THE INDIAN LAW REPORTS
(CUTTACK SERIES)

Containing Judgments of the High Court of Orissa and some important decisions of the Supreme Court of India.

Mode of Citation
2018 (II) I L R - CUT.

SEPTEMBER & OCTOBER-2018

Pages : 353 to 592

Edited By

BIKRAM KISHORE NAYAK, ADVOCATE

LAW REPORTER
HIGH COURT OF ORISSA, CUTTACK.

Published by **:** High Court of Orissa.
At/PO-Chandini Chowk, Cuttack-753002
Printed at - Odisha Government Press, Madhupatna, Cuttack-10

Annual Subscription : ₹ 300/-

ORISSA HIGH COURT, CUTTACK

CHIEF JUSTICE

The Hon'ble Shri Justice KALPESH SATYENDRA JHAVERI *B.Sc., LL.B.*

PUISNE JUDGES

The Hon'ble Shri Justice INDRAJIT MAHANTY, *LL.M.*

The Hon'ble Justice KUMARI SANJU PANDA, *B.A., LL.B.*

The Hon'ble Shri Justice S.K. MISHRA, *M.Com., LL.B.*

The Hon'ble Shri Justice C.R. DASH, *LL.M.*

The Hon'ble Shri Justice Dr. A.K. RATH, *LL.M., Ph.D.*

The Hon'ble Shri Justice BISWAJIT MOHANTY, *M.A., LL.B.*

The Hon'ble Shri Justice Dr. B.R. SARANGI, *B.Com.(Hons.), LL.M., Ph.D.*

The Hon'ble Shri Justice DEBABRATA DASH, *B.Sc. (Hons.), LL.B.*

The Hon'ble Shri Justice BISWANATH RATH, *B.A., LL.B.*

The Hon'ble Shri Justice S.K. SAHOO, *B.Sc., M.A. (Eng.&Oriya), LL.B.*

The Hon'ble Shri Justice SUJIT NARAYAN PRASAD, *M.A., LL.B.*

The Hon'ble Shri Justice K.R. MOHAPATRA, *B.A., LL.B.*

The Hon'ble Shri Justice J. P. DAS, *M.A., LL.B.*

ADVOCATE GENERAL

Shri SURYA PRASAD MISRA, *B.Sc., LL.B.*

NOMINAL INDEX

ACTS & RULE

Acts & No.

1950	Constitution of India, 1950
1973-2…..	Code of Criminal Procedure, 1973
1908-5…..	Code of Civil Procedure, 1908
1971-70…	Contempt of Courts Act,1971
1860-45….	Indian Penal Code, 1860
1985-61….	Narcotic Drugs And Psychotropic Substances Act, 1985
1989-33….	Scheduled Castes & The Scheduled Tribes (Prevention of Atrocities) Act, 1989
1882- 4….	Transfer of Property Act, 1882

RULE:- 1. Orissa Secretariat Service Rules, 1980 & Amendment to the Said Rules in 2001

SUBJECT INDEX

SERVICE LAW – Voluntary Retirement under a Scheme – Petitioner, a bank employee submitted application on 22.01.2001 – Application for Voluntary Retirement was accepted on 16.04.2001 with a condition that petitioner would be relieved from service on the closure of the business hour of the bank on 30.04.2001 – But the petitioner on the last day i.e on 30.04.2001 made an application for withdrawal of the application for Voluntary Retirement – Withdrawal application rejected – Writ petition challenging the rejection – Held, the petitioner's application for voluntary retirement having been accepted, may it be conditional basis, the same cannot be permitted to be withdrawn.

Rama Krushna Dhal -V- United Commercial Bank & Ors.

2018 (II) ILR-Cut…… 464

WORDS AND PHRASES – Reason – Meaning of – Franz Schubert said-"Reason is nothing but analysis of belief." In Black's Law Dictionary, reason has been defined as a- "faculty of the mind by which it distinguishes truth from falsehood, good from evil, and which enables the possessor to deduce inferences from facts or from propositions." It means the faculty of rational thought rather than some abstract relationship between propositions and by this faculty, it is meant the capacity to make correct inferences from propositions, to size up facts for what they are and what they imply, and to identify the best means to some end, and, in general, to distinguish what we should believe from what we merely do believe.

Nikita Sharma -V- Ravenshaw University & Ors.

2018 (II) ILR-Cut…… 380

___

2018 (II) ILR - CUT- 353 (S.C.)

S.A. BOBDE, J & L. NAGESWARA RAO, J.

SPECIAL LEAVE PETITION (CIVIL) NOS. 7104-7105 OF 2016

UNITED INDIA INSURANCE CO. LTD. .....Petitioner

.Vs.

INDIRO DEVI & ORS. .....Respondents

MOTOR ACCIDENT CLAIMS – Compensation – Income factor – Consideration thereof – Held, only income from salary cannot be the sole factor for determining compensation amount – Income Tax return aspect has to be taken into consideration, if filed.

"Indeed, it was possible that the deceased had income from other sources also. There is nothing in the law which requires the Tribunal to assess the income of the deceased only on the basis of a salary certificate for arriving at a just and fair compensation to be paid to the claimants for the loss of life." (Para 9)

For Petitioner : Mr. Binay Kumar Das
For Respondents : Mr. Satish Kumar

JUDGMENT Date of Judgment : 03. 07. 2018

S.A. BOBDE, J.

The deceased was 39 years old. He was employed with the Food Corporation of India (hereinafter referred to as 'FCI'). He met with an accident when the three-wheeler he was travelling in collided with a rashly driven Canter truck and died. The claimants claimed compensation before the Motor Accident Claims Tribunal (hereinafter referred to as "Tribunal").

2. These petitions arise from the order dated 27.08.2015 passed in C.R. No. 408 of 2006 and the Civil Appeal FAO No. 4086 of 2005 by the High Court of Punjab and Haryana at Chandigarh. The Insurance Company is before us (hereinafter referred to as "the petitioner") in the instant petitions.

3. The Tribunal found that the accident occurred because of rash and negligent driving and held the owner of the truck, the insurer and the driver jointly and severally liable to pay the amount of compensation determined.

4. The Tribunal passed an award of a sum of Rs. 12,90,000/- in favour of the claimants recoverable @ 9% per annum from the date of filing of claim petition, till its realization from the respondents jointly and severally.

5. The issue in this case revolves around the income of the deceased. On behalf of the accounts section of the employer of the deceased, it was deposed that the deceased was getting Rs. 8848/- as gross monthly salary. The deponent proved the salary certificate. The amount of salary was not questioned. The Tribunal passed the award on the basis that the salary he was receiving i.e. Rs. 8848/-.

6. The Tribunal did not take into account the fact that the Income Tax Returns of the deceased showed an income of Rs. 2,42,606/- per annum for the assessment year 2004-05 and Rs. 2,17,130 for the assessment year 2003-04. The Tribunal held that the claimants had not led any evidence to explain the contradictions between the two figures of income emerging from the evidence of the employer of the deceased and the income tax record, and passed the award relying on the salary certificate issued by the employer of the deceased.

7. In a revision carried to the High Court by the Insurance Company and appeal by the claimants, the High Court took the income of the deceased as found in the income tax assessment and provided for 50% increase as future prospect. The High Court applied the lower multiplier of 15 instead of 16 and after making a deduction of 1/4th for the personal expenses, increased the compensation to Rs. 44,03,980/- with interest @ 7.5% per annum from the date of petition till the date of payment. The amount payable was tabulated as follows:-

	FATAL ACCIDENTS Date of accident	27.2.2004	
Age	39 years		
Occupation	Employee in FCI	8848/-	
Claimants	Widow, 4 children and mother		
	Heads of claim	**Tribunal**	**High Court**
Sl.No.		**Amount(Rs.)**	**Amount (Rs.)**
1.	Income	10,000(monthly)	2,42,606 (annual)
2.	Add, % of increase 50%		3,63.909
3.	Less, Deduction		3. 2,72,932
4.	Multiplicand (annualized by multiplying 12)	80,000	2,72,932
5.	Multiplier	16	15
6.	Loss of dependence	12,80,000	40,93,980
7.	Medical Expenses & Transportation		
8.	Loss of Consortium & funeral expenses	10,000	1,00,000
9.	Loss of love and affection		2,00,000
10.	Loss to estate		5000
11.	Funeral expenses		5000
	Total	12,90,000	44,03,980

8. It was argued before us on behalf of the petitioner that the High Court has committed a gross error and perversity in taking into account the income of the deceased as per the income tax returns. According to the petitioner, the income of the deceased was Rs. 8848 per month, i.e. the amount according to the salary certificate of the deceased and the High Court ought to have relied upon the salary certificate for the calculation of the compensation.

9. We have given our anxious consideration to this contention. There is no doubt that if the salary certificate is taken into account the salary of the deceased should be taken as Rs. 1,06,176/- since the gross salary was Rs.8848 per month. That, however, in our view does not mean that the income of the deceased as stated in the Income Tax return should be totally ignored. It is not possible to agree with the observation of the Tribunal that it was necessary for the claimants to "explain the said contradiction" between two figures of income. The claimants had led reliable evidence that the deceased had returned an income of Rs. 2,42,606/- for the assessment year 2004-05. This piece of evidence has not been discredited. Indeed, it was possible that the deceased had income from other sources also. There is nothing in the law which requires the Tribunal to assess the income of the deceased only on the basis of a salary certificate for arriving at a just and fair compensation to be paid to the claimants for the loss of life.

10. In the circumstances, we see no reason to interfere with the judgment of the High Court. The SLPs are accordingly dismissed.

2018 (II) ILR - CUT- 355 (S.C.)

RANJAN GOGOI, J, R. BANUMATHI, J & NAVIN SINHA, J.

CRIMINAL APPEAL NO. 2182 OF 2010

MOHINDER SINGH .....Appellant

.Vs.

THE STATE OF PUNJAB .....Respondent

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 20 (b) (ii) (C) – Offence under – Seizure of seven kilos of opium –Trial court acquitted the appellant on the ground that there was non-compliance of Section 50 of the NDPS Act – No order of the Magistrate was proved to show that the case property was produced before the court and was brought in evidence to show that the seal of the sample sent to FSL tallied with the seal of the contraband, and thus it cannot be said that the evidence regarding such production of case property before the Magistrate was trustworthy – Appeal before the High Court – High Court convicted on the basis of evidence available on record – Held, not proper.

"For proving the offence under the NDPS Act, it is necessary for the prosecution to establish that the quantity of the contraband goods allegedly seized from the possession of the accused and the best evidence would be the court records as to the production of the contraband before the Magistrate and deposit of the same before the Malkhana or the documents howing destruction of the

contraband. In an appeal against acquittal, the High Court will not interfere unless there are substantial and compelling reasons to reverse the order of acquittal. The mere fact that on reappreciation of evidence the appellate court is inclined to arrive at a conclusion which is at variance with the trial court, the same cannot be the reason for interference with the order of acquittal. Considering the case in hand, the findings of the trial court cannot be said to be 'distorted conclusions' warranting interference." *(Paras 14 to 16)*

Case Laws Relied on and Referred to :-

1. 1998 2 SCC 724 : State of Punjab .Vs. Baldev Singh.
2. 2011 5 SCC 123 : Ashok alias Dangra Jaiswal .Vs. State of Madhya Pradesh.
3. 2005 4 SCC 350 : State of H.P. .Vs. Pawan Kumar.
4. 2013 14 SCC 527 : Vijay Jain .Vs. State of Madhya Pradesh.
5. 2007 4 SCC 415 : Chandrappa and others .Vs. State of Karnataka.
6. 2012 6 SCC 297 : Jugendra Singh .Vs. State of Uttar Pradesh.
7. 2010 1 SCC 529 : State of Uttar Pradesh .Vs. Ram Sajivan and Others.
8. (2009) 11 SCC 690: Bhaskar Ramappa Madar & Ors .Vs. State of Karnataka
9. 2007) 4 SCC 415 : Chandrappa and others .Vs. State of Karnataka.

For Appellant : Chander Shekhar Ashri
For Respondent : Kuldip Singh

JUDGMENT Date of Judgment : 14.08. 2018

R. BANUMATHI, J.

This appeal arises out of the judgment dated 30.06.2010 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No.199-DBA of 2002 in and by which the High Court reversed the judgment of acquittal of the appellant/accused and convicted him under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and sentenced him to undergo ten years imprisonment.

2. Briefly stated case of the prosecution is that on 30.04.1998, Joginder Singh, SI, Police Station Sadar Ludhiana (PW-2) along with other police officials was checking the vehicles on the bridge of Gill Canal towards the side of village Gill. Meanwhile, at about 7.00-7.30 pm, appellant Mohinder Singh came on his scooter No.PB-10B-2413. A signal was given to stop the scooter and the appellant/accused stopped his scooter. It was suspected that some contraband substance was being carried in the bag. Appellant/accused was informed of his right of search before a Gazetted Officer or a Magistrate. Joginder Singh (PW-2) called Gurjit Singh, DSP (PW-4) and the bag carried by the appellant/accused was searched in his presence and the substance bag was found to be *"opium"*. On weighment, it was found to be 7 kilos and 40 gms. Two samples from the recovered "*opium*", each weighing 20 gms were taken and sealed separately having monogram 'JS' and 'GS' and taken into possession *vide* recovery memo Ext.-PE. Case property along with two samples was deposited with Baldev Singh MHC (PW-5). Next day i.e. on 01.05.1998, the

case property as well as the sample parcels were produced before the Area Magistrate who is said to have initialed the case property and the sample parcels. The sample parcels were sent to Forensic Science Laboratory (FSL) and subjected to chemical analysis a nd the contents were found to be "*opium*" in FSL report *vide* Ext.-P1. After completion of the investigation, charge sheet was filed against appellant under Section 18 of the NDPS Act.

3. To prove the guilt of the accused, the prosecution has examined Constable Hardev Singh (PW-1), SI Joginder Singh (PW-2), ASI Harbhajan Singh (PW-3), DSP Gurjit Singh (PW-4) and Baldev Singh, MHC (PW-5). The appellant was examined under Section 313 Cr.P.C. to explain the incriminating evidence circumstance appearing in the prosecution evidence and he denied all of them.

4. The trial court acquitted the appellant *inter alia* on the ground that there was non-compliance of Section 50 of the NDPS Act. The trial court further held that no order of the Magistrate was proved to show that the case property was produced before the court, was brought in evidence to show that the seal of the sample sent to FSL tallied with the seal of the contraband, and it cannot thus be said that the evidence regarding such production of case property before the Magistrate was trustworthy. Being aggrieved by the acquittal, the State has preferred appeal before the High Court.

5. Placing reliance upon ***State of Punjab v. Baldev Singh*** (1998) 2 SCC 724, the High Court held that recovery of contraband from a bag/attache which the accused was carrying in his hands, would not amount to search of person and as such Section 50 of the NDPS Act will not apply. Based on the evidence of SI Joginder Singh (PW-2) and Harbhajan Singh (PW-3), the High Court held that the case property parcels of the samples and the samples having the seals of 'JS' and 'GS' were duly produced before the Magistrate and on those findings, the High Court reversed the order of acquittal and convicted the appellant under Section 18 of the NDPS Act and sentenced him to undergo ten years imprisonment. Being aggrieved, the appellant/accused has preferred this appeal.

6. Mr. Harkesh Singh, learned counsel for the appellant *inter-alia* submitted that since the contraband alleged to have been seized from the accused was not produced before the trial court, conviction of the appellant cannot be sustained. Learned counsel for the appellant placed reliance upon ***Ashok alias Dangra Jaiswal v. State of Madhya Pradesh*** (2011) 5 SCC 123 to contend that where the narcotic drug or the psychotropic substance seized from the possession of the accused is not produced before the Magistrate and when there is no evidence to connect the forensic science report with the drug or the substance that was seized from the possession of the accused in such a case the conviction of the appellant/accused is not sustainable.

7. Learned counsel for the State has submitted that from the oral evidence of SI Joginder Singh (PW-2) and ASI Harbhajan Singh (PW-3), the production of the contraband seized from the accused before the court has been proved by the prosecution. It was submitted that the evidence and materials on record amply proves the production of the contraband along with the sample packets before the Magistrate. It was submitted that the trial court was not right in acquitting the accused and the High court rightly set aside the acquittal and the impugned judgment does not warrant any interference.

8. We have considered the submissions and perused the impugned judgment, evidence and other materials on record. We have also taken pains to look into the original records that were called for from the trial court.

9. On behalf of the appellant, contention was raised as to the non-compliance of Section 50 of the NDPS Act to submit that the safeguards stipulated under Section 50 were not complied with. In the present case, the appellant was carrying the contraband-about seven Kilos of "*opium"* in the bag which he was carrying in the scooter. Carrying the contraband in the scooter/bag cannot be said to be 'by the person' necessitating compliance of Section 50 of the NDPS Act for personal search. Reference in this regard can be made to the decision in ***State of H.P. v. Pawan Kumar*** (2005) 4 SCC 350.

10. So far as the contention regarding production of the contraband seized from the accused, in his evidence, Harbhajan Singh (PW-3) stated that on 01.05.1998, he produced the sample parcels and the case property parcels with the seal and the sample seals before the Judicial Magistrate, Ludhiana and the Magistrate has recorded the seals tallied with the specimen impression. Harbhajan Singh (PW-3) further stated that after return of the samples and the parcels from the court, the same were lodged by him to the Malkhana on 01.05.1998 itself. Baldev Singh (PW-5) the then Malkhana in charge though orally stated about the deposit of the contraband in the Malkhana, but Baldev Singh (PW-5) has not produced Register No.19 maintained in the Malkhana to show the relevant entry in Register No.19 as to deposit of the case property in the Malkhana. Oral evidence of Harbhajan Singh (PW-3) and Baldev Singh (PW-5) as to the deposit of the contraband seized from the accused with Malkhana is not corroborated by the documentary evidence namely the entry in Register No.19.

11. After referring to the oral evidence of Joginder Singh (PW-2) and Harbhajan Singh (PW-3), the trial court in para (14) of its judgment has recorded the finding that no order of the Magistrate to prove the production of the contraband before the Magistrate was available on the file. After recording such observation, the trial court held that the oral evidence regarding production of the case property before the Magistrate was not trustworthy and not acceptable. In the absence of the order of the Magistrate showing that the contraband seized from the accused was

produced before the Magistrate, the oral evidence adduced that the contraband was produced before the Magistrate cannot form the basis to record the conviction.

12. For proving the offence under the NDPS Act, it is necessary for the prosecution to establish that the quantity of the contraband goods allegedly seized from the possession of the accused and the best evidence would be the court records as to the production of the contraband before the Magistrate and deposit of the same before the Malkhana or the document showing destruction of the contraband.

13. In ***Vijay Jain v. State of Madhya Pradesh*** (2013) 14 SCC 527, this Court reiterated the necessity of production of contraband substances seized from the accused before the trial court to establish that the contraband substances seized from the accused tallied with the samples sent to the FSL. It was held that mere oral evidence to establish seizure of contraband substances from the accused is not sufficient. It was held as under:-

> **"10.** On the other hand, on a reading of this Court's judgment in *Jitendra v. State of M.P.* (2004) 10 SCC 562*,* we find that this Court has taken a view that in the trial for an offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS Act particularly when the panch witnesses have turned hostile. Again, in *Ashok v. State of M.P. (2011) 5 SCC 123,* this Court found that the alleged narcotic powder seized from the possession of the accused was not produced before the trial court as material exhibit and there was no explanation for its nonproduction and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the appellant."

14. The High Court appears to have gone by the oral evidence of Joginder Singh (PW-2) and Harbhajan Singh (PW-3) that the contraband allegedly seized from the accused was produced before the Magistrate. When the trial court which is in possession of the case records recorded a finding that there is no order of the Magistrate showing the production of the contraband before the court and acquitted the accused on that basis, in our view, the High Court ought not to have interfered with the said order of acquittal.

15. In an appeal against acquittal, the High Court will not interfere unless there are substantial and compelling reasons to reverse the order of acquittal. The mere fact that on reappreciation of evidence the appellate court is inclined to arrive at a conclusion which is at variance with the trial court, the same cannot be the reason for interference with the order of acquittal. After referring to various judgments in

Chandrappa and others v. State of Karnataka (2007) 4 SCC 415, this Court summarised the general principles regarding the powers of the appellate court while dealing with an appeal against the order of acquittal and held as under:-

> **"42.** From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:
>
> (*1*) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.
>
> (*2*) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
>
> (*3*) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.
>
> (*4*) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. *Firstly*, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.
>
> (*5*) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

The same principles were reiterated in number of judgments viz. ***Jugendra Singh v. State of Uttar Pradesh*** (2012) 6 SCC 297, ***State of Uttar Pradesh v. Ram Sajivan and Others*** (2010) 1 SCC 529, ***Bhaskar Ramappa Madar and others v. State of Karnataka*** (2009) 11 SCC 690, ***Chandrappa and others v. State of Karnataka*** (2007) 4 SCC 415 and other judgments.

16. Considering the case in hand, the findings of the trial court cannot be said to be 'distorted conclusions' warranting interference. Based on the oral evidence of Joginder Singh (PW-2) and Harbhajan Singh (PW-3), the High Court ought not to have interfered with the order of acquittal and the conviction of the appellant under Section 18 of the NDPS Act cannot be sustained.

17. In the result, the conviction of the appellant under Section 18 of the NDPS Act and the sentence of imprisonment imposed on him is set aside and this appeal is allowed and the appellant is acquitted of the charge.

2018 (II) ILR - CUT- 361 (S.C.)

DIPAK MISRA,C.J. & A.M. KHANWILKAR, J.

CRIMINAL APPEAL NO. 684 OF 2006

R. S. SEHRAWAT ……..Appellant(s)

.Vs.

RAJEEV MALHOTRA & ORS. ……...Respondent(s)

CONTEMPT OF COURTS ACT,1971 – Section 19 (1) (b) – Appeal under – High court found the appellant guilty of filing false affidavit and attempting to mislead the Court, thus committing contempt of court by his acts which were of such a nature that they tended to substantially interfere with the due course of justice – Appellant sentenced to undergo simple imprisonment for a period of 30 days and to pay a fine of Rs.25,000/- – Review petition against the said decision dismissed – No charges framed nor served on the appellant – Held, as a matter of fact, the appellant ought to succeed on the singular ground that the High Court unjustly proceeded against him without framing formal charges or furnishing such charges to him; and more so because filing of affidavit by the appellant was supported by contemporaneous official record, which cannot be termed as an attempt to obstruct the due course of administration of justice.

Case Laws Relied on and Referred to :-

1 (2010) 3 SCC 705 : Sahdeo Alias Sahdeo Singh Vs State of Uttar Pradesh & Ors.
2 (2011) 5 SCC 496 : Muthu Karuppan, Commissioner of Police, Chennai Vs. Parithi Ilamvazhuthi and Anr.
3 (2001) 3 SCC 739 : Mrityunjoy Das and Anr. Vs. Syed Hasibur Rahaman and Ors.

For Appellant : M/s. Ashok Mathur
For Respondent : M/s. V.K.Verma

JUDGMENT Date of Judgment : 05.09.2018

A.M. KHANWILKAR, J.

1. The instant appeal under Section 19 (1) (b) of the Contempt of Courts Act, 1971, assails the judgment and orders passed by the Division Bench of the High Court of Delhi at New Delhi in C.M. No.820 of 2001 in C.W.P. No.6734 of 2000 dated 1st June, 2001 and in R.A. No.6600 of 2001 in C.W.P. No.6734 of 2000 dated 10th May, 2006 whereby the appellant has been found guilty of filing false affidavit and attempting to mislead the Court, thus committing contempt of court by his acts which were of such a nature that they tended to substantially interfere with the due course of justice. The appellant has been sentenced to undergo simple imprisonment for a period of 30 (Thirty) days and to pay a fine of Rs.25,000/- (Twenty Five

Thousand Only). Review petition against the said decision came to be dismissed on 10th May, 2006.

2. Briefly stated, the appellant was working as a Junior Engineer in Municipal Corporation of Delhi (MCD). The writ petitioner (respondent No.1 herein) had alleged that the appellant and other officials, including police officials had, by their act of commission and omission, first permitted the writ petitioner to carry on unauthorised construction on the property bearing Plot No.37-C measuring 834 square yards at Asoka Avenue, Sainik Farms, New Delhi and later on unilaterally demolished the said structure. This was the grievance made in Civil Writ Petition No.6734 of 2000 filed by respondent No.1. Respondent No.1 had prayed for taking action against the appellant and other officials including police officials involved in the alleged incident of demolition of the structure. The Division Bench of the High Court adverting to the direction issued in Public Interest Litigation bearing C.W.P. No.7441 of 1993 dated November 3, 1997 restraining unauthorised constructions in unauthorised colonies, issued notice on 6th December, 2000 in the present writ petition to the officers of the MCD and the police personnel who were posted during the time the construction was raised on the plot belonging to respondent No.1, to show cause as to why proceedings for contempt of court should not be initiated against them.

3. After receipt of notice, the appellant, as well as other officials, filed their respective affidavits. The appellant filed his detailed affidavit on 3rd January, 2001 *inter alia* pointing out the primary responsibility of the officials who were expected to comply with the directions issued on November 3, 1997 by the High Court. As regards his role in the capacity of Junior Engineer, the appellant asserted that he discharged the task assigned to him from time to time by his superior officers and submitted compliance reports to them in that behalf. He further asserted that he had undertaken 14 major demolition actions in Sainik Farms alone between 7th March, 2000 and 27th September, 2000 and razed these constructions to the ground. It was asserted that the writ petitioner illegally constructed the building at the same location inspite of the demolition action taken on the earlier occasions. In support of the contention that he had resorted to the demolition of concerned structure, he placed reliance on the office submission made by him to his superiors as well as the photographs of the structures taken before and after the demolition drive. The stand taken by the appellant was contested by respondent No.1. To verify the factual position, the High Court vide order dated 12th January, 2001 appointed a Committee of advocates to inspect the site and submit a fact finding report. That report was submitted to the High Court by the Committee of advocates on 23rd January, 2001.

4. The High Court vide order dated 24th January, 2001 after recording its *prima facie* opinion issued show cause notice to the concerned officials including the appellant as to why they should not be convicted and punished for contempt of

court. After the said order, the appellant filed a further affidavit dated 8th February, 2001 and reiterated the stand taken in the earlier affidavit as also explained the position of possibility of reconstruction on the same location after the demolition was done on 7th June, 2000 and 14th/15th September, 2000. The appellant also relied on contemporaneous evidence such as the report and photographs of the demolition. The High Court, however, was not impressed by the explanation offered by the appellant and proceeded to record finding of guilt against the appellant for filing false affidavit on January 3, 2001. The appellant preferred a review petition which was dismissed on 10th May, 2006. As a result, the appellant has challenged both the orders by way of the present appeal.

5. The principal grievance of the appellant is that no proper charge was framed and conveyed to the appellant. The first show cause notice issued to the appellant in terms of order dated 6th December, 2000 was presumably for non-compliance of the direction given on November 3, 1997 in C.W.P. No.7441 of 1993; whereas the second show cause notice issued to the appellant pursuant to order dated 24th January, 2001 was for filing an incorrect and misleading affidavit dated 3rd January, 2001. The appellant had revealed the factual position in his affidavit dated 3rd January, 2001 and further affidavit dated 8th February, 2001. The factual position stated in the said affidavits has not been analysed by the High Court at all, much less in its proper perspective. On the contrary, the High Court, proceeded to record a finding of guilt, being swayed away by the factual position recorded in the report submitted by the Committee of advocates, completely overlooking the plausible explanation offered by the appellant that the unauthorised structure in question was demolished on 7th June, 2000 and again on 14th/15th September, 2000. The contemporaneous record regarding the extent of demolition in the form of office submission, press reports and photographs was also brought to the notice of the High Court. However, that has been overlooked. The grievance of the appellant is that in the affidavit dated 8th February, 2001 a specific disclosure was made about the video recording done by news channels and liberty to play the video clippings was sought but the High Court did not deal with this request of the appellant at all. The time period between the demolition and the inspection by the Committee of advocates being quite substantial, the possibility of reconstruction of the structures in question could not be ruled out. However, the High Court has not dealt with this aspect.

6. The respondent No.1 and the Amicus Curiae espousing the cause of the respondent No.1, would, however, contend that there is no error in the approach or the conclusion recorded by the High Court.

7. We have heard Mr. Ashok Mathur advocate for the appellant, Mr. K. Radhakrishnan, learned senior counsel appearing as amicus curiae and Mr. Ashok Kumar Panda, learned senior counsel for the respondent.

8. As noted earlier, action against the appellant and other officials was initiated by the High Court in terms of order dated 6th December, 2000. The relevant portion of the said order reads thus:

> "....."
> In the instant petition, unauthorized construction was carried out in Sainik Farm which happens to be an unauthorized colony. It is not disputed that the petitioner started construction on Plot No.37C measuring 834 Sq. Yds. At Ashoka Avenue, Sainki Farm, New Delhi, in July 2000. The building was allowed to come up and when it was nearing completion the same was demolished on 30.10.2000. We fail to understand as to how the building activity could be permitted/allowed from July 2000 till October 2000 when order of this court dated November 3, 1997 was in force. It prima facie appears to us that the building in question could not have come up unless the concerned officers of the MCD and the Police connived with the petitioner. The allegation of the petitioner is that he paid bribes to various offices for raising the construction. He has named those officers.
>
> In the circumstances, we consider it appropriate to issue notices to the following officers of the MCD and the Police, who were posted during the time the construction was raised on the plot in question, to show cause why proceedings for contempt of court be not initiated against them:
>
> 1. Mr. R.S. Sherawat (JE) MCD
> 2. Mr. U.S. Chowhan (JE) MCD
> 3. Mr. S.R. Bhardwaj, A.E. South zone Building Department MCD.
> 4. Mr. Puran Singh Rawat, Baildar, MCD
> 5. Mr. Rakesh Baildar, MCD
> 6. Mr. Man Mohan, S.I. Chowki Incharge, Sainik Farms
> 7. Mr. V.K. Malhotra, Ex. Engineer MCD
> 8. Mr. Vir Singh, SHO.
>
> The aforesaid officers are present and they accept notice. They are granted two weeks time to file affidavits in reply to the show cause notice. Pleadings in the writ petition be completed before the next date."

9. On a bare perusal of this order, it is evident that the High Court took suo motu action as it was *prima facie* convinced that unauthorised construction was carried out in Sainik Farms despite the direction contained in order dated November 3, 1997 in C.W.P. No.7441 of 1993. The order also records that the show cause notice was accepted by the officers present in Court. The appellant, like other officers, filed his affidavit revealing the relevant facts concerning him vide affidavit dated 3rd January, 2001. The appellant had explained the factual position as to the action of demolition of unauthorised structures in Sainik Farms during the relevant period as per the task assigned to him by his superior officers and reporting of that fact to his superiors by way of contemporaneous office submission. The correctness of the said contemporaneous office reports could not be and has not been questioned

or doubted as such. The reply affidavit makes it amply clear that the Commissioner of the Corporation was personally supervising the demolition work of unauthorised constructions and, therefore, there was no reason to doubt the contemporaneous record in the form of office submissions and photographs reinforcing the fact of demolition. The report of the Committee of advocates, however, was based on the site visit made in January, 2001 after a gap of more than 6 months from 7th June, 2000 and 3 months from 14th September, 2000 when the demolition was actually carried out. The factual position stated in the said report, therefore, may not be the actual position as obtained on the date of demolition i.e. 7th June, 2000 and 14th September, 2000. It is not unknown that such unauthorised structures could be and were reconstructed overnight after the demolition work is undertaken by the officials. That was done by unscrupulous persons clandestinely and without notice. The factual position stated in the reply affidavit filed by the appellant also reveals that continuous follow-up action was being taken in respect of unauthorised structures including those which were demolished. Furthermore, the appellant was transferred from the concerned ward w.e.f. 27th September, 2000 and any development or illegal activity unfolding after that date cannot be attributed to the appellant. All these aspects have not been considered by the High Court.

10. During the pendency of this appeal the appellant has also brought on record a fact that he had faced departmental action on the basis of same set of facts regarding his acts of commission and omission for the following three charges:

> "Shri R.S. Sehrawat while functioning as JE (B) in Building Department, South Zone and remained incharge of the area of Sainik Farm w.e.f. 07.03.2000 to 27.09.2000, committed gross misconduct on the following counts:
>
> 1. He is connivance with the owner/builders allowed them to carry out and complete the unauthorized construction in P.Nos 37-C, 49, H-541, Sainik Farms unabatedly and did not take effective action to stop/demolish the same at its initial/ongoing stage.
>
> 2. He also did not book the said unauthorized construction in Sainik Farm just to avoid demolition action u/s 343/344 of the DMC Act.
>
> 3. He also submitted wrong affidavit in the High Court mentioning therein that unauthorized construction in P.No.49 and H-541, Sainik Farms were demolished but the same were found still existing at site. Thus, he mislead the Hon"ble High Court.
>
> He, thereby contravened Rule 3 (I) (i) (ii) & (iii) of the CCS (Conduct) Rules, 1964 as made applicable to the employees of the MCD."

