was sent to the State Government for approval. The State Government on receiving the said list, prepared another list in which the name of the appellant was found placed therein but the names of Bijaya Kumar Patra and Govinda Chandra Parida and others were omitted. Number of writ petitions were filed before the High Court purporting to interpret the service rules prepared the list of candidates who should have been selected. Pursuant to and in furtherance of the directions issued by the High Court offers of appointment were issued by the State Government in terms of the list prepared by the High Court. The appellants who had come to this Court were not parties to the writ petitions. The High Court, while preparing its own list did not think it fit to issue notices to other candidates like the appellants before this Court who had suffered prejudice by reason of the directions issued by the High Court. While dealing with the justifiability of the same this Court held that they were necessary parties and, in that context, expressed thus: (*Khetrabasi Biswal case*, SCC p. 319, para 6)

"*6*. The procedural law as well as the substantive law both mandates that in the absence of a necessary party, the order passed is a nullity and does not have a binding effect."

46. In *Shiv Kumar Tiwari,* (2001) 10 SCC 11 a suit was filed without making the affected person a party. Dealing with the said facet this Court opined that such a judgment could not be pressed into service to the detriment of the rights of a party as he was not a party and any judgment/decree/order of courts or any other authority binds only the

> parties to it or their privies when it concerns the rights of parties and such proceedings purport to adjudicate also the rights of the contesting parties by means of an adversarial process. The Court, while rejecting the plea that the affected party could have filed an appeal by obtaining special leave of the court, held that though it would have been open for such party to file an appeal with the leave of the court, there is no duty or obligation cast on it so to do on pain of distress when in law he could also legitimately ignore the said judgment as it is a judgment of no value.
>
> 47. In *Kailash Chand Mahajan case 1992 Supp (2) SCC 351* the Court ruled that if a decision is rendered which affects a party, it would amount to clear violation of the principles of natural justice and an order passed in violation of the salutary provision of natural justice would be a nullity.

12. In view of the law laid down by the apex Court if the decision has been taken which affects a party, it would amount to clear violation of the principles of natural justice and the order passed in violation of salutary provision of natural justice would be a nullity.

13. In **Meghmala (supra)**, the apex Court in paragraph-33 held as follows:

> "33. Fraud is an intrinsic, collateral act, and fraud of an egregious nature would vitiate the most solemn proceedings of courts of justice. Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. The expression "fraud" involves two elements, deceit and injury to the person deceived. It is a cheating intended to get an advantage. (Vide Dr. Vimla Vs. Delhi Administration AIR 1963 SC 1572; Indian Bank Vs. Satyam Fibres (India) Pvt. Ltd. (1996) 5 SCC 550; State of Andhra Pradesh Vs. T. Suryachandra Rao AIR 2005 SC 3110; K.D. Sharma Vs. Steel Authority of India Ltd. & Ors. (2008) 12 SCC 481; and Regional Manager, Central Bank of India V. Madhulika Guruprasad Dahir & Ors. (2008) 13 SCC 170)"

14. In view of the aforesaid law laid down by the apex Court an act of fraud on Court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void *ab initio.*

15. On the factual discussions made above, there is no semblance of doubt that respondent no.4 has played fraud on court in obtaining the order from the Director, who has no jurisdiction and the consequential order passed by the learned State Education Tribunal without impleading the affected party, namely the appellant, is in gross violation of principles of natural justice and therefore, is a nullity in the eye of law.

16. In **Mamata Mohanty and another (supra),** relied on by learned counsel for the appellant, the apex Court held that the persons having no requisite qualification cannot and should not be appointed by the authority. In any case, in view of the subsequent upgradation of educational qualification, the respondent no.4 being eligible to be considered for appointment, this Court is not delving into that question to answer in the present context.

17. Much reliance has been placed by the learned counsel for the respondent no.4 on **Krishnadevi Malchand Kamathia (supra)** where the apex Court has held that void order is required to be challenged in the appropriate Court of law. In the present case, the appellant has also preferred W.P.(C) No. 23435 of 2010 challenging the order of Director by which reinstatement order has been passed in favour of the respondent no.4 which is pending for adjudication.

18. In **Shiv Charan Singh Bhandari** (supra) it is held that no relief can be granted to a person who has approached the Court at a belated stage. But this view cannot hold good if the order has been obtained by playing fraud on Court and more so, by suppression of fact, and apart from that due to non-compliance of the principles of natural justice, without impleading the party in the proceeding itself, the order being void *ab initio,* it is a nullity in the eye of law. In such case the ratio decided in **Shiv Charan Singh Bhandari** (supra) cannot apply in the eye of law.

19. In view of the foregoing discussions, this Court is of the considered view that the learned State Education Tribunal has committed gross error apparent on the face of record in disentitling the appellant from receiving the benefits as due and admissible in accordance with law in relying upon the order of the very same Tribunal in GIA Case No. 120 of 2006. Accordingly the impugned order being a nullity and void *ab initio,* cannot sustain in the eye of law and is hereby quashed. The respondent no.2 is directed to extend the benefit admissible to the appellant against 1st of post Lecturer in English

in accordance with GIA principle within a period of three months from the date of communication of this judgment. Appeal is allowed. No costs.

Appeal allowed.

2015 (II) ILR - CUT- 1197

D. DASH, J.

R.F.A. NO.3 OF 2006

M/S. NIRANJAN SAHU …….. Appellant

.Vrs.

M/S. HINDUSTAN STEEL WORKS CONSTRUCTION LTD. & ANR. ……...Respondents

LIMITATION ACT, 1963 – S.18

Money suit dismissed on the ground of limitation – Acknowledgment made by the defendants in writing admitting the claim of the plaintiff – Section 25 (3) of the contract Act, 1872 comes to the aid of the plaintiff to hold that the suit filed by the plaintiff is well within time – Held, impugned judgment and decree is setaside and the suit of the plaintiff is decreed. (Paras 5,6,7)

For Appellant : M/s. S.K.Sanganeria,P.C.Patnaik & P.Sinha.
For Respondents : M/s. D.K.Mohapatra, Miss. Minati Mishra

Date of hearing : 07.08.2015
Date of judgment : 14.08.2015

JUDGMENT

D. DASH, J.

This appeal has been filed challenging the judgment and decree passed by the learned Adhoc Additional District Judge (F.T.C.), Rourkela in Civil Suit No.61/55/2004-05. By the said judgment and decree, the suit filed by the appellant as the plaintiff against the respondent-defendants for recovery of sum of Rs.1.04,902.10 paise has been dismissed. This dismissal of the suit thus has been called in question in this appeal.

2. For the sake of convenience, in order to bring in clarity and avoid confusion, the parties hereinafter have been referred to as they have been arrayed in the court below.

3. Plaintiff, a proprietorship concern through its proprietor has filed this suit. It is his case that they undertake the work of different organizations and institutions as contractor. It is the case of the plaintiff that the defendants had awarded the plaintiff with the jobs for execution of certain works on sub-contract basis at different time. Those works were duly executed and completed within the stipulated time frame. It is said that despite of the same, the defendants did not make the payment of the bills and several approaches for the purpose did not yield any result. So, notice was served demanding such payment and in response the defendant no.2 in his letter dated 05.12.2000 admitted the claim of the plaintiff. However, it was stated that the payment was not being made as the Company was facing serious financial crunch. At the same time, assurance to make the payment was given at the moment the fund position takes off. In other correspondences similar assurances were being given. It is stated that the plaintiff was paid a sum of Rs.20,000/- and Rs.15,000/- by two cheques dated 20.06.2001 and 15.01.2001 respectively. So, the outstanding dues on account of such execution of the work entrusted by the defendants to the plaintiff suit stands at Rs.1.04,902.10 paise. Having waited for a long period finally the plaintiff filed the suit as no further payment was received from the defendants.

The defendant no.2 in the written statement admitted that the plaintiff was entrusted with the work for execution at different times by issuance of work orders from time to time. It is further stated that payments at different times have been made. However, the defendant no.2 when asked the plaintiffs to obtain various statutory clearance, such as, certificate from ESIC for the purpose of release of the bills and clearing the payments, the plaintiffs failed to comply and so the payment could not be released. The trial court has mainly dismissed the suit holding that the plaintiff failed to plead and prove that the suit claim relates to which work order and that the work under which work as per the terms of the contract when was completely executed and what was the conditions for payment by the defendants. Next, the suit has been held to be barred by limitation being filed after lapse of 8 years from the date when the cause of action for the same had arisen,

3. Learned counsel for the appellant submits that the findings of the trial court are unsustainable both in fact and law. According to him, in view of the

clear admission of the defendants in the correspondences as regards the claim of the plaintiff for the sum as claimed in the suit towards the works executed by him as per the order placed by the defendants, there was no reason for the trial court to take amiss of the fact of non-pleading of details relating to different works as well as payments etc. In this connection, he has drawn the attention of the Court to the relevant pleadings in the plaint as well as in the written statement at paras 5 and 7 respectively. He further submits that the finding of the trial court that the suit is barred by limitation is wholly unsustainable. According to him, simply looking at the fact concerning the acknowledgement of the claim of the plaintiff by the defendants in writing the period of limitation can well be computed from that date. For the purpose, he also banks upon the provision of section 25 of the Contract Act. Thus, he urges that the judgment and decree passed by the trial court are liable to be set aside and the suit of the plaintiff is to be decreed granting him the reliefs as prayed for.

5. Learned counsel for the respondents, on the other hand, supports the findings of the trial court that the plaintiff was under obligation to specifically plead as regards the details of the work executed by him under different work orders at different times issued by the defendants as also the details of the payment received and to show exactly as to the unpaid dues. He further submits that the trial court has rightly held as regards the non-attractability of the provision of section 18 of the Limitation Act in saving the period of limitation for the purpose of recovering the money claimed by the plaintiff. He urges that the acknowledgement of the debt in writing as required under section 18 of the Limitation Act has to be well within the period of limitation and not beyond that so that the fresh period of limitation would run from that date of acknowledgement which is not the case here.

6. The plaintiff in the suit has laid a claim of Rs.104902.19 paise. After referring to different work orders issued by the defendants to him for the purpose of execution in para-3 of the plaint, it has been pleaded in the next para, i.e. para-4 that there has been successful completion of the works entrusted to him for execution within the stipulated time. In para-5 it has been pleaded that the defendants failed to make the payment of the bills. The amount due as claimed has been indicated in para-7 of the plaint and thereafter it is stated that the defendants have never disputed it and rather have assured to make the payment expressing the inability of making this payment immediately because of the financial hardship that they were facing

then. The defendants have not denied the averments of the plaint right from the para-1 to 6. As regards the averments of para-7 of the plaint, it has been admitted in part. However, then going to describe further, it has been stated that the defendant no.2 had made various payments to the plaintiff against the contract works and the plaintiff being asked to obtain the statutory clearances, such as, no due certificate from ESIC in respect of the works executed by him having not submitted for release of the bills, there remained the failure and negligence on the part of the plaintiff. So, it is stated that such dues could not be released. In para-7 of the written statement correspondences made by the defendant no.2 in response to the letters of the plaintiff have been admitted and lastly in an evasive manner it has been pleaded that the defendant no.2 is not liable to make payment of the suit amount as demanded by the plaintiff.

In this connection, attention of this Court has been drawn to two letters of defendant no.2, i.e., Exts.18 and 19 dated 20.06.2001 and 06.08.2001 respectively. This Ext.18 was in reply to the plaintiffs notice dated 08.01.2000. Ext.10 is with reference to plaintiffs letter dated 23.07.2001. The last part of Ext.18 is quoted hereunder:

> "Herewith it will not be out of place to mention that due to fund crisis we have not been able to release due amount to your client at appropriate time. However, we hve never denied the same. Also we once again intimate and assure that as soon as out fund position improves, balance amount i.e., Rs.1,39,902(-) Rs.20,000/=Rs.1,19,902.19 shall be released to your client in phases. Kindly advise your client to bear with us."

The relevant portion of Ext.19 runs as under:

> "Since we have been facing acute financial crisis and have not been able to disburse salary/wages to our employees w.e.f. Nov.2k, yet we assure you that the above amount shall be paid to you in installments in near future/as soon as our fund position improves."

Admittedly, thereafter payment of Rs.15,000/- has been made through cheque dated 15.10.2001. So, the balance dues remains at Rs.104902.19 paise. This is what the plaintiff seeks to recover from the defendants. The suit has been filed on 13.05.2004. For the sake of argument, even accepting for a moment that after complete execution of work when the amount of the plaintiff became due upon the defendants for payment, the suit has not been filed within a period of three years from those dates, nonetheless

is seen from Ext.18 and 19 that the defendant no.2 has made clear cut admission without any sort of reservation as regards the dues of the plaintiff for being paid and payment has been assured to be made as and when there takes place the improvement in the financial position. It has been clearly stated that the payment could not be made not any other reason but for the financial crunch that they are facing. Thus its an unconditional promise in writing and signed by the person concerned to pay the dues of the plaintiff as demanded. In view of the above, I am of the considered view that the provisions of section 25 (3) of the Contract Act will come to the aid of the plaintiff to hold that the suit filed by the plaintiff is well within time. The trial court is found to have erred in law by holding the suit to be barred by limitation having failed to take note of provision of section 25 (3) of the Contract Act. In view of these Exts.18 and 19 and on the face of the pleadings as referred to in the forgoing paragraphs, the trial court also ought not to have gone to put the blame upon the plaintiff for not pleading those details relating to the work orders, conditions of execution of work, payments etc, with other details as regards the payment and receipts. Thus the judgment and decree passed by the court below dismissing the suit are held liable to be set aside which is hereby done.

7. In the result, the appeal stands allowed with cost throughout. The suit of the plaintiff is decreed directing the defendants to pay a sum of Rs.104902.19 paise to the plaintiff with pendent lite and future interest @ 6% per annum from the date of filing of the suit till payment. The defendants are hereby directed to make the payment to the plaintiff as above within two months hence failing which the plaintiff is at liberty to recover the same by levying the proceeding for execution through Court.

Appeal allowed.

2015 (II) ILR - CUT- 1202

D. DASH, J.

R.S.A. NO. 22 OF 2002 (WITH BATCH)

GOURIMANI @ UMAMANI DEVI & ORS. …….Appellants

.Vrs.

NARAYAN TRIPATHY & ORS. …….Respondents

(A) LEGAL SERVICES AUTHORITIES ACT, 1987 – S.21(2)

Bar of appeal – Award passed by Lok Adalat challenged by third party prejudicially affected thereby on the ground of fraud – Party resorted to fraud is liable to be thrown out at any stage – Entertainability of appeal either U/s. 96(3) C.P.C or U/s 21(2) of the Legal Services Authorities Act – No legal bar – Held, appeal is maintainable since award passed under the Act is deemed to be a decree passed by the Civil Court. (Para 16)

(B) CIVIL PROCEDURE CODE, 1908 – O-41, R-27

Additional evidence – Delay in filing of the application – Not shown as it could not have been produced earlier with due diligence – Documents found not relevant and necessary for pronouncement of the judgment – Held, prayer for additional evidence refused.

(Para 8)

Case Laws Referred to :-

1. AIR 2008 Orissa 49 : Debasis Jena vs. Rajendra Ku. Das
2. AIR 2008 SC 1209 : State of Punjab vs. Jalour Sing
3. AIR 2008 Orissa 49 : Debasis Jena vs. Rajendra Ku. Das
4. AIR 2008 SC 1209 : State of Punjab vs. Jalour Singh
5. AIR 1994 SC 853 : S.P.Chengalvaraya Naidu (dead) by LRs vs. Jagannath (dead) by LRs and others
6. AIR 2006 SC 3028 : Hamza Haji v. State of Kerala & another Ramjas Foundation and another
7. 113 (2012) CLT 632 : Appeallants Vrs. Union of India and others,

For Appellant : M/s. A.Mukharji, G.Mukharji, S.Pattnaik, M.K.Mazumdar, A.C.Panda, A.Pradhan D.K.Mishra,G.K.Nayak,R.Mahalik &S.C.Das

For Respondent : M/s. B.H.Mohanty, D.P.Mohanty, Miss S.Patra, A.P.Bose, N.Hota, R.K.Mohanty, S.S.Routray, Mrs. V.Kar, Malay Ku. Mishra, N.B.Dora, P.Mishra

Date of hearing : 20. 08. 2015
Date of judgment: 08 . 10.2015

JUDGMENT

D. DASH, J.

The State of Odisha being aggrieved by the final decree passed by the learned Additional Civil Judge (Senior Division), Puri in O.S. No. 65 of 1966 had filed appeal i.e. T.A. No. 54 of 1995. The State had also filed twenty (20) more appeals calling in question the decrees passed in twenty (20) separate suits which were disposed of in Lok Adalat in terms of compromise between the parties therein where State of Odisha was not a party and as all those decrees had been given due weightage and recognition in the said final decree passed in O.S. No. 65 of 1966. The appeals were filed in the court of learned District Judge, Puri. All those appeals having been allowed by separate judgments passed on 27.6.2002, twenty one (21) numbers of second appeals have been filed before this Court by the respective respondents as better described in the table provided here in below:-

Sl.No.	In the Court of District Judge (A)	IntheHigh Court (B)	In the Trial Court (C)
1	T.A. No.54/95	RSA No.22/02	O.S. No. 65/66
2	T.A. No. 66/95	RSA No. 52/02	T.S. No. 242/94
3	T.A. No. 67/95	RSA No. 48/02	T.S.No.241/94
4	T.A. No. 68/95	RSA No. 56/02	T.S. No.240/94
5	T.A. No. 69/95	RSA No. 50/02	T.S. No. 239/94
6	T.A. No. 70/95	RSA No. 47/02	T.S. No. 238/94
7	T.A. No. 71/95	RSA No. 53/02	T.S. No. 237/94
8	T.A. No. 72/95	RSA No. 54/02	T.S. No. 236/94
9	TA No. 73/95	RSA No. 49/02	T.S. No. 234/94
10	T.A. No. 74/95	RSA No. 57/02	T.S. No. 244/94
11	T.A. No. 75/95	RSA No. 58/02	T.S. No. 245/94
12	T.A. No. 76/95	RSA No. 68/02	T.S. No. 246/94

13	T.A. No. 77/95	RSA No. 69/02	T.S. No. 247/94
14	T.A. No. 78/95	RSA No. 61/02	T.S. No. 248/94
15	T.A. No. 79/95	RSA No. 66/02	T.S. No. 249/94
16	T.A. No. 80/95	RSA No. 64/02	T.S. No. 250/94
17	T.A. No. 81/95	RSA No. 62/02	T.S. No. 251/94
18	T.A. No. 82/95	RSA No. 63/02	T.S. No. 252/94
19	T.A. No. 83/95	RSA No. 65/02	T.S. No. 253/94
20	T.A. No. 84/95	RSA No. 60/02	T.S. No. 254/94
21	T.A. No. 85/95	RSA No. 67/02	T.S. No. 255/94

2. Out of the above appeals, the appeals as indicated in serial nos. 3, 4, 6,9,14, 16 and 18 have been dismissed as abated on account of death of respective appellants and for non-substitution of their legal representatives in time by rejecting the highly belated move for said substitution of legal representatives in refusing to setting aside the abatement by condoning the delay by detail order passed on 4.8.2015.