Notably, the appellant has been exonerated in the said enquiry by a detailed report analysing all the official records supporting the stand of the appellant.

11. Be that as it may, the law relating to contempt proceedings has been restated in the case of ***Sahdeo Alias Sahdeo Singh Versus State of Uttar Pradesh and Others***[1] in paragraph 27 as follows:

> "27. In view of the above, the law can be summarised that the High Court has a power to initiate the contempt proceedings suo motu for ensuring the compliance with the orders passed by the Court. However, contempt proceedings being quasi-criminal in nature, the same standard of proof is required in the same manner as in other criminal cases. The alleged contemnor is entitled to the protection of all safeguards/rights which are provided in the criminal jurisprudence, including the benefit of doubt. There must be a clear-cut case of obstruction of administration of justice by a party intentionally to bring the matter within the ambit of the said provision. The alleged contemnor is to be informed as to what is the charge, he has to meet. Thus, specific charge has to be framed in precision. The alleged contemnor may ask the Court to permit him to cross-examine the witnesses i.e. the deponents of affidavits, who have deposed against him. In spite of the fact that contempt proceedings are quasi-criminal in nature, provisions of the Code of Criminal Procedure, 1973 (hereinafter called "CrPC") and the Evidence Act are not attracted for the reason that proceedings have to be concluded expeditiously. Thus, the trial has to be concluded as early as possible. The case should not rest only on surmises and conjectures. There must be clear and reliable evidence to substantiate the allegations against the alleged contemnor. The proceedings must be concluded giving strict adherence to the statutory rules framed for the purpose."

We may usefully refer to two other decisions dealing with the issue under consideration. In ***Muthu Karuppan, Commissioner of Police, Chennai Vs. Parithi Ilamvazhuthi and Anr.,*** [2] this Court observed thus:

> "15. Giving false evidence by filing false affidavit is an evil which must be effectively curbed with a strong hand. Prosecution should be ordered when it is considered expedient in the interest of justice to punish the delinquent, but there must be a prima facie case of „deliberate falsehood" on a matter of substance and the court should be satisfied that there is a reasonable foundation for the charge."

> "17. The contempt proceedings being quasi-criminal in nature, burden and standard of proof is the same as required in criminal cases. The charges have to be framed as per the statutory rules framed for the purpose and proved beyond reasonable doubt keeping in mind that the alleged contemnor is entitled to the benefit of doubt. Law does not permit imposing any punishment in contempt proceedings on mere probabilities, equally, the court cannot punish the alleged contemnor without any foundation merely on conjectures and surmises. As observed above, the contempt proceeding being quasi-criminal in nature require strict adherence to the procedure prescribed under the rules applicable in such proceedings."

In ***Mrityunjoy Das and Anr. Vs. Syed Hasibur Rahaman and Ors.***,[3] this Court observed thus:

> "14. The other aspect of the matter ought also to be noticed at this juncture, viz., the burden of standard of proof. The common English phrase „he who asserts must prove" has its due application in the matter of proof of the allegations said to be constituting the act of contempt. As regards the „standard of proof", be it noted that a proceeding under the extraordinary jurisdiction of the court in terms of the provisions of the Contempt of Courts Act is quasi-criminal, and as such, the standard of proof required is that of a criminal proceeding and the breach shall have to be established beyond reasonable doubt...."

12. In the present case, going by the material on record it is not possible to conclude beyond reasonable doubt that the appellant had contributed to the reconstruction of the unauthorised structure before or after 27th September, 2000. Furthermore, the appellant was not served with any charges muchless specific charge which he was expected to meet. Yet, the final conclusion in the impugned judgment is that the acts of the appellant tended to substantially interfere with the due course of justice and amounted to committing criminal contempt of court for having filed incorrect affidavit. The High Court made no attempt to verify or examine the contemporaneous record relied upon by the appellant in support of his plea that the factual position stated in the affidavit filed by him was borne out and reinforced from the said record. The affidavit so filed cannot be termed as incorrect or misleading by relying on the report of the advocates" committee, which was prepared after a gap of 6 months from the date of first demolition (7th June, 2000) and 3 months from the second demolition (14th September, 2000).

13. The finding recorded by the High Court that the property was not razed to the ground based on the report prepared in January, 2001, therefore, is not the correct approach and is manifestly wrong. The High Court ought to have tested the authenticity and veracity of the contemporaneous record in the form of office submissions, Misel Band register, office files, notices, photograph and press reports etc. relied upon by the appellant. It would be a different matter if the contemporaneous record did not support the stand taken by the appellant in the affidavits filed by him dated 3rd January, 2001 and 8th February, 2001 respectively. As a matter of fact, the appellant has already faced departmental enquiry in which the matter in issue has been exhaustively dealt with and the plea taken by the appellant has been found to be correct.

14. Be that as it may, the appellant has been found guilty in reference to the notice issued in terms of order dated 24th January, 2001, the relevant portion whereof reads thus:

> "Learned counsel for the petitioner also pointed out in the affidavit of Mr. R.S. Sehrawat, it is mentioned that property Nos.49 and H-541 were demolished on 7th June, 2000 and 14th September, 2000 respectively. Mr. Awasthy has shown photographs of these properties. From the photographs, it appears that the properties

are intact and were not demolished, therefore we are prima facie of the opinion that even Mr. Sehrawat has taken liberties with truth. Issue notices to Mr. U.S. Chauhan and Mr. R.S. Sehrawat, Junior Engineers, MCD, to show cause why they should not be convicted and punished for contempt of Court. Let the affidavits in response be filed by 6th February, 2001."

15. In response to the second notice given to the appellant, he filed a further affidavit dated 8th February, 2001 to urge as under:

"3. That the deponent submits that the deponent had not filed any false affidavit, nor did the deponent take liberties with truth while filing the affidavit on 3.1.2001 before this Hon‟ble Court. I state that in the order dated 24.1.2001, qua the deponent it has been recorded that properties No.49 and H-541, which were demolished by the deponent on 7.6.2000 and on 14.9.2000/15.9.2000 were not demolished as per the report of the committee appointed by this Hon‟ble Court and the photographs of these properties.

4. That the deponent submits that property No.49 was demolished on 7.6.2000 and the photo copies of the photographs of the existing building before demolition and after demolition have already been filed by the deponent along with the deponent‟s affidavit filed on 3.1.2001. The deponent is filing photocopies of further photographs of the demolished property. I further state that the press had prior information for the demolition to be carried out at Sainik Farms on 7.6.2000 and the press photographers and reporters were at Sainik Farms. The photograph of the demolished building at 49, Sainik Farm was taken by the photographers of some news papers. The times of India, edition dated 8.6.2000 showed the demolished structure. This is independent evidence which corroborates the stand of the deponent. I further state that the video team of the Doordarshan video taped the demolition of 49 Sainik Farms and the clippings were shown in the programme "Aaj Tak" on 7.6.2000 itself at 10 P.M. I crave indulgence of this Hon‟ble Court to summon the video film from the Doordarshan Authorities prepared for the programme Aaj Tak telecasted on 7.6.2000. I state that the owner of the property has reconstructed the same after its earlier demolition. I state that as stated by me in the earlier affidavit filed by the deponent, I was no longer assigned the work of Junior engineer for Sainik Farms after 27.9.2000 and the structure has been re-erected, only thereafter. I state that during my tenure as Junior Engineer incharge of Sainik Farms only one property was bearing No.49 Sainik Farms, which was demolished by me.

5. That as regards property No. H-541, Sainik Farms, I state that the committee report has not referred to the same. However, 29.1.2001, I visited the site of the said property and state that the said property has also been reconstructed after the earlier demolition carried out by me. I state that the reconstructed property is still in the process of finishing and painting work is still going on in the property. I state that the committee members should be requested by this Hon‟ble Court to immediately report whether the buildings are in the process of being painted or has been recently completed and painted as the same would show and prove its reconstruction. I have

already filed the photographs showing the demolished property by me along with my earlier affidavit.

6. That I state that as already stated by me in my affidavit filed before this Hon"ble Court on 3.1.2001, the Commissioner of the Corporation was weekly reviewing the activities at Sainik Farms and the Zonal Engineer and the Executive Engineer of the Zone were also personally supervising the demolition operations carried out by me. The reports of the said Zonal Engineer and Executive Engineers should also be called.

7. That I state that I should be given an opportunity to lead evidence of the press photographers, Doordarshan team which video taped the demolitions on 7.6.2000 as also the evidence of the Zonal Engineer and Executive Engineer to prove that I had carried out the demolitions and have not filed any affidavit nor have taken liberties with truth."

16. This specific stand taken by the appellant has not been considered by the High Court at all. The appellant made this grievance in the review petition, but of no avail. In our opinion, it is not possible to hold that the demolition work undertaken on 7th June, 2000 and 14th September 2000 was not in conformity with the position reflected in the contemporaneous office submissions/record and photographs submitted by the appellant to his superior authority.

17. As a matter of fact, the appellant ought to succeed on the singular ground that the High Court unjustly proceeded against him without framing formal charges or furnishing such charges to him; and moreso because filing of affidavit by the appellant was supported by contemporaneous official record, which cannot be termed as an attempt to obstruct the due course of administration of justice. Accordingly, this appeal ought to succeed.

18. In view of the above, the impugned judgment and orders passed by the Division Bench of High Court of Delhi at New Delhi in C.M. No.820 of 2001 in C.W.P. No.6734 of 2000 dated 1st June, 2001 and in R.A. No.6600 of 2001 in C.W.P. No.6734 of 2000 dated 10th May, 2006 are quashed and set aside and the show cause notices issued to the appellant pursuant to the order of the Division Bench of the High Court dated 6th December, 2000 and dated 24th January, 2001 are hereby dropped. Appeal is allowed in the aforementioned terms.

2018 (II) ILR - CUT- 370 (S.C.)

A.K. SIKRI, J & ASHOK BHUSHAN, J.

CRIMINAL APPEAL NO.1192 OF 2018
(Arising out of SLP (Crl.) No. 6225 of 2017)

PRADEEP BISOI @ RANJIT BISOI ……..Appellant(s)

.Vs.

THE STATE OF ODISHA ……Respondent(s)

CODE OF CRIMINAL PROCEDURE, 1973 – Section 161 read with Section 32 of the Indian Evidence Act, 1872 – First Information Report was lodged under Sections 324/326/286/34 IPC on 28.11.1990 – On 05.12.1990 the I.O. recorded the statement of injured Bhaskar Sahu under Section 161 Cr.P.C. – The injured died in hospital on 25.03.1991 – Trial court convicted the accused under Section 304 Part II of the I.P.C. – Confirmed by the High Court – The main question raised in this appeal as to whether the statement recorded by I.O. on 05.12.1990 of the victim can be treated as dying declaration since death occurred after more than three months – Held, Yes.

"Present is a case where a statement was recorded by I.O. under Section 161 of the victim on 05.12.1990. Both the trial court and the High Court held the statement relevant and placed reliance on the said statement. We have noticed that this Court has laid down that statement under Section 161 Cr.P.C., which is covered under Section 32(1) is relevant and admissible. Thus, we do not find any error in the judgment of the trial court as well as of the High Court in relying on the statement of the injured recorded by the I.O. on 05.12.1990. It is also relevant to notice that I.O. in his cross-examination has stated that he went on the night of 30.11.1990 to the Medical College to record the statement but as his condition was serious, he was not examined. Thus, reliance on the statement made on 05.12.1990 to the I.O. does not lead to any suspicious circumstances so as to discard the value of such statement." *(Para 16)*

Case Laws Relied on and Referred to :-

1. (2002) 6 SCC 710 : Laxman Vs. State of Maharashtra.
2. (2010) 8 SCALE 477 : Mukeshbhai Gopalbhai Barot Vs. State of Gujarat.
3. (2013) 12 SCC 137 : Sri Bhagwan Vs. State of Uttar Pradesh.
4. (1998) 2 SCC 45 : Najjam Faraghi@ Nijjam Faruqui Vs. State of W.B.
5. (1999) 7 SCC 695 : Paparambaka Rosamma and Others Vs. State of A.P.
6. (1999) 9 SCC 562 : Koli Chunilal 6. Savji and Another Vs. State of Gujarat.

For Appellant : Mr. Kedar Nath Tripathy
For Respondent : Mr. Sibo Sankar Mishra

JUDGMENT Date of Judgment: 10. 10. 2018

ASHOK BHUSHAN , J.

This appeal has been filed by the accused against the judgment of Orissa High Court dated 25.01.2017. The Orissa High Court vide the impugned judgment has dismissed the criminal appeal filed by the appellant questioning his conviction under Section 304 Part II of the Indian Penal Code and sentence of five years rigorous imprisonment awarded by the trial court.

2. The prosecution case as is revealed from the record is that Bhaskar Sahu (deceased) on 28.11.1990 in the morning at 7.00 A.M. was going near Belapada by a bicycle. Near the Belapada bridge, the accused threw a bomb towards the deceased, which hit the right leg of Bhaskar Sahu, the deceased, due to which he fell down on the road. Bhaskar Sahu when started running to save his life, accused came running before the deceased and dealt a kati blow on right shoulder of Bhaskar Sahu on which he fell down thereafter the accused poured acid on head, face and chest of Bhaskar Sahu. Thereafter the accused and his friends left that place. One Khalia Pati belonging to the village of Bhaskar Sahu took the deceased with the help of bicycle. Thereafter brother of Bhaskar Sahu – Surendra Nath Sahu after receiving the news of assault came with Tarini Sahu, Kasinath Bisoi and Bidyadhar Babu belonging to the village and got admitted Bhaskar Sahu in Berhampur Medical College. Suurendra Nath Sahu, the brother of Bhaskar Sahu lodged a First Information Report naming the accused. First Information Report was lodged under Sections 324/326/286/34 IPC. The I.O. visited the spot on 30.11.1990 and seized one blood stained stone and sample stone and one yellow colour banian with smell of acid and prepared the seizure list. Some sample earth, one towel with smell of acid was also noticed. Thereafter the I.O. examined the witnesses. The I.O. on 05.12.1990 showed arrest of the accused. On 05.12.1990 the I.O. recorded the statement of Bhaskar Sahu under Section 161 Cr.P.c. in which statement Bhaskar Sahu named the accused, the persons, who has thrown the bomb, hit with kati and thrown acid on his face and head. The accused was challaned and PW1, the informant, PW2 – Dandopani Dass and PW3 – Prafulla Leuman Sahu were examined by the prosecution. I.O. (PW4) – Prithandhi Moghi also appeared in the witness box. The deceased while still in hospital died on 25.03.1991. Defence examined two witnesses namely DW1–Ramesh Chandra Sahu and DW2–Bidyadhar Sahu.

3. The trial court after analyzing the evidence on record and hearing the counsel for the parties convicted the accused under Section 304 Part II of the I.P.C. and awarded five years rigorous imprisonment. Aggrieved by the judgment of the trial court, the appeal was filed by the accused in the High Court, which has been dismissed by the High Court by the impugned judgment.

4. Learned counsel for the appellant contends that there is contradiction in the evidence of PW1 with other witnesses. There is contradiction as to who took the injured to the hospital. The victim became unconscious and it is unbelievable that he

informed the PW1 that it was accused, who attacked him. The statement of injured recorded under Section 161 Cr.P.C. cannot be treated as a dying declaration in view of the well settled principle of law enunciated by a Constitution Bench judgment of this Court in **Laxman Vs. State of Maharashtra, (2002) 6 SCC 710**, as to who is the author of the crime, both the Courts below arrived at the findings based on surmises and conjectures and not on evidence on record.

5. Learned counsel for the State refuting the submission of counsel for the appellant contends that on the basis of evidence on record, both the Courts have rightly held the charge proved against the accused. No error has been committed by the Courts below relying on the statement made by the injured on 05.12.1990 recorded by the I.O. Further, evidence of PW1, to whom deceased had informed that it was accused, who threw bomb and made kati attack and threw acid, has rightly been believed by the Courts below. It is submitted that the statement made by the injured on 05.12.1990 was fully admissible and no error has been committed by the Courts below in relying the same. Learned counsel for the State has placed reliance on judgment of this Court in **Mukeshbhai Gopalbhai Barot Vs. State of Gujarat, (2010) 8 SCALE 477** and **Sri Bhagwan Vs. State of Uttar Pradesh, (2013) 12 SCC 137.**

6. We have considered the submissions of the learned counsel for the parties and have perused the records.

7. The main thrust of submission of the learned counsel for the appellant is that statement recorded by I.O. on 05.12.1990 of the victim cannot be treated as dying declaration since death occurred after more than three months. He submits that both Courts committed error in treating the said statement as dying declaration.

8. Section 32 of the Evidence Act deals with cases in which statement of relevant fact by person who is dead or cannot be found etc. is relevant. Section 32 in so far as relevant in the present case is as follows:-

> **S.32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant. —** Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases: --
>
> **(1) When it relates to cause of death.** — When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

> Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.
>
> xxxxxxxxxxxx
>
> Illustrations:
>
> (a) The question is, whether A was murdered by B; or
>
> A died of injuries received in a transaction in the course of which she was ravished. The question is whether she was ravished by B; or
>
> The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.
>
> Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration, are relevant facts.

9. Other provisions relevant to be noticed are Section 161 and Section 162 of the Code of Criminal Procedure. Section 161 deals with examination of witnesses by police. Section 162 deals with "statements to police not to be signed – Use of Statements in evidence". Section 162 Cr.P.C. is as follows:-

> **162. Statements to police not to be signed : Use of statements in evidence. -** (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:
>
> Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act , 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.
>
> (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872); or to affect the provisions of section 27 of that Act.
>
> Explanation. - An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.

10. Sub-section (2) to Section 162 incorporate a clear exception to what has been laid down in sub-section (1). The statement recorded by police under Section 161, falling within the provisions of clause (1) of Section 32 of Indian Evidence Act, thus, is clearly relevant and admissible. In **Mukeshbhai Gopalbhai Barot (supra),** this Court had occasion to consider Sections 161 and 162 of Cr.P.C. and Section 32 of the Evidence Act. In the above case, the victim, who received burn injuries on 14.09.1993 was admitted to Civil Hospital. Her statement was recorded by Executive Magistrate and by the Police. The statement recorded by police under Section 161 Cr.P.C. was discarded by the High Court taking the view that it had no evidentiary value. The view of the High Court was not accepted by this Court. In paragraph Nos. 4 and 5, this Court held that the statement of persons recorded under Section 161 can be treated as dying declaration after death. In paragraph Nos. 4 and 5, following has been laid down:-

> **"4.** We have considered the arguments advanced by the learned counsel for the parties. At the very outset, we must deal with the observations of the High Court that the dying declarations Ex.44 and 48 could not be taken as evidence in view of the provisions of Section 161 and 162 of the Cr.P.C. when read cumulatively. These findings are, however, erroneous. Sub-Section (1) of Section 32 of the Indian Evidence Act, 1872 deals with several situations including the relevance of a statement made by a person who is dead. The provision reads as under:
>
> > Sec.32. Cases in which statements of relevant fact by person who is dead or cannot be found, etc., is relevant. - Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-
> >
> > (1) When it relates to cause of death. - When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.
> >
> > Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."
>
> We see that the aforesaid dying declarations are relevant in view of the above provision. Even otherwise, Section 161 and 162 of the Cr.P.C. admittedly provide for a restrictive use of the statements recorded during the course of the investigation but sub-Section (2) of Section 162 deals with a situation where the maker of the statement dies and reads as under:
>
> > "(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of Section 32 of the

> Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act."
>
> **5.** A bare perusal of the aforesaid provision when read with Section 32 of the Indian Evidence Act would reveal that a statement of a person recorded under Section 161 would be treated as a dying declaration after his death. The observation of the High Court that the dying declarations Ex.44 and 48 had no evidentiary value, therefore, is erroneous. In this view of the matter, the first dying declaration made to the Magistrate on 14th September 1993 would, in fact, be the First Information Report in this case."

11. A similar view has been expressed by this Court in **Sri Bhagwan (supra)**, where this Court had occasion to consider Section 161 Cr.P.C .and Section 32 of the Indian Evidence Act. This Court dealt with a statement under Section 161 Cr.P.C. subsequent to death of the victim. In Para 20 to 24, following has been held:-

> **"20.** While keeping the above prescription in mind, when we test the submission of the learned counsel for the appellant in the case on hand at the time when Section 161 CrPC statement of the deceased was recorded, the offence registered was under Section 326 IPC having regard to the grievous injuries sustained by the victim. PW 4 was not contemplating to record the dying declaration of the victim inasmuch as the victim was seriously injured and immediately needed medical aid. Before sending him to the hospital for proper treatment PW 4 thought it fit to get the version about the occurrence recorded from the victim himself that had taken place and that is how Exhibit Ka-2 came to be recorded. Undoubtedly, the statement was recorded as one under Section 161 CrPC. Subsequent development resulted in the death of the victim on the next day and the law empowered the prosecution to rely on the said statement by treating it as a dying declaration, the question for consideration is whether the submission put forth on behalf of the respondent counsel merits acceptance.
>
> **21.** Mr Ratnakar Dash, learned Senior Counsel made a specific reference to Section 162(2) CrPC in support of his submission that the said section carves out an exception and credence that can be given to a Section 161 CrPC statement by leaving it like a declaration under Section 32(1) of the Evidence Act under certain exceptional circumstances. Section 162(2) CrPC reads as under:
>
> > "**162. (2)** Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of Section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of Section 27 of that Act."
>
> **22.** Under Section 32(1) of the Evidence Act it has been provided as under:
>
> > "**32.** ***Cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant***.— Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot

be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:

(1) ***When it relates to cause of death***. - When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which re- sulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

23. Going by Section 32(1) of the Evidence Act, it is quite clear that such statement would be relevant even if the person who made the statement was or was not at the time when he made it was under the expectation of death. Having regard to the extraordinary credence attached to such statement falling under Section 32(1) of the Evidence Act, time and again this Court has cautioned as to the extreme care and caution to be taken while relying upon such evidence recorded as a dying declaration.

24. As far as the implication of Section 162(2) CrPC is concerned, as a proposition of law, unlike the excepted circumstances under which Section 161 CrPC statement could be relied upon, as rightly contended by the learned Senior Counsel for the respondent, once the said statement though recorded under Section 161 CrPC assumes the character of dying declaration falling within the four corners of Section 32(1) of the Evidence Act, then whatever credence that would apply to a declaration governed by Section 32(1) should automatically deemed to apply in all force to such a statement though was once recorded under Section 161 CrPC. The above statement of law would result in a position that a purported recorded statement under Section 161 of a victim having regard to the subsequent event of the death of the person making the statement who was a victim would enable the prosecuting authority to rely upon the said statement having regard to the nature and content of the said statement as one of dying declaration as deeming it and falling under Section 32(1) of Evidence Act and thereby commend all the credence that would be applicable to a dying declaration recorded and claimed as such."

12. It is relevant to refer to judgment of this Court in **Najjam Faraghi @ Nijjam Faruqui Vs. State of West Bengal, (1998) 2 SCC 45**. In the above case, the kerosene oil was poured on the victim and she was put on fire on 13.06.1985. She lived for about a month and died on 31.07.1985. This Court referring to Section 32(1) held that mere fact that victim died long after making the dying declaration, the statement does not looses its value. In Para 9, following has been held:-

"9. There is no merit in the contention that the appellant's wife died long after making the dying declarations and therefore those statements have no value. The

contention overlooks the express provision in Section 32 of the Evidence Act. The second paragraph of subsection (1) reads as follows:

> "Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

No doubt it has been pointed out that when a person is expecting his death to take place shortly he would not be indulging in falsehood. But that does not mean that such a statement loses its value if the person lives for a longer time than expected. The question has to be considered in each case on the facts and circumstances established therein. If there is nothing on record to show that the statement could not have been true or if the other evidence on record corroborates the contents of the statements, the court can certainly accept the same and act upon it. In the present case both courts have discussed the entire evidence on record and found that two dying declarations contained in Exs. 5 and 6 are acceptable."

13. Much emphasis has been given by the learned counsel for the appellant on Constitution Bench judgment of this Court in **Laxman Vs. State of aharashtra (supra).** The above constitution Bench was constituted to resolve the conflict between two Three-Judge Bench judgment of this Court, i.e. **Paparambaka Rosamma and Others Vs. State of A.P. (1999) 7 SCC 695** and **Koli Chunilal Savji and Another Vs. State of Gujarat, (1999) 9 SCC 562.** The facts of the case and conflicting views expressed in the above two cases has been noticed in Paragraph Nos. 1 and 2, which are to the following effect:-

> "In this criminal appeal, the conviction of the accused-appellant is based upon the dying declaration of the deceased which was recorded by the Judicial Magistrate (PW 4). The learned Sessions Judge as well as the High Court held the dying declaration made by the deceased to be truthful, voluntary and trustworthy. The Magistrate in his evidence had stated that he had contacted the patient through the medical officer on duty and after putting some questions to the patient to find out whether she was able to make the statement; whether she was set on fire; whether she was conscious and able to make the statement and on being satis- fied he recorded the statement of the deceased. There was a certificate of the doctor which indicates that the patient was conscious. The High Court on consideration of the evidence of the Magistrate as well as on the certificate of the doctor on the dying declaration recorded by the Magistrate together with other circumstances on record came to the conclusion that the deceased Chandrakala was physically and mentally fit and as such the dying declaration can be relied upon. When the appeal against the judgment of the Aurangabad Bench of the Bombay High Court was placed before a three-Judge Bench of this Court, the counsel for the appellant relied upon the decision of this Court in the case of *Paparambaka Rosamma* v. *State of A.P., (1999) 7 SCC 695* and contended that since the certification of the doctor was not to the effect that the patient was in a fit state of mind to make the statement, the dying declaration could not have been accepted by the Court to form the sole basis of

conviction. On behalf of the counsel appearing for the State another three- Judge Bench decision of this Court in the case of *Koli Chunilal Savji* v. *State of Gujarat (1999) 9 SCCC 562* was relied upon wherein this Court has held that if the materials on record indicate that the deceased was fully conscious and was capable of making a statement, the dying declaration of the deceased thus recorded cannot be ignored merely because the doctor had not made the endorsement that the deceased was in a fit state of mind to make the statement in question. Since the two aforesaid decisions expressed by two Benches of three learned Judges was somewhat contradictory the Bench by order dated 27-7-2002 referred the question to the Constitution Bench.

2. At the outset we make it clear that we are only resolving the so-called conflict between the aforesaid three-Judge Bench decision of this Court, whereafter the criminal appeal will be placed before the Bench presided over by Justice M.B. Shah who had referred the matter to the Constitution Bench. We are, therefore, refraining from examining the evidence on record to come to a conclusion one way or the other and we are restricting our considerations to the correctness of the two decisions referred to *supra."*

14. The Constitution Bench approved the view taken by later judgment in **Koli Chunilal Savji (supra).** In Paragraph No. 5, following has been laid down:-

"5. The Court also in the aforesaid case relied upon the decision of this Court in *Harjit Kaur* v. *State of Punjab*4 wherein the Magistrate in his evidence had stated that he had ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect and merely because an endorsement was made not on the declaration but on the application would not render the dying declaration suspicious in any manner. For the reasons already indicated earlier, we have no hesitation in coming to the conclusion that the observations of this Court in *Paparambaka Rosamma* v. *State of A.P. (1999) 7 SCC 695* (at SCC p. 701, para 8) to the effect that

> "in the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a Magistrate who opined that the injured was in a fit state of mind at the time of making a declaration"

has been too broadly stated and is not the correct enunciation of law. It is indeed a hypertechnical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind especially when the Magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration. Therefore, the judgment of this Court in *Paparambaka Rosamma* v. *State of A.P. (1999) 7 SCC 695* must be held to be not correctly decided and we affirm the law laid down by this Court in *Koli Chunilal Savji* v. *State of Gujarat (1999) 9 SCC 562*."

15. The view expressed by Three-Judge Bench in **Paparambaka Rosamma (supra)** that in the absence of medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a Magistrate who opined that the injured was in a fit state of mind at the time of making a declaration, does not lay down a correct law. Thus, the Constitution bench was only considering the question of nature of medical certification regarding fitness of victim to make a dying declaration. The proposition laid down in the above case does not in any manner support the contention raised by the counsel for the appellant in the present case. Present is a case where a statement was recorded by I.O. under Section 161 of the victim on 05.12.1990. Both the trial court and the High Court held the statement relevant and placed reliance on the said statement.

16. We have noticed that this Court has laid down that statement under Section 161 Cr.P.C., which is covered under Section 32(1) is relevant and admissible. Thus, we do not find any error in the judgment of the trial court as well as of the High Court in relying on the statement of the injured recorded by the I.O. on 05.12.1990. It is also relevant to notice that I.O. in his cross-examination has stated that he went on the night of 30.11.1990 to the Medical College to record the statement but as his condition was serious, he was not examined. Thus, reliance on the statement made on 05.12.1990 to the I.O. does not lead to any suspicious circumstances so as to discard the value of such statement. The statement, which was made by the victim on 05.12.1990 was to the following effect:-

> "My name is Bhaskar Sahu, S/o. Kaibalya Sahu, present/permanent Resident of Village – Langal Dei, P.S. Digapahandi Dist. Gangnam, Today, i.e. on 05.12.1920, being at the Medical College ward I hereby give my verbal statement that, I was going to Belapada from our Village Langal Del on 28.11.1990 at about 6:30 to 7:00 O'clock on my bi-cycle. On my way near the bridge of Belapada Village, inhabitant of our village namely Pradeep Bisoi, S/o. Madhab Bisoi and some of his friends were waiting to kill me. They had come by a Scoter. I don't know others. Near the Belapada Bridge, all of a sudden Pradeep Bisoi threw a Bomb towards me which was defused after hitting my right leg for which I fell down on the road. When I started running, trying to save my life, at that time Pradeep Bisoi came running after me and dealt a kati blow on my right solder, for which I fell down bloodstained. Thereafter from a bottle carried by him, he poured acid on my head, face, chest and also on my entire body To save my life. I threw away my black color vest from my body. Looking at my critical condition, Pradeep Bisoi and his friends left that place. After that, the son of Khalia Pati of our village saw me, and while taking me by the help of a cycle, my brother Surendar Sahu got that news and Tarini Sahu, and Kishnath Bisoi and Bidhyadhara Babu of our village reached to me and my brother immediately admitted me in the Berhampur Medical Collage. Otherwise I would have died on the spot. Because of our previous enmity,

Pradeep Bisoi was trying to kill me. But I was just saved. There is no chance of my survival."

17. The trial court after appreciation of evidence recorded the findings that deceased had acid injuries as well as bomb blast injuries. In the acid attack, he has lost his eye-sight and also lost his right foot. The trial court has rightly held that statement of deceased made on 05.12.1990 is admissible under Section 32 because it is regarding his cause of death and how he was injured. In para 8 of the judgment, trial court has recorded as follows:-

> **"8.** From the medical report it is clear that the deceased was having acid injury and bomb blasting injury and during the treatment he died in the hospital. Now it is to be seen who has caused those acid and bomb blast injuries on the person of the eceased. There is no eye witness to the occurrence. The deceased had given information to the P.W.1 and also to the I.O. P.W.1 says that he learnt from the deceased that accused assaulted him and threw acid on his face, and other parts of his body and he reported the matter to the police, after knowing the fact from the deceased, vide Ext. 12. It is also clear from the evidence of P.W.3 that he carried the deceased to the hospital, who had sustained injuries. The statement of the deceased to P.W.1 is admissible under 32 of the Evidence Act. Because, it gives regarding his cause of death and how he was injured."

18. The injuries on the body of deceased fully support the prosecution case. The statement made by the deceased on 05.12.1990, thus, finds corroboration from the injuries on the body of deceased and the sequences of the events and manner of incidents as claimed by the prosecution. The PW1, the informant has fully supported the prosecution case.

19. The High Court while dismissing the appeal has also made observation that conviction and sentence of the accused was for a lesser offence and lenient one.

20. We having gone through the evidence on record are fully satisfied that the trial court did not commit any error in convicting the appellant. High Court while deciding the appeal has also analysed the evidence on record and has rightly dismissed the appeal. We, thus, do not find any merit in this appeal, which is dismissed.

2018 (II) ILR - CUT- 380

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

W.P.(C) NO. 3737 OF 2018

NIKITA SHARMA ……..Petitioner

.Vs.

RAVENSHAW UNIVERSITY & ORS. ……..Opp. Parties

(A) WORDS AND PHRASES – Reason – Meaning of – Franz Schubert said-"Reason is nothing but analysis of belief." In Black's Law Dictionary, reason has been defined as a- "faculty of the mind by which it distinguishes truth from falsehood, good from evil, and which enables the possessor to deduce inferences from facts or from propositions." It means the faculty of rational thought rather than some abstract relationship between propositions and by this faculty, it is meant the capacity to make correct inferences from propositions, to size up facts for what they are and what they imply, and to identify the best means to some end, and, in general, to distinguish what we should believe from what we merely do believe. (Para 8)

(B) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition challenging cancellation of admission – Petitioner on furnishing of undertaking to submit the documents later, she was given admission in MBA Course – Internal report of investigation not given to the petitioner – Show cause notice – Reply submitted – Not considered – Admission cancelled – Held, illegal.

"It is the settled principle of law that once reply to the show cause notice has been given, the authority concerned is required to pass an order only after considering the reply so submitted. The application of mind by the authority while passing an order could be assessed only when the reply is considered and dealt with in the final order passed by the authority, and in the absence of the same, it would be considered that the issuance of the show cause notice is merely a formality, as reply filed is not considered or dealt with in the final order. As such, the order of cancellation dated 21.02.2018, insofar as it relates to the petitioner, cannot be sustained in the eye of law, and is accordingly quashed." (Para 13)

Case Laws Relied on and Referred to :-

1. AIR 1978 SC 597 : Maneka Gandhi .Vs. Union of India.
2. AIR 1990 SC 1984 : S.N. Mukherjee .Vs. Union of India.

For Petitioner : M/s. Manoj KuMohanty, M.R.Pradhan, T.Pradhan & M. Mohanty
For Opp. Parties: M/s. Subir Palit, A. Mishra and A. Parija

JUDGMENT Date of Judgment : 21.03.2018

VINEET SARAN, CJ.

The petitioner-Nikita Sharma was admitted in Bachelor of Business Administration (BBA) course in the Ravenshaw University in the year 2013, which course was to conclude in the year 2016. She, thereafter in the year 2016, applied for admission in Master of Business Administration (MBA) course in the Ravenshaw University, for which she was provisionally selected for admission on

12.05.2016. On the same day, the petitioner deposited the requisite fees and took admission in MBA course. Since the result of the BBA final examination was not declared and the petitioner did not have the BBA certificate as on the date of admission i.e. 12.05.2016, she gave an undertaking to produce the Graduation (BBA) mark sheet as well as College Leaving Certificate (CLC), Conduct Certificate etc. later, which request was allowed. It was only thereafter that the requisite fees were accepted from her. The result of the BBA was subsequently published in which the petitioner had failed in one paper. However, she was allowed to appear in one back paper through a special examination, which was held in July 2016 and the result of the said back paper was published in August 2016 in which the petitioner was declared pass. She pursued her study in MBA course and passed the 1st Semester examination in February 2017.

2. Then on 02.06.2017, mark sheet, provisional pass certificate, CLC and Conduct Certificate of the BBA course were granted by the Ravenshaw University, which were all deposited by the petitioner with regard to her admission in MBA course. Then in August 2017, the petitioner passed 2nd Semester of MBA examination. Thereafter on 22.11.2017, the Ravenshaw University required the petitioner to produce the original CLC, mark sheet, Conduct Certificate etc. of the BBA examination by 27.11.2017, which the petitioner produced in original on the said date. Then in December 2017, the petitioner was permitted to appear in 3rd Semester of MBA examination.

3. To the utter surprise of the petitioner, on 20.12.2017, she was issued with a show cause notice by the Chairman, Council of Deans, Ravenshaw University, Cuttack mentioning that since she had cleared the project paper in December 2016 and had submitted the CLC and Conduct Certificate in August 2017, it would mean that she did not have BBA degree at the time of admission in MBA course in July, 2016, and, as such, she was required to explain as to why her admission to MBA course should not be cancelled for not having the BBA degree at the time of admission.

4. The petitioner submitted her explanation within the time granted i.e. on 02.01.2018, wherein she had categorically stated that she had informed the Coordinator about the back paper in a practical subject at the time of MBA admission and gave an undertaking that she would submit the mark sheet, CLC, Conduct Certificate etc. during the MBA course. It was further stated in her reply that since she had informed that she would submit the requisite documents subsequently, which request was accepted and given the admission, and then she had actually submitted the requisite documents while undergoing the MBA course, her case should be considered sympathetically so that her career would not be spoiled. Then on 21.03.2018, the admission of the petitioner, as well as three other students has been cancelled, which is under challenge in this writ petition.

5. We have heard Shri M.K. Mohanty, learned counsel for the petitioner and Shri S. Palit, learned counsel appearing for the Ravenshaw University and perused the record. Pleadings between the parties have been exchanged and with consent of learned counsel for the parties, the writ petition is being disposed of at this stage.

6. It is contended by learned counsel for the petitioner that the petitioner had disclosed all the facts at the time of admission in MBA course and the opposite party-University had allowed her to submit the requisite documents subsequently during the MBA course and, in fact, as she had already submitted all the necessary documents, the cancellation order is wholly unjustified. It is further submitted that cancellation order of the admission of the petitioner has been passed without considering her explanation, which was given in response to the show cause notice dated 22.12.2017, and the order dated 21.02.2018 cancelling her admission does not give any reason whatsoever, except mentioning the report of the Investigating Committee, without furnishing any such report of the Investigating Committee to the petitioner or even filing the same along with the counter affidavit.

7. Today, Shri Palit, learned counsel for the University wanted to pass on a copy of the report of Investigating Committee, which admittedly was submitted prior to issuance of the show cause notice dated 22.12.2017, but was neither filed with the counter affidavit nor given to the petitioner at any stage.

8. **Franz Schubert said-**

> "Reason is nothing but analysis of belief."

In **Black's Law Dictionary**, reason has been defined as a-

> *"faculty of the mind by which it distinguishes truth from falsehood, good from evil, and which enables the possessor to deduce inferences from facts or from propositions."*

It means the faculty of rational thought rather than some abstract relationship between propositions and by this faculty, it is meant the capacity to make correct inferences from propositions, to size up facts for what they are and what they imply, and to identify the best means to some end, and, in general, to distinguish what we should believe from what we merely do believe.

9. In ***Maneka Gandhi v. Union of India***, AIR 1978 SC 597, the apex Court held as follows:-

> *"the reasons, if disclosed, being open to judicial scrutiny for ascertaining their nexus with the order, the refusal to disclose the reasons would equally be open to the scrutiny of the Court; or else, the wholesome power of a dispassionate judicial*

examination of executive orders could with impunity be set at naught by an obdurate determination to suppress the reasons."

10. In ***S.N. Mukherjee v. Union of India***, AIR 1990 SC 1984, the apex Court held that keeping in view the expanding horizon of the principles of natural justice, the requirement to record reasons can be regarded as one of the principles of natural justice which governs exercise of power by administrative authorities. Except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority is required to record reasons for its decision.

11. Keeping in view the law discussed above and applying the same to the present context, we are of the opinion that when the order has been passed on the basis of the report of the Investigating Committee, which was submitted prior to issuance of the show cause notice, the least that could have been done by the University was to annex the copy of the report of the Investigating Committee along with the show cause notice, which has not been done in the present case. The order cancelling the admission of the petitioner could have been passed only on the grounds stated in the show cause notice, and that too after considering the reply of the petitioner.

12. In the present case, what we find is that the explanation required to be given by the petitioner in the show cause notice is not relating to the report of the Investigating Committee but regarding non-submission of certain documents at the time of taking admission. The same has been properly explained by the petitioner in her reply, which has not been considered in the order of cancellation, which has been passed on the basis of the alleged reasons given in the report of the Investigating Committee, which are other than those in the show cause notice.

13. It is the settled principle of law that once reply to the show cause notice has been given, the authority concerned is required to pass an order only after considering the reply so submitted. The application of mind by the authority while passing an order could be assessed only when the reply is considered and dealt with in the final order passed by the authority, and in the absence of the same, it would be considered that the issuance of the show cause notice is merely a formality, as reply filed is not considered or dealt with in the final order. As such, the order of cancellation dated 21.02.2018, insofar as it relates to the petitioner, cannot be sustained in the eye of law, and is accordingly quashed.

14. However, it is clear that the admission was granted to the petitioner without the petitioner having filed the necessary documents and the same was condoned by the Coordinator (or such other University authority) at the time of admission, which, according to Shri Palit, learned counsel for the University, could not have been granted. Be that as it may, the same cannot be held against the petitioner, as

the Coordinator or the concerned authority had granted such exemption, and if the same was granted without there being any proper provision, it is for the University to take suitable action against the person concerned or the Coordinator who had condoned the shortcoming and permitted the petitioner to take admission without having filed certain documents at the time admission, but the petitioner cannot be blamed for the same. As such, the University is at liberty to proceed against the erring officials, in accordance with law, but the admission of the petitioner to the MBA course cannot be cancelled on such ground.

15. It is further made clear that that the fees for the 3rd and 4th Semesters of MBA course may be permitted to be deposited by the petitioner within ten days of the University making such demand. The writ petition is allowed to the extent indicated above.

2018 (II) ILR - CUT- 385

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

RVWPET NO. 6 OF 2006

M/S CENTRAL ELECTRICITY SUPPLY COMPANY OF ORISSA LTD. & ORS. .....Petitioners

.Vs .

PRAMOD KUMAR SWAIN .....Opp. Party

CODE OF CIVIL PROCEDURE, 1908 – Order 47 Rule 1 – Review petition against an order passed in writ petition – Principles – Indicated.

"*In the garb of review, a party cannot be permitted to reopen the case and to gain a full-fledged innings for making submissions, nor review lies merely on the ground that may be possible for the Court to take a view contrary to what had been taken earlier. If a case has been decided after full consideration of the arguments made by a counsel, he cannot be permitted even in the garb of doing justice or substantial justice to engage the Court again to decide the controversy already decided. If a party is aggrieved by a judgment, it must approach the higher Court but entertaining a review to reconsider the case would amount to exceeding its jurisdiction conferred under the limited jurisdiction for the purpose of review.*"

(Para 15)

Case Laws Relied on and Referred to :-

1. 87 (1999) CLT 573 : Prakash Ku.Debata .Vs. The E.Engineer (GRIDCO) & Ors.
2. AIR 1978 SC 326 : Gulab Ajwani .Vs. Smt.Saraswati Bai.

3. 2010(II) CLR(SC)737: Kalabharati Advertising .Vs. Hemant Vimalnath Narichania.
4. AIR 1922 PC 112 : Chhajju Ram .Vs. Neki.
5. AIR 2003 SC 2095 : 2003 AIR SCW 92 : 2002 (3)ACJ 1822 : Rajendra Kumar .Vs. Rambhai.
6. (2004) 4 SCC 122 : AIR 2004 SC 1738: 2004 AIR SCW 1347 : Green View Tea and Industries .Vs. Collector, Golaghat, Assam,
7. (2004) 7 SCC 753 :2004 AIR SCW 5617 : AIR 2004 SC 5003 : Des Raj .Vs. Union of India.
8. AIR 1963 SC 1909 : Shivdeo Singh & Ors. .Vs. State of Punjab.
9. AIR 1979 SC 1047 : Aribam Tuleshwar Sharma v. Aribam Pishak Sharma.
10. 1993 Supp.(4) SCC 595 : S.Nagaraj .Vs. State of Karnataka.
11. AIR 2000 SC 3737 : Delhi Administration .Vs. Gurdip Singh Uban.
12. AIR 2002 SC 2573 : Subhash .Vs. State of Maharashtra & Anr.

For petitioners : M/s. B.K. Pattnaik, P. Sinha, P.K. Sahoo & R.K.Nayak.
For Opp. Party : M/s. S. Behera & S.Mohanty.

JUDGMENT Date of Judgment : 26.06.2018

DR. B.R. SARANGI, J.

The review petitioners, who were the opposite parties in the writ petition, have filed this application seeking review of order dated 21.09.2005 passed by a Division Bench of this Court in OJC No. 5652 of 1998, on the ground that the judgment, basing upon which the writ Court directed for consideration of the case of the opposite party herein for compassionate appointment, having been modified by the Full Bench, the opposite party is not entitled to get any benefit.

2. The factual matrix of the case, in hand, is that the opposite party herein, as the petitioner, filed OJC No. 5652 of 1998 seeking employment under the Rehabilitation Assistance Scheme on account of death of his father, who died on 06.04.1997 while working as a Helper under GRIDCO (Grid Corporation of Odisha). The writ Court by order dated 21.09.2005, relying upon a judgment of this Court in ***Prakash Kumar Debata v. the Executive Engineer (Gridco) and others***, 87 (1999) CLT 573, disposed of the said writ petition directing the review petitioners to consider the case of the opposite party for compassionate appointment according to his qualification and fulfillment of other criteria within a stipulated period.

3. Mr. B.K. Pattnaik, learned counsel appearing for the petitioners contended that in the case of ***Prakash Kumar Debata*** mentioned supra this Court was pleased to make applicable the Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 to the GRIDCO on the basis of Rule 11 of the said Rules. Consequentially, even though the GRIDCO Rehabilitation Assistance Rules have been repealed, but by application of Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 the

employees of GRIDCO are being extended the benefit of compassionate appoint. But subsequently, by order dated 09.05.2002 passed in OJC No. 2520 of 2002 (***Sunita Puhan v. CMD, CESCO***) this Court expressed a doubt with regard to correctness of the decision in the case of ***Prakash Kumar Debata*** (supra) and stated that the decision requires re-consideration and accordingly, referred the matter to the Full Bench. It is contended that the Full Bench of this Court held that the case of ***Prakash Kumar Debta*** is not applicable to the employees of CESCO and therefore, the order dated 21.09.2005 passed by this Court be reviewed and at best if the writ petitioner so likes may get the benefit of the Rules framed by the GRIDCO applicable to CESCO for grant of financial benefit as compensation and not compassionate appointment.

4. After hearing learned counsel for the parties and going through the records, a preliminary query was made by this Court as to whether the review application has been filed after disposal of the Full Bench judgment, learned counsel appearing for the petitioners contended that the review application has been filed after disposal of the case of ***Prakash Kumar Debta*** by the Full Bench. By the time the instant writ petition was disposed of on 21.09.2005, the Full Bench judgment in the case of ***Prakash Kumar Debta*** had not seen the light of the day.

5. This being the factual matrix of the case, in hand, it is at the outset necessary to go through the scope of the review application. In this context, it is relevant to refer to Section 114 read with Order-XLVII, Rule-1 of the C.P.C.

> ***"114. Review***.-
>
> *Subject as aforesaid, any person considering himself aggrieved-*
>
> *(a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,*
>
> *(b) by a decree or order from which no appeal is allowed by this Code' or*
>
> *(c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit*
>
> ***ORDER XLVII***
>
> ***1. Application for review of judgment.***
>
> *(1) Any person considering himself aggrieved*
>
> *(a) by a decree or order from which an appeal is allowed, but from no appeal has been preferred;*
>
> *(b) by a decree or order from which no appeal is allowed; or*
>
> *(c) by a decision on a reference from a Court of Small Causes;*
>
> *and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be*

produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgement to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgement notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review."

6. The apex Court in ***Gulab Ajwani v. Smt.Saraswati Bai*****,** AIR 1978 SC 326 and ***Kalabharati Advertising v. Hemant Vimalnath Narichania*****,** 2010(II) CLR (SC) 737 has clearly laid down that 'review' means a judicial re-examination of the case in certain specified and prescribed circumstances. The power of review is not inherent in a Court or Tribunal. It is a creature of the statute. A Court or Tribunal cannot review its own decision unless it is permitted to do so by statute. The Courts having general jurisdiction have no inherent power under Section 151, CPC to review its own order. The Explanation to Section 141, CPC clearly lays down that the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution. Therefore, the provisions contained in Section 114 read with Order 47, Rule 1, CPC ipso facto may not apply to a proceeding under Article 226 of the Constitution, but its principle will apply.

7. In ***Chhajju Ram v. Neki***., AIR 1922 PC 112, it was held by the Privy Council that analogy must be discovered between two grounds specified therein namely; (i) discovery of a new and important matter or evidence; and (ii) error apparent on the face of record, before entertaining the review on any other sufficient ground.

8. In ***Rajendra Kumar v. Rambhai,*** AIR 2003 SC 2095: 2003 AIR SCW 92 : 2002 (3) ACJ 1822; ***Green View Tea and Industries v. Collector, Golaghat, Assam,*** (2004) 4 SCC 122 : AIR 2004 SC 1738: 2004 AIR SCW 1347*;* and ***Des Raj v. Union of India,*** (2004) 7 SCC 753 : 2004 AIR SCW 5617 : AIR 2004 SC 5003, the apex Court held that the first and foremost requirement of entertaining a review application is that the order, review of which is sought (a) suffers from any error apparent on the face of the record, and (b) permitting the order to stand will lead to failure to justice.

9. The scope of review has been elaborately considered by the apex Court in ***Shivdeo Singh and others v. State of Punjab***, AIR 1963 SC 1909, ***Aribam***

Tuleshwar Sharma v. Aribam Pishak Sharma, AIR 1979 SC 1047 and ***S.Nagaraj v. State of Karnataka***, 1993 Supp.(4) SCC 595.

10. Therefore, the scope of review being very limited in nature, if the principle, which is applicable to mean (1) if the judgment is vitiated by an error apparent on the face of the record in the sense that it is evident on a mere looking at the record without any long-drawn process of reasoning, a review application is maintainable; (2) if there is a serious irregularity in the proceeding, such as violation of the principles of natural justice, a review application can be entertained and (3) if a mistake is committed by an erroneous assumption of a fact which if allowed to stand, cause miscarriage of justice, then also an application for review can be entertained.

11. In ***Delhi Administration v. Gurdip Singh Uban.,*** AIR 2000 SC 3737, the Hon'ble apex Court deprecated the practice of filing review application observing that review, by no means, is an appeal in disguise and it cannot be entertained even if application has been filed for clarification, modification or review of the judgment and order finally passed for the reason that a party cannot be permitted to circumvent or bypass the procedure prescribed for hearing a review application.

12. In ***Subhash v. State of Maharashtra & Anr***., AIR 2002 SC 2573, the apex Court emphasized that Court should not be misguided and should not lightly entertain the review application unless there are circumstances fallen within the prescribed limits that the Courts and Tribunal should not proceed to re-examine the matter as if it was an original application before it for the reason that it cannot be a scope of review.

13. In ***M/s. Jain Studios Ltd. V. Shin Satellite Public Co. Ltd.,*** AIR 2006 SC 2686, held that the power of review cannot be confused with appellate powers which enable a superior Court to correct all errors committed by a subordinate Court. It is not rehearing an original matter. A review of old and overruled argument is not enough to reopen concluded adjudications. The power of review can be exercised with extreme care, caution and circumspection only in exceptional cases.

14. In ***Zahira Habibullah Sheikh v. State of Gujarat***, (2004) 5 SCC 353 : AIR 2004 SC 3467 : 2004 AIR SCW 3318, the apex Court referred to its earlier judgments in ***P.N. Eswara Iyer v. Registrar Supreme Court of India***, (1980) 4 SCC 680; ***Suthendraraja alias Suthenthira Raja v. State,*** (1999) 9 SCC 323: AIR 1999 SC 3700 : 1999 AIR SCW 3734; ***Ramdeo Chauhan v. State of Assam***, (2001) 5 SCC 714: AIR 2001 SC 2231 : 2001 AIR SCW 2159; and ***Devender Pal Singh v. State of NCT of Delhi,*** (2002) 5 SCC 234: AIR 2002 SC 1661: 2002 AIR SCW 1586 *;* and observed that review applications "are not to be filed for the pleasure of

the parties or even as a device for ventilating remorselessness, but ought to be restored to with a great sense of responsibility as well.

15. In the garb of review, a party cannot be permitted to reopen the case and to gain a full-fledged innings for making submissions, nor review lies merely on the ground that may be possible for the Court to take a view contrary to what had been taken earlier. If a case has been decided after full consideration of the arguments made by a counsel, he cannot be permitted even in the garb of doing justice or substantial justice to engage the Court again to decide the controversy already decided. If a party is aggrieved by a judgment, it must approach the higher Court but entertaining a review to reconsider the case would amount to exceeding its jurisdiction conferred under the limited jurisdiction for the purpose of review.

16. Considering the scope of review and applying the same to the present context, it appears that the petitioners have filed this review application after the changed law laid down by the Full Bench of this Court, where this Court held that the case of ***Prakash Kumar Debta*** case was not applicable so far as employees of GRIDCO are concerned. Needless to say that by the time the order was passed, i.e., on 21.09.2005, the judgment in the case of ***Prakash Kumar Debta*** rendered by the Full Bench had not seen the light of the day. Rather, the Division Bench of this Court in ***Prakash Kumar Debta*** case stated that the Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 is applicable to the GRIDCO as per Rule 11 of the said Rules the same was in force. If that be so, the petitioners should have taken into consideration the case of the opposite party in the light of the said judgment. Subsequent judgment of the Full Bench has no application to the present context and that by itself cannot be a ground to review the order dated 21.09.2005 passed by the writ Court. Even otherwise, the order impugned does not come within the scope and ambit of review, as applicable to the present case.

17. In the above view of the matter, we do not find any merit in the review petition, which is accordingly dismissed. No order as to cost.

2018 (II) ILR - CUT- 390

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

OJC NO. 11206 OF 1999

S.K. MAHTO & ORS. .....Petitioners

.Vs.

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

INTERPRETATION OF STATUTE – Literal rule of interpretation – Principles reiterated – Held, it is well settled principle of law of interpretation that applying the rule of literal construction the words of a statute are first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning, unless that leads to some absurdity or unless there is something in the context, or in the object of the statute to suggest the contrary. (Para 8)

Case Laws Relied on and Referred to :-

1. AIR 1955 SC 376 : Jugalkishore Saraf .Vs. Raw Cotton Co. Ltd.
2. AIR 1962 SC 1543 : Madanlal Fakir Chand Dudhediya .Vs. Sri Changdeo Sugar Mills Ltd.
3. AIR 1997 SC 1165 : Mohammad Ali Khan .Vs. Commissioner of Wealth Tax.
4. AIR 2007 SC 2018 : State of Rajasthan .Vs. Babu Ram.

For Petitioner : Mr. S.D.Das, Sr. Counsel.
M/s. A.K. Nayak, L. Samantray, H.S. Satpathy, B. Patnaik, B.K. Sinha, D. Dhar, D.R. Bhokata & B.N. Udgata
For Opp.Parties : Mr. R.K. Mohapatra, Govt. Adv.

JUDGMENT Date of Judgment : 12.07.2018

VINEET SARAN, CJ.

The petitioners are the officers of Steel Authority of India Ltd, Rourkela Steel Plant, Rourkela an integrated Steel Plant in the State of Orissa which is a public sector undertaking of Government of India and was established for manufacturing, marketing quality steel in the domestic as well as in international market. In course of production of Steel, the impurities in the iron ore such as Silica, Sulphide and residues from coke, dolomite lime stone, etc. are flushed out from the Blast Furnace which is called "Slag". The slag does not have market value or use excepting in manufacture of Slag Cement. The hot molten slag from the Blast Furnace is carried in Slag Pots from Blast furnace to the Slag Granulation Plant. The temperature of the Slag is as high as 1500 degree centigrade, the same is cooled down by water jets under high pressure. The slag which is porus in nature absorbs water and after some time water is released. The slag, excepting its use in manufacture of slag cement, has no significant market value for which it is dumped in Blast Furnace Slag Dump Yard.

2. The Senior Inspector of Legal Metrology, Rourkela (Enforcement) on 18.10.1997 at about 2.30 P.M. inspected Slag Granulation Plant of Rourkela Steel Plant. In course of inspection it was revealed that the slag were being sold by truck

on measurement, and thus the Inspector issued compounding notice of Rs.3,000/- on each of the petitioners, who were Executives of Rourkela Steel Plant, alleging contravention of Section 22 of the Standards of Weights and Measure (Enforcement) Act, 1985. He neither seized any truck carrying slag sold on volumetric basis nor any documentary evidence to show that material was sold on volumetric basis and issued compounding notice of Rs.3000/- on each of the executives, the petitioners herein.

3. Against the said compounding notices, the petitioners filed appeal before the Controller, Legal Metrology-opposite party no.2 stating inter alia that the compounding notices were issued without giving opportunity of hearing and therefore the same be quashed. But, the appellate authority-opposite party no.2 on a frivolous ground without considering the appeal, transmitted to the court of law for trial, contending that the petitioners-appellants failed to prove the contents of the appeal petition. Hence this application.

4. Mr. S.D. Das, learned Senior Counsel appearing for the petitioners contended that the "Hydrous" is semi-solid product containing water, the sale of the same by volume is permissible in view of Clause (d) of Rule 11 of the Orissa Standard of Weights and Measures (Enforcement) Rules, 1993. Thereby it is contended that the compounding notices dated 20.10.1997 in Annexure-2 series issued to each of the petitioners, without giving opportunity of hearing and consequential appellate order transmitting the case to the court of law for trial on the ground that the petitioners failed to prove the contents in the appeal petition dated 30.11.1998 in Annexure-1 be quashed.

5. Mr. R.K. Mohapatra, learned Government Advocate argued with vehemence that since the petitioners did not produce any evidence with regard to the method of measurement, the orders passed by the authority issuing compounding notices and consequential order of appellate authority transmitting the case record to the court of law for trial is well justified, which does not warrant interference of this Court at this stage.

6. We have heard learned counsel for the parties. On perusal of the records, as well as the impugned order passed by the appellate authority, it is clear that at the time of inspection, the Senior Inspector of Legal Metrology, Rourkela (Enforcement), who had inspected the slag granulation plant of the Rourkela Steel Plant on 18.10.1997, found that the granulated slag were being sold in trucks by measurement. But it is the sole case of the opposite party that the product 'hydrous' was being sold by "volume" measurement, whereas it should have been sold by "weight" which is the only permissible way of measurement.

7. In exercise of power conferred by Sub-Section (1) of Section 72 of the Standards of Weights and Measures (Enforcement) Act, 1985, the State Government framed a rule called "The Orissa Standards of Weights and Measures (Enforcement) Rules, 1993. The Rule in question has got statutory force. Therefore, for the just and proper adjudication of the case, the relevant Rule-11 of the Orissa Standards of Weights and Measures (Enforcement) Rules, 1993 is reproduced below:

> *"**11. Use of Weights only or measures only or Number only in certain cases**- Except in the cases of commodities specified in Schedule IV the declaration of quantity in every transaction, dealing or contract, or for industrial production or for protection shall be in terms of the unit of:*
>
> *(a) weight, if the commodity is solid, semi- solid viscous or a mixture of solid and liquid;*
>
> *(b length, if the commodity is sold by linear measure;*
>
> *(c) area, if the commodity is sold by area measure;*
>
> ***(d) volume, if the commodity is liquid or is sold by cubic measure;** or*
>
> *(e) number, if the commodity is sold by number;"*
>
> *(emphasis supplied)*

8. It is well settled principle of law of interpretation that applying the rule of literal construction the words of a statute are first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning, unless that leads to some absurdity or unless there is something in the context, or in the object of the statute to suggest the contrary as held by the apex Court in ***Jugalkishore Saraf v. Raw Cotton Co. Ltd***., AIR 1955 SC 376, ***Madanlal Fakir Chand Dudhediya v. Sri Changdeo Sugar Mills Ltd***., AIR 1962 SC 1543, ***Mohammad Ali Khan v. Commissioner of Wealth Tax***, AIR 1997 SC 1165 and ***State of Rajasthan v. Babu Ram***, AIR 2007 SC 2018.

9. Applying the rule of Literal Construction as discussed above and on perusal of Clause (d) of Rule-11 of Rules, 1993, it is clear that the method of measurement by "volume" is permissible and "weighing" of the product alone is not the only method of measurement. The appellate authority, while mentioning the facts of the case in his order dated 30.11.1998 in Annexure-1 specifically indicated that–

> *"the Senior Inspector of Legal Metrology, Rourkela (Enforcement) inspected the slag granulation Plant of the Rourkela Steel Plant on 18.10.1997 and found that the granulated slag are being sold in trucks by measurement".*

But the only question remains with regard to methodology adopted for sale of slag by the opposite party. To that, it is admitted that the same was done on "volume" basis, which also a permissible mode prescribed under Clause (d) of Rule-11 of the Orissa Standards of Weights and Measures (Enforcement) Rules, 1993.

10. The meaning of "compounding" has been prescribed in "**Advanced Law Lexicon of P. Ramanath Aiyar 4th Edition"**

> "*arranging, coming to terms; condone for money, arranging with the creditor to his satisfaction*".

Applying meaning of the "compounding" mentioned above to the present case, the petitioners did not come to the terms for commission of such offence to condone the same for money. Rather, the Senior Inspector, Legal Metrology had unilaterally issued compounding notices of Rs.3000/- each of the petitioners without affording opportunity of hearing, thereby there is gross violation of principles of natural justice. Giving notice to the affected party being the basic norm of compliance of the principles of natural justice and the same having not been followed, compounding notices issued on 20.10.1997 in Annexure-2 series by the authority concerned cannot sustain in the eye of law.

11. In **English Oxford Dictionaries** "**hydrous**" has been defined to the following effect:

> "*Containing water as a constituent. 'a hydrous lava flow'*."

In **Advanced Law Lexicon of P. Ramanath Aiyar 4th Edition**, it was specified that –

> ""*hydrous" is a scientific term, indicating the presence of water*."

12. In view of such meaning attach to word hydrous, the weighment of "hydrous" is a semi-solid state can only be done by "volume" as prescribed under Clause (d) of Rule-11 of Rules 1993.

13. The contention raised before the appellate authority that the "hydrous" can be measured on "volume" basis, the same was not considered in proper perspective rather the impugned order dated 30.11.1998 in Annexure-1 itself stated that whatever may be the value of slag, the same is considered as a "solid material" and all the transactions should have been made by "weight" only. By giving such observation, the appellate authority had not applied his mind in proper perspective and the finding arrived at by him stating that "hydrous" can only be sold by "weight" is an absolutely misconceived one. Consequential transmitting of the same to the court of law for trial, stating that the petitioners failed to prove the contents in appeal petition, cannot sustain in the eye of law.

14. As it is admitted in the appellate order that the Senior Inspector, Legal Metrology had found that the slag was being sold by measurement and since the "volume" is a mode of measurement, we are of the considered opinion that

imposition of any penalty by issuing compounding notices in Annexure-2 series are wholly unjustified and the consequential appellate order passed by the appellate authority on 30.11.1998 in Annexure-1 also being an outcome of non-application of mind, both Annexures-2 and 1 deserve to be quashed, and are accordingly quashed.

15. The writ petition is allowed. No order as to cost.

2018 (II) ILR - CUT- 395

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

W.P.(C) NO. 743 OF 2004

MD. HUSSAIN ……..Petitioner

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Prayer for issue of Writ of Certiorari – When can be issued? – Principles – Indicated.

"The writ of certiorari can be issued only when there is a failure of justice and it cannot be issued merely because it may be legally permissible to do so. There must be an error apparent on the face of record as the High Court acts merely in a supervisory capacity. An error apparent on the face of the record means an error which strikes one on mere looking and does not need long drawn out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. Such errors may include the giving of reasons that are bad in law or inconsistent, unintelligible or inadequate. It may also include the application of a wrong legal test to the facts found, taking irrelevant considerations into account and failing to take relevant considerations into account, and wrongful admission or exclusion of evidence, as well as arriving at a conclusion without any supporting evidence. Such a writ can be issued when there is an error in jurisdiction or authority whose order is to be reviewed has acted without jurisdiction or in excess of its jurisdiction or has failed to act. While issuing the Writ of Certiorari, the order under challenge should not undergo scrutiny of an appellant court. It is obligatory on the part of the petitioner to show that a jurisdictional error has been committed by the Statutory Authorities. There must be the breach of principles of natural justice for resorting to such a course. ***Harbans Lal v. Jagmohan Saran****, AIR 1986 SC 302,Followed)*

(Para 11)

Case Laws Relied on and Referred to :-

1. AIR 1986 SC 302 : Harbans Lal .Vs. Jagmohan Saran.
2.(2006) 5 SCC 173 : Municipal Council, Sujanpur .Vs. Surinder Kumar.