Thus now the appeals under above serial nos. 1, 2, 5, 7 to 13, 17, 19 to 21 remained on board. All these appeals involve common questions although arise out of different suits and yet the ultimate result sought to be achieved is by way of reaping real benefit in getting huge extent of land of 880 acres excluded from the purview of the partition suit i.e. O.S. NO. 65 of 1966 in its final decree which has thus been so achieved. Therefore, all the appeals having been heard together, this common judgment is passed which would govern all those.

3. Dinabandhu Puspalak who is appellant no. 7 here as the plaintiff had filed Title Suit No. 65 of 1966 in the court of Subordinate Judge, Puri (as it was then) against other co-sharers of Puspalak family i.e. present appellant nos. 1 to 6 arraigning them as defendants. The suit was for partition of their joint family property. At that time Chapter-IV of the Odisha Land Reforms Act concerning the fixation of ceiling and vesting as well as disposal of ceiling surplus land had not come into force. In the said suit on 7.4.1967, preliminary decree was passed. The Chapter IV of the OLR Act relating to fixation of ceiling limit as well as vesting of ceiling surplus land and their disposal came into force on 26.9.1970. Sometime in the year 1975, the plaintiff filed a petition for making the preliminary decree final. In that year

itself proceeding for declaring ceiling surplus land in respect of the suit land belonging to the Pushpalak family under Section 40 (A) of the OLR Act was initiated. That very initiation of the ceiling proceeding was challenged by the members of the Puspalak family by carrying writs to this Court in OJC Nos. 1957-1963 of 1975. Said batch of writs were disposed of with the direction that the ceiling proceeding would not proceed till conclusion of the final decree proceeding. Thereafter, on 10.4.92, the State of Odisha represented by Collector, Puri filed an application in the said Title Suit No. 65 of 1966 seeking leave to be impleaded as a party. However, the said petition stood rejected by order dated 15.10.92. This Court then by order dated 22.4.94 considering the submission that since the final decree proceeding is under the control of the members of the Pushpalak family and that they have been unnecessarily dragging on the disposal of the said proceeding taking advantage of the order of this Court as above, passed an order that the final decree proceeding of Title Suit No. 65 of 1966 if not completed by 31.7.1994, the ceiling cases would continue for disposal on their own merits.

4. The matter took a great turn thereafter when respondent nos. 1 to 20 in the appeals under serial no.1 of the table as the respective plaintiffs who have also filed separate second appeals before this Court, filed 20 suits claiming acquisition of right of occupancy raiyat by way of adverse possession over different portions of land forming the subject matter of Title Suit No. 65 of 1966 as also the subject matter of the ceiling proceeding. But the State of Odisha was not made a party therein. In those suits in total, the claim of those 20 nos. of plaintiffs came over the extent of 880 acres of land. Those suits were disposed of on compromise between the parties thereto. These compromises were effected in the Lok Adalat held on 31.7.94.

Being armed with such compromise decrees, then those plaintiffs who are respondent nos. 1 to 20 in the appeal under serial no.1 of the table and appellants of the appeals under serial nos. 2 to 21 of the table went to file petitions to get them impleaded as parties in the said ceiling proceeding then pending before the Additional Tahsildar, Puri and prayed that said land of 880 acres over which their right, title and interest has been declared in terms of compromise against the members of the Puspalak family be excluded from the purview of the ceiling proceeding. Then accordingly, the members of Puspalak family filed their revised return excluding those 880 acres of land covered under those 20 compromise decrees. They also applied in the final decree proceeding of O.S. No. 65 of 1966 for allotment of the

respective land as decreed in their favour in those suits to them. The trial court thereafter accordingly passed the final decree.

The State of Odisha being aggrieved by the said final decree passed in O.S. No. 65 of 1966 filed Title Appeal No. 54 of 1995 as indicated in serial no. 1 of the table provided challenging the same as regards the adjustments made in the said final decree with regard to those lands decreed in favour of respective plaintiffs in those twenty suits i.e. T.S. No. 236 to 255 of 1994 as per the compromise decrees passed in the Lok Adalat. Similarly, the State of Odisha also filed twenty (20) more appeals challenging those compromise decrees passed in those suits in Lok Adalat as find mention under serial nos. 2 to 21 of the table given in the foregoing para. In the said appeals as the State of Odisha was not a party to the suit and therefore, it prayed for grant of necessary leave to maintain the appeals, condonation of delay and to pursue the same. By order dated 7.4.2000, the learned District Judge granted the leave as prayed for and condoned the delay on that ground. These orders were then challenged by filing Civil Revisions before this Court at the instance of plaintiff, Dinabandhu Puspalak as also in other revisions filed by the plaintiffs of those suits decreed in terms of compromise in the Lok Adalat Those Civil Revisions were numbered as 198, 200, 217 and 218 of 2000. This Court by a detail reasoned and well discussed order upheld the order of the learned District Judge in granting the leave as aforesaid and condoning the delay. Said order of this court was not further challenged by carrying the matter to higher court. Thereafter said main appeal No. 54 of 1995 as well as all other appeals having been allowed by setting aside the final decree passed in O.S. No. 65 of 1966 as also those compromise decrees as passed in those twenty suits, all these above noted appeals have come to be filed.

5. These appeals have been admitted on the following substantial questions of law:-

"i. Whether a decision rendered in the case without pleadings, without issue and without evidence is sustainable in law and whether such a judgment can be termed as per incuriam?

ii. Whether findings of fraud and collusion can be said to have been substantiated without affording an opportunity to the appellants to controvert it and whether such decision is vitiated for violation of the principles of natural justice?

iii. Whether the decision based on surmises and conjectures is sustainable in law?"

6. Learned counsel for the appellants of RSA No. 22 of 2002 under serial no.1 of the table submits that the grant of leave to the appellant in filing the appeal before the learned District Judge is illegal and that appeal is thus not maintainable.

He next contends that the State of Odisha having filed the appeal challenging the final decree on the ground of perpetration of fraud by the parties being in collusion with the plaintiffs of other suits filed later claiming to have acquired right title and interest as occupancy raiyat over a large chunk of suit property in order to deprive the State from recovering the ceiling surplus land as duly determined under the law, the lower appellate court has completely erred in law by holding the final decree to be the outcome of collusion and fraud between the plaintiff and those 20 others who had independently filed separate suits claiming acquisition of occupancy raiyati right by adverse possession over portions of land out of the suit land against said plaintiff the suit pending for final decree and members of the Pushpalak family and getting the suit decreed in terms of compromise in the Lok Adalat.

It is further submitted that there is no pleading to that effect and no evidence is there on record. It is also stated that the plaintiff was not given the opportunity to meet those allegations of fraud. Thus, according to him, the judgment passed by the lower appellate court being based on conjectures and surmises are unsustainable in the eye of law. He also contends that the lower appellate court has been swayed away by the judgment passed by this Court in Civil Revisions where the question of grant of leave was the subject matter for decision and the discussions and observations made therein being confined for that purpose only at that stage, in appeal against the final decree in order to decide the same on merit, the lower appellate court ought not to have taken those into consideration at all and it ought not to have based its conclusion accepting those very observations.

7. Learned counsel for the appellants of those appeals under serial numbers 2, 5, 7, 8, 10 to 13, 15, 17, 19 to 21 of the table as given above while reiterating the submission of the learned counsel for the appellant of RSA No. 22 of 2002 further submits that the awards having been passed in Lok Adalat in terms of compromise as per Section 21 of the Legal Services Authority Act, 1987 in the suits filed by those appellants as plaintiffs, no

appeal could have been carried at all and as such those appeals are incompetent in the eye of law. Furthermore, he contends that on the face of the provision of Section 96(3) of the Code of Civil Procedure, such appeals at the behest of the State are also not maintainable in challenging the awards of Lok Adalat which could be well said to be decrees on consent. He also contends that such awards of the Lok Adalat for the purpose of execution are deemed decrees as per Section 21 (1) of the Legal Services Authority Act but not for the purpose of appeal under the general provision as contained in the Code. In course of submission he has placed reliance upon the decision of the Apex in case of **State of Punjab vs. Jalour Singh**: AIR 2008 SC 1209 and of this Court in case of **Debasis Jena vs. Rajendra Ku. Das**: AIR 2008 Orissa 49.

Learned Senior counsel on behalf of the State of Odisha submits that here the fraud is quite apparent on the face of the record in showing as to how everything were stage-managed to save the immovable property from the clutches of the Ceiling Law by hatching definite plan in setting up those 20 persons who are appellants in filing suits with stereo type plaint and claim etc. claiming different portions of the suit land measuring huge extent of 880 acres of land and getting those all on a fine morning compromised at the earliest in Lok Adalat.

He contends that all those moves are totally collusive to nullify the ceiling proceeding and frustrate the Ceiling Laws to have its play in respect of the land of the Pushpalak family from being vested and made available to the landless and other persons as per said statute. He further submits that the judgment of the lower appellate court is not at all based on conjectures and surmises and the lower appellate court enjoying all the powers as that of the trial court on appreciation of the facts and circumstances which stand admitted has rightly set aside the final decree as passed and also those Lok Adalat awards deemed to be decrees passed in suits filed by the appellants of second appeals under item nos. 2 to 21.

He further contends that the suit lands were the subject matter of the consolidation proceedings and the members of Puspalak family having appeared there and moved for stay of those proceedings till disposal of the second appeals, the prayer was not entertained for which they had moved this Court in OJC Nos. 4269 of 2000 and this Court by order dated 25.9.02 directed expeditious disposal of those consolidation cases. The appellants other than the appellant of this RSA No. 22 of 2002 did not raise their claim

in the consolidation forum. He thus submits that thereafter the order being passed on 19.11.2011 that the entire disputed land belongs to the State of Odisha and in pursuance to the same, the possession having been taken over by the State, now nothing remains to be decided in all these appeals. Filing those extract orders of the consolidation cases and the final order dated 19.11.2011, his prayer is to allow the petition under Order 41 Rule 27 of the Code giving rise to Misc. Case No. 678 of 2015 and accept those documents as additional evidence. This move is seriously objected to the learned counsels for the appellants in writing as also in course of submission on the ground that such prayer should have been made before hearing of these appeals and not after commencement of the hearing. Moreover, the objection is also on the ground that the prayer having been advanced at a highly belated stage that too without any sort of plausible explanation, the same is not to be entertained. It is lastly submitted that said documents sought to be adduced as additional evidence do not have any such bearing on the substantial questions of law framed for being answered in this appeal.

It is next stated that the ingredients for favourably considering such prayer for adduction of additional evidence in this appeal are not at all fulfilled. The State being well aware of the litigation having fled the petition at such highly belated stage and that too without any explanation, the same according to him is thus liable to be dismissed.

8. At the outset taking up the matter of adduction of additional evidence as prayed for by the State, it is seen that such documents which are now sought to be admitted as additional evidence are mostly of the year 2011. The explanation given is that of delay in the official process in compiling the papers for which those could not be produced earlier on account of official congestion. Thus it is said to be neither willful nor deliberate. The State as the appellant had carried the appeals in the lower appellate court way back in the year 1995 and has been contesting these appeals since the year 2002. The litigation concerns with huge extent of landed property. It is said that the properties were also the subject matter of the consolidation proceeding. But the fact remains that those proceedings from which the documents are now forthcoming as it appears have been culminated way back in the year 2011. So now to say that in the official process, the delay took place as those papers could not be compiled and those could not be produced earlier is per se not acceptable for holding that the respondent in spite of exercise of due diligence could not produce the document earlier. Moreover, in view of the substantial questions of law

which have been framed in this appeal, although these orders have been passed during pendency of the present appeals but then those are not shown to be having any such important bearing for answering the questions so as to enable this Court to pronounce judgment. Moreover, on the contentious issues involved, those do not go to throw any light for rendering just and proper answer. Therefore, the prayer stands accordingly rejected and resultantly, the Misc. Case No. 678 of 2015 stands dismissed.

9. On the rival submission of the learned counsel for the parties touching the merit of the case and with reference to the substantial questions of law as framed, it is felt apposite to first of all answer as to whether at this stage the appellants can question the grant of leave to the State to file the appeal i.e. Title Appeal No. 54 of 1995 under serial no.1 of the table as also the appeals under serial nos. 2, 5, 7, 8, 10, to 13, 15 17 and 19 to 21 of the table as given above challenging the final decree passed in O. S. No. 65 of 1966 and those awards passed in Lok Adalat in the suits filed by the other appellants that goes to the root of the matter and an answer to it in favour of the appellants would decide the fate of this appeal in favour of the appellants as also the unsustainability of the lower appellate court's judgment in all those appeals.

It may be stated at the cost of repeatation that this order of grant of leave as passed by the learned District Judge was challenged in Civil Revisions before this Court wherein the said orders of grant of leave as passed by the learned District Judge has been given the seal of approval by this Court and upheld.

For the purpose of challenge, reliance is heavily placed on the provision of Section 105 of the Code of Civil Procedure which reads as follows:-

> "Other orders.-(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.
>
> (2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

It's no doubt correct to say that the scope of a revision application is narrower than the scope of an appeal. However, when the revisional jurisdiction of the superior court is invoked, it is so done as the superior court is in a position to interfere with the said order for the purpose of rectifying the error committed by the court below. Section 115 of the Code no doubt circumscribes the limitation of that revisional jurisdiction but still the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior Court. It is only one of the modes of exercising power conferred by the statute. Basically and fundamentally, it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense. If the order of grant of leave would not have been challenged before this Court, certainly as provided in Section 105 of the Code, its correctness and sustainability would have remained open to be examined further. But since a remedy has been availed of and the order on that score has become final, their correctness or sustainability is no more open to challenge in the present appeal by banking upon the provision of Section 105 of the Code which in fact is not engrafted in the Code being intended to be taken aid of in the present eventuality. Thus the submission of the learned counsel for the appellant on this score fails.

10. Now let me proceed to address the question of maintainability of the appeals filed by the State challenging the final decree as also those awards passed in Lok Adalat in the suits filed by said appellants. The final decree has been challenged basically in view of the exclusion of the land which are the subject matter of those 20 suits wherein the title of those respective plaintiff have been declared. It is submitted on behalf of the appellants that those decrees having been passed in Lok Adalat in terms of compromise between the parties and accordingly those having been duly given respect to and weightage in the final decree proceeding, those are no more available to be challenged by resorting to provision of Section 96 of the Code and said provision has no applicability to challenge Lok Adalat awards. It is further submitted that since those decrees have been passed in terms of compromise, the provision of Section 96 (3) of the Code of Civil Procedure as also the provision under Section 21 (2) of the Legal Services Authority Act stand as bar.

The above submission is countered by contending that since the State was not a party in those suits where the parties being hand in gloves have got the suits disposed of in terms of compromise in the Lok Adalat and accordingly have obtained the awards, the State being the person seriously

and highly affected by those awards which are deemed to be decrees under Section 21 (1) of the Legal Services Authority Act, said person, here the State whose right has been affected thereby and who has not been deliberately not made party and had it been the party there would not have been a compromise as it has been so recorded, the appeals are very much maintainable under the provision of Section 96 of the Code and in that event Section 21 (2) of the Legal Services Authority Act do not and cannot stand as legal bar. It is contended that said Lok Adalat awards are nullity and as such void.