3. (2008) 2 SCC 417 : Sarabjit Rick Singh .Vs. Union of India.
4. (2008)14 SCC 171 : Assistant Commissioner, Income Tax, Rajkot .Vs. Saurashtra Kutch Stock Exchange Limited.
5. (2010) 13 SCC 336 : Sant Lal Gupta .Vs. Modern Co-operative Group Housing Society Ltd.

For Petitioner : Mr. A.P. Bose
For Opp. Parties : Mr. B.P. Pradhan, Addl. Govt. Advocate.
M/s. A.A. Das, M.K. Balbant Ray, A.K. Behera, S. Mohanty, B.R. Swain and A.K. Pattnaik.

JUDGMENT Date of Judgment: 16.07.2018

DR. B.R. SARANGI, J,

The petitioner, who is a workman of the Rourkela Steel Plant under Steel Authority of India Limited (SAIL), a Government of India Undertaking, has filed this writ petition challenging the award dated 30.06.2003 passed by the Presiding Officer, Labour Court, Sambalpur in I.D. Case No.3 of 2002 refusing continuity of his service, within the previous employment period, and consequential service benefits including seniority, by holding that the petitioner is not entitled to any relief.

2. The factual matrix of the case, in hand, is that the petitioner joined in the Rourkela Steel Plant on 16.01.1962 as a Coil Provider. On 15.01.1962, he met with an accident, while he was returning from his duty, and was admitted in Ispat General Hospital, Rourkela. In course of his treatment, he was served with a letter on 18.07.1968 directing him to resume his duty on expiry of extra-ordinary leave without pay granted to him for 87 days from 25.01.1968 to 20.07.1968, failing which his services would stand automatically terminated. The petitioner could not join in his duty and consequentially, he was terminated from his service. Thereafter, he submitted an application before the opposite party no.2-Management requesting to allow him to join as a fresh entrant. The opposite party no.2-Management, on consideration of his request, issued offer of appointment on sympathetic ground, after complying with necessary procedure and formalities. The petitioner accepted the terms and conditions of the offer of appointment dated 10.04.1969 by putting his signature, knowing fully well that his joining was a fresh one. After his joining, he made a representation for continuity of his service with previous employment with seniority and consequential service benefit. The representation of the petitioner was examined and after due consideration it was found that the said request of the petitioner could not be acceded to, and such fact was communicated to the petitioner vide letter dated 24/31.07.1970.

3. After completion of 25 years of service, the petitioner raised an Industrial Dispute before the Deputy Labour Commissioner-cum-Conciliation, Rourkela claiming seniority and service benefit for the period he was out of employment. The

said dispute being admitted to the conciliation upon disagreement between the parties regarding the non-entitlement of claim advanced by the petitioner, the conciliation ended in failure and the District Labour Officer and Conciliation Officer, Rourkela sent the failure report to the appropriate government. As a consequence thereof, the Government in the Department of Labour and Employment made a reference under Sections 10 and 12 of the Industrial Disputes Act, 1947 to the Labour Court, Sambalpur for adjudication with following schedule of reference.

> *"1. Whether the action of the management of SAIL, Rourkela Steel Plant, Rourkela in refusing continuity of service to Md. Hussian, Pl. No. 21636, Sr. Operative of Cold Rolling Mill (O) department with his previous employment period and consequential service benefits including seniority is legal and/or justified ? If not, to what relief Md. Hussain is entitled."*

4. On the basis of reference made by the State Government, the Labour Court, Sambalpur registered I.D. Case No.03 of 2002 for adjudication. On being noticed, the respective parties filed their written statement before the Presiding Officer, Labour Court. On perusal of the pleadings of the parties, the Presiding Officer, Labour Court, Samblpur framed as many as two issues reproduced hereunder:

> *"(i) Whether the action of the management of SAIL, Rourkela Steel Plant, Rourkela in refusing continuity of service to Md. Hussain, Pl. No. 21636, Sr. Operative of Cold Rolling Mill (O) department with his previous employment period and consequential service benefits including seniority is legal and justified.*
> *(ii) If not to what relief he is entitled?"*

5. Learned Presiding Officer, Labour Court, Sambalpur, while answering issue no.1, observed that since the petitioner had accepted the offer of appointment on the basis of his request made to opposite party no.2 for fresh employment, he was not entitled to any relief of continuity of service including the seniority and dismissed the reference, hence this application.

6. Mr. A.P. Bose, learned counsel for the petitioner strenuously urged before this Court that the termination of service of the petitioner is imaginary one. Therefore, the subsequent denial of fixation of scale of pay and continuity of service cannot sustain in the eye of law. Opposite party no.2 has exploited the petitioner, which amounts to unfair labour practice. Hence, the petitioner has approached this Court by filing this writ petition.

7. Per contra, Mr. A.K. Pattnaik, learned counsel appearing on behalf of Mr. A.A. Das, learned counsel for opposite party no.2 justified the award passed by the Labour Court and contended that the petitioner made a representation, after his termination, for fresh appointment, which was considered on sympathetic ground and consequentially fresh appointment was given, pursuant to which he joined and discharged his duty. After a long lapse of 25 years of service, the petitioner cannot

claim continuity of service with his previous employment with the scale of pay, for which the Presiding Officer has rightly passed the award refusing the prayer of the petitioner, which does not warrant interference of this Court at this stage.

8. We have heard Mr. A.P. Bose, learned counsel for the petitioner and Mr. A.K. Pattnaik, learned counsel appearing on behalf of Mr. A.A. Das, learned counsel for opposite party no.2. Pleadings have been exchanged and with their consent the matter is being disposed of at the stage of admission.

9. Before proceeding to find out correctness of the impugned award passed by the learned Labour Court/Tribunal, at the outset it is necessary to examine the scope of this Court for interference with the same in exercise of power under Articles 226 and 227 of the Constitution of India. It is well settled law that before examining an award of present nature, the High Court has to see-

(i) whether the Tribunal has exceeded its jurisdiction or has failed to exercise its jurisdiction given under the I.D. Act?;

(ii) whether the award is perverse?;

(iii) whether the award suffers from any error of law or misconception of law?;

(iv) whether the Tribunal has violated the statutory procedure resulting in denial of natural justice?; and

(v) whether there is error of law apparent on the face of records?"

10. Keeping the above parameters in view, this Court carefully examined the impugned award in proper perspective and came to the considered opinion that in view of undisputed facts of the case, the Presiding Officer, Labour Court has not committed any illegality or irregularity so as to warrant interference of this court invoking jurisdiction in exercise of power under Articles 226 and 227 of the Constitution of India.

11. In ***Harbans Lal v. Jagmohan Saran***, AIR 1986 SC 302, the apex Court had held that the writ of certiorari can be issued only when there is a failure of justice and it cannot be issued merely because it may be legally permissible to do so. There must be an error apparent on the face of record as the High Court acts merely in a supervisory capacity. An error apparent on the face of the record means an error which strikes one on mere looking and does not need long drawn out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. Such errors may include the giving of reasons that are bad in law or inconsistent, unintelligible or inadequate. It may also include the application of a wrong legal test to the facts found, taking irrelevant considerations into account and failing to take relevant considerations into account, and wrongful admission or exclusion of evidence, as well as arriving at a conclusion without any supporting evidence. Such a writ can be

issued when there is an error in jurisdiction or authority whose order is to be reviewed has acted without jurisdiction or in excess of its jurisdiction or has failed to act. While issuing the Writ of Certiorari, the order under challenge should not undergo scrutiny of an appellant court. It is obligatory on the part of the petitioner to show that a jurisdictional error has been committed by the Statutory Authorities. There must be the breach of principles of natural justice for resorting to such a course.

Similar view has also been taken in ***Municipal Council, Sujanpur v. Surinder Kumar***, (2006) 5 SCC 173, ***Sarabjit Rick Singh v. Union of India***, (2008) 2 SCC 417, ***Assistant Commissioner, Income Tax, Rajkot v. Saurashtra Kutch Stock Exchange Limited***, (2008) 14 SCC 171 and ***Sant Lal Gupta v. Modern Co-operative Group Housing Society Ltd***., (2010) 13 SCC 336.

12. Applying the above principle to the facts of the present case, we do not find any illegality or irregularity committed by the Presiding Officer, Labour Court by passing the impugned award so as to warrant our interference invoking jurisdiction of writ of Certiorari and accordingly hold that the writ petition is devoid of merits.

13. The writ petition is accordingly dismissed. No order as to cost.

2018 (II) ILR - CUT- 399

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

OJC NO. 6209 OF 1999

NETRANANDA MISHRA .....Petitioner

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition challenging the orders passed by the Revenue authorities – Petitioner a land oustee obtained a land on lease – Adjacent land owner encroached upon the lease hold land of the petitioner and initiated proceedings in a fraudulent manner – Approach to court in unclean hand and playing fraud on court – Effect of – Held, the persons playing fraud on court should be dealt with strong hand.

"*As a matter of fact, the encroachers have deliberately and willfully not impleaded the petitioner as party before the appellate authority as well as before the revisional authority and by suppressing the fact before the court below in a fraudulent manner, opposite party No.5 has tried to get an order in her favour to the*

detrimental interest of the petitioner, who has acquired a right by virtue of the lease executed in his favour on 18.07.1974, particularly when the petitioner is a land oustee and his agricultural and homestead land had been acquired for the purpose of greater interest of the country for construction of NALCO project and, as such, a small piece of land, i.e., Ac.0.12 decimals was allotted in his favour for survival in Angul Town area, pursuant to Angul Town Lease Case No.88 of 1964. The encroacher, being adjacent to the land of the petitioner, tried to grab the property of the petitioner, even though she lost before the appellate authority, revisional authority, as well as in T.S. No 25 of 1989 filed by her before the Subordinate Judge, Angul. In view of the law discussed above, since opposite party no.5 tried to play fraud on the court itself, she is not entitled to get any relief and her application should be dismissed in limine. Apart from the same, the encroachers had not approached the authorities concerned who are exercising quasi judicial powers, with a clean hand. For suppression of facts and having not approached this Court with a clean hand, the encroacher is not entitled to get any relief, particularly when the valuable right accrued in favour of the petitioner is being jeopardized for last 43 years for no fault of him, on which this Court takes a serious view."

(Para 25 & 26)

Case Laws Relied on and Referred to :-

1. (1956) AC 736 : Smith .Vs. East Elloe Rural District Council.
2. (1974) QB 24 : R .Vs. West Sussex Quarter Sessions, ex p Albert & Maud Johnson Trust Ltd.
3. AIR 1992 SC 1555 : Smt. Shrisht Dhawan .Vs. Shaw Brothers.
4. (1994) 1 SCC 1: AIR 1994 SC 853 : S.P. Chengalvaraya Naidu .Vs. Jagannath.
5. (1996) 5 SCC 550 : AIR 1996 SC 2592 : Indian Bank .Vs. Satyam Fibres (India) Pvt. Ltd.,
6. AIR 1994 SC 579 : Chancellor .Vs. Bijayananda Kar.
7. AIR 1977 SC 781 : State of Haryana .Vs. Karnal Distillery.

For Petitioner : M/s. P.K.Mohapatra, S.K.Jena & (Mrs.) M. Rout.
For Opp. parties : Mr. B.P. Pradhan, Addl. Government Advocate
Mr. S.P.Mishra, Sr. Advocate
M/s S. K. Mishra, S. Mishra & S.Dash.

JUDGMENT Date of Judgment : 24.07.2018

DR. B.R. SARANGI, J.

The petitioner, a retired Government servant, has filed this application challenging the inaction of the authority in not delivering the possession of homestead leasehold land in his favour, though lease had been granted vide Lease Case No.88 of 1964 by the then Revenue Divisional Commissioner, Northern Division, Sambalpur under Urban Land Settlement Act.

2. The factual matrix of the case, in hand, is that the petitioner is a land less person inasmuch as his entire landed property, including house and homestead, had been acquired for construction of NALCO project. Consequentially, after retirement,

he was staying in a rented house at Angul. A piece of land measuring Ac.0.12 decimals out of plots no.309/2 and 310/2 (2 decimals from plot no.309/2 and 10 decimals from plot no.310/2) in Angul town was sanctioned on lease basis for homestead purpose in favour of the petitioner by the then Revenue Divisional Commissioner, Northern Division, Sambalpur vide Angul Town Lease Case No.88 of 1964. After getting notice from the competent authority on the sanction of the lease, the petitioner deposited the premium amount and thereafter the lease deed was executed and registered. The said lease deed is nomenclatureed as "Standard Form of lease deed for lease of government land in favour of Middle Class People in town areas in the State of Orissa". The lease deed was executed on 18.07.1974 and after execution of lease deed, the petitioner applied and requested the Tahasildar, Angul to demarcate the plot and give physical delivery of possession of the said plot to him. At that point of time, the petitioner was informed that the said land is under encroachment and after evicting the encroachers, delivery of possession would be made in favour of the petitioner. The petitioner waited till 1983 for taking over possession of the plot from the revenue authorities, but no action was taken by the authority to give delivery of possession of the land in question in favour of the petitioner.

3. In the year 1983, the Land Acquisition Collector, Dhenkanal acquired the entire landed properties of the petitioner both agricultural, homestead and house etc. for NALCO project at Angul. Thereafter, the petitioner on 24.05.1984, submitted a representation before the Collector, Dhenkanal stating inter alia that if his lease hold land is in encroachment, another suitable plot measuring Ac.0.12 decimals within Angul NAC be allotted to him for construction of a house, but no action was taken by him on the same. The revenue authorities also did not take any action till 1985 for eviction of the encroachers from the plot in question, even though an eviction order was passed against the encroachers in the year 1974 vide Encroachment Case No.127 of 1970-71. In spite of said order being subsisting, a fresh encroachment case against the said encroachers was initiated vide Encroachment Case No.1 of 1985 under Orissa Prevention of Land Encroachment, Act (for short "OPLE, Act"). But the revenue authorities did not take any steps for removal of the encroachers from the said leasehold land. On enquiry, the petitioner came to know that one Sri Dasarathi Pattnaik was the encroacher of his leasehold land. Further, Sri Dasarathi Pattnaik was granted lease in respect of Ac.0.12 decimals of land out of plot no.309 in the year 1970-71. After receiving the said land from the government on lease, Sri Dasarathi Pattnaik constructed his dwelling house there and subsequently encroached the adjacent plots out of plots no.309 and 310 granted on lease in favour of the petitioner. After coming to know the fact that Encroachment Case No.1 of 1985 has been initiated against the encroacher, the petitioner intervened in the same and filed objection stating inter alia that the encroached land has been sanctioned in his favour, vide Angul Town Lease Case No.88 of 1964.

4. During pendency of the said encroachment case, the encroacher Sri Dasarathi Pattnaik and his daughter in law, Smt. Nalini Pattnaik, filed two writ petitions bearing OJC No.1549 of 1987 and OJC No.1376 of 1987 respectively before this Court. The grievance of Sri Dasarathi Pattnaik in the said writ petition was that although the notice was issued to him in the encroachment proceeding, it was served on a date subsequent to the date fixed for his appearance, and on that account he failed to appear and ex parte order of eviction was passed. The daughter-in-law of Sri Dasarathi Pattnaik, namely, Smt. Nalini Pattnaik made grievance in her writ petition that she was in possession of the case plot and she had no relation with the encroacher Sri Dasarathi Pattnaik and, as such, she claimed for settlement of the said land in her favour by dropping the encroachment case initiated against Sri Dasarathi Pattnaik.

5. After hearing both the writ petitions, this Court, while permitting Sri Dasarathi Pattnaik to file his show cause afresh in the encroachment proceeding, directed the authorities to dispose of the same in accordance with law, and on the other hand, this Court was not inclined to admit the writ application filed by Smt. Nalini Pattnaik. Therefore, the said application was withdrawn on being prayer made by Smt. Smt. Nalini Pattnaik.

6. After being unsuccessful in the writ application, Smt. Nalini Pattnaik intervened in the encroachment proceeding no. 1 of 1985 initiated against Sri Dasarathi Pattnaik and after hearing the parties, the Tahasildar, Angul, vide order dated 19.06.1987, rejected the plea of Smt. Nalini Pattnaik and directed for eviction of Sri Dasarathi Pattnaik from the encroached plot in question.

7. By virtue of the eviction order passed by the Tahasildar, Angul, the petitioner represented the authority concerned to give him demarcation and delivery of possession of the lease plot, which was sanctioned in his favour by the government. But in spite of repeated request, no steps were taken for eviction so as to handover the possession of the plot in favour of the petitioner. Consequentially, the petitioner submitted a representation on 06.04.1988 before the Collector, Dhenkanal requesting to provide an alternative plot so that he can construct his dwelling house. In spite of such representation, no action was taken and on the other hand Sri Dasarathi Pattnaik and Smt. Nalini Pattnaik, being aggrieved by the order passed by the Tahasildar, Angul, preferred two appeals bearing no.9 of 1987 and no.8 of 1987 respectively before the Court of Sub-Divisional Officer, Angul, without impleading the present petitioner as a party. The learned Sub-Divisional Officer, Angul, upon hearing dismissed both the appeals, vide order dated 30.05.1989, and directed for eviction of encroachers.

8. Smt. Nalini Pattnaik filed civil suit bearing T.S. No.25 of 1989 before the Subordinate Judge, Angul thereafter, praying for declaration of her right, title and interest over the said land and for confirmation of possession. She further prayed that the State Government be permanently restrained from interfering with the possession and eviction from the suit land. The said suit, in which the petitioner was also not impleaded as party, was dismissed on 07.08.1990 for non-prosecution.

9. The petitioner again made fresh representation on 28.05.1994 before the Collector, Angul for consideration of his case and for direction to give him delivery of possession of his lease plot forthwith. He further prayed that if that plot was in encroachment, then another alternative plot of same area be given to him, as he is a landless person and residing in a rented house. But no action was taken on such representation. Again the petitioner filed reminder on 06.05.1998 by making fresh representation, but on receipt of the same the Collector remained silent for near about three months and all on a sudden the Addl. District Magistrate, Angul informed the petitioner, vide letter dated 14.08.1998, to be present before the office on 16.05. 1998 at 8.30 AM for enquiring about the matter regarding delivery of possession of the lease plot, with a further request to bring all relevant paper with him on the date fixed. During such inquiry, the Addl. District Magistrate, Angul brought to the notice of the petitioner about the order passed by the then revisional authority, namely, Addl. District Magistrate, Angul in Revision Case No.7 of 1989 and 8 of 1989 preferred by Sri Dasarathi Pattnaik and Smt. Nalini Pattnaik challenging the order passed by the appellate authority and informed that in such view of the matter possession of the lease land was not delivered to him. Needless to say that the petitioner was also not made party before the appellate authority where the appeals were preferred by Sri Dasarathi Pattnaik and Smt. Nalini Pattnaik. Therefore, the petitioner could not be able to know that against the order passed by the appellate authority, the encroacher Sri Dasarathi Pattnaik and Smt. Nalini Pattnaik have already preferred revision before the revisional authority. Even though the petitioner is a necessary party in the revisional proceeding, deliberately and willfully the encroachers had not impleaded him as party in the Revision Case nos.7 and 8 of 1989 filed by Sri Dasarathi Pattnaik and Smt. Nalini Pattnaik. The Addl. District Magistrate, Angul also disposed of the said two revision cases on 16.06.1994, without hearing the petitioner, by setting aside the orders dated 19.06.1987 and 30.05.1989 of the Tahasildar, Angul and Sub-Divisional Officer, Angul in Encroachment Case No.1 of 1985 and Encroachment Appeal No.8 of 1987 respectively. The Revisional authority dismissed the revision preferred by Sri Dasarathi Pattnaik on the ground of *res judicata* and in the revision filed by Smt. Nalini Pattnaik, while setting aside the order passed by the Courts below, directed the Tahasildar, Angul to consider the case of Smt. Nalini Pattnaik in settling the case land in her favour by instituting a fresh encroachment case against her. The Addl. District Magistrate, Angul allowed the prayer made by Smt. Nalini Pattnaik on the

ground that herself and her husband were having separate holding numbers and they were paying holding tax of the case land to the NAC, Angul since 1982-83 and they had no connection with Sri Dasarathi Pattnaik. Therefore, there was no justification for institution of encroachment case against Sri Dasarathi Pattnaik. The findings arrived at by the Revisional Court is without any basis, as late Ambika Pattnaik, husband of Smt. Nalini Pattnaik is the second son of Sri Dasarathi Pattnaik, which was already confirmed by this Court in OJC No.1376 of 1987. In the said writ petition, such plea of Smt. Nalini Pattnaik was turned down and, as such, the said fact has also been fortified from the voter list of the year 1984 under 116 Assembly Constituency of Amlapada, Angul pertaining to holding no.220. Challenging the order dated 16.06.1994 passed by the Addl. District Magistrate, Angul in Encroachment Revision Case No.8 of 1989, hence this application.

10. Mr. P.K. Mohapatra, learned counsel for the petitioner contended that at the behest of the encroachers the authorities are not evicting them from the case land and, as such, the petitioner is a land oustee and he has been rendered homestead less because of commencement of new project at NALCO by the government. Even if the land has been allotted in favour of the petitioner, pursuant to Angul Town Lease Case No.88 of 1964, and consequence there of the lease deed has also been executed on 18.07.1974, till date delivery of possession has not been given to the petitioner and, as such, the petitioner could not construct house over the said land for survival. It is further contended that the encroachers, namely, Sri Dasarathi Pattnaik and Smt. Nalini Pattnaik, though approached the appellate authority in Encroachment Appeal Case No.9 of 1987 and 8 of 1987 respectively, without impelading the present petitioner as a party to the proceeding, the said appeals have been dismissed and subsequently Smt. Nalini Pattnaik filed civil suit bearing T.S. No. 25 of 1989 before the Subordinate Judge, Angul for declaration of right, title and interest over the property in question, which was also dismissed for default, where the petitioner also had not been impleaded as a party. Thereafter, two separate revisions bearing Revision Case Nos.7 and 8 were filed by Sri Dasarathi Pattnaik and Smt. Nalini Pattnaik respectively before the Addl. District Magistrate, where deliberately and willfully the petitioner was not impleaded as a party. Consequentially, the revisional authority passed the order behind the back of the petitioner on 16.06.1994 by rejecting the revision filed by encroacher Sri Dasarathi Pattnaik and allowing the revision filed by daughter-in-law of Sri Dasarathi Pattnaik, i.e., Smt. Nalini Pattnaik and directed the Tahasildar, Angul to settle the land in favour of Smt. Nalini Pattnaik by instituting a fresh encroachment proceeding. It is contended that the encroachers have not approached the Court with clean hand and adopted fraudulent method and, as such, they want to grab the land in question which has been allotted in favour of the petitioner in Angul Town Lease Case No. 88 of 1964 and consequence thereof lease deed has also been executed in his favour. Accordingly, he prays for quashing of the order dated 16.06.1994 passed by the Addl. District

Magistrate and for eviction of the encroachers with a further direction to the authorities to give delivery of possession of land in question so as to enable the petitioner to construct a house for his survival.

11. Mr. B.P. Pradhan, learned Addl. Government Advocate though tried to justify the order passed by the authority concerned, at the same time admitted that the petitioner was not impleaded as a party before the revisional authority and that the order in question has been passed behind his back.

12. Mr. L.K. Moharana appearing on behalf of Mr. S.P. Mishra, learned Senior Counsel for opposite party no.5 argued with vehemence justifying the order passed by the revisional authority and contended that the Sub-Divisional Officer has ignored certain documentary evidence produced by opposite party no.5 in support of her claim of possession over the case land and on the contrary, he relied upon certain facts, which were not on record, and, by introducing the same behind the back of opposite party no.5, arrived at a conclusion that Sri Dasarathi Pattnaik was not in possession over the case land. It is thus contended that without considering the documents produced by Smt. Nalini Pattnaik into consideration, the Sub-Divisional Officer, Angul has passed the order, therefore in exercise of powers under Section 12 (2) of the OPLE, Act 1972, the revisional authority set right the wrong done by the subordinate Court, vide order dated 16.06.1994. Consequentially, no illegality or irregularity has been committed by the authority so as to warrant interference by this Court in the present proceeding.

13. We have heard Mr. P.K. Mohapara, learned counsel for the petitioner; Mr. B.P. Pradhan, learned Addl. Government Advocate and Mr. L.K. Moharana on behalf of Mr. S.P. Mishra, learned Senior Counsel for opposite party no.5 and perused the record.

14. Notice was issued on 07.09.2000 to the opposite parties and on the very same date this Court passed interim order staying operation of the order dated 16.06.1994 in the Encroachment Revision case passed by the Addl. District Magistrate, until further orders. The said notice on the question of admission and final disposal issued to opposite parties no.1 to 5 was received by them on 18.12.2001. Pursuant to such notice, Mr. S.P. Mishra, learned Senior Counsel and associates have filed vakalatnama on behalf of opposite party no.5 on 23.10.2000. Thereafter, when the matter was listed on 09.09.2004, on the request of learned counsel for opposite party no.5, the matter was adjourned. Then the matter was on the board on 09.02.2016, 17.02.2016, 30.11.2016, 02.01.2017 and 11.01.2017. Thereafter on 16.01.2017, on the request of learned counsel for opposite party no.5, the matter was adjourned for two weeks and thereafter when the matter was listed on 20.06.2018, learned counsel for opposite party no. 5 was not present and,

therefore, the matter was directed to be listed after two weeks. On 12.07.2018, this Court directed that the matter would be listed on 24.07.2018, by which date if no counter affidavit is filed by opposite party no.5, the writ petition itself would be disposed of. When the matter was listed today, i.e, 24.07.2018, none appeared for opposite party no.5 at the time of call, nor has any counter affidavit been filed. However, the matter was passed over and thereafter on revised call when the matter was taken up for hearing, pursuant to order dated 12.07.2018, learned counsel for opposite party no.5 sought time to file counter affidavit, which this Court was not inclined to grant, as this case is of the year 1999 and more particularly it is a certiorari proceeding. Therefore, on the basis of materials available on record, this Court decided to proceed with hearing of the matter and accordingly by consent of learned counsel for the parties, this matter is taken up for hearing and disposed of at the stage of admission.

15. The factual matrix of the case, as delineated above, is undisputed. Admittedly, the petitioner is a land oustee and his agricultural and homestead land had been acquired for the purpose of construction of NALCO project. The petitioner was allotted a piece of land, pursuant to Angul Town Lease Case No.88 of 1964, and the lease deed was executed on 18.07.1974. In spite of several efforts made by the petitioner, physical delivery of possession of the land in question has not been given to the petitioner till date. In the meantime, more than 43 years have been elapsed and this is a clear case of inaction of the authority and more particularly the petitioner has been put to harassment by initiating a proceeding at the instance of the encroachers, without impleading the petitioner as a party to the proceeding, and consequentially delivery of possession of encroached land has not been made in favour of the petitioner. The sequence of facts clearly indicates that efforts have been made by the encroachers to grab the property by playing fraud on Court and succeeded in getting the order without impleading the petitioner as party. The fraudulent act of the encroacher, who was approaching the court without clean hand, should be curbed in a strong hand so that justice can be delivered to the real person.

16. In ***Smith v. East Elloe Rural District Council***, (1956) AC 736, Lord Denning said that "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".

17. In ***Smith v. East Ellows Rural District Council,*** (1956) 1 All ER 855, it has been held that "Fraud vitiated any act or order passed by any quasi judicial authority even if no power of review is conferred upon it. The effect of fraud would normally be to vitiate all acts and orders".

18. In ***R v. West Sussex Quarter Sessions, ex p Albert and Maud Johnson Trust Limited,*** (1974) QB 24, it has been held by Lord Denning that "there is ample

authority for holding that, where there is evidence that the decision of an inferior court has been obtained by the fraud of a party or by collusion, the court of Queen's Bench will order it to be brought up and will quash it.

19. In ***Smt. Shrisht Dhawan v. Shaw Brothers***, AIR 1992 SC 1555, it has been held that "Fraud and collusion vitiate even the utmost solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct."

20. In ***S.P. Chengalvaraya Naidu v. Jagannath***, (1994) 1 SCC 1: AIR 1994 SC 853, the apex Court in no uncertain terms observed "The principle of finality of litigation cannot be passed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the Court, must comes 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…… A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage……A litigant, who approaches the Court, is bound to produce all the documents executed by him, which are relevant to the litigation. If we withhold 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 on the opposite party."

21. In ***Indian Bank v. Satyam Fibres (India) Pvt. Ltd***., (1996) 5 SCC 550 : AIR 1996 SC 2592, the apex Court observed that "since fraud affects the solemnity, regularity and orderliness of the proceedings of the court it also amounts to an abuse of the process of the Court that the courts have inherent power to set aside an order obtained by practicing fraud upon the court and that where court is misled by a party or the Court itself commits a mistake which prejudice a party, the court has the inherent power to recall its order.

22. In ***R. v. Kensington, Income Tax Commissioner***, (1917) 1 KB 486 at page 506, it was held that "the prerogative writ is not a matter of course; the applicant must come in the manner prescribed and must be perfectly frank and open with the Court."

23. In ***State of Haryana v. Karnal Distillery***, AIR 1977 SC 781, the apex Court refused to grant relief on the ground that the applicant has misled the Court.

24. In ***Chancellor v. Bijayananda Kar***, AIR 1994 SC 579, the apex Court held that a writ petition is liable to be dismissed on the ground that the petitioner did not approach the Court with clean hands.

25. As a matter of fact, the encroachers have deliberately and willfully not impleaded the petitioner as party before the appellate authority as well as before the revisional authority and by suppressing the fact before the court below in a fraudulent manner, opposite partyno.5 has tried to get an order in her favour to the detrimental interest of the petitioner, who has acquired a right by virtue of the lease executed in his favour on 18.07.1974, particularly when the petitioner is a land oustee and his agricultural and homestead land had been acquired for the purpose of greater interest of the country for construction of NALCO project and, as such, a small piece of land, i.e., Ac.0.12 decimals was allotted in his favour for survival in Angul Town area, pursuant to Angul Town Lease Case No.88 of 1964. The encroacher, being adjacent to the land of the petitioner, tried to grab the property of the petitioner, even though she lost before the appellate authority, revisional authority, as well as in T.S. No 25 of 1989 filed by her before the Subordinate Judge, Angul.

26. In view of the law discussed above, since opposite party no.5 tried to play fraud on the court itself, she is not entitled to get any relief and her application should be dismissed in *limine*. Apart from the same, the encroachers had not approached the authorities concerned who are exercising quasi judicial powers, with a clean hand. For suppression of facts and having not approached this Court with a clean hand, the encroacher is not entitled to get any relief, particularly when the valuable right accrued in favour of the petitioner is being jeopardized for last 43 years for no fault of him, on which this Court takes a serious view. In such view of the matter, the order dated 16.06.1994 passed by the revisional authority in Encroachment Revision Case No.8 of 1989 in Annexure-10 deserves to be quashed and is accordingly quashed. The opposite parties, more particularly opposite parties no.3 and 4 are directed to take necessary steps to evict the encroacher-opposite party no.5 from land allotted in favour of the petitioner forthwith, preferably within a period of two months, and deliver possession thereof to the petitioner.

27. The writ petition is allowed to the extent indicated above. However, there shall be no order as to costs.

2018 (II) ILR - CUT- 409

I.MAHANTY,J. BISWAJIT MOHANTY,J.