11. By virtue of Section 21 (1) of the Legal Services Authority Act, all awards of the Lok Adalat are deemed to be decrees of a civil court or as the case may be, an order of any other court and where compromise and settlement has been arrived at by a Lok Adalat, in a case referred to it under Sub-Section-1 of Section 20 of the Act, the Court fees paid in such cases shall be refunded in the manner as provided under the court fees Act. As per Sub-section (2) of Section 21 of the Act such awards passed in Lok Adalat shall be final and binding on all the parties to the dispute and no appeal shall lie to any court against the award. No doubt this sub-section-2 of Section 21 of the Act prohibits the appeal against the award of the Lok Adalat but when as per said provision it is said to be binding on all the parties to the dispute, the bar against entertainment of an appeal as indicated therein certainly stand for all the parties and that cannot apply to a non-party who has been definitely affected thereby or claims to have been materially affected in so far as his right is concerned. This in my considered view comes out as the correct interpretation on a harmonious reading of the said provision and the other correct interpretation also emerges that the award referred to therein so as to be no more open to challenge, it must be an award passed by the authority in accordance with law. The intention of legislature in prohibiting the appeal against the Lok Adalat is no doubt to give finality to the award, in order to see that further unnecessary litigations are avoided. But its again between the parties in terse. So, when the award is not binding upon a non-party, it cannot be said to have reached its finality in so far as the non-party is concerned so as to bind him and even deny him the right of appeal. When a necessary party to the suit is omitted from being made party and the award has been passed affecting his right, said the award cannot certainly be held to be final and binding on him. More particularly in view of the fact that had he been a party the compromise either would not have materialised at all or would not have been so effected without his consent. So in this case it has to

be said that the necessity of the consent of the non-party has been suppressed being not brought to the notice of the authority and had that been so brought to the notice, the awards would never have resulted at all. In that event, the bar to appeal cannot come to operate so far as that non-party is concerned. Then also the award being void *ab initio* so far as the non-party is concerned as the parties to the suit had not got the very power to enter into the compromise affecting the right of the non-party, the compromise can be said to have been entered into by playing fraud and in such circumstances that award could be said to be nonest so far as the non-party is concerned whose right has been affected. Thus where the compromise has been entered into in the Lok Adalat is void ab-initio or nullity or nonest in that circumstance the non-party cannot be said to be remediless in any way. Therefore an appeal as one of the mode of challenge could be maintainable under Section 96 of the Code and the similar bar contained in Order 23 Rule 1-A (ii) of the Code would also not come into play. When Section 96 (3) of the Code bars an appeal against the decree passed in terms of compromise between the parties, it implies that such decree are very much binding on the party unless set aside by the procedure prescribed or available to the parties. One such remedy available was by way of filing appeal under Order 43 Rule 1 (m) of the Code. If the order recording the compromise gets set aside in that appeal, there remains no necessity or occasion to file an appeal against the decree. Similarly a suit is used to be filed for setting aside a decree on the ground that the decree is based an invalid and illegal compromise not binding on a person who was not a party. But after amendment which has been introduced by Amending Act of 1976 neither an appeal against the order recording the compromise nor remedy by way of filing suit is available in cases covered under Rule-3 (A) of Order 23 of the Code. As such a right has been given under Rule 1 (A) (ii) of Order 43 to a party who challenges the recording of the compromise to question the validity thereof while preferring an appeal against the decree only on the ground that it should not have been recorded. This is not available to a non-party. So, section 96 (3) of the Code shall not be a bar to such an appeal because of its applicability to a case where the factum of compromise or agreement by the parties is not in dispute. The cases in hand stand in a different and much higher pedestal that here the State is not a party to the suit and its challenge to those awards is on the ground that those have been made to pass or obtained by collusion between the parties in order to defraud the State by not purposely making it a party to the suit knowing fully well that the right of the State would get affected seriously and that those awards which are deemed decrees would be

projected as weapons to defeat and frustrate the statutory proceeding highly detrimental to the interest of the State. It has also been said to have been obtained by playing fraud and thus not a settlement in the eye of law. In other wards such awards can well be termed as to have been so obtained by fraud upon the statutory provisions engrafted in Chapter IV of the Odisha Land Reforms Act and the proceeding under that statute.

It has been held in case of **State of Punjab vs. Jalour Singh** *(supra)* that if a party wants to challenge such award based on settlement, it can be done only by filing a petition under Article 226 and/or Article 227 of the Constitution that too on very limited grounds. But where no compromise or settlement is signed by the parties and order of the Lok Adalat does not refer to any settlement but directs the respondent to either make payment if it agreed to the order or approach the High Court for disposal of the appeal on merits, if he does not agree, the same is not an award of the Lok Adalat and in that event it has been held that the High Court ought to have heard and disposed of the appeal on merit.

However, the instant case is not like that. In the said case, it was a challenge by the party himself whereas here it's by a non-party. In that case the Hon'ble Apex Court did not find it to be an award at all in terms of the provision of Section 21 of the Legal Services Act since there was no agreement between the parties even and it was a decision left open to be agreed or disagreed running against the objective and spirit of the concept of Lok Adalat awards.

In case of **Debasis Jena** *(supra)*, it was a case where the persons challenging were very much parties to the suit in which compromise was so recorded in Court and where the decree was drawn up in Lok Adalat. These decisions are well distinguishable in the facts and circumstances of the case in hand and thus I find those are of no support in any way for a decision in these appeals.

12. Adverting to the merit of appeals, when we come to the facts of the cases in hand, it is seen that the challenge is in essence to the final decree on the ground of exclusion of land as per the awards passed in twenty (20) suits in the Lok Adalat where only the members of Puspalak family and those respective plaintiffs were the parties. The claim in all those suits are based on adverse possession and in total the suit land of those twenty (20) suits comes to an extent of 880 Acres. Thus the appeals are at the instance of the State later for setting aside the said final decree in which those awards which

were obtained by fraud and also void and nullities have been given respect to by way of exclusion of said chunk of land from the purview of the final decree passed in the suit and thereby all have become successful in defrauding the State which had long prior to that initiated the ceiling proceeding for declaring the ceiling surplus land of the Pushpalak family for vesting with the State and for being made available to be settled on persons as eligible under the provisions of OLR Act. Thus fraud practised in obtaining the awards in Lok Adalat being in collusion and with the full knowledge of the pendency of the ceiling proceeding and without making the State a party is the attack.

13. In case of **S.P.Chengalvaraya Naidu (dead) by LRs vs. Jagannath (dead) by LRs and others**; AIR 1994 SC 853, it has been held:-

"Fraud-avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and nonest in the eyes of law. Such a judgment/decree - by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.

The Court went on to observe that the High Court in that case was totally in error when it stated that there was no legal duty cast upon the plaintiff to come to the Court with a true case and prove it by true evidence. Their Lordships stated:-

"The Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. We are constrained to say that more often than not, process of the Court is being abused. Property-grabbers, tax-evaders, bank loan-dodgers and other unscrupulous persons from all walks of life find the Court process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation."

In the said judgment the Hon'ble Supreme Court have further held that "A litigant who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side, then

he would be guilty of playing fraud on the Court as well as the Opposite Party."

In the said case it was also clearly stated that the courts of law are meant for imparting justice between the parties & one who comes to the court, must come with the clean hands. A person whose case is based on false hood has no right to approach the Court. A litigant, who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation. If a vital document is withheld in order to gain advantage on the other side he would be guilty of playing fraud on court as well as on the opposition party.

14. In Smt.Shrist Dhawan v. M/s. Shaw Brothers:AIR 1992 SC 1555, it has been opined that fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It has been defined as an act of trickery or deceit. The aforesaid principle has been reiterated in Roshan Deen v. Preeti Lal: AIR 2002 SC 33. Ram Preeti Yadav v. U.P.Board of High School & Intermediate Education & others☹2003) 8 SC 311 and Ram Chandra Singh v. Savitri Devi & others: (2003) 8 SCC 319.

In State of Andhra Pradesh & another V.T. Suryachandra Rao :AIR 2005 SC 3110 after referring to the earlier decision the court observed as follows:

"In ***Lazaurs Estate Ltd. v. Beasley***: (1956) 1 QB 702 Lord Denning observed at pages 712 &713, 'No judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. In the same judgment Lord Parker L.J.observed that fraud vitiates all transactions known to the law of however high a degree of solemnity.

Yet in another decision ***Hamza Haji v. State of Kerala & another***, AIR 2006 SC 3028, it has been held that no court will allow itself to be used as an instrument of fraud and no court, by way of rule of evidence and procedure, can allow its eyes to be closed to the fact it is being used as an instrument of fraud. The basic principle is that a party who secures the judgment by taking recourse to fraud should not be enabled to enjoy the fruits thereof.

In case of ***Ramjas Foundation and another, Appeallants*** Vrs. ***Union of India and others, Respondents;*** reported in 113 (2012) CLT 632 relying on a catena of decisions it has been held as follows:

"The principle that a person does not come to the court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Article 32, 226 and 136 of the Constitution but also to the cases instituted in other courts and judicial forums. The object underlying the principle is that every court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have bearing on adjudication of the issue(s) arising in the case."

15. According to Story's Equity Jurisprudence, 14th Edn. Vol.1, Para-263:-

"Fraud indeed, in the sense of a Court of Equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another or by which an undue and unconscientious advantage is taken of another."

In ***Lakshmi Charan Saha vrs. Nur Ali***, ILR (1911) 38 Calcutta 15 CWN 1010 it was held that:

"The jurisdiction of the Court in trying a suit [questioning the earlier decision as being vitiated by fraud.], was not limited to an investigation merely as to whether the plaintiff was prevented from placing his case properly at the prior trial by the fraud of the defendant. The Court could and must rip up the whole matter for determining whether there had been fraud in the procurement of the decree.

In ***Manindra Nath Mittra vrs. Hari Mondal***, (1919) 24 CWN 133: AIR 1920 Calcutta 126 the Court explained the elements to be proved before a plea of a prior decision being vitiated by fraud could be upheld. The Court said:-

"With respect to the question as to what constitutes fraud for which a decree can be set aside, two propositions appear to be well established. The first is that although it is not permitted to show that the Court (in the former suit) was mistaken, it may be shown that it was misled, in other words, where the Court has been intentionally misled by the fraud of a party and a fraud has been committed upon the Court with the intention to procure its judgment, it will vitiate its judgment. The second is that a decree cannot be

set aside merely on the ground that it has been produced by perjured evidence."

The position was reiterated by the same High Court in ***Esmile Uddin Biswas Vrs. Shajoran Nessa Bewa,*** 132 IC 897: AIR 1931 Calcutta 649 (2). It was held that:-

"It must be shown that the fraud was practised in relation to the proceedings in Court and the decree must be shown to have been procured by practising fraud of some sort, upon the Court."

In ***Nemchand Tantia Vrs. Kishinchan Chellaram (India) Ltd***. (1959) 63 CWN 740: AIR 1959 Calcutta 776 it was held that:-

"A decree can be reopened by a new action when the Court passing it had been misled by fraud, but it cannot be reopened when the Court is simply mistaken; when the decree was passed by relying on per jured evidence, it cannot be said that the Court was misled."

16. In the light of aforesaid, lets now further examine the case from another angle. In view of the pendency of the ceiling proceeding to the full knowledge of the defendants of those suits placed in Lok Adalat where awards in terms of compromise were passed, they were fighting tooth and nail to save maximum acreage of land from out of the purview of the said proceeding from being vested to the State and when in that situation the compromise has been entered into with 3rd parties who were till then not in the arena of litigation and that too they came to file the suits with stereo type pleadings just by changing the subject matter when rest everything remain the same and by the day by which this Court had directed the final decree proceeding to end or the ceiling proceeding to continue, those twenty suits have been compromised. Perpetration of fraud upon the Court as well as the State having been greatly caused thereby is as clear as noonday. The defendants in those suits have suppressed all those material facts about prior long drawn litigations in different forums and have gone to accept the claim of those persons highly detrimental to their interest which is highly shocking and running against common sense. This clearly reveals underhand deals and hidden agenda that they used the legal forum and abused the legal process. It is also a case of fraud on the statute as the whole things have been sought to have been managed by members of Puspalak family and those twenty plaintiff-appellants being in collusion to frustrate the ceiling proceeding. Thus those void awards passed in twenty suits which are nullities having

been given effect to with their full weightage in the final decree, the said final decree as passed cannot stand in the eye of law. The court just cannot act as a mute spectator and go on to observe with silence that the stream of justice is polluted by resorting to suppression of vital facts. No sooner did those suits are compromised, the parties are running to the court in seisin of final decree proceeding as well as to the authority deciding the ceiling proceeding for doing the needful to get those lands excluded. There even the members of Pushpalak family are filing revised return. This shows clearly the collusion and knowledge of all about prior proceedings or else that those plaintiffs of twenty suits to be actually dummy. Those awards passed in Lok Adalat as stated above are all nonest in the eye of law. Those being pressed into service in the final decree proceeding, when the move has become successful as the fraud perpetrated has achieved its goal, the State being the sufferer and person greatly affected by said final decree being not in a position to proceed with the statutory proceeding under a special statute as per law, so as to achieve its objective, has all the right of appeal resorting to the provisions of Section 96 of the Code and in such situation the legal bar under Section 96 (3) of the Code or under Section 21 (2) of the Legal Services Authority Act are not attracted so as to come to the aid of perpetrators of fraud.. The fraud being crystal clear as viewed from the materials on record and on their face value, the question of pleading in detail in compliance to the provision of Order 6 Rule 4 of the Code in the appeal does not arise and thus the question of depriving the appellants of the opportunity to meet those in the facts and circumstances pales into insignificance as even those accepted facts clearly expose the perpetration of fraud of colossal magnitude.

17. The above discussions and reasons accordingly provide the answers to the substantial questions of law as framed and in the upshot of the same, this Court thus finds that all these appeals are liable to be dismissed.

18. Resultantly, all the appeals stand dismissed and in the facts and circumstances with cost throughout.

Appeals dismissed.

2015 (II) ILR – CUT- 1220

B.RATH, J.

W.P.(C) NO. 13570 OF 2014

CAPT. HARI SANKAR AIRY ……..Petitioner

.Vrs.

COAL INDIA LTD. & ORS. ……Opp. Parties

SERVICE LAW – Transfer – Petitioner was relieved even though he has not received the order of transfer – Though the petitioner has less than two years services for superannuation he is not to be disturbed as per the transfer policy issued by the employer – Moreover transfer having been made on administrative exigencies, no reason has been assigned on the relevant file – Held, the impugned order of transfer and the order reliving the petitioner are quashed – Direction issued to the opposite parties to allow the petitioner to continue in his former post with release of all consequential benefits.

(Para 3)

For Petitioner : M/s. S.K.Das,S.K.Mishra,& P.K.Behera
For Opp.Parties : M/s. Debaraj Mohanty & Abhilash Mishra

Date of hearing : 26.8.2014
Date of Judgment: 5.9. 2014

JUDGMENT

BISWANATH RATH, J.

By filing the writ Petition the petitioner has sought for the following relief :

> "that this Hon'ble Court be graciously pleased to quash order of transfer dated 22.07.2014 under Annexure-4 and the consequential order dated 23.07.2014 under Annexure-5 in order to enable the petitioner to continue in MCL, Head Quarter at Burla till his retirement on superannuation."

2. The case of the petitioner as narrated from the writ petition and submitted during the course of argument, is that the petitioner was an ex-army personnel. He joined as security officer in the Coal India Limited in the grade of officer E/2 on 19.3.1986. For his successful career, after bringing him to several posts, he was lastly promoted from Senior Manager (Security) grade E/6 to Chief Manager (Security) in grade E/7. On his such promotion,

he was posted in MCL Jagannath area vide order dated 3.5.2012 as appearing at Annexure-1. Further case of the petitioner is that while the petitioner was so continuing and discharging his duties as Chief Manager (Security) in Jagannath Area of MCL, he was transferred to MCL headquarter at Burla vide office order dated 31.8.2013. Following the above transfer order, he was relieved by office order no. 7229 dated 1.9.2013, petitioner joined on the same day in the headquarter at Burla in the post of Chief Manager (Security) E/7 grade. Petitioner alleges that while he was continuing as such, he was served with office order No. 208 dated 22.7.2014 by which the petitioner has been once again transferred to another subsidiary company of the Coal India Ltd., i.e., Central Coalfields Ltd., headquarters at Ranchi. He further alleges that even though copy of such transfer order has not been served on the petitioner, he was relieved by opposite party no.4 by office order No. 2859 dated 23.7.2014 with further advise to the petitioner to report for duty before the Chairman-cum-Managing Director, CCL. Through the same order, the petitioner was directed to hand over the charges to one Shri B. K. Singh, MCL headquarter. Petitioner submitted that he has not handed over any charge and further Shri B.K.Singh is an officer of E/5 grade, two stages below the petitioner. The petitioner has assailed the transfer order dated 22.7.2014 and his relieve order dated 23.7.2014 in filing the present writ. The petitioner submitted that the action of the management is not only in colourable exercise of power but also is in violation of the transfer policy of the Coal India Ltd. To substantiate his allegation, the petitioner referred to a circular/transfer policy which specifically stipulates that no employee either in the executive or in the non-executive, can be transferred if he has less than two years for superannuation. Since the petitioner is to retire in the month of July, 2015, he is well covered by the above circular/transfer policy. The petitioner further alleged that the transfer order at such fag end of his career, also puts him into harassment. Further second transfer even within a short span of time for no valid reason, is also bad in the eye of law. He also attack the transfer order on the plea that since there exist vacancy in E/7 grade, his transfer also suffers for the reason that on his previous transfer, he has been very recently provided with a quarter at Burla and he has shifted his assets and belongings to the said quarter hardly two months back. He further alleged that his such transfer order is motivated and stage managed, only to accommodate the junior staff posted against such high place.