W.P.(C) NO. 5679 OF 2015

W.P.(C) Nos.5679, 5439, 5441, 5442, 5443, 5444, 5445, 5446, 5449, 5495, 5496, 5497, 5498, 5499, 5642, 5644, 5647, 5678, 5680, 5681, 5695, 5696, 5697, 5699, 5701, 5703, 5707, 5709, 5710, 5711, 5712, 5713, 5714, 5715, 5717, 5718, 5724, 5725, 5728, 5729, 5731, 5733, 5735, 5738, 5741, 5744, 5747, 5748, 5750, 5751, 5752, 5753, 5754, 5755, 5756, 5757, 5758, 5759, 5760, 5762, 5763, 5764, 5765, 5766, 5767, 5768, 5769, 5770, 5889, 5894, 5896, 5899, 5902, 5905, 5906, 5932, 5945, 5946, 5947, 5948, 5949, 5950, 5958, 5959, 5960, 5961, 5962, 5963, 5964, 5965, 5966, 5967, 5968, 5969, 5970, 5971, 5972, 5973, 5974, 5975, 5976, 5977, 5978, 5979, 5980, 5981, 5982, 5983, 5984, 5985, 5986, 5987, 5988, 5989, 5990, 5991, 5992, 5993, 5994, 5995, 5996, 6004, 6095, 6097, 6098, 6099, 6101, 6102, 6105, 6106, 6108, 6109, 6110, 6112, 6123, 6124, 6133, 6148, 6149, 6199, 6200, 6202, 6203, 6205, 6206, 6207, 6208, 6218, 6220, 6227, 6241, 6242, 6243, 6244, 6245, 6246, 6247, 6248, 6249, 6250, 6251, 6252, 6253, 6254, 6255, 6256, 6257, 6258, 6259, 6260, 6261, 6262, 6263, 6264, 6265, 6266, 6267, 6268, 6269, 6270, 6271, 6272, 6274, 6278, 6279, 6281, 6285, 6286, 6333, 6350, 6356, 6352, 6353, 6354, 6355, 6502, 6503, 6505, 6507, 6508, 6510, 6513, 6515. 6516, 6517, 6598, 6600, 6601, 6602, 6603, 6605, 6607, 6608, 6610, 6611, 6634, 6637, 6655, 6692, 6693, 6694, 6695, 6696, 6697, 6698, 6699, 6700, 6701, 6702, 6703, 6704, 6705, 6706, 6767, 6768, 6786, 6788, 6790, 6791, 6824, 6827, 6825, 6826, 6828, 6829, 6837, 6839, 7193, 7438, 7755, 7756, 7920, 8096, 8883, 8943, 8944, 8945, 8946, 8947, 8948, 8949, 8950, 8951, 8952, 9471, 11632, 13295, 13297, 13298, 13300, 13301, 14760, 17225, 17227, 17229, 17231, 17598 and 17600 of 2015

SARASWATI SAHU .....Petitioner

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – State excise matter – Challenge is made to the demand of TCS (tax components) amount by Odisha State Beverages Corporation Ltd. allegedly included in MRP – Batch of writ petitions – Plea that the demand is illegal and has been raised not as per any law or basis – Plea of OSBCL that the TCS is included in MRP as fixed as per Excise policy – Held, the earlier MRP was fixed as per the policy relating to calculation of MRP prevailing during 2009-2013 as is revealed from Annexure-A/1 – The new calculation policy under Annexure-B/1 which was implemented with effect from 2015-16, which does not have any retrospective operation – Therefore, the impugned demands for a prior period having been made relying on such new calculation policy, are clearly arbitrary and unreasonable thus inviting the mischief of Article-14 of the Constitution of India – Writ petitions allowed.

For Petitioner : M/s. J.P.Mohanty, J.P.Behera
For Opp. parties : M/s. S.K.Jena, A.R.Mohanty, R.C.Behera, C.R.Dash

ORDER Date of Order 24.08.2018

I.MAHANTY,J.

Heard learned counsel for the petitioners, Mr. S.K. Jena, learned counsel appearing for Odisha State Beverages Corporation Ltd., for short, "OSBCL" and Mr. L. Samantaray, learned Standing Counsel. Since according to learned counsel for the petitioners issue involved in all these writ petitions is same and pertains to demands for recovery of TCS amount included in MRP by "OSBCL", this Court while taking up all these matters together for disposal, thinks it proper to take up W.P.(C) No.5679 of 2015 as the lead case.

In W.P.(C) No.5679 of 2015, the petitioner-Saraswati Sahoo, who is a licensee of several IMFL 'OFF' shops located at Nachuni, Tangi, Balugaon, Banapur and Badapadar has sought to challenge the respective demands made under Annexure-3 series for recovery of T.C.S. amount included in maximum retail price (MRP) for the period 01.04.2010 to 31.8.2013. The said demands for the respective F.L. 'OFF' shops are quoted hereunder :

Nachuni F.L. OFF shop-Rs.7,07,271/-
Tangi F.L. OFF shop-Rs.6,66,020/-
Balugaon F.L. OFF shop-Rs.13,43,144/-
Banapur F.L. OFF shop-Rs.10,63,701/-
Badapadar F.L. OFF shop-Rs.1,35,537/-

The entire basis for raising these demands has been provided by the "OSBCL" in its counter affidavit filed through the Managing Director. In the counter, it has been stated that in the audit carried out by the Office of the Accountant General, Odisha, it was pointed out that during the financial years 2010 to 2013, the "OSBCL" has sold 4.53 lakh cases of beer and IMFL and collected Rs.62.51 crores as T.C.S. from the retailers at the time of sale and, thereafter, deposited the same with the Income Tax Department. It is further averred that the retailers obtained certificates of T.C.S. from "OSBCL" to avail credit against assessment of their income tax liabilities and most importantly also recovered the same from the consumers through maximum retail price (MRP) which had been inadvertently included in the price (MRP) fixed by the Price Fixation Committee (PFC). The copy of the procedure adopted by OSBCL for calculation of issue price of IMFL per case for the years 2009 to 2013 was appended as Annexure-A/1 to the counter affidavit which is extracted herein below:

"Details of procedure adopted at "OSBCL" for calculation of issue price of IMFL per case :

	Offer price	A	Offer price submitted by the supplier and accepted by the OSBC after approval by the Price Fixation Committee
	Import fee (If any)	B	Import fee on the stock imported from outside the State as per the Excise Policy for the year
	Entry Tax	C	(A+B+F) 1% in case of stock sourcing from outside the State and (A+E) 1% for stock sourcing from inside the State
	Landing Cost	D	A+B+C = Landing Cost
	Margin	E	OSBC Margin, as fixed from time to time by the Board of Directors of O.S.B.C.Ltd.
	State Excise Duty	F	As Notified by the government under the Excise Policy of the State for the year
	Total		
	Issue price rounded up to next0.50 paise		
	Issue price	G	(D+E+F) OSBC Issue price
	VAT @ 20%	H	As per Government Notification
	Sub-Total	I	(G+H) Wholesale issue price to retailer/ licensee
I.T. component	T.C.S. @ 1%	J	As per provisions U/D 27-C of the I.T. Act
	Surcharge on TCS @ 1%	K	As per provisions of I.T. Act
	Edn. Cess @ 3%	L	As per provisions of I.T. Act
	Total	M	(I+J+K+L) Price inclusive of taxes to licensee"

It is further averred that in terms of the Liquor Sourcing Policy (LSP) for the year 2010 to 2013, the income tax component i.e. T.C.S. had been inadvertently included, as a result of which the tax burden was passed on to the consumers giving the retailers undue benefits of Rs.75.01 crores. The retailers/petitioners not only collected the amount of T.C.S. component but also collected their percentage of Margin of Rs.12.50 crores of the T. C.S. from the consumers, which they were not entitled to and for which they were/are unjustly enriched. However, after such observations made by the Accountant General, necessary rectification procedures have been carried out by the "OSBCL" after due approval of the Government. For the present, the mode of computation of sale price to the retailers and MRP for IMFL for the year 2015-16 onwards has been annexed as Annexure B/1 and extracted herein below:

"Procedure adopted for calculation of OSBC's Sale Price to Retailer and MRP:

Offer price	A	Offer price submitted by the supplier when accepted by the Corporation becomes the approved Offer price for the Corporation.
Import fee	B	Import fee on the stock imported from outside the State as per the Excise Policy for the year
Entry Tax	C	1% of (A+B+E)
Landing Cost	D	A+B+C
State Excise Duty	E	As Notified by the government under the Excise Policy of the State for the year
Purchase Price	F	D + E
Profit	G	OSBC profit as fixed from time to time by the Board of directors of OSBC. (See Para 30.2)
Additional Rounding Off License Fee	H	Additional rounding off license fee for rounding off the MRP to nearest rupee t. This amount is to be paid to the State Government
Sale Price	I	F + G + H
VAT	J	As per Government Notification. Now it is @ 25% of (I). (20% for C.S.)
Total	K	I+J
TCS	L	@ 1% of K as per provisions U/s. 27 C of the I.T. Act
Amount payable by Retailer	M	K+L (i.e. the total invoice amount raised on the retailer)
MRP per Case	N	K + retailer's margin as per the rate fixed by the Government from time to time.
MRP per Bottle	O	N. divided by the number of bottles in the Case.

It is submitted on behalf of the "OSBCL" that since the petitioners/retailers have got undue advantage on account of an inadvertent mistake committed by the "OSBCL", the impugned demand has come to be raised against the petitioner for different periods.

It is submitted by Mr. Jena, learned counsel for the "OSBCL" that the mode adopted by the corporation under Annexure-A/1 was erroneous which led to a situation where the retailers benefited on account of such error committed in Annexure-A/1. He justified the demand based on changed policy under Annexure-B/1. However, he fairly admits that in the fact situation no direct loss has been caused to the "OSBCL" and insists that the error of computation, if any, was on account of the "OSBCL" following the mandate of Liquor Sourcing Policy as quoted hereinabove at Annexure-A/1.

Mr. Samantaray, learned Additional Government Advocate supports the contention advanced by Mr. Jena, on behalf of the "OSBCL" and submits that the retailers having reaped undue benefit on account of an error committed by the "PFC" & "OSBCL", it is entitled to effect recovery of the same though no counter affidavit has come to be filed by the State.

Learned counsel for the petitioner asserts that the entire basis of the demand notices is fallacious, as no loss has been caused to "OSBCL" . He further submits that the corporation admits that the manner in which they computed the MRP

(maximum retail price) has been in tune with Liquor Sourcing Policy of the years 2009 to 2013 as would reveal from Annexure-A/1. Further it is submitted at the bar that even in the Excise Policy of 2009-10 of Government, maximum retail price was required to be displayed on all merchandise sold in terms of Clause-23 of the Excise Policy for 2009-10, which is extracted hereunder:

> **"23. MAXIMIM RETAIL PRICE:**
>
> Maximum Retail Price (MRP will be displayed on each bottle of IMFL, Beer and Country Spirit and sold accordingly. The vendors will issue Cash Memo on demand to the consumers, failing which the vendors shall be penalized with fine upto Rs.10,000/-"

Similarly in the Excise Policy of the year 2012-13 at page 40 of Annexure-2 series, the manner in which MRP was to be fixed is stipulated in Clause-24 thereof and extracted hereunder:

> **"24. MAXIMUM RETAIL PRICE:**
>
> Maximum Retail Price (MRP) will be displayed on each bottle of IMFL, Beer and Country spirit and sold accordingly. The vendors will issue Cash Memo on demand to the consumers, failing which the vendors shall be penalized with fine upto Rs.10,000/-.
>
> A. The MRP shall be decided on the principle of landing cost + all taxes/duties + OSBC Margin + Retailer Margin.
>
> B. While the landing cost will be decided by the Price Fixation Committee and OSBC margin will be decided by OSBC Ltd., the Retailer margin will be decided in the following manner.

IMFL upto Rs.850/- landing cost per case	IMFL above Rs.850/- landing cost per case	FMFL/ Scotch	Beer
25%	20%	15%	25%"

It is submitted on behalf of the petitioner that by the time "OSBCL" sells its products to licensed retailers, the maximum retail price (MRP) is always as fixed by the "PFC". Further in terms of the Government policy, it would be clear that the maximum retail price fixed would be inclusive of all taxes and levies on the product therefrom. Thus no wrong has been committed while fixing MRP for the years 2009 to 2013.

It is further submitted by learned counsel for the petitioner that there has neither been any loss to the "OSBCL" nor any loss to the Income Tax Department and more importantly, he highlights that once the "PFC" fixes the price at which

"OSBCL" will sale its products to the retailers and the maximum price at which the retailers will sale to the consumers, the retailer has no right to sale above the maximum retail price. It is further submitted that there is nothing to show that the retailers like petitioners have sold above the maximum retail price. Consequently no demand for recovery of TCS can be made. It is also asserted that such a demand is not backed by any law/agreement. Lastly, it is submitted that on his/her income, the petitioner also pays further income tax. In any case, there exists no demand either by Government or by the Income Tax Department. In such background, prayer is made for quashing the demand for recovery of TCS.

It appears from the submissions made at the bar and from the records that the method adopted by the authorities is firstly to determine the price at which various excisable products will be procured into the State of Odisha from the manufacturers/suppliers. Thereafter they determine the rate at which such goods are to be sold to retailers (after including profit of margin therein for the "OSBCL") and thirdly they also indicate at what maximum retail price (MRP) that a retailer can sale the product. These three determinations are done by a committee formed by the State known as the Price Fixation Committee (PFC). It is the case of the "OSBCL" that it has strictly complied with the guidelines issued by "PFC" from time to time for the purpose of pricing both at the time of procurement, sale to the retailers as well as fixing the maximum price at which the retailers can sale the products to the consumer.

In the present case after hearing the learned counsel for the respective parties, we are of the considered view that there appears to be some confusion at the end of the "OSBCL" insofar as the manner for determining the "maximum retail price". From time to time the state policy has expanded the definition of maximum retail price "to include retailers margin and all taxes & duties". It is also a matter of fact that after the Accountant General Audit pointed out certain errors in the computation being made by the "OSBCL", it is now following the revised method in terms of Annexure-B/1 extracted hereinabove. Now the only issue that remains for determination relates to the demands for a period which is prior to the period covered under the notification annexed as Annexure-B/1. The earlier MRP was fixed as per the policy relating to calculation of MRP prevailing during 2009-2013 as is revealed from Annexure-A/1. The new calculation policy under Annexure-B/1 which was implemented with effect from 2015-16, which does not have any retrospective operation. Therefore, the impugned demands for a prior period having been made relying on such new calculation policy, are clearly arbitrary and unreasonable thus inviting the mischief of Article-14 of the Constitution of India. Further it is not disputed that "OSBCL" has not suffered any loss. Moreover, we are of the considered view that there has been no undue enrichment by the petitioner inasmuch as there is no allegation of even a single retailer selling above the maximum retail price i.e. MRP. It may further be noted that the term maximum

retail price as defined and as accepted is not necessarily the rate at which the products are always sold. It is verily possible that products are sold below the MRP and any assumption that the entire stock purchased by the retailers was sold at the maximum retail price would be an assumption which in our considered view may not be correct, without any evidence thereof being brought on record. The aforesaid facts have been noted by us to highlight the aspect that in the case at hand, even though maximum retail price has been fixed, yet, it is the market conditions that determine whether a retailer can sale their products at the maximum retail price or offer a discount thereon.

Consequently the assumption on behalf of the corporation that the petitioner made an undue profit in our considered view, is misplaced.

It would be appropriate to take note of the fact that in the instant case "OSBCL" had acted in terms of the Policy (as then in force) for the years 2009 to 2013 under Annexure-A/1. Therefore, no fault can be attributed to the "OSBCL" for having followed the same while computing the rate at which the sales would be effected to the retailers as well as while computing the MRP since it was inconsonance with the Policy as it stood then. Assuming for the sake of argument that any error existed in the Policy, no fault can be found either with the "OSBCL" or with the retailers. The said Policy subsequently changed and the changed policy under Annexure-B/1 is presently in force. It would be also important to note herein that Annexure-B/1 relied upon by the "OSBCL" was issued pursuant to Liquor Sourcing Policy of 2015-16, which amended the mode of computation of MRP. As indicated earlier, such policy cannot have retrospective effect and only prospective effect. Consequently, applying the new formula to the transactions which had already taken place for the earlier years, in our considered view, would be clearly arbitrary, irrational and unreasonable.

Apart from the above, when we queried from the counsel for the "OSBCL" as to under which law or contract the present impugned demand has come to be made, he has fairly stated there is no such specific law or terms in the contract under which "OSBCL" has made the demand except highlighting the fact that the same is being done on the basis of the Audit Report. Thus, there appears to be no law for such recovery and the assumption that the retailers have made undue profit itself appears in our considered view not supported by any documentary evidence on record. In view of the aforesaid discussions, we are of the view that the impugned demands raised towards recovery of TCS amount included in the MRP for the period stated in the impugned demand and the amount stated therein have no legal foundation or basis to stand. Accordingly, this writ application is allowed and the impugned demands stand quashed.

Since rest of the batch of writ petitions involve the similar issue, accordingly the impugned demands pertaining to the said writ petitions are also accordingly quashed.

It is made clear that if any of the petitioners have made any payment to the "OSBCL" against the impugned demands which have been set aside by this order, the "OSBCL" shall refund/adjust the same immediately within a period of three months from today vis-à-vis such petitioners. Free copy of this order be handed over to the learned counsel for the state for necessary communication and compliance.

2018 (II) ILR - CUT - 416

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

W.P.(C) NO.9546,11595 11596 & 12193 OF 2012 AND
W.P.(C) NO.13134 OF 2013 & W.P.(C) NO. 18617 OF 2014

STATE OF ODISHA & ANR. .....Petitioners
W.P.(C) NO.9546 OF 2012

.Vs.

SARADA KANTA TRIPATHY & ORS. .....Opp. Parties

For Petitioners : Additional Government Advocate
For Opp. Parties: M/s. Dinesh Ku. Panda, Gopal Sinha & Amrit Mishra

STATE OF ODISHA & ANR. .....Petitioners
W.P.(C) NO. 11595 OF 2012

.Vs.

SUKANTA CH. MOHANTY & ANR. .....Opp. Parties

For Petitioners : Additional Government Advocate
For Opp. Parties: Mr. S.K. Pattnaik (Sr. Advocate)
Sanjit Mohanty (Sr. Advocate)
M/s. R.R. Swain, J.K. Naik, I.A. Acharya,
M/s. Sanjay Ku. Pradhan, M/s. Pramod Ku. Das,
J.K. Mohapatra & S.S. Parida

STATE OF ODISHA & ANR. …….Petitioners
W.P.(C) NO.11596 OF 2012 *.Vs.*

RABINDRANATH SARANGI & ORS. …….Opp. Parties

For Petitioners : Additional Government Advocate
For Opp. Parties: M/s Mr. S.K. Pattnaik, U.C. Mohanty, P.K. Pattnaik, D. Pattnaik, S. Pattnaik & S.P. Das
M/s. Dinesh Ku. Panda, Gopal Sinha & Amrit Mishra

RABINDRANATH SARANGI & ORS. ……..Petitioners
W.P.(C) NO. 12193 OF 2012
.Vs.
STATE OF ODISHA & ORS. …….Opp. Parties

For Petitioners : M/s Santosh Ku. Pattnaik, U.C. Mohanty, D.P. Das, P.K. Pattnaik, D. Pattnaik & S. Pattnaik
For Opp. Parties : Additional Government Advocate
M/s. Pradipta Ku. Mohanty (Sr. Advocate)
D.N. Mohapatra, Smt. J. Mohanty,
P.K. Nayak, S.N. Dash & A. Dash

DEBENDRA KU. MOHANTY & ANR. …….Petitioners
W.P.(C) NO.13134 OF 2013
.Vs.
STATE OF ODISHA & ORS. ……..Opp. Parties

For Petitioners : Mr. Santosh Ku. Pattanaik (Sr. Advocate)
M/s. U.C. Mohanty, D.P. Das,
P.K. Pattnaik, D. Pattnaik & S.P. Das
For Opp. Parties: Additional Government Advocate

SUKANTA CH. MOHANTY ……..Petitioner
.Vs.
STATE OF ODISHA & ORS. …….Opp. Parties

For Petitioner : Santosh Ku. Pattanaik (Sr. Advocate)
M/s. P.K. Pattnaik, S.P. Das & S. Das.
For Opp. Parties: Additional Government Advocate

ORISSA SECRETARIAT SERVICE RULES, 1980 AND AMENDMENT TO THE SAID RULES IN 2001 – Amended Rules 5 and 7 – Challenge is made to the vires of Rules 5 and 7 of Amended Rules, 2001 – Plea that

promotional prospect of the applicants were infringed by treating un-equals as equal – Tribunal though held the rules to be discriminatory but failed to grant the relief – Writ petitions by both sides – Amendment Rules, 2001 declared to be *ultra vires* of Articles 14 and 16 of the Constitution of India – Reasons – Discussed.

*"From a close scrutiny of the memorandum dated 6th January, 2001, it appears that the amendment of Rules, 1980 became expedient as the ministerial cadre could not get equal opportunity for promotion to the post of Under Secretary. The situation of ban imposed by the State Government to creation of new posts was temporary and cannot be a ground for amendment of the Rules. Further, other two grounds stated in the memorandum are also equally untenable for the reason it does not meet the scrutiny of reasonableness. Both the Ministerial Cadre and the cadre of Law Officer have their distinct entity. The Senior Assistant having a degree in Law and 5 years of service experience has to appear in a selection test for appointment as Assistant Law Officer and on being appointed as such, he ceases to be a member in the Ministerial Cadre. They have their own hierarchy of promotion. Further, the terms 'common cadre' and 'counterpart' etc. becomes misnomer and misleading after a Senior Assistant leaves the Ministerial Cadre by joining the cadre of Law Officer. Thus, keeping the cadre of Law Officer waiting till an employee in the Ministerial Cadre becomes eligible, is by itself an attempt to make the unequals equal which is forbidden under law and does not stand to the scrutiny of classification making the differentia, as held in **Ajay Hasia (supra)**. Further, it is sheer arbitrary and unreasonable legislative action of the State by curtailing promotional avenue of the Law Officers even if they are otherwise eligible for the same. The Amendment Rules, 2001 is otherwise ambiguous and does not stand to the scrutiny of Article 16 of the Constitution as it does not make any provision for promotion of direct recruits into the cadre of Law Officers. In that view of the matter, while upholding the impugned order passed by learned Tribunal, we declare the Amendment Rules, 2001 to be ultra vires of Articles 14 and 16 of the Constitution of India and strike down the same."* *(Paras 11 to 13)*

Case Laws Relied on and Referred to :-

1. AIR 1974 SC 555 : E.P. Royappa .Vs. State of Tamil Nadu.
2. AIR 1974 SC 2009 : Maganlal Chhagganlal (P) Ltd. .Vs. Municipal Corporation of Greater Bombay & Ors.
3. AIR 1978 SC 597 : Maneka Gandhi .Vs. Union of India.
4. AIR 1979 SC 1628 : Ramana Dayaram Shetty .Vs. International Airport Authority of India.
5. AIR 1980 SC 1992 : Kasturi lal Lakshmi Redddy .Vs. State of Jammu and Kashmir & Anr.
6. AIR 1981 SC 487 : Ajay Hasia etc .Vs. Khalid Mujib Sehravardi & Ors. Etc.

JUDGMENT Date of Judgment: 01 .08.2018

K.R. MOHAPATRA, J.

In all these writ petitions, common order dated 12.05.2011 passed by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack (for short, 'Tribunal') in O.A. Nos. 1235 (C) of 2001, 3462 (C) of 2001 and 1113 (C) 2001, is under challenge.

2. Since common facts and law are involved in all these writ petitions and a common order of learned Tribunal is under challenge, the same are taken up for analogous hearing. For the sake of convenience, the parties in all these writ petitions are described as per their respective status before learned Tribunal. In all the aforesaid Original Applications, the vires of Rules 5 and 7 of Orissa Secretariat Service (Amendment) Rules, 2001 (for short, 'Amendment Rules, 2001') was under challenge and applicants also prayed for consequential relief.

3. Learned Tribunal upon hearing the parties held as under:-

> *"After hearing all parties, on the face of it the Orissa Secretariat Service (Amendment) Rules, 2001, though issued as per powers conferred under Article-309 of the Indian Constitution, appear to be discriminatory to the extent that once such personnel have been inducted as Assistant Law Officers through a selection process they cannot be equated with any employee of the common cadre who was apparently equal or senior to them at their point of entry as Junior or senior Assistant in the common cadre and the term counter-part is a misnomer, particularly as no parity can be claimed as once they have been inducted to a separate cadre of Law Officers. Moreover, a selection process is involved and the incentive of accelerated promotion has been offered to them for such specialization. In view of the said position depriving them of such promotion prospects without even providing a quota for promotion from the stream of Assistant Law Officers/Law Officers is discriminatory, and it appears that an effort has been made to make unequals equal by cutting promotion prospects of the applicants and allowing better promotion prospect at the same time to the Ministerial personnel of the common cadre. Hence, it may be appropriate for the authorities to decide on a quota for promotion to Assistant Law Officer/Law Officer vis-à-vis the Secretariat Common cadre personnel for promotion as Under Secretaries."*

The applicants essentially assail the order of learned Tribunal on the ground that although learned Tribunal observed that promotional prospect of the applicants were infringed by treating un-equals as equal, but it failed to grant appropriate relief by setting aside the Amendment Rules, 2001, which has been held to be discriminatory. The State-respondent filed writ petitions assailing the order/judgment holding the Amendment Rules, 2001 to be discriminatory and directing the State Government to convene DPC as per the Rules, i.e., Orissa

Secretariat Service Rules, 1980 (for short, 'Rules, 1980') holding that the Amendment Rules, 2001 came into force on 12.04.2001 and 21 posts in the cadre of Under Secretary were lying vacant prior to that date.

4. Short narration of facts is necessary for proper adjudication of the case. The applicants are Assistant Law Officers/Law Officers in different Departments of Government of Odisha. They were recruited as Junior Assistants in different Departments of the Government, except the applicant, namely, A.K. Guru [applicant in O.A. No.1113(C) of 2001], who was directly recruited as Assistant Law Officer as per the provisions of Rules, 1980. As per the provisions of the Rules, 1980, the promotional hierarchy of the Junior Assistant is promotion to the cadre of Senior Assistant and then to the rank of Section Officer Level-II and the Section Officers Level-II are further promoted as Section Officers Level-I as per the provisions of Orissa Secretariat (Class-II) Rules, 1986. However, the Senior Assistants in various Departments (other than Law Department) of Odisha Secretariat, who have degree in Law and five years service experience as Senior Assistant had an option to compete for being appointed as Assistant Law Officer on selection basis and on being selected as Assistant Law Officer they ceased to be covered under the provisions of Orissa Secretariat (Junior Branch) Rules, 1981 (for short, 'Rules, 1981'). The Assistant Law Officers on being appointed as such had to forego the promotional prospects available under Rules, 1981.

5. Rule-5(2) read with Rule-7 of Rules, 1980 prescribe the eligibility criteria for promotion to the cadre of Under Secretary. For ready reference, Rule-5 and Rule-7 of the Rules, 1980 are quoted here under:-

> "**5. Method of Recruitment**:
>
> (1) All first appointment to the service shall be made in the rank of Under Secretaries to Government.
>
> (2) The following categories of Officers shall be eligible for consideration for first appointment to the Service, namely:-
>
> > (a) Section Officers, Level-I appointment under the Orissa Secretariat Service, (Class-II) Rules, 1986;
> >
> > (b) Law Officers of Departments of Government except in the Law Department.
>
> (3) Appointment to the rank of Deputy Secretaries, Joint Secretaries and Additional Secretaries shall be made by promotion from the ranks of Under Secretaries, Deputy Secretaries and Joint Secretaries, respectively.
>
> xx xx xx

> **7. Preparation of Consolidate List:**
> The Home Department on receipt of information, lists and documents specified in rule 6 shall prepare a consolidated list of officers eligible for consideration for promotion to the rank of Under Secretaries and the names of such Officers shall be arranged on the basis of the total length of their continuous valid officiation in the eligible grades.
>
> Provided that the total length of continuous valid officiation in the eligible grade of Section Officer Level-I appointed under the Orissa Secretariat Service Class-II Rules, 1986 for the purpose of this rule, shall be taken into consideration from the date of completion of ten years of service in the post of Section Officer Level-II appointed under the Orissa Secretariat Service (Junior) Rules, 1981 and the total length of continuous valid officiation as Section Officer Level-I, both taken together.
>
> In the case of Law Officers except in the Law Department the total length of continuous valid officiation for the purpose of this rule, shall be taken into consideration from the date of completion of ten years of service in the post of Legal Assistant/Junior Law Officer and the total length of continuous valid officiation as Law Officer, both taken together."

Thus, it is clear from the above provisions of Rule-7 of Rules, 1980 that Section Officer Level-I shall be considered for promotion to the cadre of Under Secretary on completion of 10 years of service in the cadre of Section Officer Level-I and Section Officer Level-II taken together. Likewise, Law Officers except in the Law Department can be considered for promotion to the cadre of Under Secretary on completion of 10 years service in the cadre of Legal Assistant/Junior Law Officer (Assistant Law Officer) and Law Officer taken together.

6. The dispute arose when five Law Officers were excluded from the zone of consideration in the DPC held on 11.07.2000 for promotion to the cadre of Under Secretary, on the ground that they had not served at least for one year as Law Officer, although Rule-7 of 1980 Rules does not envisage any such provision. As such, all the five Law Officers filed Original Applications before the Tribunal challenging such action of the Government. The Original Applications were allowed directing the State Government to hold DPC to fill up five posts of Under Secretary kept reserved by virtue of an interim order of learned Tribunal taking into consideration the case of those five Law Officers. The State Government, however, assailed the same before this Court in a batch of writ petitions. During pendency of the writ petitions before this Court, the Government of Odisha brought in amendment to Rule 5(2) and Rule 7 of the Rules 1980, by virtue of Amendment Rules, 2001. The relevant provisions of Amendment Rules, 2001 are quoted hereunder for ready reference.;

> "3. In the said rules, for sub-rule (2) of rule 5, the following sub-rule shall be substituted, namely:-

(2) The following categories of officers shall be eligible for consideration for first appointment to the service, namely :-

(a) Section Officers, Level-I appointed under the Orissa Secretariat Service, Class-II (Group-B) Rules, 1986; and

(b) Assistant Law Officers appointed from the Common Cadre of Law Officers in different Departments of Government other than the Law Department as and when their counterparts in the Common Cadre on being promoted to the rank of Section Officer, Level-I become eligible for such consideration."

4. In the said rules, the proviso to rule 7 shall be substituted by the following proviso, namely;-

Provided that no Section Officer, Level-I shall be considered for inclusion in the list of Officers for consideration for promotion to the post of Under-Secretary in the Service unless on the date the Selection Board meets he/she has rendered 7 (seven) years of continuous service in the rank of Section Officer, Level-II and Section Officer, Level-I taken together:

Provided further that no Assistant Law Officer or Law Officer in any Department of Government recruited from the Common Cadre except in case of the Law Department shall be considered for inclusion in the list of Officers for consideration for promotion to the post of Under-Secretary in the service unless his counterpart in the Common Cadre having held the post of Junior Assistant/Senior Assistant/Section Officer, Level-II/Section Officer, Level–I is eligible for such consideration."

Assailing such amendment and consequential action of excluding the applicants from the zone of consideration for promotion to the cadre of Under Secretary aforesaid Original Applications were filed.

7. The State Government filed counter affidavit contending that the Government in exercise of power conferred under Article-309 of the Constitution, has framed the Orissa Secretariat Service (Amendment) Rules, 2001. It was further contended in the counter affidavit that in absence of specific norms and procedure for recruitment of Assistant Law Officers, different Departments of the Government fixed their own norms keeping in view the minimum eligibility criteria fixed by Law Department, particularly to provide promotional facilities to the Assistant Law Officer/law Officers, who were recruited from the posts of Senior Assistant. Thus, it was decided by the Government to amend the relevant provisions of the Rules, 1980 and accordingly, in order to remove irrationality in Rule-5(2) read with Rule-7 of the Rules, 1980, such provisions were amended by the Amendment Rules, 2001. The State Government mainly took a stand that in order to give equal opportunity to both the streams as mentioned under Rule-5(2) of Rules, 1980, the amendment of Rule-5(2) and Rule-7 was expedient and accordingly Amendment Rules, 2001 was framed. Rejoinder and further counter to the rejoinder were also filed.

8. Learned Tribunal, taking into consideration although held the amendment of Rule-5(2) and Rule-7 of Rules, 1980 by virtue of Amendment Rules 2001, to be discriminatory but, without setting aside the same, held that since prior to the date of promulgation of Amendment Rules, 2001, i.e. on 12.04.2001, vacancies (21 in number) in the cadre of Under Secretary was already existing, the same amendment would not be applicable to the case of applicants as the Amendment Rules, 2001 cannot be made retrospective and accordingly directed for consideration of the case of the applicants in terms of Rule-7 of Rules, 1980.

9. Although learned counsel for applicants in different writ petitions made their individual elaborate submissions on facts and law, Mr. Pattnaik, learned Senior Advocate led the argument on behalf of the applicants on the question of law. Since the validity of the Amendment Rules, 2001 is in question in these writ petitions we do not think it necessary to elaborate individual arguments made on facts.

10. Mr. Pattnaik, learned Senior Advocate advancing his submissions contended that by virtue of amendment, a Law Officer on completing 10 years of service as Assistant Law Officer and Law Officer taken together cannot claim to be promoted as Under Secretary unless his counterpart in the ministerial cadre of the Secretariat becomes eligible for the same, which is a misnomer. Again the promotional prospect of the Law Officers was curtailed by making an attempt to make 'un-equals' equal. The feeder sources for promotion to the cadre of Under Secretary in the Odisha Secretariat are from the cadre of Law Officers and ministerial cadre of the Secretariat. Thus, they have their distinct identity and promotional avenue. The object of making them equal by curtailing the promotional avenue of the Law Officer is arbitrary, discriminatory and unconstitutional. Learned Tribunal although held the Amendment Rules, 2001 to be discriminatory, but could not gather courage to set aside the same. Accordingly, he prayed for setting aside the Amendment Rules, 2001 by declaring the same ultra vires of the Constitution.