3. Per contra, the opposite parties by filing a common counter, while denying the allegations and accusations made against the opposite parties,

submitted that the petitioner has been transferred from MCL Mahanadi Coalfields Ltd. to Central Coalfields Ltd. in his existing capacity and he has been relieved in the meanwhile. The transfer has been effected as per CCL transfer order dated 22.7.2014. Considering the requirement of an executive in security discipline in CCL, the transfer has been effected after discussing with the Director (P & IR CCL) who has agreed for such transfer of the petitioner from MCL to CCL taking into consideration the transfer policy of the Company. The proposal for transfer of the petitioner was approved keeping in view the administrative exigencies as such claimed that there has been no illegality in the transfer of the petitioner. Learned counsel for the opposite party during the course of argument, supported the stand of the opposite parties on the basis of the stand taken in the counter, particularly advancing an argument that the transfer of the petitioner was made on administrative exigencies hence, should not be interfered with by a writ court. Further since the petitioner has accepted appointment of the employer with the terms and conditions for being transferred, he should not hesitate on his transfer. The petitioner by filing a rejoinder affidavit, while reiterating his submission in the writ petition, has submitted that his transfer is not on account of any administrative exigency as there is no such indication in the transfer order vide Annxure-4. While referring some of the judgments of the apex Court, the petitioner has also claimed the order of transfer as illegal.

During the course of hearing, petitioner as well as opposite parties have referred to circulars of transfer vide Annexure-6 and Annexure-G respectively, relevant portion of which, are reproduced as herein below :

"Annexure-6

Coal India Limited.

No.CIL/C5A(vi/50729/CCC)/1111 Dated 07/09.01.2009

OFFICE MEMORANDUM

(I) Executives on promotion from E5 to M1 grade(except those posted in CMPDIL, IICM and Coal Videsh) and from non-executive to executive cadre except in Survey Discipline will be transferred out of the Company. However, such executives in E5 grade who have spent less than one year at the existing company and get promoted to M1 grade will be exempted from transfer. Those having less than two years of service will also be excluded from this provision.

xx xx xx xx xx

xx xx xx xx xx
xx xx xx xx xx

Sd/-H.Kujur.
General Manager(Pers.)"

"Annexure-H

COAL INDIA LIMITED
COAL BHAWAN
10 N S ROAD, CALCUTTA-700 001

No.CIL/C-5A(vi)/50729/CCC/26 Dated April 26, 2002

OFFICE MEMORANDUM

In pursuance of the decision of the Board of Directors of Coal India Limited in its 195th meeting held on 30th April, 2001 at Kolkata, the ***'Transfer Policy'*** in respect of Executives under Common Coal Cadre and in respect of Executives & Non-executives working in sensitive disciplines are hereby ammended as under :

GENERAL

1) Transfers should normally be programmed during the beginning and end of the academic year.
2) Executives who have less than 02 years service left are not to be transferred normally. They may be given a posting of their choice if vacancy is available, keeping in mind the administrative requirement.
3) Transfer of executives posted in projects are to be covered by the Government guidelines on the subject.
4) Transfer & posting of executives trained specially should be in line with their specialisation.
5) Large scale transfer is to be avoided, but at least 10% of the executives satisfying the criteria laid down hereunder be transferred each year.
6) Transfer on 'Administrative Ground' may be effected at any tie.
7) Executives of M1 grade and above who have been working in the same company for more than 10(ten) years either in the same capacity or in different capacities, be transferred to another company.

8) Officer transferred from one company to another will not be transferred to the company in which he was earlier posted before expiry of 03 (three) years period.

Sd/-BN JHA
(CHIEF GENERAL MANAGER(PERSONNEL)"

From perusal of the above two circulars, the circular which was issued on 26.4.2012, at condition no.2 under the heading of general, makes it clear that the executives who has less than 02 number of years of service, not to be transferred normally. They may be given a posting of their choice if vacancy is available keeping in mind the administrative requirement. Similarly, the office memorandum of 7/9 Jan, 2009 brings out an amendment to the transfer policy dated 26.4.2001 referred to herein above. Vide clause (i) of this memorandum, while modifying the previous transfer policy, the provision in the previous transfer policy for not transferring the officers having less than two years of service, has been maintained. Therefore, there is no doubt that the opposite parties are following a transfer policy protecting the executives/officers who has less than two years of service left from the purview of transfer. The provisions in the said regard, is sustained. During the course of hearing, I had called upon learned counsel for opposite parties for producing the file in connection with transfer of the petitioner for perusal of this Court. Consequent upon direction to Mr. S.D. Das, learned senior counsel for the opposite parties, file containing the decision of transfer of the petitioner is also produced before me. I have gone through the said file and in the entire file, I find a single document dated 22.7.2014, the proposal in the matter of transfer of the petitioner submitted to the higher authority for their approval. The proposal has taken note of the fact that there is a relaxation for transfer to the executives who has less than two years of service. Though, the proposal was made keeping in view the administrative exigencies but the document seeking proposal and the approval thereupon, no where indicates or discusses the reason for such administrative exigencies except use of word 'administrative exigency' in the proposal.

The mandate of law as decided in a catena of decisions right from Privy Council.

> "It is well settled principle of law laid down by the Privy Council in **Nair Ahmad v. King Emperor**, 1936 PC 253 and subsequently followed by the apex Court in **Municipal Corporation of Delhi v. Jagdish Lal and another,** AIR 1970 SC 7; **Ramchandra Keshav Adke (Dead) by Lrs V. Govind Joti Chavare and others**, AIR 1975

SC 915 and **Babu Verghese and others v. Bar Council of Kerala and others**, AIR 1999 SC 1281 and various Courts that if the statute prescribes a thing to be done in a particular manner, the same should be done in the same manner or not at all."

The circulars/office memorandum referred to herein above, are issued by none else than the employer, has a binding fierce on the employer as well as the employee. The case at hand involves a case of transfer of a person having less than two years to serve and is well protected under the above memorandum/circulars. Being conscious of the issue of transfer of a person having less than two years and the protection granted to such person vide above two circulars, it is desired that the higher authorities while considering transfers of a person in the particular agency should have applied their mind and deliberated on the issue and further approved the transfer on assigning reasons. In view of the settled principle of law as narrated herein above and under the findings arrived at by me herein above, I find the impugned order of transfer vide Annexure-4 suffers from being based on no consideration of the higher authority deliberating the particular issue and having not assigning any reason thereof during approval. The proposal though highlighted such a situation but same has not been considered at all. Consequently the order relieving the petitioner vide Annexure-5 is also bad in law, which, I set aside accordingly. Further on perusal of the order dated 25.7.2014, this Court while issuing notice, also directed the learned senior counsel appearing for the opposite parties to justify his argument with regard to what exigencies have been prevailed in the mind of the authorities to transfer the petitioner who is to retire within one year and at the same time, this Court also by the very same order, as an interim measure, permitted the petitioner not to hand over charge pursuant to orders of transfer if he has not handed over the charge in the meanwhile which order was allowed to continue by further orders in same matter. In the meanwhile, about six weeks have been passed from the date of interim order, the opposite parties could neither be able to establish the exigencies nor could bring to establish that they have suffered in any manner any material before this Court for non-implementation of the transfer order.

In the above premises, while setting aside the impugned orders under Annexures 4 & 5, I direct the opposite parties to allow the petitioner to continue in his former post with the release of all consequential benefits. The writ petition succeeds. However, there shall be no order as to cost.

Writ petition allowed.

2015 (II) ILR - CUT- 1226

B.RATH, J.

W.P.(C) NO. 2672 OF 2012

GAYATRI BEHERA …….. Petitioner

.Vrs.

THE CHIEF EXECUTIVE OFFICER,
CESU, KHURDA & ORS. ……Opp.Parties

ELECTROCUTION INJURY – Snapping of 11 KV eclectic wire on the victim, a girl child of 13 years – Her right hand was burnt and there was amputation of 1/3rd portion of the right hand fore-arm – Petitioner suffered 70% disability – She is likely to suffer throughout her life – Negligence on the part of the opposite parties as they have failed to perform their duties as enshrined under Rules 91 and 92 of the Odisha Electricity Rules, 1956 – Held, petitioner is entitled to compensation of Rs. 6,75, 00/- as a whole with 8 % interest P.A. from the date of filing of the writ petition. (Paras 4,5)

For Petitioner : M/s P.K. Nanda, M.K. Dash & A.S. Paul

For Opp. Parties : M/s. R.Acharya & B.Barik

Date of hearing : 03.11.2014
Date of Judgment : 20.11.2014

JUDGMENT

BISWANATH RATH, J.

The petitioner, who is a minor alleging to be suffering from electrocution, has filed the writ petition seeking a direction directing the opposite parties to pay compensation amounting to Rs.6,75,000/-(rupees six lakhs seventy-five thousand) along with interest @ 12% per annum from the date of mishap till payment.

The facts as narrated by the petitioner is that the victim while going to give food to her father on 30.05.2011 came in contact with an electric wire of 11.K.V. connection suddenly snapped from the pole and fell on the head and consequently the right hand of the petitioner got burnt. During her treatment the doctor was compelled to ampute $1/_{3rd}$ of the right hand fore-arm of the petitioner. The family of the petitioner got terribly disturbed and as they were attending the victim in the hospital they lodged F.I.R. in the Jankia Police Station vide P.S. Case No.140 of 2011 on 09.07.2011. It is alleged that Chief

District Medical Officer, Khurda examined the petitioner and granted a Disability Certificate against the petitioner indicating disability up to 70%. The petitioner has also filed a copy of the said Disability Certificate in the writ petition. It is further alleged by the petitioner that the petitioner was hardly 13 years at the time of the incident and she is a girl child from a poor family. Due to negligence of the opposite parties, she became disabled with 70% and suffering althrough her life. The family of the petitioner spent lot of money for her treatment and approached severally to the opposite parties for compensation on the suffering of the petitioner for their negligence but, the opposite parties did not co-operate in the matter rather avoided the claim of the petitioner taking some plea or other. The petitioner finding no alternative approached this Court and claimed the compensation amount of Rs.6,75,000/-(rupees six lakhs seventy-five thousand) along with interest @12% per annum from the date of mishap.

2. Per contra, the opposite parties on their appearance filed a counter strongly denying the allegations made against them. The opposite parties in their counter went to the extent of submitting that the accident as narrated by the petitioner was beyond the knowledge of the opposite parties, they have even gone to the extent of denying that there is no accident even. Opposite parties have also submitted to lack any knowledge of any F.I.R. being lodged by Jaykrushna Behera, the grandfather of the petitioner and they strongly disputed the disability certificate. The opposite parties refused to accept the responsibility on the ground that there was no information at all to them of this accident at any point of time. The opposite parties further submitted that there is no material to prove on spending for her treatment. They disputed the allegation of suffering by the petitioner on account of electrocution.

It is in these premises, the opposite parties claimed that the present dispute cannot be decided in a matter in exercise of power under Article 226 of the Constitution of India. During the pendency of the writ petition, the opposite party no.3 filed an additional counter affidavit on 07.01.2014 indicating therein that the aforesaid accident has been enquired by the Sub-divisional Officer(Electrical), Jankia on 31.05.2011 and the said Sub-divisional Officer(Electrical), Jankia submitted a report clearly indicating therein that some miscreants cut the existing stay wire on the 11 K.V. line at Rambhabilly for which the pole became bend and the 11 K.V. conductor (one spam) was in sagging position for which the above non-fatal accident occurred. Considering the said theft, the Junior Engineer of Jankia Electrical Section submitted an F.I.R. in Jankia Police Station alleging the said incident

dated 30.05.2011. In filing this affidavit, even though the opposite party no.3 denied any negligence attributed to the Department but claimed that the accident was unintentional and due to mischief played by the miscreants and said act can be called as act of God. In concluding the opposite party no.3 submitted that in view of disputed question of facts, the matter can be adjudicated in Civil court. The counter affidavit filed by the opposite parties on 03.05.2011 is far from the averments made in the counter by the opposite party no.3 along with other opposite parties in their combined counter denied the incident to have occurred. At the same time the opposite party no.3, in categorical term not only admitted the incident but also produced the record to establish that there is an enquiry involving in the incident on 31.05.2011 and they found that the accident has taken place due to miscreants taking away the existing stay wire and the accident has occurred due to mischief committed by the miscreants. The opposite party no.3 in its independent counter also submitted that its officer filed an F.I.R. categorically indicating that such an incident has taken place in the locality. In the said F.I.R., the Junior Engineer has also specifically mentioned that due to aforesaid mischief, the petitioner came in contact with the wire and has suffered.

3. In view of the aforesaid affidavit, there is no dispute that there is an accident due to snapping of wire and there is no dispute that due to cause of said snapping of wire, the petitioner became the victim and she has suffered. The certificate on disability as granted by the Team of Orthopedicians engaged in District Headquarter Hospital, Khurda also clearly indicates that the petitioner has suffered 70% disability. The final form in the F.I.R. at the instance of grandfather of the petitioner also indicates that the petitioner has suffered due to electric burn. Under the above circumstances, I hold the opposite parties responsible for the incident and the petitioner has suffered on account of the accident, i.e., due to negligence of their's as they have failed to perform their duties as enshrined under Rules 91 and 92 of the Orissa Electricity Rules, 1956 and as such they are liable to pay compensation. Delving with compensation part, I would like to discuss the definition of negligence as well the interpretation of word negligence by the Hon'ble Apex Court which runs as follows:-

"***According to Black's Law dictionary 6th edition the term "negligence" has been defined as***

> "the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human

affairs, would do, or the doing of something which a reasonable and prudent man would not do"

According to the American Heritage Dictionary of the English Language, 4th Edition

"Failure to exercise the degree of care considered reasonable under the circumstances, resulting in an unintended injury to another party."

According to the Century Dictionary and Cyclopedia

The fact or the character of being negligent or neglectful; deficiency in or lack of care, exactness, or application; the omitting to do, or a habit of omitting to do, things which ought to be done, or the doing of such things without sufficient attention and care; carelessness; heedless disregard of some duty.

Specifically, in law, the failure to exercise that degree of care which the law requires for the protection of those interests of other persons which may be injuriously affected by the want of such care.

In Advanced Law Lexicon of 3rd Edition 2009, negligence has been defined as follows:

"Negligence" is not an affirmative word, it is a negative word; it is the absence of such care, skill and diligence as it was the duty of the person to bring to the performance of the work, which he is said not to have performed." Negligence may consist as well in not doing the thing which ought not to be done as in doing that which ought not to be done when in either case it has caused loss and damage to another. Negligence is "the absence of proper care, caution and diligence; of such care, caution and diligence, as under the circumstances reasonable and ordinary prudence would require to be exercised".

In the case of Donoghue v Stevens [1932] AC 562, Lord Atkin stated that;

'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour'.

This is the establishment of a general duty of care.

Now coming to know the meaning of the negligence as enumerated by the Hon'ble Apex Court through many of its judgments which runs as follows :-

In **Malay Kumar Ganguly v. Dr.Sukumar Mukherjee**, (2009) 9 SCC 221= AIR 2010 SC 1162, the apex Court considering the meaning o "negligence", held as follows:

> "Negligence is breach of duty caused by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Negligence means either subjectively a careless state of mind, or objectively careless conduct. It is not an absolute term but is a relative one; it is rather a comparative term. In determining whether negligence exists in a particular case, all the attending and surrounding facts and circumstances have to be taken into account. Negligence is strictly nonfeasance and not malfeasance. It is omission to do what the law requires, or failure to do anything in a manner prescribed by law. It is the act which can be treated as negligence without any proof as to the surrounding circumstances, because it is in violation of statute or ordinance or is contrary to dictates of ordinary prudence.

In Jacob Mathew (supra) the apex Court considering the meaning of "negligence", held as follows:

> "The jurisprudential concept of negligence defies any precise definition. In current forensic speech, negligence has three meanings. They are : (i) a state of mind, in which it is opposed to intention; (ii)careless conduct; and (iii) the breach of a duty to take care that is imposed by either common or statute law. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings."

In **M.S.Grewal v. Deep Chand Sood**, (2001) 8 SCC 151 = 2001 SCC (Cri) 1426, the apex Court in para 14 stated as follows :

> "Negligence in common parlance means and implies "failure to exercise due care, expected of a reasonable prudent person". It is a breach of duty and negligence in law ranging from inadvertence to shameful disregard of the safety of others. In most instances, it is caused by heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from his act. Negligence is thus a breach of duty or lack of proper care in doing something, in short, it is want of attention and doing of something which a prudent

> and a reasonable man would not do. Though sometimes the word "inadvertence" stands and is used as a synonym to negligence, but in effect negligence represents a state of the mind which, is much more serious in nature than mere inadvertence. There is thus existing a differentiation between the two expressions- whereas inadvertence is a milder form of negligence, "negligence" by itself means and implies a state of mind where there is no regard for duty or the supposed care and attention which one ought to bestow."