11. Mr. M.S. Sahu, learned Additional Government Advocate, on the other hand, contended that it is well within the domain and competence of the Government conferred on it under Article-309 of the Constitution to make Rules and in exercise of that power Orissa Secretariat Service Amendment Rules, 2001 was framed. When the ministerial officers in the Odisha Secretariat Service did not get the equal opportunity as that of the Law Officers of the Secretariat except Law Department for promotion to the cadre of Under Secretary, it became expedient to make provisions for providing equal opportunity to both the feeder cadres. Thus, Amendment Rules, 2001 was promulgated. Learned Tribunal without assigning any reason and without taking into consideration the contentions raised by the Government, held the Amendment Rules, 2001 to be discriminatory. Further, directing the Government to convene DPC taking into consideration the eligiblilty

criteria under un-amended Rule-7 of Rules, 1980 is illegal and unjustified. Thus, the impugned order is liable to be set aside.

In the case of ***E.P. Royappa -v- State of Tamil Nadu***, reported in AIR 1974 SC 555, the Hon'ble Justice Bhagwati speaking for the Bench propounded a new approach to the concept of the equality under Article 14 of the Constitution. At paragraph-85 of the said judgment, it is held as follows:

> "85. ……Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14, and if it affects any matter relating to public employment, it is also violative of Art.16. Arts. 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would: amount to mala fide exercise of power and that is hit by Arts.14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Arts. 14 and 16….."
>
> *(emphasis supplied)*

Again the Hon'ble Justice Bhagwati in the case of ***Maganlal Chhagganlal (P) Ltd. -v- Municipal Corporation of Greater Bombay & Ors***., reported in AIR 1974 SC 2009, speaking for the Bench emphasized:

> "26…. Article 14 enunciates a vital principle which lies at the core of our republicanism and shines like a beacon light pointing towards the goal of classless egalitarian socio-economic order which we promised to build for ourselves when we made a tryst with destiny on that fateful day when we adopted our Constitution. If we have to choose between fanatical devotion to this great principle of equality and fable allegiance to it, we would unhesitatingly prefer to err on the side of the former as against the latter. We should be breaking our faith with the Constitution if we whittle down in any measure this high and noble principle which is pregnant with hope for the common man and which is at once a goal as well as a pursuit, for history shows that it is by insidious encroachments made in the name of pragmatism and expediency that freedom and liberty are gradually but imperceptibly eroded and we should not allow the same fate to overtake equality and egalitarianism in the name of expediency and practical convenience…."

The concept of equality has also been discussed in the case of ***Maneka Gandhi -v- Union of India***, reported in AIR 1978 SC 597; ***Ramana Dayaram Shetty -v- International Airport Authority of India***, reported in AIR 1979 SC 1628 and ***Kasturi lal Lakshmi Redddy –v- State of Jammu and Kashmir and another***, reported in AIR 1980 SC 1992, but in the oft quoted case of ***Ajay Hasia etc –v- Khalid Mujib Sehravardi and others etc***., reported in AIR 1981 SC 487, the Hon'ble Supreme Court, while giving a new approach to the concept of equality held as under:-

> "16…….The true scope and ambit of Article 14 has been the subject matter of numerous decisions and it is not necessary to make any detailed reference to them. It is sufficient to state that the content and reach of Article 14 must not be confused with the doctrine of classification. Unfortunately, in the early stages of the evolution of our constitutional law, Article 14 came to be identified with the doctrine of classification because the view taken was that Article forbids discrimination and there would be no discrimination where the classification making the differentia fulfils two conditions, namely, (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action. It was for the first time in E.P. Royappa v. State of Tamil Nadu, (1974) 2 SCR 348: AIR 1974 SC 555), that this Court laid bare a new dimension of Article 14 and pointed out that that Article has highly activist magnitude and it embodies a guarantee against arbitrariness….
>
> This was again reiterated by this Court in International Airport Authority's case ((1979) 3SCR 1014) at p. 1042: (AIR 1979 SC 1628) (supra) of the Report. It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not para-phrase of Article 14 nor is it the objective and end of that Articles. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

In the backdrop of the above ratio laid down by the Hon'ble Supreme Court, we have to analyze the reasonableness in the legislative action of the State by bringing out the amendment to Rules 5(2) and 7 Rules, 1980 by virtue of Amendment Rules, 2001.

12. Admittedly, the promotional post of Under Secretary in the Odisha Secretariat has two feeder cadres, namely, Ministerial Cadre and Cadre of Law Officers. As discussed earlier, the Section Officer Level –I and Law Officers of the Departments of Government (except Law Department) are the feeder cadre posts to be promoted to the cadre of Under Secretary. Their scale of pay is same. In Rules, 1980, both feeder cadres were given equal weightage, but by virtue of the Amendment Rules, 2001, the experience of 10 years for the Ministerial Cadre has been reduced to 7 years and the employees belonging to the cadre of Law Officer were made to wait till his counterpart in the common cadre of ministerial officers become eligible for such consideration. Learned Government Advocate, in order to substantiate its averments in the counter affidavit, produced the memorandum dated 06.01.2001 of the Home Department in course of hearing, which deals with the object behind amendment of Rules-5(2) and 7 of Rules, 1980. It is stated, *inter alia* that, after introduction of common cadre in the level of Junior Assistant to the level of Section Officer in the Secretariat and due to imposition of ban on creation of new posts, the promotional avenue available to the Secretariat employees have been narrowed, as a result of which, Senior Assistant of different Departments of the Secretariat are promoted to the post of Section Officer Level-II after rendering more than 20 years of service in the rank of Senior Assistant. As a result, experienced officers in the OSS Cadre could not be considered for promotion to the rank of Under Secretary as they could not acquire the requisite experience of 10 years of service in the rank of Section Officer Level-II and Section Officer Level-I taken together. Whereas the Law Officers having 10 years of service experience in the rank of Assistant Law Officer and Law Officer got a march over the ministerial cadre. Further, it is the memorandum which contained that the Law Officers cannot lay any legitimate claim for accelerated promotion solely on the basis of their additional qualification of Law. It further appears from the memorandum that the object behind the amendment of Rules, 1980 was that no regular or uniform procedure was followed by different Department in selecting Legal Assistant (presently Assistant Law Officer or Law Officer). Thus, the amendment of Rules-5(2) and Rule-7 of Rules, 1980 was expedient.

13. From a close scrutiny of the memorandum dated 6th January, 2001, it appears that the amendment of Rules, 1980 became expedient as the ministerial cadre could not get equal opportunity for promotion to the post of Under Secretary. The situation of ban imposed by the State Government to creation of new posts was temporary and cannot be a ground for amendment of the Rules. Further, other two grounds stated in the memorandum are also equally untenable for the reason it does not meet the scrutiny of reasonableness. Both the Ministerial Cadre and the cadre of Law Officer have their distinct entity. The Senior Assistant having a degree in Law and 5 years of service experience has to appear in a selection test for appointment as Assistant Law Officer and on being appointed as such, he ceases to be a member in

the Ministerial Cadre. They have their own hierarchy of promotion. Further, the terms 'common cadre' and 'counterpart' etc. becomes misnomer and misleading after a Senior Assistant leaves the Ministerial Cadre by joining the cadre of Law Officer. Thus, keeping the cadre of Law Officer waiting till an employee in the Ministerial Cadre becomes eligible, is by itself an attempt to make the unequals equal which is forbidden under law and does not stand to the scrutiny of classification making the differentia, as held in ***Ajay Hasia (supra)***. Further, it is sheer arbitrary and unreasonable legislative action of the State by curtailing promotional avenue of the Law Officers even if they are otherwise eligible for the same. The Amendment Rules, 2001 is otherwise ambiguous and does not stand to the scrutiny of Article 16 of the Constitution as it does not make any provision for promotion of direct recruits into the cadre of Law Officers.

14. In that view of the matter, while upholding the impugned order passed by learned Tribunal, we declare the Amendment Rules, 2001 to be *ultra vires* of Articles 14 and 16 of the Constitution of India and strike down the same.

The State-Respondents are directed to convene review DPC for the Applicants and other eligible officers for promotion to the cadre of Under Secretary as per the provisions of Rules, 1980 in respect of the vacancies of the year 2001 and also for subsequent years and grant all consequential benefits within a period of three months hence.

15. Accordingly, W.P.(C) Nos. 9546, 11595 and 11596 of 2012 filed by the State-Respondents being devoid of any merit stand dismissed. The writ petitions, i.e., W.P.(C) No.12193 of 2012, W.P.(C) No.13134 of 2013 and W.P.(C) No.18617 of 2014 filed by the Applicants are allowed. No cost.

2018 (II) ILR - CUT- 427

S. PANDA, J & J.P. DAS, J.

CRIMINAL APPEAL NO. 223 OF 1999

CHINARI NAIK & FIVE ORS. .....Appellants.

.Vs.

STATE OF ODISHA .....Respondent.

INDIAN PENAL CODE,1860 – Sections 302/323/34 – Offence Under – Conviction – Out of six accused persons only one has inflicted a lathi blow when others have only assaulted fist and kick blows – Held, the others might not have the intention to kill – Conviction of other five

accused persons set aside except the one who had given the fatal lathi blow.

"Taking the entire evidence of prosecution into consideration as stated above, we are of the considered view that all the appellants excepting the appellant no.3, cannot be said to have shared the intention of committing the murder of the victim. But, the evidence is consistent so far as the appellant no.3 is concerned, that he dealt the fatal blow on the head of the victim which resulted in his death. The injuries as found out on the temporal region of the victim, were serious in nature and it cannot be said that the appellant no.3 Humar Naik did not have any intention of committing murder of the victim. So far as other appellants are concerned, they had assaulted the victim as well as his informant son causing some injuries and have been convicted under Sections 323/34 of the I.P.C." *(Para 12)*

For Petitioner : M/s. D.P.Dhal, D.K.Das, K.Rath, S.K.Tripathy
For Opp. Party : Additional Standing Counsel

JUDGMENT Date of Hearing : 27.08.2018 Date of Judgment : 27.08.2018

J.P.DAS, J

The appellants stood convicted under Sections 302/323 read with Section 34 of the Indian Penal Code by the learned Sessions Judge, Phulbani in S.T. Case No.38 of 1998 and have been sentenced to undergo life imprisonment for the offence under Section 302/34 of the I.P.C. and to undergo rigorous imprisonment for six months for the offence under Section 323/34 of the I.P.C.

2. The prosecution case is that on 01.01.1995 the informant along with his father and other villagers were having a feast in front of the church. At this time the appellant no.3-Humar Naik came there and challenged the victim Iswar Naik, the father of the informant, as to why his buffaloes damaged his paddy seedlings. The victim replied that he would look into the matter after the feast was over. Thereafter, all the accused persons came there and again challenged the victim which ensued hot exchange of words. At this time, the appellant no.1-Chinari Naik instigated the other accused persons to assault the victim and the appellant no.3-Humar Naik, who was holding a lathi, dealt a blow on the head of the victim, as a result of which, he fell down on the ground. It is further alleged that all other accused persons thereafter assaulted the victim by means of fist blows and kicks. When the informant-son tried to intervene, the accused persons chased him to assault and threw stones at him which caused some injuries on his person. The informant-son came back to the spot after some time and found his father lying on the ground with severe bleeding injuries. He carried him to the Daringbadi Government Hospital with the help of other villagers but on the way the victim expired. Thereafter, the informant lodged the F.I.R. at Daringbadi P.S. pursuant to which the concerned P.S. Case No.1(1) of 1995 was registered under Sections 337/302/34 of the I.P.C and the investigation was taken up.

3. In course of investigation, the inquest and post-mortem were conducted on the dead body. The informant-injured was also medically examined. The wearing apparels were seized, one lathi, the alleged weapon of offence, was seized from the house of the accused Humar Naik, the medical opinion was obtained and after completion of investigation, charge sheet was submitted against all the six accused persons under Sections 302/307 read with Section 34 of the Indian Penal Code.

4. The accused persons faced the trial with a plea of complete denial advancing a further plea through defence evidence that the accused persons as well as the informant group were drunk at the time of feast and there was some disturbance due to influence of liquor and the victim sustained injury by falling down on the ground.

5. Seven witnesses were examined on behalf of the prosecution in support of its case as against one in defence on behalf of the accused persons.

6. The P.W.1 was the informant-son of the deceased, P.Ws.2 and 3 were two occurrence witnesses, P.W.4 was a seizure witness, P.W.5 was the doctor who conducted the post-mortem examination as well as examined the injured-informant, P.W.6 was a police constable assisting in investigation and P.W.7 was the Investigating Officer. The D.W.1 was a co-villager.

7. The learned trial court on analyzing the material evidence placed before it, found and held all the accused persons guilty of the offences punishable under Sections 302/323/34 of the I.P.C and convicted them thereunder. The offence under section 307/34 of the I.P.C. was found not to have been made out against the accused persons.

8. It was submitted by learned counsel for the appellants that the learned trial court seriously erred in law in reaching the conclusion of guilt against the accused-appellants ignoring major contradictions in the statements of the witnesses as well as their interestedness for the prosecution case for being relations of the informant and the victim. It was also submitted that as per the defence case, there was a disturbance between the groups under the influence of liquor and hence, the accused-appellants could not have any motive to commit the murder of the victim so as to be liable under Section 302 of the I.P.C.. Learned counsel for the appellants placed the depositions of the witnesses and pointed out the contradictions in their statements which were confronted to the Investigating Officer. It was also submitted on behalf of the appellants that there was some earlier dispute between the parties and hence, the appellants have been falsely implicated in the case.

9. Per contra, it was submitted by the learned counsel appearing for the State that the contradictions as submitted were minor in nature without affecting the veracity of the prosecution witnesses all of whom have given consistent statements about the alleged occurrence and the acts of the appellants in assaulting the victim as

well as his informant son. It was also submitted on behalf of the state that the victim was a witness for the P.W.4 in a case against the accused-appellants for which the accused-appellants bore grudge against the victim which establish their motive in assaulting and committing murder of the victim.

10. We have carefully gone through the detailed evidence led on behalf of the prosecution before the learned trial court. The P.W.1, the informant as well as P.Ws.2 and 3, two other witnesses to the occurrence have categorically stated that all the accused persons came there and challenged the victim about the damage of crops by his buffaloes to which the victim replied that he would look into that after the feast was over. At this, the accused Humar (appellant no.3) dealt a lathi blow on the head of the victim from his backside as a result of which, he fell down on the ground. They also stated that thereafter the other accused persons assaulted the victim by means of fist blows and kicks. In respective cross-examination at length of the three witnesses, nothing could be brought out on behalf of the defence so as to discredit their veracity about the alleged occurrence. All of them have categorically stated that the accused-appellant, Humar Naik dealt a lathi blow on the backside of the victim as a result of which, he fell down sustaining bleeding injury. They have denied the suggestion that due to long standing dispute, there was a disturbance between the persons under the influence of liquor and both the parties assaulted each other. The contradictions were tried to be pointed out in the evidence of said three witnesses vis-à-vis their statements given before the Police in course of investigation were relating to the occurrence as to who instigated the accused persons and who had given a lathi to another co-accused at the time of occurrence. We are in agreement with the learned counsel for the State that the discrepancies as pointed out were minor in nature and no way affected the truthfulness of the prosecution case and its witnesses.

11. It was strenuously submitted on behalf of the appellants that only one lathi blow was dealt on the head of the victim by the appellant no.3 and other accused-appellants are alleged to have dealt fist blows and kicks. In this respect it was further submitted that as per the evidence of the doctor who conducted post-mortem examination, all the injuries were found on the temporal region of the victim and there was no corresponding injuries to substantiate the allegations that the other co-accused persons dealt fist blows and kicks to the victim sharing an intention for committing murder of the victim. As per the opinion of the doctor, the injuries as found on the temporal region of the victim were ante-mortem and homicidal in nature. The cause of death was due to haemorrhage and shock. The alleged weapon of offence, lathi, was also recovered on production by the appellant no.3 from inside his house. The learned trial court disbelieving the evidence of the prosecution so far as the alleged offence under Section 307 of the I.P.C. is concerned, has convicted the accused persons under Sections 323/34 of the I.P.C., of course, so far as the injured-informant was concerned. The only witness examined as D.W.1, stated that

there was a disturbance between the members who attended the feast, due to influence of liquor the deceased fell down on the ground. But, peculiarly, in his cross-examination, he admitted that the deceased had sustained injuries being assaulted. This evidence of D.W.1 cannot be said to have washed away the evidence of P.Ws. 1, 2 and 3 who have consistently and categorically stated about the alleged incident and assault.

12. Taking the entire evidence of prosecution into consideration as stated above, we are of the considered view that all the appellants excepting the appellant no.3, cannot be said to have shared the intention of committing the murder of the victim. But, the evidence is consistent so far as the appellant no.3 is concerned, that he dealt the fatal blow on the head of the victim which resulted in his death. The injuries as found out on the temporal region of the victim, were serious in nature and it cannot be said that the appellant no.3 Humar Naik did not have any intention of committing murder of the victim. So far as other appellants are concerned, they had assaulted the victim as well as his informant son causing some injuries and have been convicted under Sections 323/34 of the I.P.C..

13. Accordingly, we hold the accused-appellant no.3 Humar Naik guilty under Sections 302/323/34 of the I.P.C and confirm his conviction and sentences as have been awarded by the learned trial court. So far as the appellant nos. 1, 2, 4, 5 and 6 are concerned, their conviction under Section 302/34 of the I.P.C. is set-aside and their conviction and sentence under Section 323/34 of the I.P.C. is confirmed.

14. Since it was submitted that the appellant nos. 1, 2, 4, 5 and 6 had remained in custody for more than a year, they are set at liberty since the sentence awarded by the learned trial court against them was only for six months. So far as the accused-appellant no.3-Humar Naik is concerned, he is directed to surrender within a fortnight hence before the learned trial court to undergo the remaining period of sentences and on his failure to surrender, learned trial court shall proceed according to law to take him to judicial custody.

2018 (II) ILR - CUT- 431

S. PANDA, J & J.P. DAS, J.

CRIMINAL APPEAL NO. 226 OF 1996

RUPINDER SINGH ..... Appellant

.Vs.

STATE OF ORISSA ..... Respondent.

CRIMINAL TRIAL – Offence under Section 302 – Conviction based on Circumstantial evidence – Appreciation of circumstantial evidence – Principles – Held, when the case depends upon circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn must be cogently & firmly established, secondly, the circumstances should be of a definite tendency unerringly pointing towards guilt of the accused & thirdly, circumstances taken cumulatively should form a chain so completely that there is no escape from the conclusion that within all human probability the crime was committed by the accused & non else.

Case Laws Relied on and Referred to :-

1. 1995 ACR 370 : Tarseem Kumar v. Delhi Administration .
2. 1984 AIR 1622 : Sharad Birdhi Chand Sarda v. State of Maharashtra.
3. AIR 1982 SC 1157 : Gambhir v. State of Maharashtra.

For Appellant : Mr. S.K. Mund, D.P. Das & J.K. Panda.
For Respondent : Mrs. S. Mohapatra, Addl. Standing Counsel.

JUDGMENT Date of Judgment : 04.09.2018

S. PANDA, J.

This Criminal Appeal is directed against the judgment dated 16.08.1996 passed by the learned Addl. Sessions Judge, Cuttack in S.T. Case No.122 of 1993 (arising out of G.R No.237 of 1991) in convicting the present appellant along with another person, namely Sarabjit Singh for commission of offence under Section 302/34 of the Indian Penal Code and sentencing them to undergo R.I. for life.

2. The brief facts of the case as delineated in the judgment tend to reveal that on 10.7.1991, the S.I. of Chandeli P.S. (P.W.10) getting information regarding death of an unknown person, went to the spot, which was by the side of Sitagada Nala. He found the dead body of a Sikh person was lying in a bushy area closed to the southern parapet of the bridge. He also found blood stains on the southern side of the pitch portion of the road and a trail of blood from the pitch portion to the spot, where the dead body was lying. One empty cartridge was lying on the eastern earthen plank of the road and another was lying near the dead body. He also noticed gun-shot injury on the person of the deceased. Accordingly, he drew up the plain paper FIR, registered a case and took up investigation. During investigation, he found that the deceased was Sadhu Singh, father of P.W.9 who was having truck business. According to P.W.9, his father had informed him that Laxmidhar Singh had demanded Rs.50,000/-cash from him at Rayagada, failing which he would be kidnapped. On 7.7.1991 his father's Truck bearing No.ORJ - 7067 proceeded to Rayagada. Following day, his father went to J.K. Pur with another Truck. On

11.7.91, accused Rupinder Singh informed P.W.9 that his father was already kidnapped by Laxmidhar and his associates on 9.7.91 and they had sent him (appellant) to collect Rs.50,000/- from P.W.9 or else his father would be killed and in case P.W.9 goes to the police station, then he will be killed. On 14.7.91, he got information regarding murder of his father from police. During the course of investigation, M.O.I and II, i.e. two A.K.47 Rifles were seized from the possession of one Laxmidhar Singh and Sarabjeet Singh at Bhandaripokhari under Bhadrak District. Then, the I.O. sent the empty cartridges recovered from the spot to the Chemical Examiner to test the empty cartridges vis-à-vis the two Rifles and as to whether those cartridges were fired from the two Rifles. Thereafter the accused persons were arrested and charge sheet was filed against the accused persons, namely; Sarabjit Singh, Laxmidhar Singh and Rupinder Singh (present appellant) for commission of offence under Sections 302/34 IPC and 27 (3) of the Arms Act. On the prayer of the prosecution and also submission of the accused persons, this Court in Crl. Misc. Case No.343/92 (State of Orissa-vs. Laxmidhar Singh & Others) transferred the case from Rayagada and Bhadrak to the file of S.D.J.M., Sadar, Cuttack. Out of three accused persons, since Laxmidhar Singh remained absconder after being released on bail, the trial was spilt up and the impugned judgment was pronounced as against the other two accused persons, namely; Rupinder Singh (present appellant) and Sarabjit Singh. Since Sarabjit Singh died during the pendency of the appeal, the appeal preferred by him (CRA No. 236 of 1996) was abated vide order dated 27.08.2018.

3. The plea of the accused persons was one of complete denial.

4. The prosecution in order to establish the charges examined as many as eleven witnesses which includes P.W.4, who is the circumstantial witness regarding the demand of ransom with A.K. 47 Rifles, P.W.6 is the Medical Officer, who conducted Post-Mortem examination over the dead body, P.W.9 is the son of the deceased and another circumstantial witness and P.Ws.10 and 11 are the I.Os. of the case. Prosecution also exhibited certain documents as exhibits, which includes Ext.5-Post Mortem Report, P.W.9 the Written F.I.R., P.W.12, the Chemical Examination report and Ext.4, the inland letter in original written in Gurumukhi Script. On the other hand the accused Sabarbjeet Singh examined the priest of Jagdalpur Gurudwar as D.W.1, but did not exhibit any document. M.Os. I and II are two A.K. 47 Rifles.

5. The learned Sessions Judge on analyzing the evidence on record held that the prosecution has successfully brought home the charges against the appellant and another accused under Sections 302/34 I.P.C. However the court below acquitted them for the offences charged U/s. 27(3) of the Arms Act, 1959.

6. Learned counsel appearing for the appellant submits that the impugned judgment is contrary to law and against the weight of the evidence on record. The Court below had relied on the evidence of P.W.4, but the said witness had only named other two accused person and he had not named the appellant regarding threatening and demand of money, but he faced the trial along with others. So far as the letter under Ext.4 is concerned, the content and author of such letter has not been proved. The evidence of P.W.4 was demolished by D.W.1, the priest of Jagdalpur Gurudwara, who categorically stated that he did not know any person namely Jeevan Singh, Laxmidhar Singh and Sarabjeet Singh. That apart the said D.W.1, despite being a material witness, had not been examined by the prosecution. There being no evidence led by the prosecution to show that the appellant has participated in the murder of the deceased, the learned Sessions Judge has erred in convicting the appellant under Section 302/34 I.P.C. The impugned judgment has therefore, resulted in flagrant miscarriage of justice. As such the impugned judgment of conviction and sentence is not sustainable in law and liable to be set aside.

7. Learned Addl. Government Advocate while supporting the impugned judgment submitted that the trial court after taking into consideration the evidence of the circumstantial witnesses convicted the appellant under Sections 302/34 of I.P.C, and therefore, impugned judgment does not warrant any interference in this appeal.

8. Perused the L.C.R. and went through the evidence on record carefully. The prosecution in order to bring home the charge, relied mostly on the evidence of the circumstantial witnesses, i.e. P.W.4 and P.W.9. P.W.4 in his examination-in-chief had stated that he did not know the appellant, whereas he knew the two other accused persons. In the night of 29.06.1991 while he was in his house, someone knocked the door. When he opened the door he found Sarabjit and Laxmidhr entered his house and pointed guns towards him. Each of them were holding guns. He also identified the said two guns to be M.O.I and II. They told him to pay an amount of Rs.50,000/- and when P.W.4 told them that he had no money they told him to pay the said amount at Jagadalpur Gurudwar. The accused persons had also told him to pay the amount to the priest of that Gurudwar and before paying the said amount he should show a two rupee note to the priest, so that the priest will recognize P.W.4. After two to three days he went to the priest and showed him two rupees note, but the priest did not recognize him and he told that the accused persons had not come to him nor told to receive the money. Therefore, he went back with the money. On 19.07.1991, he received a letter under Ext.4 which was written in Gurumukhi Script. In the said letter it had been indicated that since P.W.4 did not pay the amount as per the earlier agreement, he had to pay the same within eight days, failing which he shall face the consequence as done to the deceased. He also told that he had submitted the Xerox copy of the letter to the police. However the content of such

letter and the author of the said letter have not been proved. When P.W.4 had specifically stated that the contents were written in Gurumukhi Script, the same was neither examined nor translated into other language, or the same was not examined by the hand-writing expert to know the author of the same. Similarly, the P.W.4 has not named the present appellant anywhere in his deposition rather he had named other two accused to have holding two rifles.

9. The prosecution also relied on the evidence of another circumstantial witness, P.W.9, who happens to be the son of the deceased. He had deposed that his father returning from Rayagada told him that one Laxmidhar Singh had demanded ransom of Rs.50,000/- at Rayagada, failing which he shall be kidnapped. On 08.07.1991, his father had gone to J.K. Pur with his Truck. P.W.9 had gone to his maternal uncle's house at Bhubaneswar. At Bhubaneswar, the present appellant told him that his father had already been kidnapped by accused Laxmidhar Singh and his associates on 09.07.1991 and the accused persons had sent the present appellant to collect the ransom of Rs.50,000/-. The present appellant also told him that his father would be killed, in case he went to the police. On 14.07.1991 he was informed by his maternal uncle that his father was murdered. According to him, the present appellant is the son of his maternal uncle's brother-in-law (*sadu*). P.W.9 has not pointed out any finger towards the overt act performed by the present appellant with regard to the murder.

10. The prosecution also relied on the Chemical Examination report, which reveals that the cartridges were fired from the AK 47 Rifels marked as M.O.I and M.O.II, which were seized from the accused persons namely Laxmidhar and Sarabjit. Here also the role of the present appellant with regard to chain of circumstances is not complete. Similarly there are number of missing links at different points. When the presence of the present appellant was basing on the statement of one Narayan Sukla during the investigation by the I.O., the statement of such person has not been recorded. There is also discrepancies so far as the cause of death opined by the Doctor and cause advanced by the prosecution is concerned.

11. Admittedly there is no eye witness to the occurrence. The case of the prosecution solely rests on circumstantial evidences. As the case is based solely on the circumstantial evidence, the Court has to be satisfied that the legal parameters decided in the case of ***Tarseem Kumar v. Delhi Administration*** reported in ***1995 ACR 370*** that the circumstances from which conclusion of guilt is to be drawn has been fully established, all the facts so established are consistent only with the hypothesis of guilt of the appellant and they do not exclude any other hypothesis except the one sought to be proved, the circumstances on which reliance has been placed are conclusive in nature and the chain of the evidence in the case is such that there is no scope for any reasonable ground for conclusion consistent with the innocence of the accused.

12. In the said case ***Tarseem Kumar (supra)*** at paragraph-8 it has been observed as follows:-

> *"Normally, there is a motive behind every criminal act and that is why investigating agency as well as the Court while examining the complicity of an accused try to ascertain as to what was the motive on the part of the accused to commit the crime in question. It has been repeatedly pointed out by this Court that where the case of the prosecution has been proved beyond all reasonable doubts on basis of the materials produced before the Court the motive loses its importance. But in a case which is based on circumstantial evidence, motive for committing the crime on the part of the accused assumes greater importance. Of course, if each of the circumstances proved on behalf of the prosecution is accepted by the court for purpose of recording a finding that it was the accused who committed the crime in question, even in absence of proof of a motive for commission of such a crime, the accused can be convicted. But the investigating agencies as well as the court should ascertain as far as possible as to what was the immediate impelling motive on the part of the accused which led him to commit the crime in question.*"

Here the prosecution tried to prove the motive through P.W.4, P.W.9 and Ext.4, when evidences of such witnesses were silent about the overt act performed by the present appellant. That apart the authenticity of the document under Ext.4, the author of the letter and the contents of such letter were not proved. Therefore, the prosecution has failed to prove the motive of the appellant for such crime.

13. It is the settled law that the circumstances from which conclusion is drawn should be fully proved; circumstances should be conclusive; all established facts should be consistent with the hypothesis of guilt and inconsistent with the innocence of the accused; and circumstances should exclude possibility of guilt of any person other than the accused. The Chain of evidence must be so complete that the circumstances must show that in all human probability, the act must have been done by the accused. The Apex Court in the case of ***Sharad Birdhi Chand Sarda v. State of Maharashtra,*** reported in ***1984 AIR 1622*** observed that:-

> *Evidence- Circumstantial evidence-Onus of proof Prosecution must prove every link of the chain and complete chain-Infirmity or lacuna in the prosecution cannot be cured by false defence or plea-A person cannot be convicted on pure moral conviction-False explanation can be used as additional link to fortify the prosecution case, subject to satisfaction of certain conditions.*

14. The law has also been settled in the case of ***Gambhir v. State of Maharashtra*** reported in ***AIR 1982 SC 1157*** wherein it has been held that when the case depends upon circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established, secondly, the circumstances should be of a definite tendency unerringly pointing towards guilt of the accused and thirdly, circumstances taken cumulatively should

form a chain so completely that there is no escape from the conclusion that within all human of probability the crime was committed by the accused and none else.

15. The evidence as analyzed hereinabove paragraphs and taking into consideration the same, we are of the opinion that the prosecution has failed to prove the case beyond reasonable doubt as against the present appellant. Hence, this Court sets aside the impugned order of conviction and sentence passed by the learned Addl. Sessions Judge, Cuttack in S.T. Case No.122 of 1993 (arising out of G.R No.237 of 1991) vide judgment dated 16.08.1996 and acquits the appellant from the charges made under section 302/34 of the I.P.C. accordingly.

16. The bail bond of the appellant, who is on bail, be cancelled and he be set at liberty, in case he is not required to be in custody in connection with any other case. The Lower Court Records along with copy of judgment be sent forthwith to the Trial Court for necessary action. The Criminal Appeal is accordingly allowed.

2018 (II) ILR - CUT- 437

S.K. MISHRA, J.

W.P.(C) NO.16451 OF 2017

MAHAL INDUSTRIES REPRESENTED BY ITS PROPRIETOR MR. MATLUB ALI .....Petitioner

.Vs.

GOVERNMENT OF INDIA & ORS. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ Petition – Prayer for revival and rehabilitation of the manufacturing unit of the petitioner by invoking the notification of Central Govt. under Micro, Smal & Medium Enterprises Development Act, 2006 – Measures for promotion & Development of the industries – Rephasement/ restructuring of loan account – When can be permitted – Held, bank shall consider the possibility of restructuring the account if it is prima-facie viable & the borrower is not a willful defaulter i.e. there is no diversion of funds, fraud or malfeasance etc. – Petitioner being an willful defaulter not entitled for the relief. (Paras 6 & 8)

For Petitioner : M/s. K.M.H.Niamati, & S.K.Mohanty
For Opp. Party : M/s. Chandra Kanta Pradhan, Central Govt. Counsel
M/s. P.N.Mishra & S.R. Debata.

JUDGMENT Date of Judgment: 05.9.2018

S.K.MISHRA, J.