In **Poonam Verma v. Ashwin Patel,** (1996) 4 SCC 332, „negligence" has been dealt with by the apex Court which has stated thus:

> 10 "Negligence as a tort is the breach of a duty caused by omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do. The definition involves the following constituents:
>
> (1) a legal duty to exercise due care;
>
> (2) breach of the duty; and
>
> (3) consequential damages."

It is now necessary to notice the provisions contained in section 91 & 92 of the Indian Electricity Rules, 1956 which runs as follows :-

> "91. Safety and protective devices.-(1) Every overhead line erected over any part of street or other public place or in any factory or mine or on any consumers' premises shall be protected with a device approved by the Inspector for rendering the line electrically harmless in case it breaks.
>
> (2) An Inspector may by notice in writing require the owner of any such overhead line wherever it may be erected to protect it in the manner specified in sub-rule (1).
>
> (3) The owner of every high and extra-high voltage overhead line shall make adequate arrangements to the satisfaction of the Inspector to prevent unauthorized persons from ascending any of the supports of such overhead lines which can be easily climbed upon without the help of a ladder or special appliances. Rails, reinforced cement concrete poles and pre-stressed cement concrete poles without steps, tubular poles, wooden supports without steps, [sections and channels shall be deemed as supports which cannot be easily climbed upon for the purpose of this rule.]

> 92. Protection against lightening.-(1) The owner of every overhead line [sub-station or generating station] which is so exposed as to be liable to injury from lightning shall adopt efficient means for diverting to earth any electrical surges due to lightening.
>
> [(2) The earthing lead for any lightening arrestor shall not pass through any iron or steep pipe, but shall be taken as directly as possible from the

In view of definition of negligence and under the ruling of the Hon'ble Apex Court referred to hereinabove, and under the provisions contained at Rule 91 & 92 of the Indian Electricity Rules, 1956 it is now to be considered as to whether there is any negligence on the part of the Electric Supply Company or not.

Under the findings at paragraph-3 hereinabove and in view of the definition of negligence as narrated hereinabove, I am of conclusion that the opposite parties have neglected in maintaining the line in their custody and they are responsible for the injury sustained by the petitioner, a girl child and likely to suffer all through her life.

4. The material produced in the case amply establishes that the petitioner way not only a girl child but also hardly 13 years old. For her amputation of 1/3rd portion of the right hand fore-arm and she is likely to suffer throughout her life. Taking into account bare minimum the immediate necessity for running of a girl child to be at least Rs.100/-(rupees one hundred) per day, I calculate her monthly entitlement to be Rs.3,000/- (rupees three thousand) per month and taking the same to account the annual income will be at Rs.36,000/-(rupees thirty-six thousand) per annum.

5. Considering the age of the girl as 13(thirteen) at the time of accident and taking into consideration the life expectancy of a girl, I allow her at least 20 multiply, which brings the total compensation to Rs.7,20,000/-(rupees seven lakhs twenty thousand) considering her claim made in the writ, I confine the compensation at Rs.6,75,000/-(rupees six lakhs seventy five thousand) only as a whole and such amount will be released in her favour with 8% interest per annum from the date of filing of the writ petition.

I further direct that since the petitioner is a minor, 50% of the compensation with accrued interest will be kept in fixed deposit in her name in any nationalized bank at least for a period of 10 years and the rest 50% will be granted in her favour to allow to have her future plans and present maintenance.

6. The writ petition succeeds to the extent directed above. However, there shall be no order as to costs.

Writ petition allowed.

2015 (II) ILR - CUT- 1233

S. K. SAHOO, J.

BLAPL NO. 1947 OF 2015

ANIL KUMAR DASH .....Petitioner

.*Vrs.*

STATE OF ORISSA .....Opp. Parties

(A) N.D.P.S ACT, 1985 – S.2(viia)

Whether 20 Kg. of ganja comes within "Commercial quantity" as prescribed U/s 2 (viia) of the Act. ? "Commercial quantity " means any quantity greater than the quantity specified by the central Government by notification in the official Gazette – Column No 6 of the table in the notification prescribes 20 kg. as "Commercial quantity"– Held, "Commercial quantity "in respect of ganja is to be greater than the quantity specified in the aforesaid notification which would mean any quantity more than 20 kg. (Para 5)

(B) N.D.P.S ACT, 1985 – S.37 (i) (b)

Seizure of 20 kg. of ganja – Bail refused by the learned sessions judge as 20 kg. of ganja comes under the purview of Commercial quantity and section 37 (i) (b) stands as a bar for grant of bail – Held, since "Commercial quantity" of ganja would mean any quantity more than 20 kg. the petitioner appears to be involved in an offence U/s 20 (b)(ii) (B) of the Act but not U/s 20 (b) (ii) (c) of the said Act, hence this court is inclined to release him on bail. (Paras 6,7,8)

For Petitioner : M/s. Arun Kumar Das
For Opp. Parties : Mr. Sangram Keshari Nayak, Addl.Govt.Advocte
Mr. Jyoti Prakash Patra, (Addl. Standig

Date of Argument: 15. 09.2015
Date of judgment : 22. 09.2015

S.K. SAHOO, J.

The question that crops up for consideration in this bail application under section 439 Cr.P.C. is whether 20 kg. of ganja comes within "commercial quantity" as prescribed under section 2(viia) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter for short 'NDPS Act')?

2. In the present case, the petitioner Anil Kumar Dash who is an accused in Naktiduel P.S. Case No. 15 of 2012 corresponding to T.R. Case No. 25 of 2012 pending in the Court of learned Sessions Judge -cum- Judge (Special Court), Sambalpur has been chargesheeted under section 20(b)(ii)(C) of NDPS Act for transporting 20 kg. of ganja on 29.03.2012 at about 4 a.m. in his motorcycle bearing Regd. No. OR 19E 1589 near Ambajhari temple under Naktideul police station in the district of Sambalpur.

3. The petitioner is in custody since 14.02.2015 and his prayer for bail has been turned down by the learned Sessions Judge -cum- Judge (Special Court), Sambalpur vide order dated 25.02.2015 on the ground that the recovered and seized ganja being 20 kg. comes within the purview of commercial quantity and therefore section 37 of the NDPS Act is a legal impediment for grant of bail.

4. Heard Mr. Arun Kumar Das, learned counsel appearing for petitioner Anil Kumar Dash and Mr. Sangram Keshari Nayak, learned Additional Government Advocate.

It is the contention of Mr. Das that the quantity of ganja seized does not come within "commercial quantity" and as such the bar under section 37 of the NDPS Act for grant of bail is not applicable. On the other hand Mr. Nayak contended that the notification published by the Central Government vide S.O. 1055 (E), dated 19.10.2001 specifies in column no. 6 that 20 kg. of ganja is commercial quantity and therefore the limitations specified in sub-clause (b) of sub-section (1) of section 37 of the NDPS Act on granting of bail applies to the case.

5. Section 20 of the N.D.P.S. Act prescribes punishment for contravention in relation to cannabis plant and cannabis. The relevant provision of section 20 is quoted herein below:-

> "**20. Punishment for contravention in relation to cannabis plant and cannabis.**-

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

In view of the definition under sub-clause (b) of clause (iii) section 2 of NDPS Act, "cannabis (hemp)" means ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever, name they may be known or designated.

"Commercial quantity" has been defined in clause (viia) of section 2 of the NDPS Act which reads as follows:-

> "**2.(viia)** "commercial quantity", in relation to narcotic drugs and psychotropic substances, means <u>any quantity greater than the quantity specified</u> by the Central Government by notification in the Official Gazette;"

Similarly "small quantity" has been defined under clause (xxiiia) section 2 of N.D.P.S. Act which reads as follows:-

"**2.(xxiiia)** "small quantity", in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette;"

The Amending Act of 2001 (The Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 (Act 9 of 2001)) introduced the concept of "small quantity" and "commercial quantity" for the purpose of imposing punishment. The punishment thereunder is graded according to whether the contravention involved "small quantity", "commercial quantity" or, a quantity in between the two. By reason of Section 41(1) of the Amending Act of 2001, the amended provisions apply to pending cases. Simultaneously, with the Act of 2001 coming into force, by a notification S.O. 1055 (E) dated 19.10.2001 issued in exercise of the powers conferred by clauses (viia) and (xxiiia) of section 2 of the NDPS Act, the Central Government specified what would amount to "small quantity" and "commercial quantity" respectively, of different substances. The quantity mentioned in columns 5 and 6 of the table, in relation to the narcotic drug or psychotropic substance mentioned in the corresponding entry in the columns 2 to 4 of the said table are the small quantity and commercial quantity respectively for the purposes of the said clauses of that section.

TABLE

[See sub-clause (viia) and (xxiiia) of section 2 of the Act]

Sl. No.	Name of Narcotic Drug and Psychotropic Substance (International non-proprietory name (INN)	Other non-propriety name	Chemical Name	Small Quantity (in gm.)	Commercial Quantity (in gm./kg.)
1.	2.	3.	4.	5.	6.
55.	Ganja			1000	20 kg.

Even though in column no.6 of the table under the heading of commercial quantity, 20 kg. has been mentioned but in view of clause (viia) of section 2 of the NDPS Act, 20 kg. of ganja will not come within the definition of "commercial quantity". Commercial quantity in respect of ganja is to be greater than the quantity specified in the aforesaid notification which would mean any quantity more than/bigger than/larger than 20 kg.

Where the contravention relates to sub-clause (b) of section 20 of the NDPS Act and the quantity of ganja involved is 20 kg., it can be said to be lesser than commercial quantity but greater than small quantity which is punishable under section 20(b)(ii)(B) of NDPS Act and not under section 20(b)(ii)(C) of NDPS Act.

6. Section 37 of the NDPS Act reads as follows:-

> "**37. Offences to be cognizable and non-bailable**–(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), -
>
> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless-
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.

In view of section 37 of the NDPS Act, the limitations on granting of bail specified in clause (b) of sub-section (1) of that section will not be applicable to the quantity of 20 kg. of ganja as the said quantity is lesser than "commercial quantity" but greater than "small quantity" and accordingly punishable under section 20(b)(ii)(B) of NDPS Act. The limitations shall apply, inter alia, for the offence under section 20(b)(ii)(C) of NDPS Act.

7. The language of the relevant sections of the NDPS Act discussed in the foregoing paragraphs are plain and unambiguous and conveys a clear and definite meaning and therefore it should be given its ordinary, natural and familiar meaning.

8. The petitioner has been charge sheeted under section 20(b)(ii)(C) of NDPS Act but in view of the quantity of ganja seized in this case, prima facie offence under section 20(b)(ii)(B) of NDPS Act is made out. The petitioner is in custody since 14.02.2015 and the case diary does not reveal any criminal antecedent against the petitioner. Since out of thirteen charge sheeted witnesses, ten witnesses are official witnesses, the chance of tampering with the evidence is very less. The petitioner is a young boy and a permanent resident of village Jarada. Considering the facts and submissions made and especially the fact that the petitioner appears to be involved in an offence under section 20(b)(ii)(B) of NDPS Act, taking into account his period of detention in judicial custody, I am inclined to release on bail.

9. Accordingly, the prayer for bail is allowed and the petitioner is directed to be released on bail in connection with Naktiduel P.S. Case No.15 of 2012 corresponding to T.R. Case No.25 of 2012 pending in the Court of Sessions Judge -cum-Judge (Special Court), Sambalpur on furnishing bail bond of Rs.50,000/- (fifty thousand) with two solvent sureties each for the like amount to the satisfaction of the Court in seisin over the matter with the further terms and conditions as may be imposed by the said Court. The petitioner shall appear in person before the Court in seisin over the matter on each date, to which the case stands posted and shall also appear before his home police station i.e. Kancha Police Station once in a week on every Sunday in between 4.00 p.m. to 6.00 p.m. till the conclusion of the trial. Violation of any of the conditions imposed either by this Court or by the Court in seisin over the matter shall entail cancellation of bail. Accordingly the bail application is allowed.

Application allowed.

2015 (II) ILR – CUT-1238

S. N. PRASAD, J.

W.P.(C) NO.(s) 12536 OF 2012 & 5143 OF 2013

JYOTSHNAMAYEE MISHRA ……..Petitioner

.*Vrs.*

A.D.M, BOUDH & ORS. ……Opp. Parties

ANGANWADI WORKER – Appointment – Eligibility condition is to be seen on the due date of consideration of the application or the date of declaration of the result – Held, Rules for selection can not be changed after process of selection once been initiated.

In this case owing to an advertisement Dt. 14.1.2011 for appointment of Anganwadi worker the petitioner in W.P.(C) No. 12536/2012 has applied and was selected on 29.2.2011 as per guideline Dt. 2.5.2007 as she was residing in Kurtipali village within the Mahulbahali Anganwadi Centre – However instead of issuing engagement order forthwith as per the rules there was delay of three months – In the mean time District Social Welfare Officer on Dt. 21.5.2011 has taken out Kurtipali village from the perview of Mahulbahali Anganwadi Centre and made fresh advertisement Dt. 20.6.2012 on the ground that the petitioner already selected is no more residing in the Centre area on or after 21.5.2011 and appointed O.P.4 in that post – Hence the writ petition – Held, second advertisement Dt. 20.6.2012 as well as appointment of O.P.4 are quashed – Direction issued to the State to issue appropriate appointment order in favour of the petitioner. (Paras 10 to 16)

Case Laws Referred to :-

1. (2013)11 SCC 58 : Rakesh Kumar Sharma -v- State(NCT of Delhi) & Ors.
2. (1994)2 SCC 723 : U.P.Public Service Commission –v- Alpana
3. (1993)2 SCC 429 : M.V.Nair -v- Union of India
4. 1995 Supp(4) SCC 706 : Harpal Kaur Chahal –v- Director Punjab Instructions
5. 1993 Supp(3) SCC 168 : Rekha Chaturvedi –v- University of Rajasthan
6. (1993)Supp(2) SCC 61 : Ashok Kumar Sharma -v- Chander Shekhar

For Petitioner : M/s. L.K.Mohanty & B.K.Jena
M/s. G.K.Nanda, Satyabrat Rath

For Opp. Parties: Mr. Amit Pattnaik, Addl.Govt.Advocte
M/s. G.K.Nanda, Satyabrat Rath,
Indramani Sahoo M/s. L.K.Mohanty
& B.K.Jena.

Date of hearing : 23.09.2015
Date of judgment: 23.09.2015

JUDGMENT

S.N.PRASAD,J.

In both the writ petitions, common issue is involved regarding selection of Anganwadi Worker for Mahulbahali Anganwadi Centre hence both the writ petitions are being disposed of by a common order.

2. In W.P.(C) No.12536 of 2012 prayer has been made to quash the order dated 5.7.2012(Annexure-5, report of District Social Welfare Officer, Boudh dated 21.5.2011(Annexure-6) and fresh advertisement dated 20.6.2012(Annexure-7).

W.P.(C) No.5143 of 2013 has been filed for quashing of order dated 1.1.2013(Annexure-8) and permitting the petitioner to discharge the duty of Anganwadi Worker at Mahulbahali Anganwadi Centre along with consequential benefits.

3. Brief facts of the case in W.P.(C) No.12536 of 2012 is that advertisement has been issued by the C.D.P.O., Kantamal on 14.1.2011 to fill up four posts of Anganwadi Workers of four Anganwadi Centre including Mahulbahali Anganwadi Centre of Manmunda Gram Panchayat of Kantamal Block. In pursuance to the said advertisement the petitioner being residing in Mahulbahali Anganwadi Centre of Manmunda Gram Panchayat has made an application and selected and was waiting for engagement as Anganwadi Worker but the authorities have not issued order of engagement, petitioner has preferred a writ petition bearing W.P.(c) No.18307 of 2011, disposed of on 28.9.2011 giving liberty to the petitioner to prefer appeal before the A.D.M., appeal was rejected on the ground that the Collector has decided for fresh selection in view of changed circumstance.

During pendency of the appeal before the A.D.M. fresh advertisement was issued on 20.6.2012 inviting applications for engagement of Anganwadi Worker for Mahulbahali Anganwadi Centre. Petitioner has filed this writ petition challenging the order of the A.D.M. and fresh advertisement. This Court in Misc.Case No.11056 of 2012 stayed fresh selection of the Anganwadi Worker in respect of Mahulbahali Anganwadi Centre but the opposite party although has proceeded in terms of the second advertisement and selected opposite party no.4, but by virtue of order passed by this Court on 23.7.2012 staying fresh selection of Anganwadi Worker, order of disengagement issued in favour of opposite party no.4 on 1.1.2013 which has been challenged by the opposite party no.4 filing writ petition bearing W.P.(C) No.5143 of 2013.

4. Case of the petitioner that when he has made an application in terms of advertisement issued on 14.1.2011, on the date she was eligible for her candidature in view of the guideline dated 2.5.2007 which prescribes that the candidate is to be resident of the area where the centre is situated and the petitioner on the date of advertisement or even on the date of consideration and final selection by the selection committee was residing in the area where the centre is situated but due to subsequent change by taking out area of residence from the purview of the Mahulbahali Anganwadi Centre, petitioner has been said to be ineligible for issuance of engagement order and thereafter the authorities have come for fresh selection.

Ground of challenge by the petitioner is that eligibility of a candidate is to be seen when advertisement was issued or on the due date of consideration and if the condition of eligibility is changed due to subsequent decision of the Government, candidate already considered and selected cannot be adversely affected.

5. Opposite party-State has filed counter affidavit wherein stand has been taken that the petitioner is residing in Kurtipali Village, the village was in Mahulbahali Anganwadi Centre on the date of advertisement or on the date of consideration but subsequently Kurtipali village has been separated from Mahulbahali Anganwadi Centre and as such petitioner has found ineligible and accordingly fresh advertisement has been directed to be issued by the order of the Collector which was based upon decision of the District Social Welfare Officer.

6. Opposite party no.4 has been represented by her learned Advocate who has submitted that prerequisite qualification laid down in the guideline dated 2.5.2007 is that a candidate must be residing in the area where the centre is situated. Petitioner although was eligible on the date of advertisement or on the date of consideration but not found eligible at the time of issuing of the appointment order due to decision of the Government that Kurtipali village where the petitioner is residing which is under Mahulbahali Anganwadi Centre has been taken out from the Centre area hence the petitioner is no more eligible as per the guideline dated 2.5.2007. Hence the authorities have taken right decision in terms of the guideline dated 2.5.2007 and has issued second advertisement, in pursuance of the same she has made application, selected and engaged, hence there is no infirmity in the action of the opposite party-State.

7. In W.P.(C) No.5143 of 2012 the petitioner in view of the advertisement issued on 20.6.2012 made an application, being eligible from all corner as per the terms and conditions laid down in the guideline, selected and engaged but subsequently disengaged vide order passed by the authority on 1.1.2013(Annexure-8) which is absolutely illegal and improper because the petitioner has been selected when found eligible and meritorious as such authorities ought not to have disengaged the petitioner from service.

In this case State has not filed counter affidavit although direction has been issued but however detail counter affidavit has been filed in W.P.(C) No.12536 of 2012, since facts of both the cases are same as such counter affidavit filed by the opposite party-State will also be taken into consideration for the purpose of adjudication of this case.

8. Heard learned counsel for the parties and perused the documents on record.

9. Fact which is not in dispute is that one advertisement was issued on 14.1.2011 in which petitioner in W.P.(C) No.12536 of 2012 being eligible as per the guideline and being residing in the area where the centre is situated i.e. Kurtipali Village was selected on 29.2.2011 as would be evident from Annexure-3 annexed to the W.P.(C) No.12536 of 2012. Thereafter no engagement order has been issued in favour of the petitioner in W.P.(C) No.12536 of 2012 fairly for long period and by virtue of the decision of the District Social Welfare Officer dated 21.5.2011 the area where the petitioner was residing was taken away from the purview of Mahulbahali Anganwadi Centre which would be evident from Annexure-6 and on that pretext engagement of the petitioner has not been issued on the ground that on or after 21.5.2011 the petitioner is not eligible as per the guideline dated 2.5.2007.

10. Question arises for consideration before this Court what will be the date of consideration of eligibility.

In order to decide this issue reference of judgments rendered by the Hon'ble Apex Court in the case of **Rakesh Kumar Sharma –v- State(NCT of Delhi) and others**, reported in (2013)11 SCC 58 although similar is with respect to regular service law and this case pertains to Anganwadi Worker but in order to take help of principles regarding due date of consideration of eligibility reference of these judgment is being made.

The Hon'ble Apex Court after taking into consideration all several judgments like **U.P.Public Service Commission –v- Alpana** reported in (1994)2 SCC 723, **M.V.Nair –v- Union of India** reported in (1993)2 SCC 429, **Harpal Kaur Chahal –v- Director, Punjab Instructions** reported in 1995 Supp(4) SCC 706, **Rekha Chaturvedi –v- University of Rajasthan** reported in 1993 Supp(3) SCC 168, **Ashok Kumar Sharma –v- Chander Shekhar** reported in (1993)Supp(2) SCC 611 has been pleased to observe that the requisite qualification on the last date of submission of application is to be considered. Reference may be made to the extract of paragraphs 21 and 22 which is being quoted below:

> "21. In the instant case, the appellant did not possess the requisite qualification on the last date of submission of the application though he applied representing that he possessed the same. The letter of offer of appointment was issued to him which was provisional and conditional subject to the verification of educational qualification i.e. eligibility, character verification, etc. Clause 11 of the letter of offer of appointment dated 23.2.2009 made it clear that in case character is not certified or he did not possess the qualification, the services will be terminated. The legal proposition that emerges from the settled position of law as enumerated above is that the result of the examination does not relate back to the date of examination. A person would possess qualification only on the date of declaration of the result. Thus, in view of the above, no exception can be taken to the judgment of the High Court.
>
> 22. It also needs to be noted that like the present appellant there could be large number of candidates who were not eligible as per the requirement of rules/advertisement since they did not possess the required eligibility on the last date of submission of the application forms. Granting any benefit to the appellant would be violative of the doctrine of equality, a backbone of the fundamental rights under our Constitution. A large number of such candidates may not have applied considering themselves to be ineligible adhering to the statutory rules and the terms of the advertisement."

wherein their Lordships has been pleased to held that eligibility condition is to be seen on the due date of consideration or the date of declaration of the result.

Likewise judgment rendered by the Hon'ble Supreme Court in the in the case of **Bishnu Biswal and others –v- Union of India and others**, reported in (2014) 5 SCC 774 where their Lordships has been pleased to hold by taking into so many judgments passed by the Hon'ble Supreme Court and also taking into consideration the order passed by the Hon'ble Supreme Court in the case of **Tej Prakash Pathak –v- Rajasthan High Court** reported in (2013) 4 SCC 540(where matter has been sent before the larger Bench) has been pleased to hold that has been reflected at paragraph-19 to the effect that the rules of game cannot be changed after process of selection once been initiated.

11. Now in the light of the observations of the Hon'ble Apex Court in the cases referred above if the facts of the cases will be compared with the instant case the advertisement was issued on 14.1.2011, petitioner in W.P.(C) No.12536 of 2012 has made application as per the eligibility condition as provided in the guideline dated 2.5.2007 which provides that a candidate is to be residing in the area where the centre is situated. Petitioner admittedly was residing in Kurtipali village, the area which was on the date of advertisement, was within the Mahulbahali Anganwadi Centre and accordingly being eligible as per the guideline, has found eligible, selected but no engagement order has been issued. Although guideline dated 2.5.2007 provides that engagement order is to be issued without any delay and, to that effect relevant portion is quoted for ready reference:

> "After the enquiry into the objection and verification of documents, the Selection Committee will give points to all the eligible candidates as per the criteria spelt out in the guideline. The Committee will finally select the candidate who secures the maximum points. In case two or more candidates secure same points, preference will be given to the older candidate. The Committee will notify the candidate selects on the same day in Panchayat Samiti and CDPO's office and within 48 hours at the GP and village level, CDPO is authorized to issue engagement order in favour of the candidate selected and this should be issued within 24 hours of the selection of the candidate."

12. Thus engagement order ought to have been issued forthwith. Petitioner was admittedly being selected on 29.2.2011 hence as per the provisions of the guideline as indicated hereinabove, engagement order ought to have been issued in favour of the petitioner but not issued.

All of a sudden on 21.5.2011 District Social Welfare Officer has taken out Kurtipali village from the purview of Mohulbahali Anganwadi Centre and thereafter gone for fresh advertisement on the pretext that the petitioner already selected is no more residing in the centre area on or after 21.5.2011 hence is not eligible as per the guideline dated 2.5.2007. The authorities have gone for second advertisement inviting fresh applications, opposite party no.4 has applied, selected but by virtue of interim order passed in Misc.Case No.11056 of 2012 she has been directed which is subject matter of W.P.(C) No.5143 of 2013.

13. There is no dispute that as on 14.1.2011 petitioner was eligible even after due date of consideration. When the petitioner was declared successful petitioner was eligible. Engagement order has not been issued fairly for a period of three months which will be said to be inordinate delay because guideline provides within period of three days by completing all procedure engagement order has to be issued i.e. 48 hours will be taken for notifying selected candidate and when it will be notified, engagement order shall be issued within 24 hours of selection of candidate. During these three months authorities have taken out Kurtipali village from the purview of the Mohulbahali Anganwadi Centre and the petitioner has been said to be ineligible.

14. Learned counsel for the opposite party no.4 and petitioner in W.P.(C) No.5134 of 2013 as well as learned counsel for the opposite party-State has submitted that the petitioner in W.P.(c) No.12536 of 2012 since not been appointed, hence she was at all eligible to be engaged in view of the non-eligibility in pursuance to the guideline. This argument cannot be accepted for the two fold reasons:

(i) Admittedly petitioner was selected on 29.2.20111 but engagement order has not been issued which was contrary to the provision of the guideline.

If the authorities would have followed the guideline in strict sense the order of engagement would have been issued and if then decision would have been taken regarding taking out Kurtipali village from Mohulbahali Anganwadi Centre then decision of the authority will not have adversely affected the petitioner and in that situation petitioner would not have been disengaged from service due to subsequent change in eligibility condition due to settled proposition of law that any decision of the authority cannot be given its retrospective application which will adversely affect right of a party.

(ii) When applications have been invited stipulating certain condition therein it is expected from the authority to follow the same and simultaneously candidate is supposed to follow the said terms and conditions. Hence applying the view of Hon'ble Apex Court as observed in the cases referred above. The petitioner cannot be said to be ineligible as per condition dated 2.5.2007 regarding condition pertaining to residing in area where centre is situated.

Petitioner in this case on the due date application or on the date of consideration was found eligible and thereafter selected but engagement order has not been issued which was contrary to the provision of the guideline since no explanation has been furnished in the counter affidavit what led the authority not to issue engagement order fairly for a period of three months while the guidelines provides that engagement order will be issued within 24 hours from the date of publication of the selection list.

On the basis of these two fold reasons, argument advanced by learned counsel for the State as well as private opposite party cannot be accepted.

15. In view of the foregoing reasons action of the opposite party-State cannot be approved and accordingly second advertisement dated 20.6.2012 is hereby quashed.

16. In the result, appointment of opposite party no.4 who is petitioner in W.P.(C) No.5143 of 2013 is also hereby quashed.

Accordingly, opposite party-State is directed to issue appropriate engagement order in favour of the petitioner in W.P.(C) No.12536 of 2012 within reasonable period preferably within four weeks from the date of receipt of copy of this order. With the above observation and directions, both the writ petitions are disposed of.

Writ Petitions disposed of.

2015 (II) ILR – CUT-1247

S. N. PRASAD, J.

W.P.(C) NO.s 10432 OF 2005 & 10433 OF 2005

B.M., NEW INDIA ASSURANCE CO. LTD. ……Petitioner

.Vrs.

LAXMAN MUDULI & ANR. ……Opp. Parties

WORKMEN'S COMPENSATION ACT, 1923 – S.4A(3)
r/w O-6, R-7 C.P.C.

Award against the Insurance Company-petitioner – Direction in the award for payment within 60 days from the date of the order, failing which to pay interest – Petitioner deposited the award amount much after 60 days and filed a petition to recall the part of the order directing payment of interest – Application rejected by the Commissioner – Hence the writ petition – The petitioner cannot approbate by accepting the part of the order and at the same time reprobate by denying its other direction – Held, impugned order needs no interference.

(Para 16)

Case Laws Referred to :-

1. AIR 1993 SC 352 : R.N.Gosain –v- Yashpal Dhir, reported in
2. (2010)10 SCC 422 : Mumbai International Airport Private Limited –v- Golden Chariot Airport and another

For Petitioner : M/s. S.S.Rao & B.K.Mohanty
A.K.Panda & A.K.Nath
For Opp. Parties: None

Date of hearing : 6.10. 15
Date of judgment: 6.10. 15

JUDGMENT

S.N.PRASAD,J.

In both the writ petitions since common question is involved, same is being decided by a common order.

2. In W.P.(C) No.10433 of 2005 the New India Assurance Company Limited through its Branch Manager has filed this writ petition, case is that claimant Mukta Jani while working as labourer in the truck bearing Registration No.OR-01-2160 belonging to the opposite party no.1, had died

on 3.11.1999 in course of his employment. Pursuant to notice owner of the vehicle entered appearance and filed written statement. Insurer of the vehicle i.e. the petitioner has filed written statement denying liability. Learned Commissioner for Workmen's Compensation and Assistant Labour Commissioner, Jeypore in W.C.No.58 of 1999 after taking into facts and circumstances of the case vide order dated 20.7.2002 awarded amount of Rs.1,01,213/- and directed the present petitioner to pay the same within 60 days from the date of passing of the order failing which the petitioner would be liable to pay interest under section 4-A of the Workmen's Compensation Act,1923. Petitioner deposited the entire award amount before the Commissioner on 15.4.2003. Thereafter, petitioner has filed an application to recall the part of the order by which petitioner has been directed to pay interest in making non-payment of the amount within period of 60 days on account of the reason that the petitioner is not at all liable to pay any interest. Learned Commissioner decided the matter on 6.5.2005 rejected the same, hence this writ petition.

3. In W.P.(C) No.10433 of 2005 the New India Assurance Company Limited through its Branch Manager has filed this writ petition against the award dated 20.7.2002 passed in W.C.57 of 1999 directing payment of Rs.2,10,621/- on account of death of brother of the petitioner namely Lachhu Muduli who was working as labourer in truck bearing Registration No.OR-01-2160 belonging to the opposite party no.1.

Petitioner has deposited awarded amount before the learned Commissioner on 15.4.2003, filed an application for recall of the part of the order by which direction was passed by the Commissioner to pay interest if the awarded amount will not be paid within period of 60 days, but the same has been rejected vide order dated 6.5.2005, hence this writ petition.

4. Learned counsel for the petitioner has submitted that the Insurance Company is not liable to pay interest under the Workmen's Compensation Act hence order of awarding amount of interest is without any jurisdiction.

5. This Court has issued notice on 15.9.2005 with direction upon the petitioner to deposit the award amount for the period from 21.8.2002 to 15.4.2003, petitioner has deposited the awarded amount. Notices have been issued, acknowledge receipt from opposite parties 1 and 2 after valid service have been received, but none represented, hence matter is decided on the basis of the materials on record.

6. Case of the petitioner in both the writ petitions is that petitioner being an Insurance Company is not liable to pay interest under section 4-A(3) of the Workmen's Compensation Act,1923. In order to adjudicate this issue it is relevant to see the provision of Section 4-A(3) of the Act which is being quoted for ready reference:

> "Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall-
>
> (a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and
>
> (b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent of such amount by way of penalty:
>
> Provided that an order for the payment of penalty shall not be passed under clause(b) without giving a reasonable opportunity to the employer to show cause as it should not be passed.
>
> 3-A -The interest and the penalty payable under sub-section (3) shall be paid to the workman or his dependant, as the case may be."
>
> This provision of section 4-A(3) stipulates that in case of any default in paying compensation due under this Act within one month from the date learned Commissioner has been directed to impose interest.

7. Claim has been decided by the learned Commissioner directing the Insurance Company to make payment of the amount under Section 14 of the Workmen's Compensation Act. Learned Commissioner has fixed liability at the insurance company since vehicle was insured. Petitioner has not challenged the award passed by the learned Commissioner rather he has implemented the same by making deposit of the amount on 15.4.2003 i.e. beyond the stipulated period directed by the learned commissioner in the award dated 6.5.2005 wherein learned Commissioner has directed the petitioner to deposit the amount within period of 60 days failing which Insurance company i.e. the petitioner is held liable to pay interest under

section 4-A of the Workmen's Compensation Act. Petitioner being aggrieved with that part of the order has filed this writ petition.

8. Now question is that the Insurance Company has not challenged the award in totality rather he has accepted the award, deposited money but after due date of 60 days can he assail the part of the award that too after making default in making payment of awarded amount as per direction of the learned Commissioner dated 6.5.2005.

9. Workmen's Compensation Act has been enacted to compensate certain classes of employers for injury by accident, the Workmen's Compensation Act has came into force on 1st July,e1924, amended time to time. In this case, the kith and kin of the opposite party no.1 in both the cases have died due to injuries sustained in course of accident, resolving this claim cases having been filed under the provisions of Workmen's compensation Act before the learned Commissioner. Learned Commissioner after taking into consideration the fact that vehicle was insured with the petitioner, hence invoking jurisdiction as conferred upon the learned Commissioner under section 14 of the Act,1923 has passed the award. The petitioner has not challenged legality of the award rather he has challenged part of the order by which petitioner has been directed to pay interest in terms of Section 4-A(3) of the Act in case of failing in making payment within period of 60 days. Petitioner has not paid the awarded amount within period of 60 days and after making default payment he has challenged the same which is not permissible in the eye of law because of the reason that a party once chosen to accept the order he will be ceased to challenge the part of the order. The Insurance Company have implemented the order by making payment but beyond period of 60 days, hence petitioner is liable to pay interest as directed by the learned Commissioner in the award impugned.

10. So far as contention of the learned counsel for the petitioner that action of the learned Commissioner is without any jurisdiction, the same cannot be accepted because the Commissioner has been empowered under the provisions of section 4-A(3) which provides that where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled banks as the case may be specified by the Central Government.

11. Sole question raised by the petitioner is that since the petitioner is not an employer rather Insurance Company, hence provisions of section 4-A(3) cannot be invoked, this argument is not available by the petitioner at this stage since the petitioner has accepted the award, made payment of awarded amount and when he has made payment certainly he will be laible to pay interest also. Hence, it cannot be said that the order passed by the learned Commissioner to that effect of making payment of interest under section 4-A(3) is without any jurisdiction.