In this writ petition the petitioner, being represented by its proprietor, has sought a direction from the Court to opposite parties 2 and 3 to place the loan account of the petitioner before the committee formed under the Central Government Notification dated 29.5.2015, under Annexure-4, for revival and rehabilitation of the manufacturing unit of the petitioner.

2. It is not disputed that the petitioner is a loanee. It has availed term loan as well as cash credit loan from the opposite parties-2 i.e. the Bank. The petitioner has set up an industry for manufacturing of colour profile sheets (roofing sheets). The opposite parties-Bank sanctioned a loan of Rs.125.00 lakhs on 30.1.2016. It is the case of the petitioner that due to unavailability of raw material and other allied problems coupled with Bank's non-supportive attitude, the petitioner faced lot of problems in manufacturing unit. However, learned counsel for the petitioner submits that the petitioner was regularly paying the instalments and has already paid a sum of Rs.25 lakhs. In view of the above difficult situation, the petitioner defaulted in some payment. So it requested the Bank for restructuring or rephasement of the loan account. Without going into the merits of the case, the Bank rejected the prayer.

3. The petitioner seeks to take advantage of the Central Government Notification for Revival and Rehabilitation of Micro, Small and Medium Enterprises for providing relief to loan accounts experiencing incipient stress. In the said frame work the Bank have been directed to form committee before which the cases of MSME borrowers can be placed for revival. In the said scheme the committee was to chalk out a corrective action plan to resolve the stress in the account in accordance with the procedure as laid down in the said framework. The petitioner claims that it belong to Micro, Small and Medium Enterprises, without specifying whether it is a medium, small or micro industry, and prays for issuing the aforesaid direction.

4. The Central Government has not filed any counter affidavit in this case.

5. Opposite party no.2, being the Branch Manager of Andhra Bank, filed counter affidavit himself and on behalf of opposite party no.3. It is apparent from the records that the petitioner failed to operate both the loan accounts satisfactorily in spite of repeated approaches from the Bank resultantly the accounts skipped to N.P.A. on 30.4.2017 which was intimated to the petitioner. The petitioner without regularizing the said accounts sent a letter dated 3.5.2017 under Annexure-2 to the opposite party no.2 requesting the Bank to do the needful so that its accounts can be restructured/rephased with some false allegations regarding gestation period etc. On receipt of the letter dated 3.5.2017, opposite party no.2 by its order dated 5.5.2017 under Annexure-3 gave a detailed reply to the petitioner intimating therein that despite earlier letters, telephonic advise from the Bank to submit renewal papers in O.C.C. account and to pay the over due instalments in terms loan account

the petitioner did not respond to the same and failed to deposit a single pie since February, 2017. It is further pleaded by the Bank that instead of repaying all the over dues including instalments in term loan, the petitioner closed the unit without intimating the Bank. Closure of the unit soon after availing the aforementioned over drawals proves that the petitioner has diverted the Bank funds for other purposes without the knowledge of the Bank. It is further pleaded that the gestation period of three months in repayment of the term loan is clearly mentioned in the sanction letter under Annexure-1 which is accepted by the petitioner with his endorsement on the sanction letter itself. Opposite party no.2 in its letter dated 5.5.2017 categorically intimated the petitioner that restructuring/rephasement of the loan accounts is not possible as the petitioner has closed the unit deliberately with oblique motive and diverted the Bank funds without knowledge of the Bank. In the said letter dtd.5.5.2017 opposite party no.2 advised the petitioner to repay the over dues in term loan and excess amount in O.C.C. account to make the accounts as performing asset and submit renewal papers for renewing the working capital limit. But the Bank has not received any response from the petitioner. It is further pleaded by the Bank that the petitioner/borrower has submitted stock statement in the Bank from time to time which reveals that the petitioner/borrower had sufficient stocks of finished goods. As per the last stock statement dated 31.1.2017 the existing stock was for Rs.1,11,96,000/- for finished goods, but the petitioner did not make any deposit in the cash credit account of the sale proceeds of the stock since then. Therefore, it was pleaded that the sale proceeds of the stock has been diverted by the petitioner/borrower to some other uses and it has intentionally made the account N.P.A. Hence, it is submitted that the application for rephasement/rescheduling of the loan account does not arise.

6. Admittedly, the petitioner is a borrower and has defaulted payment of the amount due. The loan was initially sanctioned on 30.1.2016 and it became N.P.A. on 30.4.2017, within barely a year and three months. Annexure-4 has been issued by the Central Government invoking Section 9 of the Micro, Small and Medium Enterprises Development Act, 2006. However, such remedial measures, on a reading of the entire document is attracted only to those cases of Small, Medium or Micro Industries, which are viable and the borrower is not a wilful defaulter and there is no diversion of funds, fraud or malfeasance etc. It is apparent from Annexure-4 at page 19 that in restructuring the Bank shall consider the possibility of restructuring the account if it is prima facie viable and the borrower is not a wilful defaulter, i.e. there is no diversion of funds, fraud or malfeasance etc. This aspect is reflected in Clause-(ii) of paragraph-5 which provides for Corrective Action Plan by the Committee. The same aspect is reflected at page-22, which is a part of paragraph-6 of Annexure-4, which provides at sub-para (ii) that wilful defaulters shall not be eligible for restructuring. The said clause provided that the Committee may review the reasons for classification of the borrower as a wilful defaulter and satisfy itself that the borrower is in a position to rectify the wilful default and the

decision to restructure such cases shall have the approval of the board of concerned bank within the committee who has classified the borrower as wilful defaulter.

7. Now the only question that remains to be determined in this case is whether the petitioner's case for restructuring/Rephasement is possible and whether it is not a wilful defaulter and the Bank's action in proceeding under the SARFAESI Act is illegal in view of the fact that there is possibility of restructuring/rephasement and, therefore, the same has to be adhered to by the Bank.

8. From the materials available on record, it is found that on 30.1.2016 the Bank has sanctioned loan of Rs.125.00 lakhs to the petitioner and it is the petitioner's positive case that it has deposited only a sum of Rs.25 lakhs till now. At present more than Rs.2 crores (rupees two crores) are outstanding in its name and the last O.C.C. credit advance in favour of the petitioner to the tune of Rs.15 lakhs was on 27.2.2017. It is also seen that stock statement was submitted to the Bank on 31.1.2017. The existing stock finished produced was to the tune of Rs.1,11,96,000/-, but thereafter no payment has been made to the Bank. If the petitioner has so much of finished produce of its own possession, there is no reason why it should not have paid money to the Bank. No rejoinder affidavit has been filed by the petitioner denying this aspect. Thus, it is apparent from the record that the petitioner is a wilful defaulter as per the provisions of the notification under Annexure-4. The Bank is not in any obligation to refer its case for reconstructing/rephasement. So it has taken a proper step in taking recourse to the SARFESI Act and, therefore, this Court is of the opinion that there is no merit in the writ petition and the petitioner is not at all entitled to its relief it has claimed for.

9. Hence the writ petition is dismissed being devoid of any merit.

10. There shall be no order to as to costs.

2018 (II) ILR - CUT- 440

S.K. MISHRA, J.

WRIT PETITION (CIVIL) NO. 5098 OF 2003

JHASKETAN BHOI (DEAD) & ORS. .....Petitioners

.Vs.

KRUSHNA BHOI (DEAD) & ORS. .....Opp.Parties

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition challenging the orders passed under the Orissa Consolidation of Holdings & Prevention of Fragmentation of Land Act, 1972 – Prayer

for issue of Writ of Certiorari – Scope and ambit of Certiorari jurisdiction – Discussed.

"Power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the above said two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court." *(Paras 12 & 13)*

(B) ORISSA CONSOLIDATION OF HOLDINGS & PREVENTION OF FRAGMENTATION OF LAND ACT, 1972, – Sections 9, 12 and 36 – Objection, Appeal and Revision – Consolidation Officer ignored certain vital facts while considering the objection petitions and recorded all the findings against the present petitioners who are the recorded tenants in respect of the lands – Appellate court without discussing the facts and law confirmed the order of Consolidation officer – Revisional court on the basis of the findings of courts below that by virtue of unregistered sale deeds of the year 1927 and 1929 (without examining as to whether possession has been delivered or not) title has been passed, affirmed the said findings and held that the Opposite parties have right title interest over the land in question – The lands were recorded in the name of the petitioners after the death of the original recorded tenant in the year 1951 in a mutation proceeding – Non-examination of the unregistered sale deeds as per the principles under Section 90 of the Indian Evidence Act – Held, the orders impugned being illegal and having the effect of gross miscarriage of justice, liable to be quashed in a certiorari proceeding.

(Paras 14 to 16)

(C) TRANSFER OF PROPERTY ACT, 1882 – Section 54 – Sale – It is true that any land or immovable properties can be sold without registration of the same, if the same is of the value of Rs.100/- or less to which Indian Registration Act applies if the same is accompanied by delivery of possession – No finding has been given by the Courts of Consolidation authorities that the sale was accompanied by delivery of possession – Hence the finding that by virtue of unregistered sale deeds of the year 1927 and 1929 title has been passed is illegal.

(Para 17)

Case Laws Relied on and Referred to :-

1. AIR 1964 S.C. 477 : Syed Yakoob.Vs. K.S.Radhakrishnan & Ors.
2. (2003) 6 SCC 675 : Surya Dev Rai .Vs. Ram Chander Rai.
3. (2015) 5 SCC 423 : Radhy Shyam and another Vs. Chhabi Nath & Ors.
4. AIR 1954 Orissa 31 (DB) : Parakhita Thappa .Vs. Nidhi Thappa & Ors.

For Petitioners : M/s. N.K.Sahu.
For Opp. Parties : Mr. R.K.Mohanty,D.K.Mohanty, A.P.Bose, S.N.Biswal P.K.Samantray, S.K.Mohanty, M.R. Dash, S.Mohanty Mr. Satyanarayan Mohapatra, J.Panda, J.Mishra. & Additional Government Advocate

JUDGMENT Date of Judgment: 06.07.2018

S.K.MISHRA, J.

The present writ application has been filed by the petitioners who are the decedents of late Krutartha assailing the judgment rendered by the learned Joint Commissioner, Settlement and Consolidation, Sambalpur in Consolidation Revision Case No.78 of 1990 dismissing the petitioners' revision under section 36 of Orissa Consolidation of Holdings & Prevention of Fragmentation of Land Act, 1972, hereinafter referred to as OCH & PFL Act and confirming the order passed by the appellate authority as well as the Consolidation Officer.

2. The petitioners being the son and grandsons of late Kutartha lay claim over the land in Hamid Settlement Plot No.2139 corresponding to M.S. Plot No.2844 and 2845 under L.R. Holding No.177 of village Jamurda. In the Land Register, the said plots were divided into 12 plots having been recorded in the name of sons of Trilochan Bhoi on rayati basis.

H.S.Plot No.1778 and 1846 (P) corresponds to M.S. Plot Nos.2776, 2777, 2250, 2256 and 3176(P) and further corresponds to L.R. Plot Nos.4766, 4777, 4748, 3955, 3956, 3957, 3958, 3959, 3985, 3987, 3991, 3992, 3994 and 3995, in total 14 plots.

H.S.Plot No.1847 corresponds to M.S.Plot No.2255 and further corresponds to L.R. Plot No.3951, 3953 and 3954, in total three plots.

3. It is the case of the petitioners that the landed properties in question were recorded in the name of Krutartha Bhoi and Chakra Bhoi in Hamid Settlement Record of Rights having Khata no.19. They were in possession of the said land. after the death of Kutartha Bhoi and Chakra Bhoi. Hamid Khata no.19 was mutated in the name of Dukha Bhoi wife of Krutartha, Dolamani Bhoi and Jhasketan Boi, sons of late Krutatha in the year 1942. In the Major Settlement operation the property in dispute corresponding to M.S. Khata no.205 and M.S. Plot No.232 were recorded in the name of Dolamani Bhoi and Jhasketan Bhoi sons of Krutatha Bhoi. The petitioners were also paying the land revenue for the disputed land. However, in the year 1972-73 the V.B. Register in respect of Holding No.232, 205 the possession of the petitioners was recorded in respect of the disputed land. A ceiling case was initiated against Dolamani and Jhasketan and the property in dispute was allotted within their ceiling limit. The petitioners have also paid the land revenue for the disputed land up to the year 2009 and patta was issued to them. The petitioners therefore, claimed right, title, interest and possession over the land in question.

Hence prayed at the consolidation stage to delete the note of forcible possession of the remarks column over the disputed land in favour of the opposite parties.

4. The opposite parties claimed that Arjun Bhoi and Baidyanath Bhoi, the ancestors of opposite parties had purchased Hamid Settlement Plot No.2139, measuring an area Ac.2.35 dec. from Krutartha and Chakra by way of unregistered sale deed for consideration of Rs.80/-. The unregistered sale deed is dated 10.06.1925 is annexed as Ext.A.

It is the further case of the opposite parties that on 04.08.1929 Chakra and Krutatha sold the plot No.1778 and 1846 to Arjun Bhoi and Baidyanath Bhoi for Rs.70/- by virtue of unregistered sale deed under Ext.B.

It is further case of the opposite parties that by virtue of an unregistered sale deed of the year 1929, Chakra and Krutartha and Arjun sold plot No.1847 for Rs.50/-. This document is not forthcoming and it is claimed that the document has been damaged and lost. Their case is that the land sold to Arjun and Baidyanath was accompanied by delivery of possession. As all the sales were made for a considerations of less than Rs.100/-, no registration was necessary for lesser valuation of Rs.100/-.

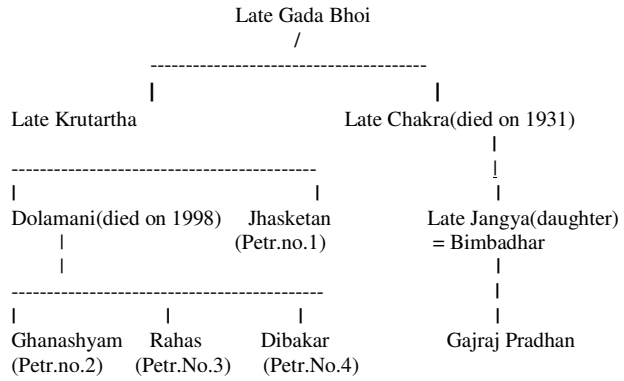
It is the further case of the opposite parties that after the death of Arjun, his two sons possessed the same separately by virtue of amicable partition, but the said lands have been recorded in the name of heirs of Chakra and Krutartha with note of possession in favour of the opposite parties.

5. When the Consolidation operation started Objection Case No.1906/103 along with 9 other objection cases were filed by the recorded tenants of L.R.Khata No.177 under section 9(3) of OCH&PFL Act before the learned Consolidation Officer for partition with a prayer to record the said land separately in Khata Nos.136 and 137.

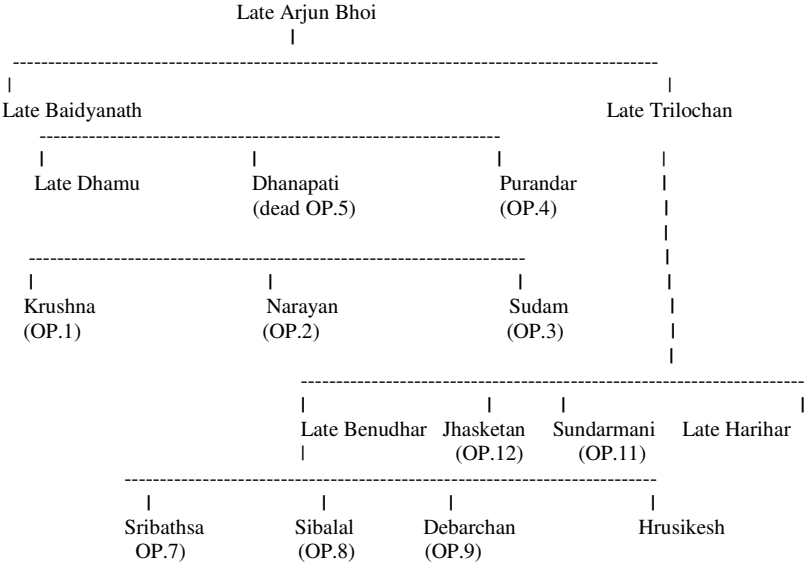
Objection Case No.2199/392 was filed by the petitioners under section 9(3) of OCH&PFL Act to delete the names of the opposite parties in L.R.Khata No.136 and to record the same in their favour.

Objection case No.2174/36 filed by Dolamani and Jhasketan Bhoi and others to record their names in respect of Khata No.177.

6. In order to properly appreciate the case of the parties, it is appropriate to take note of genealogy which is not disputed in this case. The genealogy showing relation of Krutartha and Chakra with the petitioners is given below.



The genealogy of the opposite parties are as follows:



7. Briefly stating the learned Consolidation Officer allowed the application filed by the opposite parties declaring their right, title, interest and possession over the disputed land disallowing the claim of the petitioners on the following grounds:

i) The custody of Exts. A and B and the lost sale deed has been proved by Baidyanth in his evidence.

ii) The learned Consolidation Officer has further held that the document was duly executed by Chakra and Krutartha.

iii) The certified copy of V.B. Register for 1963-71 shows that the opposite parties were in possession over the disputed properties.

iv) The certified copy of the Mutation Register of the year 1927-28 clearly reflects the possession of Arjun.

v) The note of possession over the disputed property is reflected in the Land Records.

vi) From the oral evidence led, the Consolidation Officer to hold that the ancestors of the opposite parties were in possession of the disputed properties and after their death the opposite parties are in possession.

vii) The petitioners were never in possession of the disputed properties.

viii) Due to non-production of Exts.A and B, M.S. Record has been wrongly prepared in the names of the petitioners.

ix) The rent receipt of the year 1976, 1977, water tax and cess from 1971 to 1977, 1977-78, 1980-81, 1981-82, 1982-83 are best piece of evidence of possession of the opposite parties.

x) By virtue of Ext.A, B the opposite parties are possessing the disputed properties since the date of transfer till today.

8. These findings of the opposite parties have been confirmed by the appellate as well as revisional authority on the following proposition of law.

a) Unregistered sale deeds (Ext.A and B) are 30 years old. The proper custody of the said documents have been proved under section 90 of the Indian Evidence Act.

b) Thus it is held that the recital of the documents are admissible in evidence under section 32(2) of the Indian Evidence Act as it is a statement against the proprietary interest of a dead person.

c) Documents of sale (Exts.A and B) clearly indicate the lands mentioned therein have been sold.

d) Possession of opposite parties have been proved by the admitted boundary tenants.

e) The findings and decision of the OLR authorities in ceiling proceeding have no evidentiary value where no surplus land has been declared.

f) The petitioner No.1 has admitted in cross-examination that prior to 1970-71 i.e. prior to publication of MS ROR the persons who were actually growing Dalua crops were recorded in the "V.B. Register and after 1970-71, the V.B. Register maintained basing upon MS recorded tenants on the basis of cultivating possession.
Thus, there is no evidentiary value of V.B. Register for 1970-71 produced by the petitioners.

g) Loss of the sale deed of the year 1929 has been proved through evidence in terms of section 65 of the Indian Evidence Act.

9. In developing a strong case for the petitioners, Mr.N.K.Sahoo, learned counsel appearing for the petitioners raised the following contentions:

a) Two unregistered sale deeds have never seen the light of the day before production of the same before the learned Consolidation Officer. So, it is argued that the presumption under section 90 of the Indian Evidence Act becomes very week.

b) Hal Settlement ROR, M.S. ROR and entries in V.B. Register, Records the order passed by the Revenue Officer under OLR Act in a ceiling proceeding constitute sufficient rebuttal of presumption arising out of Section 90 of the Evidence Act.

c) Ignoring all procedural law of appreciation of evidence and without considering the documents filed by the petitioners the C.O. relied upon two unregistered sale deeds.

d) The learned Consolidation Officer has arrived at contradictory opinion that the opposite parties have acquired title by way of transfer as well as by way of adverse possession.

e) The learned Consolidation Officer has come to the conclusion that in the objection filed by the decedents of Jhasketan that the decedents of Krutarth will inherit the properties and since coparcener, it is the Krutartha and Chakra are two brothers being the sons of Gada Bhoi and late Chakra died in the year 1931 leaving behind his only daughter Jagnya in the year 1931 the daughter has no right to property of Hindu living in jointness. So all the properties recoded in the name of Krutartha and Chakra would devolve, by way of survivorship upon the decedents of late Krutartha and the decedents of Chakra will not inherit the properties. Laying emphasis on the basis of the case Mr.Sahoo, learned counsel for the petitioners submits that there are contradictory findings in two sets of cases disposed of analogously on the same day.

f) Portions of the land involved in Exts.A and B has been acquired by the State. The State has acquired Ac.0.33 dec. of land and on 05.07.1954 compensation has been paid for acquisition of such land to the petitioners.

g) No objection has been filed by the opposite parties before the Revenue authorities in ceiling proceeding (OLR Case No.2876 of 1976) for which ceiling proceeding has been terminated including the disputed property in a ceiling holding of the present petitioners.

h) In view of section 51 of OCH & PFL Act the order passed by the Revenue authority under the OLR Act so also similar revenue law have binding effect on all other proceedings.

Therefore, the learned counsel for the petitioners argues that as the Consolidation authorities in three different stages have not taken into consideration the documents which are admissible in evidence and has adopted a procedure in total ignorance of law of evidence, the writ court should exercise its jurisdiction. In other

words, the contention is that even if there are concurrent findings of different levels of Consolidation authorities, the jurisdiction under Articles 226 and 227 of the Constitution should be exercised and writ of certiorari should be issued quashing the orders as the findings recorded by the Consolidation authorities are not based on reasoning and in total ignorance of vital pieces of documents and evidences and also there is a procedural irregularities adopted by them while appreciating the material evidence available on record.

10. Ms.Sumitra Mohanty, learned counsel appearing for the opposite parties argues that the writ of certiorari under Article 226 of the Constitution and the power of superintendence under Article 227 of the Constitution should be exercised sparingly and it should not be exercised in cases where three different authorities have concurrent findings in favour of the opposite parties. Learned counsel for the lis pendence purchaser also supports the argument advanced by the learned counsel for the contesting opposite parties.

11. Thus, on the basis of this factual backdrops and submission raised at the bar the following questions arise for consideration and adjudication in this case.

i) Whether in this case the consolidation authorities have acted in a complete disregard of the law of evidence and have come to an erroneous conclusion which has resulted in complete failure of justice ?

ii) Whether Chakra and Krutartha have sold the land vide Exts A and B and sale of the year 1929 to Arjun and Baidyanath ?

iii) Whether the ancestors of opposite parties were in possession and after that the opposite parties are in possession ?

iv) Which of the parties have right, title, interest and possession over the disputed land ?

12. The scope and ambit of certiorari jurisdiction arose before the constitution bench of the Hon'ble Supreme Court in the case of **Syed Yakoob-vrs.-K.S.Radhakrishnan and others reported in AIR 1964 S.C. 477**. In the constitutional Bench judgment the Hon'ble Supreme Court in a very clear terms laid down the question about the limits of jurisdiction of the High Court in issuing a writ of certiorari. Under Article 226 of the Constitution of India, a writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals, these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. The Hon'ble Supreme Court further held that a writ can similarly be issued wherein exercise of jurisdiction conferred upon it, the Court or Tribunal acted illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. The

Hon'ble Supreme Court further laid down that there is however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court can exercise it is not entitled to act as an appellate court. This limitation necessarily means that findings of facts reached by the inferior court or tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ jurisdiction. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari.

13. In this connection, this Court also takes into consideration the case of ***Surya Dev Rai vs. Ram Chander Rai*** (2003) 6 SCC 675, wherein the Hon'ble Supreme Court has examined the scope and ambit of certiorari jurisdiction and the supervisory jurisdiction under Article 227 of the Constitution. This Court is quite aware of the fact that the judgment passed by the Hon'ble Supreme Court in the case of ***Surya Dev Rai vs. Ram Chander Rai*** (supra) has been overruled by larger Bench judgment of the Hon'ble Supreme Court in-part on a different count, in the case of ***Radhy Shyam and another Vs. Chhabi Nath and others, (2015) 5 SCC 423.*** In the case of ***Surya Dev Rai vs. Ram Chander Rai*** (supra), the Hon'ble Supreme Court has held that the writ application under Article 226 of the Constitution is also maintainable against the order passed by the Civil Court in a proceeding arising out of dispute between two private parties. The Hon'ble Supreme Court however further clarifies the distinction between the powers of High Court under Articles 226 and 227 of the Constitution. Thereafter, the Hon'ble Supreme Court has laid down the law in what cases the writ of certiorari under Article 226 of the Constitution and supervisory jurisdiction under Article 227 of Constitution should be exercised. In the larger Bench decision of ***Radhey Shyam and another vs. Chhabi Nath and others*** (supra), this aspect of limited scope of jurisdiction of the High Court in exercise of certiorari jurisdiction and supervisory jurisdiction has not been discussed or overruled. In fact, the Hon'ble Supreme Court in the case of ***Radhy Shyam and another vs. Chhabi Nath and others*** (supra) has partly followed the ratio decided in ***Surya Dev Rai vs. Ram Chander Rai*** regarding the distinction between the exercise of power under Article 226 of the Constitution for the purpose of issuing writ of certiorari and supervisory jurisdiction under article 227 of the Constitution.

For the aforesaid reasons, this Court places reliance in the case of ***Surya Dev Rai vs. Ram Chander Rai (supra).*** After examining various judgments of Hon'ble Supreme Court, the Honble Supreme Court in the case of ***Surya Dev Rai vs. Ram Chander Rai*** (supra) held that writ of certiorari, under Article 226 of the

Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (*i*) without jurisdiction - by assuming jurisdiction where there exists none, or (*ii*) in excess of its jurisdiction – by overstepping or crossing the limits of jurisdiction, or (*iii*) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

The Hon'ble Supreme Court further held that Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

The Hon'ble Supreme Court further held that be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (*i*) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (*ii*) a grave injustice or gross failure of justice has occasioned thereby.

The Hon'ble Supreme Court defines a patent error as an error which is self-evidence i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent.

The Hon'ble Supreme Court held that the power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the above said two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court.

14. In this case, it is apparent from the record that the learned Consolidation Officer has ignored the fact that in Hamid Settlement and in the settlement of the year 1947 the lands were recorded in the name of the petitioners after the death of the original recorded tenant in the year 1951 in a mutation proceeding the name of Dolamani and Jhasketan have been recorded with respect to the lands in question. The learned Court also ignored the fact that in a ceiling proceeding the lands were measured, possession was determined, proclamation was issued and the suit land

involved in the case covered under the alleged three sale deeds are held to be the ceiling land of the petitioners' family. These evidences have not been discussed by the learned Court below. No weightage has been given to it and simply on the basis of the two unregistered sale deed and on the basis of an alleged unregistered sale deed which was not produced (having been destroyed and secondary evidence relied upon), the V.B.Register and the evidence of one witness examined on behalf of the present opposite parties the findings have been recorded. So this court is of the opinion that this is an appropriate case where a writ of certiorari should be invoked and the materials available on record should be examined.

15. The second question relates to the unregistered sale deeds Ext.A & B dated 10.06.1925, Ext.A, the unregistered sale deed of the year 1929 and another sale deed of the year 1927. I have very carefully examined the judgment rendered by the learned Consolidation Officer. After describing the facts and arguments advanced by both the parties at page 80 of the brief, the findings of the learned Consolidation Officer appears. He has come to the conclusion that the said land has been transferred by the ancestors of the opposite parties (present petitioners) to the ancestors of the objectors i.e., opposite parties in this case and the opposite parties are in possession of the suit land by virtue of the sale deeds and the ancestors of the opposite parties are also in possession since the year of transfer. While discussing the contents of Exts.A and B and the documents which have not been produced, the learned court has come to the conclusion that these documents are more than 30 years old document at the time it was produced and the son of the scribe of the document has been examined and he has proved the handwriting of his father. It is no-doubt clear that Section 90 of the Indian Evidence Act if any document is produced from proper custody which is executed 30 years back then the document can be proved by production from proper custody. But that does not mean that the contents of the documents are proved. The contents of the document has to be proved by cogent evidence. In this connection it is appropriate to take note of the provision of section 90 of the Indian Evidence Act which is quoted below:

> **S.90.** Where any document, purporting or provided to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.
>
> **Explanation** – Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom they would naturally be; but no custody is improper if it is proved to have had legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.
>
> This explanation applies also to section 81.

Illustrations

a) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land, showing his title to it. The custody is proper.

b) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

c) A, a connection of B, produces deeds relating to lands in B' possession which were deposited with him by B for safe custody. The custody is proper.

Thus, a plain reading of the provision leads this Court to come to a conclusion that when a document is purportedly to be more than 30 years old, if it be produced from what the Court considers to be proper custody, it may be presumed (a) that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and (b) that it was duly executed and attested by the person by whom it purports to be executed and attested. Thirty year old document, produced from proper custody, not looking ex facie suspicious, presumption could be drawn in favour of proper execution of the document. It is not necessary that the signatures of the attesting witnesses or of the scribe be proved; if everything was proved there would be no need to presume anything. There can, however, be no presumption as to who is the person, who executed the document was and what authority he had to execute the document, and whether he had the requisite authority, or whether the contents of the document are true. In other words, the execution and attestation of the document is presumed, but the contents has to be proved by some way or other. Moreover it has to be produced from proper custody. Having examined the judgment rendered by the learned Consolidation Officer, which has been concurred by the appellate court as well as the revisional court, this Court finds that there is no whisper of any discussion regarding proper custody of the documents. The learned court has only relied upon the document has come to the conclusion that there has been presumption that the sale of the land by the predecessor in interest of the petitioners.

16. The use of the word expression "may presume" means that the trial court has a discretion either to presume a fact as proved or to call for proof of it. The presumption is discretionary and not obligatory. Even if the elements mentioned in the section are satisfied, the Court may require the document to be proved in the ordinary manner. It is necessary for the Court to consider the evidence external or internal of the document in order to enable it to decide whether in any particular case it should or should not presume proper signature and execution. The Court may, but is not bound to, make the presumption merely because of the alleged age of the document. Thus, discretion should be more carefully exercised when the document was not produced before any authority after its execution for a long period. In other words, the documents executed between 1925 to 1929 did not see the light of the

day for 62 years and for the first time in the year 1987 which was produced before the Consolidation authority. In such circumstances discretion should not be exercised in favour of the presumption of the documents, rather the Court should have exercised its jurisdiction to prove the actual contents of the same and proper execution of the executants. Be that as it may, the document having been not produced before any authority for about 62 years, having not seen the light of the day, a rebuttal presumption arises and rebuttal presumption in this case has been duly discharged by the petitioner by showing that they are in possession over the land in question.

17. An error of law apparent on the face of the record. It is true that Section 54 of Transfer of Property Act, 1882 which defines sale provides that any land or immovable properties can be sold without registration of the same, if the same is of the value of Rs.100/- or less to which Indian Registration Act applies if the same is accompanied by delivery of possession. In the entire judgment passed by the consolidation authorities no finding has been given by any of the Courts that the sale was accompanied by delivery of possession. Their emphasis was on the execution of the document and the recital on the document has not been discussed in any of the judgments. In the case of **Parakhita Thappa –vrs.-Nidhi Thappa and others** reported in AIR 1954 Orissa 31 (DB), this Court has held that the plaintiff is certainly entitled to prove the factum of actual delivery of possession in spite of unregistered sale deed and unless there being such delivery of possession, the sale cannot be held to be complete.

18. The error committed by the Consolidation Officer and confirmed by the appellate Court and revisional authorities is a patent error which is self evident. It has been demonstrated without involving any lengthy argument and long drawn process of reasoning. Hence this Court is inclined to interfere in the matter. Moreover, a gross failure of justice would occasion if the lands recorded in the names of ancestors of the petitioners in the Hamid Settlement, in the settlement of 1947, in Mutation proceedings of 1951, which has been held to be ceiling lands of the petitioners family in an OLR proceeding and for acquisition of portion of such land the petitioners have received compensation are allowed to be recorded in the names of opposite parties on the basis of three unregistered sale deeds, one of which has not been filed before the learned Consolidation Officer, which never saw the light of the day for almost 62 years.

19. Thus, in view of the aforesaid discussion this Court is of the opinion that the order passed by the learned Consolidation Officer confirmed by the learned Deputy Director, Consolidation and Holdings and the Commissioner, Land Records, cannot be sustained and, therefore the writ petition has to be allowed. In the result, the writ application is allowed on contest. Annexures-1 to 3 are hereby quashed. The petitioners have right, title, interest and possession over the land in question as

indicated in schedule to the writ application. The Land records should be prepared and patta should be issued in favour of the petitioners by the Consolidation authorities. With such observation the writ petition is disposed of. There shall be no order as to cost.