12. Reference may be made to the judgment rendered by the Hon'ble Apex Court in the case of **R.N.Gosain –v- Yashpal Dhir,** reported in AIR 1993 SC 352 wherein at para-10 their Lordship has been pleased to hold:

> "Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid any thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage". [See: Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd., (1921) 2 R.B. 608, at p.612, Scrutton, L.J]. According to Halsbury's Laws of England, 4th Edn.,Vol. 16, "after taking an advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside"

In another judgment rendered in the case of **Mumbai International Airport Private Limited –v- Golden Chariot Airport and another**, reported in (2010)10 SCC 422 wherein at paragraph-45 their Lordships has been pleased to hold:

> "The common law doctrine prohibiting approbation and reprobation is a facet of the law of estoppels and well established in our jurisprudence also. The doctrine of election was discussed by Lord Blackburn in the decision of the House of Lords in Scarf –v- Jardine wherein the learned Lords formulated (AC p.361)
>
> "… a party in his own mind has thought that he would choose one of two remedies, even though he has written it doesn on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his

remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act…. The fact of his having done that unequivocal act to the knowledge of the persons concerned is an election."

13. Thus law is well settled that a person cannot approbate by accepting the benefit and at the same time reprobate by denying of its other direction.

Applying the same principle in the case in hand it is not open to the petitioner to challenge part of the order regarding interest by accepting part of the order by which he has been directed to make payment under the provisions of Workmen's Compensation Act.

14. In totality of the facts and circumstances of the case, the order needs no interference. Accordingly, both the writ petitions are dismissed being devoid of merit.

Writ petititions disposed of.

2015 (II) ILR – CUT-1252

K. R. MOHAPATRA, J.

F.A.O. NO. 372 OF 2009

M/S. BAJRANG METALLICS LTD., KACHERY ROAD, SUNDARGARH ……..Appellant

.Vrs.

M/S. SHIVOM MINERALS LTD., SUNDARGARH ……Respondent

CIVIL PROCEDURE CODE, 1908 – S.16

Suit for compensation for wrong to the immovable property – Property situates under Kaira P.S. of Sundargarh District which is beyond the local limits of the learned Civil Judge (Sr. Div.), Rourkela – Learned Civil Judge directed the plaintiff to take return of the plaint for its presentation in proper Court – Hence the appeal – The relief sought for in the suit can be obtained through the personal obedience of the defendant adhering to the principles of "equity acts in personam" and

such relief can be granted by the learned Civil Judge (Sr. Div.) Rourkela – Held, impugned order is set aside – Matter is remitted back for fresh adjudication in accordance with law. (Paras 8 to 15)

Case Laws Referred to :-

1. (2005) 7 SCC 791 : Harshad Chiman Lal Modi -V- DLF Universal Ltd. & Anr.
2. AIR 2006 SC 646 : Harshad Chiman Lal Modi -V- DLF Universal Ltd. & Anr.
3. 2009 (113) DRJ 518 : S. Kumar Investment & Properties -V- D.D.Resorts Pvt. Ltd.

For Appellant : M/s. Prasenjeet Mohapatra, S.C.Pani, A.Patnaik, R.C.Sahoo & S.C.Nayak

For Respondent : M/s. Aditya Ku. Mohapatra & Ashutosh Panda

Date of Judgment: 25.09.2015

JUDGMENT

K.R. MOHAPATRA, J.

The plaintiff in C.S. No.166 of 2008 has filed this appeal under Order 43 Rule 1(a) of the C.P.C. assailing the judgment dated 1.5.2009 passed by the learned Civil Judge (Senior Division), Rourkela directing him to take return of the plaint for its presentation in proper Court.

2. Factual matrix of the suit relevant for proper adjudication of the case is that C.S. No. 166 of 2008 was filed with a prayer to pass a decree of Rs.18,05,332.21 paise, *pendente lite* and future damages at the rate of Rs. 18,000/- per day for illegal occupation of the plant premises of the plaintiff by the defendant and not removing its iron ore materials and for mandatory injunction along with cost of the suit.The plaintiff and defendant are companies registered under the Companies Act, 1956. By virtue of the agreement executed between the parties on 2.1.2005, the defendant took the crushing plant of the plaintiff on hire for a period from 1.1.2005 to 30.11.2005 for a consideration of Rs. 1,43,00,000/-. The defendant-company had paid 11 postdated cheques each for Rs. 13,00,000/-. On expiry of the period agreed upon, the plaintiff allowed the defendant to continue the business for a further period of two months on the said terms and conditions for a consideration of Rs. 26,00,000/-. It was also agreed between the parties that the defendant should pay the electricity charges during the aforesaid

period. On expiry of the extended period of agreement, i.e. on 1.2.2005, the defendant-company failed to remove the iron ore materials, structures and machineries installed by them within thirty days. He turned deaf ear to the repeated requests of the plaintiff for removal of the aforesaid materials. The defendant also did not pay the consideration amount of Rs. 26,00,000/- as well as electricity charges etc. Hence, the plaintiff filed a suit for the aforesaid relief.

3. The defendant-respondent filed a written statement admitting the averments made in paragraphs- 1 to 3 of the plain in its entirety. He also admitted the averments made in paragraphs-4 and 5 partly and refuted all other averments made by the plaintiff.The defendant challenged the maintainability of the suit as well as cause of action for filing of the suit and categorically asserted that the learned Civil Judge (Senior Division), Rourkela lacked territorial jurisdiction to entertain and try the suit. The defendant contended that prior to the agreement dated 2.1.2005, they had entered into an agreement with the plaintiff on 1.10.2004 for running the business as per the terms and conditions stated therein. On expiry of the term of the said agreement, a fresh agreement was executed on 2.1.2005, which was valid up to 30.11.2005. As per the terms and conditions of the agreement on its determination, the employees of the defendant had initiated the process of removal of machineries, pipelines, structures etc. within the stipulated period. However, the plaintiff requested the defendant to carry on the business expressing his precarious financial condition. Thus, accepting the request of the plaintiff, the defendant carried on its business activities on the same terms and conditions. However, the condition with regard to the rent of the plant was modified to the effect that the defendant would pay Rs.7.00 lakhs to the plaintiff for the month of December, 2005 and Rs.6.00 lakhs for the month of January, 2006. Accordingly, the defendant had paid the rent vide Cheque No.923016 dated 30.12.2005 and 923017 dated 5.1.2006 of Rs.7,00,000/- and Rs. 6,00,000/- respectively drawn on Bank of Borada, Rourkela. The defendant specifically denied its liability to pay the monthly rent at the rate of Rs.13,00,000/- per month. Further, the defendant had erected certain structures and installed certain machineries which they wanted to remove during 1st week of February, 2006 but the plaintiff obstructed the same and requested them to carry on business and requested for negotiation. As a result, the defendant could not remove the same. The defendant also contended that the plaintiff had violated the terms and

conditions of the agreement for which they were not liable to pay any compensation and prayed for dismissal of the suit with cost.

4. Taking into consideration the rival contentions of the parties, the learned trial court framed as many as seven issues. The learned trial court for the sake of convenience took up Issue Nos. 1 and 3 for adjudication and held that the Court lacked territorial jurisdiction to try the suit and directed the plaintiff to take return of the plaint to be presented before the competent court. Issue Nos. 1 and 3 are as follows:

(i) Is the suit maintainable?

(ii) Had this Court jurisdiction to try the suit?

5. It is not disputed that the property i.e. Crusher Unit situates at village Somua under Kaira P.S. in the district of Sundargarh beyond the territorial jurisdiction of the learned Civil Judge (Senior Division), Rourkela. The suit agreement dated 2.1.2005 (Ext. 1) was executed at Rourkela. However, both the plaintiff and the defendant ordinarily reside within the territorial jurisdiction of the learned trial court and voluntarily carry on their business and personally work for gain at Rourkela. The defendant raised the question of maintainability of the suit on the ground of lack of territorial jurisdiction of the Court to try the suit on the allegation that the property involved in the suit situates beyond the territorial jurisdiction of the Court in which the suit was instituted.

6. Mr. P. Mohapatra, learned counsel for the appellant strenuously urged that the suit is for realization of compensation and damages. The learned trial court misconstruing the same to be recovery of immovable property and misreading the provisions of Section 16 of the C.P.C. has passed the impugned judgment which has resulted in grave miscarriage of justice. He further contended that the learned trial court did not, at all, take into consideration the proviso to Section 16 of the C.P.C. which is squarely applicable to the case at hand. He further contended that this being not a suit for possession or determination of any right or interest relating to the suit property and the suit being filed for compensation which can be entirely obtained through personal obedience of the defendant, the same is maintainable before the learned Civil Judge (Senior Division), Rourkela.

7. Mr. A. K. Mohapatra, learned counsel for the respondent, on the other hand, refuting the contentions of the learned counsel for the appellant submitted that the suit is essentially covered under Clause (d) and (e) of

Section 16 C.P.C. In view of the provisions contained in Section 16(d) and (e) of the C.P.C., the suit for determination of any right to or interest in immovable property other than recovery of possession, partition, foreclosure, sale or redemption of mortgage and for compensation for wrong to immovable property shall be instituted in the Court within whose local limits of jurisdiction the property situates. However, proviso to Section 16 carves out an exception to the effect that where the immovable property is held by or on behalf of the defendant and the relief sought can be entirely obtained through his personal obedience, the suit may be instituted either in the Court within the local limits of whose jurisdiction the property situates, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain. Thus, the proviso to Section 16 applies only to the cases where the immovable property is held by or on behalf of defendant. In that event, the plaintiff has two options i.e. either to institute the suit in the Court within the local limits of whose jurisdiction the property situates or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides and carries on business, or personally works for gain. Had the immovable property been held by or on behalf of the defendant in the present case, the Court in Rourkela would have assumed jurisdiction to entertain the suit filed by the plaintiff. He further submitted that the learned court below on scrutiny of the pleadings and the evidence of the plaintiff with regard to possession over the immovable property in dispute came to a conclusion that the defendant had handed over possession of the immovable property in dispute to the plaintiff after expiry of the agreement period on 1.02.2006, which was admitted by the plaintiff in its plaint as well in its evidence in para-8. In view of the above, the proviso to Section 16 of the C.P.C. has no application to the facts of the present case and the plaintiff should have instituted the suit in a Court having jurisdiction over the immovable property in dispute and not before the Court situated in Rourkela. Thus, the leaned trial court has rightly directed the plaintiff to take return of the plaint to file the same before the Court having territorial jurisdiction over immovable property i.e. Crusher Unit.

8. In order to analyze the rival contentions raised by the parties, it is profitable to go through the provisions under Section 16 of C.P.C. Section 16 of the C.P.C. reads as follows:

"16. **Suits to be instituted where subject-matter situate** –Subject to the pecuniary or other limitations prescribed by any law, suits-

(a) for the recovery of immovable property with or without rent or profits,

(b) for the partition of immovable property,

(c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,

(d) for the determination of any other right to or interest in immovable property,

(e) for compensation for wrong to immovable property,

(f) for the recovery of movable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situated:

Provided that a suit to obtain relief, respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situated or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain."

Proviso to Section 16 C.P.C. provides that the suit to obtain relief, respecting, or compensation for wrong to the immovable property held by or on behalf of the defendant, where the relief sought can be entirely obtained through personal obedience, can be instituted either in the Court within the local limits of whose jurisdiction the property situates or in the Court within the local limits of whose jurisdiction the defendant actually or voluntarily resides or carries on business or personally works for gain.

The Hon'ble Supreme Court in the case of ***Harshad Chiman Lal Modi –v- DLF Universal Ltd. and another***, reported in (2005) 7 SCC 791, held at paragraphs-16, 17 and 18 as follows:

"16. Section 16 thus recognizes a well established principle that actions against res or property should be brought in the forum where such res is situate. A court within whose territorial jurisdiction the property is not situate has no power to deal with and decide the rights or interests in such property. In other words, a court has no

jurisdiction over a dispute in which it cannot give an effective judgment. Proviso to Section 16, no doubt, states that though the court cannot, in case of immovable property situate beyond jurisdiction, grant a relief in rem still it can entertain a suit where relief sought can be obtained through the personal obedience of the defendant. The proviso is based on well known maxim "equity acts in personam, recognized by Chancery Courts in England. Equity Courts had jurisdiction to entertain certain suits respecting immovable properties situated abroad through personal obedience of the defendant. The principle on which the maxim was based was that courts could grant relief in suits respecting immovable property situate abroad by enforcing their judgments by process in personam, i.e. by arrest of defendant or by attachment of his property.

17. In Ewing v. Ewing, (1883) 9 AC 34 : 53 LJ Ch 435, Lord Selborne observed :

"The Courts of Equity in England are, and always have been, courts of conscience operating in personam and not in rem; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts in trusts as to subjects which were not either locally or ratione domicilli within their jurisdiction. They have done so, as to land, in Scotland, in Ireland, in the Colonies, in foreign countries."

18. The proviso is thus an exception to the main part of the section which in our considered opinion, cannot be interpreted or construed to enlarge the scope of the principal provision. It would apply only if the suit falls within one of the categories specified in the main part of the section and the relief sought could entirely be obtained by personal obedience of the defendant."

Admittedly, the instant suit is for compensation for wrong to the immovable property which situates beyond the local limits of learned Civil Judge (Senior Division), Rourkela i.e. under Kaira P.S of Sundargarh District. In the instant case, the plaintiff does not seek for a relief in rem. The relief sought for can be obtained through the personal obedience of the defendant adhering to the principles of 'equity acts in personam' as it is a suit to obtain relief, respecting, or compensation for wrong to, immovable property.

10. Thus, the question remains to be decided as to whether the suit property is held by or on behalf of the defendant-company. The plaintiff-company in para-10 of the plaint pleads as follows:

> "10. That as agreed the defendant stopped the use of the crushing plant of the plaintiff from 1.2.05 onwards and handed over the possession of the plant to the plaintiff, but as agreed the defendant did not remove all his iron ore materials left in the plant premises of the plaintiff within 30 (thirty) days of 31.1.06 in spite of repeated demands and requests. Which has also caused hindrances, obstacle, and great inconvenience in the smooth and profitable operation of the crushing plant by the plaintiff, in course of his personal use and operation of the plant from and after the period 1.2.06."

Again reiterating the pleadings in para-10 of the plaint, the P.W.1 in his deposition stated on oath as follows:

> "8. That as agreed the defendant handed over the possession of the crushing plant on expiry of it's period on 1.2.06 but did not remove all his iron ore material stored in the plant premises of the plaintiff within 30 days of 31.1.06 in spite of repeated demands and request of the plaintiff, which has also caused hindrances, obstacle and great inconvenience in the smooth and profitable operation of the crushing plant by the plaintiff in the course of his personal use and operation of the plant from the and after the period 1.2.06.

Moreover, the suit is for damages for occupying the plant premises of the plaintiff and not removing the iron ore materials by the defendant from the plant premises.

11. It is clear from the pleadings, deposition of the witness of the plaintiff and the relief sought for in the suit that though the possession of the crushing plant was handed over to the plaintiff on 1.2.2006, the defendant did not remove the iron ore and other materials stored in the plant premises of the plaintiff and the defendant was occupying the plant premises creating hindrance to the plaintiff. Thus, it cannot be held that the plant premises, where the iron ore and other materials were stacked by the defendant, was handed over to the plaintiff. The defendant continued to hold and remain in possession over the same. Moreover, the suit is filed for compensation for wrong to the suit land where the iron ore and other materials were stacked. There cannot be any dispute that the suit property includes the plant and the

premises. When the materials of the defendant stacked in the plant premises are admittedly not removed and the suit was filed for compensation/damages for such occupation of the defendant, it can be safely held that a portion of the suit property is still in possession and occupation of the defendant. In that view of the matter, the finding of the learned trial court to the effect that the proviso to Section 16 of the C.P.C. is not applicable to the case at hand, is not sustainable.

12. The learned Civil Judge (Senior Division), Rourkela relied upon the decision in the case of ***Harshad Chiman Lal Modi Vs. D.L.F. Universal and another,*** reported in AIR 2006 SC 646 wherein it was held as under:

> "Since the dispute relates to immovable property and the prayer was for specific performance of an agreement on sale of immovable property and recovery of possession thereof, the relevant provision was Section 16 of the Code. Under Clause (d) of the said section, only Gurgaon Court had jurisdiction. We also held that notwithstanding the agreement between the parties that only Delhi Court had jurisdiction, the said clause could not operate as section 20 of the Code could not be invoked. According to us Section 20 would apply where two or more courts had jurisdiction and the parties by an agreement consented that one of such Courts would try the suit."

13. There cannot be any dispute with regard to the ratio decided above in the case of ***Harshad Chiman Lal Modi Vs. D.L.F. Universal and another,*** reported in AIR 2006 SC 646. However, the aforesaid ratio is not applicable as the facts involved and relief sought for in the instant case is completely different to the case at hand. In the reported case (supra), the appellant claimed for specific purpose of an agreement for sale of immovable property and recovery of possession thereof, which comes under Clause (a) and (c) of Section 16, C.P.C. On the other hand, the instant case is squarely covered under Section 16(e) of C.P.C. Thus, the principles decided in the case of ***Harshad Chiman Lal Modi –v- DLF Universal Ltd. and another***, reported in (2005) 7 SCC 791 has an application to the facts and circumstances of this case.

14. Mr. P. Mohapatra, learned counsel for the appellant further relied upon a decision in the case of ***S. Kumar Investment & Properties –v- D.D. Resorts Pvt. Ltd.***, reported in 2009 (113) DRJ 518 and in the said case, the Hon'ble Court relying upon the decision in the case of Harshad Chiman Lal Modi (supra) held as under:

> "16. After having considered the legal proposition and facts of this case from which it is clear that plaintiff is already in possession of suit property, I am of the view that proviso of Section 16(d) of CPC would have application to the facts of this case. Proviso is based on the maxim equity acts in personam. Under the proviso even though the immovable property is not situated within the jurisdiction of a court, a suit in respect of compensation to the immovable property may at the option of the plaintiff be instituted in that court if the person of the defendant or his personal property is within its jurisdiction and the relief asked for can be entirely obtained through defendant's personal obedience."

Thus, the relief sought for with regard to compensation which includes the suit amount, compensation, *pendent lite* interest and future damages can be granted by the leaned Civil Judge (Senior Division), Rourkela.

15. In view of the above, the impugned judgment and order is set aside and the matter is remitted back to the learned Civil Judge (Senior Division), Rourkela for fresh adjudication in accordance with law. Accordingly, the appeal is allowed, but in the circumstances, there shall be no order as to costs.

Appeal allowed.

2015 (II) ILR – CUT-1261

J. P. DAS, J.

C. R.A. NOs. 69 & 74.OF 1992

HATI @ CHINTAMANI MOHANTY .....Appellant

.Vrs.

STATE OF ORISSA .....Respondent

PENAL CODE, 1860 – S. 376.

Rape – Trial court convicted the appellants solely basing on the version of the victim, which is not unblemished – Medical evidence was against the possibility of rape and chemical examination report did not support the prosecution case – serious discrepancies in the prosecution evidence have been lightly brushed aside by the learned

trial court – None of the accused persons were medically examined, though both of them were arrested on the very next day of the alleged occurrence – Defence plea was not taken in to consideration when there was animosity between the parties – Held, impugned judgment of conviction and sentence is set aside. (Para 16 to 22)

Case Laws Referred to :-

1. (2012) 7 SCC 178 : Narendra Kumar -V- State (NCT of Delhi)
2. (2000) 1 SCC 621 : Padam Singh -V- State of U.P.

For Appellant : M/s. D.Panda,G.C.Mahapatra, A.C.Das, R.Parida & Miss D.R.Nanda,
: M/s S.K.Padhi, Miss D.Mohapatra, Mr. Laxmi Narayan Das (Amicus Curiae)

For Respondent : Addl. Standing Counsel

Date of hearing : 06.10.2015
Date of judgment : 30.10.2015

JUDGMENT

J.P. DAS, J.

Both the appeals are taken up together since both are directed against the judgment dated 30.01.1992 passed by the learned Addl. District & Sessions Judge, Jajpur in S.T. No. 303/67 of 1989, convicting Hati @ Chintamani Mohanta (Appellant in CRA 69/1992) under Section 376 of the Indian Penal Code (IPC in short) and sentencing him to undergo R.I. for five years and to pay a fine of Rs.3,000/- in default to undergo R.I. for six months more and convicting Jairam Mohanta (appellant in CRA 74/1992) u/s. 354 IPC and sentencing him to undergo R.I. for two years.

2. The prosecution story, as unfurled, is that on 11.10.1988 at about 2.30 p.m., when the parents of the victim were absent from the house and the victim alone was combing her hair, both the accused persons entered inside her house, gagged her mouth by means of a towel and dragged her to inside a room. There the accused Hati @ Cintamani forcibly raped the victim and thereafter when the accused Jairam was trying to rape her, two females of the village came inside the house and both the accused persons fled away. In the evening, the victim informed her mother, after she came back home, who in turn informed her husband in the night. The father of the victim lodged a written report on the next day at Kaliapani Outpost.

Pursuant to the report, the ASI of police in charge of the Outpost took up the investigation sending the FIR to Tamka Police Station for formal registration of the case. In course of the investigation the informant, the victim and the other witnesses were examined, the wearing apparels of the victim and the accused Hati were seized and sent for chemical examination, both the accused persons were arrested and forwarded to the court and the victim was medically examined, once at S.D. Hospital Jajpur for the injuries and again at SCB Medical College, Cuttack for determining her age. After completion of the investigation, charge sheet was submitted under Sections 448/376 IPC against the accused Hati @ Chintamani and under Sections 448/354 of the IPC against the accused Jairam.

3. Both the accused persons pleading not guilty to the charges faced their trial with a further plea that due to certain dispute between them and the brother of the victim who was fined in the village meeting, they have been falsely implicated in the case.

4. The prosecution examined 7 witnesses in support of its case as against one in defence to state the defence plea of earlier dispute.

5. The learned Additional Sessions Judge on evaluation of the evidence and the materials placed before him found the prosecution case well proved against both the accused persons as charged and accordingly, passed the impugned judgment of conviction and sentence. Hence the two appeals, filed separately by the two convicts.

6. It has been submitted in the appeal memos, almost with similar averments in both the cases that the learned trial Court seriously erred in law in reaching the conclusion of guilt against the appellants by ignoring the glaring discrepancies and deficiencies in the prosecution case thereby flouting the settled principles of law. It was submitted that the evidence as led by the prosecution never inspired confidence apart from the fact that the medical evidence was against the possibility of rape. It has also been submitted that the investigation of the case also suffered from lacuna making the prosecution case defective, much less establishing the alleged offences against the appellants beyond reasonable doubts. It has also been mentioned that the learned trial Court ignored the defence evidence of animosity between the parties without any assigned reason.

7. Since the counsels for the appellants did not appear despite repeated adjournments for hearing of the matter Mr. Laximinarayan Das, Advocate was engaged as amicus curiae to assist the Court.

8. The learned amicus curiae made the submissions as pleaded in the appeal memo as grounds for appeal besides placing certain citations in support of his contentions. He also painstakingly pointed out the discrepancies and deficiencies in the evidence and materials placed on behalf of the prosecution before the trial Court. It was also submitted that the glaring discrepancies between the versions of the victim in her statement recorded under Section 164 of the Code of Criminal Procedure ('Code' in short) and her statement before the Court showing her over interestedness was itself enough to disbelieve her version of rape.

9. Per contra, the learned Counsel for the State supporting the verdict of the trial Court submitted that the findings of guilt against the appellants have been rightly reached, since the evidence of the victim itself is enough to bring home the prosecution case without requiring any corroboration. He also submitted that the minor discrepancies as have been pointed out on behalf of the appellants did not affect the veracity of the prosecution case in any manner.

10. The father of the victim submitted the written report on 12.10.1988 alleging that on the previous day at about 2.30 p.m. when he and his wife were absent from their house, the two accused-appellants forcibly entering inside his house pounced upon his 15 year old daughter and gagging her mouth by means of a towel were committing rape on her. At this time since two females of the village reached there, the appellants fled away. Out of the seven witnesses examined on behalf of the prosecution, the p.w.1 is the informant-father, p.w.2 is the victim, p.w.3 is one of the females who reached at the spot at the time of occurrence, p.w.4 is the mother of the victim, p.w.5 is the doctor who first examined the victim about the injuries, p.w.6 is the other doctor who conducted ossification test of the victim and the p.w.7 is the investigating officer. The d.w.1 was examined in support of the defence plea of enmity. It may be mentioned here that the statements of P.Ws. 2 and 3 were recorded under Section 164 of the Code in course of investigation.

11. Looking into the prosecution case in order of sequence, the victim in her statement under Section 164 of the Code had stated that both the appellants entered inside her house, the appellant Jaya gagged her mouth by a towel and laid her on the ground and the appellant Chintamani @ Hati raped her. Thereafter when the appellant Jairam was trying to rape her, two females reached there who lifted her. She also stated that both the appellants

had also threatened her with dire consequences if she shouted. One Mali Mohanta, one of the females who reached the spot stated in her statement under Section 164 of the Code that while she was going on the road, she heard the shouts of the victim from inside their house and entering inside the house she found the victim and that both the appellants went out of the house seeing her and thereafter she lifted the victim from the ground and brought her outside. She concluded by saying that the parents of the victim were not present in the house and thereafter she left. The victim, appearing as p.w.2 before the court, stated that when she was combing her hair inside the house, both the accused persons came inside their house, the accused Chintamani gagged her mouth by a towel and both the accused dragged her inside a room. Thereafter the accused Chintamani pulled out her 'chaddi' and raped her. She added that thereafter the accused Jairam committed intercourse with her forcibly and ejaculated his semen inside her vagina. She added that the two females came inside the house and both the accused persons left the place. She further stated that at about 4.00 p.m. when her mother came back home she told her the incident and that her father came home in the night and reported the matter to police next day morning. In her cross-examination she had stated that she was dragged on the surface for about six cubits. Most importantly, she was confronted with her statement made before the police about the rape by the accused Jairam, but she categorically denied the suggestion put to her that she did not state before the police about the rape by the accused Jairam. The p.w.3, one of the females who entered inside the house stated that while she was passing by the side of the house of the victim she heard a groaning sound from inside the house and she went inside. She added that seeing her, accused Hati went away from the house and the other accused Jairam was inside the house. She talked to Jai who told her that he had done nothing. Then the victim told her that Hati forcibly raped her and thereafter she brought the victim to the outer veranda and left the place. Being confronted with her earlier statement, she denied the suggestion that she had not stated before the police that she heard a groaning sound from inside the house.

12. The mother of the victim appearing as p.w.4 stated that on her return to house, her daughter told her that both the accused persons dragged her inside the house and the accused Hati forcibly raped her. The father of the victim appearing as p.w.1 stated that on his return home his wife told him about the incident and on the next day he reported the matter to police.

13. In this respect it was submitted by the learned amicus curiae that the prosecution solely relied upon the version of the victim for the alleged occurrence since the p.w.3 who allegedly reached the spot did not whisper anything to have seen the occurrence of rape. Further in her statement recorded under Section 164 of the Code, p.w.3 had not stated as to the victim telling her anything about the occurrence at the spot, whereas in her statement before the Court she went on to say that the accused Hati left the spot and she had a talk with the other accused, adding further that the victim told her that the accused Hati raped her. Again, the victim has tried to exaggerate the incident by further implicating the appellant Jairam for the rape, which shows her interestedness to get the appellants punished. It was submitted that as per the settled proposition of law, even though the solitary testimony of the victim is sufficient to convict the accused but such statement of the victim must be trust worthy and without any blemishes so as to discard any iota of doubt regarding her veracity.

14. In this regard it would be profitable to quote the observation of the Hon'ble Apex Court in the case of ***Narendra Kumar vrs. State (NCT of Delhi), in (2012) 7 SCC 178*** as under :

> "It is a settled legal proposition that once the statement of the prosecutrix inspires confidence and is accepted by the Court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the Court for corroboration of her statement. Corroboration of the statement of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.
>
> A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject-matter being a criminal charge. However, if the Court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial which may lend assurance to her testimony…."

15. On the touchstone of the quoted observation, it may be mentioned that there appeared exaggerations in the versions of the prosecutrix as well as in the statement of the p.w.3 who appeared at the scene of occurrence at the relevant time. Keeping these in mind I would like to consider the other circumstantial evidence as found out in the prosecution case. It was submitted on behalf of the appellants that the very first part of the prosecution story that both the appellants entered inside the house of the victim with a criminal intention and left the door of the house open so that the p.w.3 and another female entered inside the house to witness the occurrence is not believable. Further, the other female said to have been present along with the p.w.3 has not been examined by the prosecution without any reason. That apart as per the prosecution case the victim was gagged in her mouth and she has stated that she could not shout but the p.w.3 heard some sound of the victim from inside the house while passing on the road. These contentions have definitely some considerable force to be reckoned with. It may also be reiterated that the p.w.3 did not say about any disclosure to have been made by the victim about the occurrence before her in her statement recorded u/s.164 of the Code but said many things before the court.

16. Now coming to the medical evidence, as per the statement of the victim, she was dragged by the accused persons to a certain distance on the floor. But absolutely no external injury was found on her body by the doctor, p.w.5 who examined the victim on 13.10.1988, the alleged occurrence being on 11.10.1988. As per the evidence on record, the doctor found no tenderness on the body, no stains on the clothes, no spermatozoa in the vaginal smear and the victim did not complain of any pain on her person. The doctor also stated that she could not tell as to whether the girl was raped or not. Added to this, the wearing apparels, one ‘chaddi’ of the victim and one ‘lungi’ of the accused Chintamani were sent for chemical examination but as per the report, ext.9, no blood stain or seminal stain was found on those clothes. The victim stated in her cross-examination that the floor of the place was stained with semen but the Investigating officer (p.w.7) denied to have noticed any such mark at the spot. In a case of physical violence, the medical evidence plays a vital role, but in the case at hand the medical evidence and the chemical examination report being totally negative to the prosecution allegation, no circumstantial support was available to the prosecution case. The learned trial court observing that bsence of injury on the body or private part of the victim does not

necessarily rule out the allegation of rape, relied upon certain case laws in that regard. True, presence of injury is not a mandatory requirement, but in the present case the chemical examination report also did not support the prosecution. The learned trial court has totally ignored this aspect. All these circumstances would have been immaterial if the sole evidence of the prosecutrix would have been unblemished. The learned trial court has ignored the highly exaggerated version of the prosecutrix before the court simply to hold the accused Jairam guilty for the offence under Section 354 of the IPC and not under Section 376 of the IPC. It may also be noted here that the victim stated in her statement recorded under Section 164 of the Code that the accused Jairam gagged her mouth by a towel, whereas she stated before the Court that the accused Chintamani gagged her mouth. Stressing on this it was submitted on behalf of the appellants that no case under section 354 of the IPC was even made out against the appellant Jairam. Another serious lacuna that the prosecution case suffered from is that neither of the accused persons was medically examined, even though both of them were arrested on the very next day of the alleged occurrence. Going through the impugned judgment, it is seen that these discrepancies and deficiencies in the prosecution case have been lightly put aside by the learned trial court.

17. Lastly, it was submitted on behalf of the appellants that although the victim was reading in a school, the investigating agency had made no effort to find out any school register or any other document to establish the age of the victim. It has simply relied upon the version of the p.w.6, the doctor who on examination of the x-ray plate opined that the age of the victim was above 14 years and below 16 years. It was submitted that in absence of any documentary evidence, the opinion of the p.w.6 cannot be accepted as conclusive, apart from the fact that as per the settled principle of law, a presumptive benefit of two years can be given to the age determined on ossification test.

18. The Sarpanch of the village was examined as D.W.1 who stated that few days prior to the alleged occurrence there was a dispute of assault between the brother of the victim and both the accused persons and in a village meeting, the brother of the victim was fined. The informant-father of the victim, p.w.1 admitted about the dispute. The learned trial court has disbelieved the defence plea with the observation that for such a trifling issue, a case of rape could not have been filed. Be that as it may, it is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution

case has to stand on its own legs and cannot take support from the weakness of the case of defence. It was also observed by the Hon'ble Apex Court in the case of **Narendra Kumar** (*supra*), that :

> "However, in case the court has reason not to accept the version of the prosecutrix on its face value, it may look for corroboration. In case the evidence read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected. The court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation."

19. It was also held by the Hon'ble Apex Court in another case as reported in ***(Padam Singh v. State of U.P.),*** **(2000) 1 SCC 621** that :

> "It is the duty of an appellate court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution can be said to have been proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by the appellate court in drawing inference from proved and admitted facts. It must be remembered that the appellate court, like the trial court, has to be satisfied affirmatively that the prosecution case is substantially true and the guilt of the accused has been proved beyond all reasonable doubt as the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final Court of Appeal and that presumption is neither strengthened by an acquittal or weakened by a conviction in the trial court."

20. In the light of the aforesaid legal propositions, to sum up my observations on the prosecution case as laid before the court are;

i) the victim materially and substantially differed in her statements recorded under Section 164 of the Code and the statements made before the court, which seriously affected her veracity so as to be solely relied upon in order to reach a conclusion of guilt against the accused persons,

ii) similar was the case in respect of p.w.3, which made her presence at the spot of occurrence appear doubtful,

iii) the other female said to have been present along with p.w.3 has not been examined by the prosecution without any assigned reason,

iv) the medical evidence as well as the chemical examination report did not support the prosecution case, and

v) there remained admitted animosity between the parties.

21. Considering the facts and circumstances as discussed, I am constrained to disagree with the findings of the learned trial court as have been reached against both the appellants that the prosecution has been successful in establishing the presumption of guilt against the appellants beyond all reasonable shadows of doubt so as to be awarded with the impugned conviction and sentence.

22. In the result, therefore, both the appeals are allowed. The impugned judgment of conviction and sentence passed in S.T. No.303/67 of 1989 by the learned Additional Sessions Judge, Jajpur is set aside and both the appellants are set at liberty being discharged from their bail bonds furnished at the time of filing of the appeals.

23. Before I part, I must record my appreciation for the able assistance provided by Mr. Das, Advocate, learned amicus curiae in deciding the case.

Appeals allowed.