2018 (II) ILR - CUT- 453

DR. A.K. RATH, J.

W.P.(C) NO.13132 OF 2009

RAMANATH MISHRA & ORS. .....Petitioners

.Vs.

UDAYANATH MOHANTY & ORS. .....Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order 41 Rule 27 – Provision for adducing additional evidence – Application under was filed before hearing of the appeal – Rejected – The question arose as to whether the application for additional evidence can be taken up before hearing of the appeal – Held, Yes, additional evidence can be considered at the time of hearing of the appeal.

Case Laws Relied on and Referred to :-

1. 2015 (II) CLR 583 : Sankar Pradhan .Vs. Premananda Pradhan (dead) & Ors.

For Petitioners : Mr. Amiya Kumar Mishra.
For Opp. Parties : Mr. Dinesh Kumar Mohanty

JUDGMENT Date of Hearing & Judgment: 28.08.2018

DR.A.K.RATH, J.

This petition challenges the order dated 01.08.2009 passed by the learned District Judge, Puri in R.F.A. No. 141 of 2005, whereby and whereunder, the learned appellate court rejected the application of the appellants-petitioners under Order 41 Rule 27 CPC to admit certain documents as additional evidence.

02. The mother of the petitioners as plaintiff instituted the suit for partition impleading the opposite parties as defendants.The suit having been dismissed, she filed R.F.A. No. 141 of 2005 before the learned District Judge, Puri. During pendency of the appeal, the appellant filed an application under Order 41 Rule 27 CPC for admitting certain documents as additional evidence. Learned District Judge rejected the same.

03. Mr. Amiya Kumar Mishra, learned counsel for the petitioners submits that the application for additional evidence can be considered at the time of hearing of the appeal. But, the learned District Judge rejected the same before hearing of the appeal.

04. Per contra, Mr. Dinesh Kumar Mohanty, learned counsel for the opposite parties submits that the petitioners filed an application under Order 41 Rule 27 CPC to admit the documents as additional evidence. In an elaborate order, the learned District Judge came to hold that the requirements of clauses (a) and (aa) of Rule 27 (1) of Order 41 CPC have not been satisfied. There is no illegality or infirmity in the same.

05. The sole question that hinges for consideration of this Court is as to whether the application for additional evidence can be taken up before hearing of the appeal?

06. The subject-matter of dispute is no more res integra. In *Sankar Pradhan v. Premananda Pradhan (dead) and others*, 2015 (II) CLR 583, this Court in paragraph-7 of the report held as follows:

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

07. In view of the authoritative pronouncement of this Court in the case of *Sankar Pradhan* (supra), the inescapable conclusion is that the application for additional evidence can be considered at the time of hearing of the appeal.

08. Resultantly, the order dated 01.08.2009 passed by the learned District Judge, Puri in R.F.A. No. 141 of 2005 is quashed. The learned District Judge shall consider the application for additional evidence at the time of hearing of the appeal. Since the appeal is of the year 2005, the learned appellate court shall do well to dispose of the same by end of November, 2018 without being influenced by the impugned order.

[

09. The petition is allowed. There shall be no order as to costs.

2018 (II) ILR - CUT-455

DR. A.K. RATH, J.

W.P.(C) NO. 5598 OF 2004

DR. KESHAB CHANDRA PANDA ……Petitioner

.Vs.

VICE-CHANCELLOR, SAMBALPUR UNIVERSITY & ORS. ……Opp.Parties

(A) SERVICE LAW – Disciplinary proceeding – Prayer for quashing of disciplinary proceeding at the stage of issuance of show cause notice or charge sheet – Whether permissible? – Principles – Indicated.

"Law regarding quashment of disciplinary proceeding is well known. In Union of India v. Kunisetty Satyanarayana, AIR 2007 SC 906, the apex Court held that the reason by ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at that stage the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not given rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of any one. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed that the said party can be said to have any grievance. Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause or charge-sheet." *(Para 9)*

(B) SERVICE LAW – Disciplinary Proceeding – Allegation of bias and malafide – No material to substantiate the allegation – Records show grant of fullest opportunities to the petitioner – No interference warranted at the stage of service of second show cause notice.

"The logical sequitur of the analysis made in the preceeding paragraphs is that the petitioner was afforded fullest opportunity to defend his case. The enquiry was conducted in a free and fair manner. Allegation of bias and mala fide against the Enquiry Officer is a ruse. The charges levelled against the petitioner are clear and unambiguous." *(Para 16)*

For Petitioner : Mr. A.K. Mishra, Senior Advocate
Mr. D.K. Panda, Mr. Amit Mishra, Advocates

For Opp. Parties: None

Case Laws Relied on and Referred to :-

1. AIR 1997 SC 3011 : Vishaka & Ors. -V- State of Rajasthan & Ors.
2. AIR 1986 SC 2118 : Kashinath Dikshita -V- Union of India & Ors.

3. AIR 1994 SC 1074 : Managing Director, ECIL, Hyderabad, etc. -V- B. Karunakar
4. AIR 2001 SC 343 : State of Punjab -V- V.K. Khanna & Ors.
5. AIR 2010 SC 3131 : State of U.P. & Ors. -V- Saroj Kumar Sinha.
6. AIR 2013 SC 93 : Medha Kotwal Lele & Ors. -V- U.O.I. & Ors.
7. Vol.47 (1979) CLT-5 : Jagannath Mohapatra -V- Utkal University
8. AIR 1964 SC 1854 : Champaklal Chimanlal Shah -V- The Union of India.
9. AIR 1977 SC 965 : Chairman, Board of Mining Examination & Anr. -V- Ramjee.
10. AIR 1973 SC 1260 : Hira Nath Mishra & Ors. -V- The Principal, Rajendra Medical College, Ranchi & Anr.

JUDGMENT Date of Hearing: 14.08.2018 Date of Judgment: 29.08.2018

DR. A.K. RATH, J.

By this application under Article 226 of the Constitution of India, the petitioner has prayed inter alia to quash the charges framed by the disciplinary authority vide Annexure-6 and the show cause notice dated 24.4.2004 issued by the Registrar, Sambalpur University vide Annexure-14 for imposing punishment of dismissal.

02. Sans details, the case of the petitioner was that he was appointed as Lecturer in Physics in Sambalpur University (in short, "University") during September, 1979. He was promoted to the post of Reader in the year 1993. There was no blemish in his service career. While the matter stood thus, Miss Alekhika Pani was appointed as Junior Research Fellow on 14.8.2002 in the Department of Physics by the Vice-Chancellor of the University. Miss Pani was not sincere. She was cautioned time and again to be sincere with her research work. As a Post Graduate student for the academic session 1998-2000, she had the acquaintance with him. She had cooperated and participated in the research work. As a project leader, it was the bounden duty of the petitioner to see, remind, reprimand the persons those who were working in the project in order to have a good reputation of the project work. She submitted her resignation on 30.9.2002, but the same was not accepted with a hope that she will improve. All the efforts made by the petitioner ended in a fiasco. Finally she submitted her resignation on 24.2.2003, which was accepted on 28.2.2003.

03. While the matter stood thus, Mr. J.M. Pani of Sambalpur sent a letter to the Vice-Chancellor of the University with regard to the sexual harassment of his daughter by the petitioner. The petitioner received a letter on 7.4.2003 from Professor P.K. Mohapatra, Convenor of Enquiry Committee to remain present on 10.4.2003 at 9.30 a.m. in the Syndicate Hall of the University in order to respond to the charges made against him by Mr. J.M. Pani. The complainant alleged that his daughter, Miss Alekhika Pani, enrolled as a research scholar under the petitioner in a project namely, "Studies in Nuclear Reaction". She never thought that her career

would come to an abrupt end for no fault of her. She had a brilliant academic record in Physics and great enthusiasm in fundament research. Her ordeal started after joining the project. The petitioner as a guide talked with regard to unrelated work of the research with his daughter, who was making amorous advances in talks and gestures. He used to comment about her dress and look. His lasciviousness and mischief was visible. His lewd remarks and lecherous looks became a routine event. A national symposium on nuclear physics was to be held in Chennai from 26th December to 30th December, 2002. Around second week of December, 2002, his daughter registered for the said national symposium as asked by her guide. Days before the event, she was told that her railway ticket and accommodation had been taken care of. The petitioner told her that they would stay together. She was shocked. She had not gone to Chennai. Thereafter the petitioner became very irritable and uncooperative with his daughter. He started troubling her. He made a second effort in February, 2003 when her "Project Definition" was to be done at IUC/DAEI, Calcutta Centre. Just two days before the event, i.e., 16th February, 2003, she was informed about the programme and told that they would stay together, as there was no time for making arrangements for accommodation. His daughter vehemently protested. The petitioner told her that to earn a Ph.D. degree, she had to bear all this. If she was unwilling and tried to divulge anything, she will be ruined. The petitioner warned his daughter of the consequences of going against him. He often talked of his links with Chancellor's Office and Minister of Higher Education. The facts had been narrated by his daughter to him. He made the complaint on 26.3.2003 before the Vice-Chancellor.

04. Pursuant to the letter dated 7.4.2003, the petitioner appeared before the Enquiry Committee headed by Prof. P.K. Mohapatra. Three committee members, namely, Ms. Basanti Biswal (Deptt. of Life Science), Ms. Pramila Mishra (Deptt. of Chemistry) and Ms. Sabita Tripathy (Deptt. of English) were junior to him. The petitioner submitted his reply. He received a letter dated 12.4.2003 to appear before the committee on 15.4.2003 at 9.30 a.m. and requested that the persons name in the said letter to appear before the committee in the Office of the Registrar of the University. Enquiry was not completed. On 16.4.2003, some of the students appeared before the committee. They stated that this was an effort to tarnish the image of the petitioner at the behest of some of the interested persons having ill intention and motive. The committee submitted the report to the Vice-Chancellor. After receipt of the report, the Vice-Chancellor convened the Syndicate meeting on 19.4.2003. On 19.4.2003, the matter was discussed in the Syndicate. The Syndicate considered the report of the Enquiry Committee and resolved to place the petitioner under suspension with immediate effect. By order dated 19.4.2003, he was placed under suspension pending framing of charges. Thereafter the charges were framed against him. The same was placed before the Syndicate for approval. The Syndicate after deliberations as per resolution dated 12.5.03 approved the charges and resolved to appoint a retired High Court Judge/retired District Judge as Enquiring Officer as

per the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 (in short, "the Rules, 1962"). Charges were served upon him on 14.5.2003. He was called upon to file reply within thirty days. He sent a letter to the Registrar of the University on 12.6.03 to supply the documents enabling him to submit his explanation. On 6.8.03, the Registrar of the University sent a letter indicating that no other copies of the relevant documents in support of the complaint petition dated 26.03.03 was submitted except the copy which was supplied to him along with the charge sheet. He was directed to inspect the document with prior permission of the Enquiry Officer on the date, time and place fixed for such inspection. The Registrar refused to supply the documents. A copy of the preliminary report was not furnished to him. He was prevented to submit explanation. Again he made a representation on 5.10.03 requesting the Registrar of the University to supply the documents enabling him to submit his reply. Felt aggrieved, he filed appeal before the Chancellor for supply of documents, payment of subsistence allowance and to revoke the order of suspension. The same was pending consideration. While the matter stood thus, he received a letter from the Marshalling Officer to appear before the Enquiry Officer on 12.1.04 in the University Guest House. He pointed out the Vice-Chancellor that he had not been given adequate opportunity to file his reply to the charges for non-supply of documents. On 12.1.04, he received a letter from the Enquiry Officer that he did not appear on 12.1.04. The proceeding was adjourned to 21.1.04. On 13.1.04, he was intimated about the appointment of Mr. G.R. Dubey, a retired District Judge as Enquiring Officer pursuant to the resolution of the Syndicate. On 21.1.04, he requested the Enquiry Officer to supply the proceedings of the hearing with copies of day to day order sheet. The Enquiry Officer directed the petitioner to file his written statement by 31.1.04. He filed list of documents/witnesses. The appointment of Enquiry Officer was illegal. The Enquiry Officer conducted enquiry and closed the same on 30.3.04. The enquiry was held in an undue haste. The Enquiry Officer submitted the report to the Registrar of the University. The same was placed before the Syndicate on 24.4.04. The Syndicate resolved to accept the report of the Enquiry Officer and take action as per the statutory provision. A copy of the enquiry report was not furnished to him before issuing 2nd show cause notice. The Enquiry Officer had no role to suggest imposition of penalty on the delinquent officer. The resolution of the Syndicate is a non-application of mind. The finding rendered by the Enquiry Officer is perverse.

05. A counter affidavit has been filed by the opposite parties stating that Mr. J.M. Pani of Sambalpur lodged a written complaint on 26.3.03 before the Vice-Chancellor of the University making allegations of sexual harassment by the petitioner to his daughter Miss Alekhika Pani, Junior Research Fellow working under the petitioner. A fact finding enquiry was conducted by an Enquiry Committee presided over by Professor P.K.Mohapatra. The petitioner was placed under suspension by office order dated 19.4.2003 vide Annexure-3. The report of the

Enquiry Committee was considered by the Syndicate. The Syndicate on 12.5.2003 resolved and approved the charges against the petitioner. The Registrar of the University issued the charges to the petitioner on 14.5.2003. The petitioner received the same on 19.5.2003. The departmental proceeding was initiated under Statute-299 read with Rule 15 of the Rules, 1962. Mr. G.R. Dubey, a retired District Judge was appointed as Enquiry Officer as per the notification dated 13.1.2004. On completion of the enquiry, the Enquiry Officer submitted his report on 12.4.2004 to the Vice-Chancellor. The same was placed before the Syndicate on 24.4.2004. The Syndicate accepted the recommendation of the Enquiry Officer and resolved to issue show cause notice of dismissal of the petitioner. Accordingly, show cause notice was issued to the petitioner.

06. An additional affidavit filed by the petitioner controverting the averments made in the counter affidavit.

07. Heard Mr. Aswini Kumar Mishra, learned Senior Advocate along with Mr. D.K. Panda and Mr. Amit Mishra, learned Advocates for the petitioner. None appeared for the opposite parties.

08. Mr. Mishra, learned Senior Advocate for the petitioner submitted that charges are framed against the petitioner before forming an opinion to hold an enquiry. Initiation of disciplinary proceeding and framing of charges are two distinct and separate acts. Approval of charges framed on the basis of enquiry report of the complaints committee by the Syndicate is in contravention of the judgment of the apex Court in the case of *Vishaka and others vs. State of Rajasthan and others,* AIR 1997 SC 3011. The disciplinary proceeding and the show-cause notice issued to him are illegal and violation of the Rules, 1962. The charges are framed on the basis of non-existing documents. The same are approved by a non-speaking order. The charges are vague and indefinite. The unsigned and incomplete charge-sheet was communicated by the Registrar. The Enquiry Officer was appointed simultaneously with the approval of the charges. Appointment of Enquiry Officer along with framing of charges is pre-mature. Before he filed his written statement of defence, the disciplinary authority appointed the Enquiry Officer. Enquiry Officer was appointed due to acceptance of hospitality and conveyance of the University. The examination-in-chief was not conducted in his presence. The cross-examination was conducted without supplying the oral evidences recorded ex-parte in the examination-in-chief. The detailed order-sheet was not supplied to him. The charges were not proved. The finding of the Enquiry Officer is perverse. The proposed order of dismissal was passed without application of mind before furnishing a copy of the enquiry report. He requested the disciplinary authority to supply the documents basing upon which charges have been framed. But the same was refused by the Vice-Chancellor. A copy of the enquiry report was not furnished before issuing 2nd show-cause notice and as such there was no opportunity to assail the report. To

buttress the submission, learned Senior Advocate placed reliance to the decisions of the apex Court in the case of *Kashinath Dikshita vs. Union of India and others,* AIR 1986 SC 2118, *Managing Director, ECIL, Hyderabad, etc. vs. B. Karunakar, etc.,* AIR 1994 SC 1074, *Vishaka and others vs. State of Rajasthan and others,* AIR 1997 SC 3011, *State of Punjab vs. V.K. Khanna and others,* AIR 2001 SC 343, *State of U.P. and others vs. Saroj Kumar Sinha,* AIR 2010 SC 3131, *Medha Kotwal Lele and others vs. U.O.I. and others,* AIR 2013 SC 93 and this Court in the case of *Jagannath Mohapatra vs. Utkal University,* Vol.47 (1979) C.L.T.-5.

09. Law regarding quashment of disciplinary proceeding is well known. In *Union of India v. Kunisetty Satyanarayana*, AIR 2007 SC 906, the apex Court held that the reason by ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at that stage the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not given rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of any one. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed that the said party can be said to have any grievance. Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause or charge-sheet.

10. On the anvil of the decision cited supra, the instant case may be examined. The petitioner was a Reader in Physics. Miss Alekhika Pani, Junior Research Fellow in the P.G. Department of Physics in the University, was working under the petitioner. Mr. J.M. Pani, father of Miss Pani, sent a letter to the Vice-Chancellor of the University on 26.3.2003 making allegations of sexual harassment by the petitioner to his daughter. His daughter narrated the facts stated supra, whereafter he made the complaint. A preliminary enquiry was conducted by a committee headed by Professor P.K. Mohapatra and along with five others. There were four women members in the committee. Three members were from other P.G. Departments. The committee recorded the statement of the petitioner as well as Miss Pani. The committee found that there was a prima facie case, which required initiation of disciplinary proceeding against the petitioner. The preliminary report was placed before the Syndicate on 19.4.2003. The Syndicate accepted the report. Thereafter the petitioner was placed under suspension. The Syndicate in its meeting on 12.5.2003 resolved and approved the charges against the petitioner vide Annexure-5. The Registrar issued the charge-sheet vide Annexure-6 to the petitioner on 14.5.2003. The petitioner received the same on 19.5.2003. Thereafter, the petitioner sent a letter

on 12.6.2003, vide Annexure-7, to the Registrar of the University to supply the documents. The Registrar of the University sent a letter on 6.8.2003 vide Annexure-8 to the petitioner stating that the documents had been supplied to him. He was also permitted to inspect the documents with prior permission of the Enquiry Officer on the date and time. Other documents were not supplied on the ground that the same did not pertain to framing of charges. He had not submitted his written statement of defence. He engaged a battery of lawyers. The Enquiry Officer submitted the report to the Vice-Chancellor of the University on 12.4.2004 in a sealed cover. The same was placed before the Syndicate on 24.4.2004. The Syndicate accepted the recommendation of the report of the Enquiry Officer and resolved to issue show-cause notice of dismissal to the petitioner. The 2nd show-cause notice of punishment was issued to him on 24.4.2004 as well as copy of the enquiry report and decision of the Syndicate.

11. In *Champaklal Chimanlal Shah vs. The Union of India,* AIR 1964 SC 1854, the Constitution Bench of the apex Court held that a preliminary enquiry is usually held to determine whether a prima facie case for a formal departmental enquiry is made out, and it is very necessary that the two should not be confused. It further held that when a preliminary enquiry is held in the case of temporary employee or a government servant holding a higher rank temporarily it must not be confused with the regular departmental enquiry (which usually follows such a preliminary enquiry) when the government decides to frame charges and get a departmental enquiry made in order that one of the three major punishments already indicated may be inflicted on the government servant. It further held that such a preliminary enquiry may even be held ex parte, though usually for the sake of fairness, explanation is taken from the servant concerned even at such an enquiry.

12. The statement of the petitioner as well as Miss Pani was recorded by the committee. The committee recorded its finding and submitted the report. Charges were approved by the Syndicate of the University. The charges are clear and unambiguous. The petitioner participated in the enquiry without any demur or protest. A battery of lawyers appeared for him. Thus, it is too late on the day to contend that the Enquiry Officer was biased, merely because the report of the Enquiry Officer was not palatable to the petitioner. There is no allegation that the petitioner was not afforded the fullest opportunity to defend himself. The petitioner does not show how he was prejudiced.

13. A girl in the tradition bound non-permissive society of India would be extremely reluctant to admit that any incident which is likely to reflect on her chastity had ever occurred. But in the instant case, Miss Pani narrated the entire episode to her father. The father of a girl in the same logic would be extremely reluctant to admit that any such instance had happened to his daughter.

14. In his inimitable style, Justice Krishna Iyer in *Chairman, Board of Mining Examination & another v. Ramjee*, AIR 1977 SC 965 proclaimed that "natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt--that is the conscience of the matter".

15. The contention that Miss Pani was not subject to cross-examination by the petitioner is difficult to fathom. Some would be adding salt to the injury. In *Hira Nath Mishra and others vs. The Principal, Rajendra Medical College, Ranchi and another,* AIR 1973 SC 1260, the appellants were second year students of the college and lived in a Hostel attached to the college. There was another Hostel for girl students. On the night between 10th and 11th June, 1872 some male students of the college were found sitting on the compound wall of the girls Hostel. Later they entered into the compound and were seen walking without clothes on them. They went near the windows of the rooms of some of the girls and tried to pull the hand of one of the girls. Some five of these boys then climbed up along the drain pipes to the terrace of the girls Hostel where a few girls were doing their studies. One seeing them the girls raised an alarm following which the students ran away. The girls recognized four out of these male students. The complaint was received by the Principal of the College from 36 girl students residing in the Girls Hostel alleging the above facts. The Principal decided to hold an enquiry and entrusted the enquiry to three staffs. The four students were directed to remain present in the Principal's room in connection with the enquiry on 15-6-1972 at 4.30 p.m. They attended the enquiry. The students were called one after other in the room and to each one of them the contents of the complaint were explained. A charge memo was served on them. They were directed to file their reply and appear before the Enquiry Committee. The students uniformally denied having trespassed into the girls Hostel. The statement of the girls had not been recorded in the presence of the appellants. After making necessary enquiry, the committee came to the unanimous conclusion that the three appellants and Upendra had taken part in the raid that night. They were guilty of gross misconduct. They recommended that they may be expelled from the college for a period of two calendar years and also from the Hostel. Acting on the report, the Principal of the college expelled them from the college for two academic sessions and directed them to vacate the Hostel within 24 hours. They filed writ petition before the High Court. Their chief contention was that rules of natural justice had not been followed before the order was passed. The enquiry had been held behind their back; the witnesses who gave evidence against them were not

examined in their presence, there was no opportunity to cross-examine the witnesses with a view to test their veracity. The High Court held that rules of natural justice were not inflexible and that in the circumstances and the facts of the case, the requirements of natural justice had been satisfied. The matter went to the apex Court. The apex Court held that requirements of natural justice were fulfilled.

16. The logical sequitur of the analysis made in the preceeding paragraphs is that the petitioner was afforded fullest opportunity to defend his case. The enquiry was conducted in a free and fair manner. Allegation of bias and mala fide against the Enquiry Officer is a ruse. The charges levelled against the petitioner are clear and unambiguous.

17. In view of the same, this Court is not inclined to quash the charge-sheet.

18. In *Managing Director, ECIL, Hyderabad, etc.* (supra), the Constitution Bench of the apex Court held that when the Inquiry Officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the Inquiry Officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the Inquiry Officer's report before the disciplinary authority takes its decision on the charges is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.

19. While issuing notice, a Bench of this Court on 20th May, 2004 directed that no final decision shall be taken without leave of the Court pursuant to the Syndicate resolution dated 24.4.2004, Annexure-14. The disciplinary proceeding proceeded further in view of the interim order passed by this Court. There is no document on record that 2nd show-cause notice was issued to the petitioner along with copy of the enquiry report.

20. In *State of Punjab* (supra), the apex Court held that soon after the issuance of the charge-sheet, the Press reported a statement of the Chief Minister that a Judge of the High Court would look into the charges against the respondent. It further held that it is well settled in Service Jurisprudence that the concerned authority has to apply its mind upon receipt of reply to the charge-sheet or show-cause as the case may be, as to whether a further inquiry is called for. In the event upon deliberations and due considerations it is in the affirmative---the inquiry follows but not otherwise. As held above, the petitioner participated in the enquiry without any demur or protest. The decision is distinguishable on facts.

21. In *Vishaka and others* (supra), the apex Court laid down the guidelines and norms for due observance at all work places or other institutions, until a legislation is enacted for the purpose. The decision is no help to the petitioner.

22. In *Medha Kotwal Lele and others* (supra), the apex Court issued further directions with regard to sexual harassment at work places.

23. In *Jagannath Mohapatra* (supra), this Court held that it would not be illegal to appoint the inquiring officer simultaneously with the framing of the charges and to direct the delinquent to submit his explanation on the charges to the inquiring officer so that he will directly deal with the same from that stage. Therefore, the appointment of the inquiring officer before the submission of the written statement of defence by the delinquent cannot be supported. As held above, the petitioner had participated in the enquiry. He has not shown any prejudice.

24. In *State of U.P. and others* (supra), the documents forming foundation of charge-sheet was not supplied to the delinquent. Despite the relentless efforts made by the delinquent to secure copies of the documents, which was ought to be relied upon, to prove the charges those were denied by the department. The apex Court held that the entire proceedings are vitiated. In *Kashinath Dikshita* (supra), copies of the documents were not supplied to the delinquent by the disciplinary authority. The apex Court held that order of dismissal was violative of Article 311 (2) of the Constitution of India. But in the instance case, the documents had been supplied to the petitioner. Simultaneously, the petitioner had been directed to peruse the documents.

25. In the wake of aforesaid, the writ petition is disposed of with a direction to the opposite parties to furnish a copy of the enquiry report along with 2nd show-cause notice to the petitioner. Thereafter, the opposite parties shall proceed with the matter. There shall be no order as to costs.

2018 (II) ILR-CUT - 464

DR. B.R. SARANGI, J.

W.P.(C) NO. 6866 OF 2002

RAMA KRUSHNA DHAL .....Petitioner

.Vs.

UNITED COMMERCIAL BANK & ORS. .....Opp. Parties

SERVICE LAW – Voluntary Retirement under a Scheme – Petitioner, a bank employee submitted application on 22.01.2001 – Application for Voluntary Retirement was accepted on 16.04.2001 with a condition that petitioner would be relieved from service on the closure of the business hour of the bank on 30.04.2001 – But the petitioner on the last day i.e on 30.04.2001 made an application for withdrawal of the application for Voluntary Retirement – Withdrawal application rejected – Writ petition challenging the rejection – Held, the petitioner's application for voluntary retirement having been accepted, may it be conditional basis, the same cannot be permitted to be withdrawn.

(Para 22)

Case Laws Relied on and Referred to :-

1. (1997) 4 SCC 280 : Power Finance Corporation Ltd. .v. Promod Kumar Bhatia.
2. (1998) 9 SCC 559 : J.N. Srivastava .Vs. Union of India.
3. (2002) 3 SCC 43 : Sambhu Murari Singha .Vs. Project & Development India Ltd.
4. (2002) 9 Scale 519 Bank of India .Vs. O.P. Swarnakar.
5. (2003) 11 SCC 572 : Vice Chairman and Managing Director. A.P. Sidc Ltd. v. R. Varaprasad & Ors.
6. 2014 SCC Online Ori 258 : Chandrakanta Tripathy v. State of Orissa & Ors.
7. AIR 1978 SC 17 : Dinesh Chandra Sangma v. State of Assam.
8. (1994) 4 SCC 293 : State of Haryana v. S.K. Singhal.
9. (2010) 5 SCC 335 : New India Assurance Co. Ltd. v. Raghuvir Singh Narang.
10. (2003) 5 SCC 163 : A.K.Bindal v. U.O.I.
11. (2004) 2 SCC 651 : State Bank of Patiala v. Romesh Chander Kanoji.
12. (2003) 2 SCC 721 : Bank of India v. O.P. Swarnakar.
13. (2004) 2 SCC 201 : State Bank of Patiala v. Jagga Singh.

For Petitioner : M/s. Debasis Nayak, D.K. Panda, S. Dey, B.K. Ragada, A. Mohanty, S.P. Das, L.N. Patel & B.P. Swain.
For Opp. Parties : M/s. Somanath Mishra,G. Tripathy & S. Mishra

JUDGMENT Date of argument: 28.08.2018 Date of Judgment: 03.09.2018

DR. B.R. SARANGI, J.

The petitioner, who was working as Clerk-cum-Assistant Cashier in United Commercial Bank (UCO Bank), Balasore Branch, Balasore, has filed this application with following prayers:

> *"(i) As to why Annexure-1 and 2 to the Writ Application shall not be quashed;*
> *(ii) As to why Annexure-5 & 6 to the Writ Application shall not be quashed;*
> *(iii) As to why a direction shall not be issued for allowing the Petitioner to resume his duties as an employee of the opposite parties's Bank.*
> *(iv) And in the alternative why a directions shall not be issued to give the financial benefits to the petitioner as per the original V.R.S., 2000.*

(v) And if the Opposite parties fail to show cause or show insufficient cause the rule may be made absolute;
(vi) Further Your Lordships may be pleased to pass such other or orders as may be deemed fit and proper in the particular circumstances of the case."

2. The factual matrix of the case, in hand, is that the petitioner joined as Clerk-cum-Assistant Cashier in UCO bank-opposite party no.1 on 16.02.1981. While he was working as such, UCO Bank floated a scheme called "UCO Bank Employees' Voluntary Retirement Scheme, 2000" by issuing circular to all branches/offices vide No. CHO/PMG/19/2000 dated 16.11.2000. The board of directors of the bank in their meeting held on 29th September, 2000 and 25th October, 2000 adopted the Voluntary Retirement Scheme for the employees of the bank. The same has also got approval of the board of directors. Under the said scheme, an employee opting for voluntary retirement is required to submit duly filled in application in prescribed format on or after 1st January, 2001 but not beyond 31st January, 2001 directly addressing to the Deputy General Manager (Personnel), Personnel Department, Head Office in an envelope marked "OFFER TO SEEK VOLUNTARY RETIREMENT". The said application was to be forwarded, by the respective branches/offices after making due verification, to the respective regional offices. The application should be considered by the competent authority on the basis of "first cum first served" subject to discretion of the competent authority to the extent of number of employees assessed for the purpose subject to certain conditions mentioned in the scheme itself. The acceptance of application for voluntary retirement was subject to adherence to the procedure envisaged in the scheme itself. On acceptance of application for voluntary retirement of an employee by the competent authority, the concerned employee can submit his application for settlement of his terminal benefits as per procedure laid down by the bank. Annexure-1 to the scheme dated 16.11.2000 indicates detailed procedure and other criteria to be followed for the purpose.

2.1 Subsequently, on 07.04.2001, a circular was issued for conversion of "housing loans" of employees of VRS optees into "UCO shelter loan". With due adherence to the provisions contained in the scheme, 2000, the petitioner applied for voluntary retirement from service on 22.01.2001. The circular dated 07.04.2001 with regard to conversion of "housing loans" of employees of VRS optees into "UCO shelter loan" provides that a non-pensioner who opted for VRS has to give an undertaking that out of his terminal benefit to be received under the VRS, he has to deposit a sum equivalent to converted loan amount with the bank. In addition to the same, clauses-9.2.1 and 9.2.3 require that the employee should mortgage his property in favour of the bank. The Regional Manager UCO bank wrote a letter to the petitioner on 16.04.2001 informing him that his application under VRS had been accepted and he would be relieved from the services of the bank at the close of business on 30.04.2001. But the petitioner, after issuance of the circular dated

07.04.2001, found that he would get a sum less than what he would have got under the original scheme. Therefore, he made representation on 30.04.2001 itself, before close of the business, to the authority requesting for withdrawal of the application for voluntary retirement, which had been duly recommended by the Sr. Manager of the bank to the competent authority. But on 13.10.2001, it was communicated to the petitioner that his withdrawal application could not be considered. In response to the same, the petitioner made several requests by way of filing representation to allow him to work in the bank, but the same was not considered. Hence, this writ application.

3. Mr. Debasis Nayak, learned counsel for the petitioner contended that the acceptance of application dated 16.04.2001 of the petitioner for voluntary retirement was conditional one to the extent that he would be relieved from service of the bank at the closure of business on 30.04.2001. Thereafter, the petitioner may submit his application for settlement of terminal benefits in normal course. It is contended that as the petitioner was not relieved by 30.04.2001 and was continuing in service, his application for withdrawal of option for voluntary retirement could not have been rejected and he should have been allowed to continue in service as before. It is further contended that the petitioner having applied for VRS under the UCO Bank Voluntary Retirement Scheme, 2000 on 22.01.2001, the subsequent circular issued on 07.04.2001 cannot have any application so far as conversion of "housing loans" of employees of VRS optees into "UCO shelter loan" is concerned. If the subsequent circular dated 07.04.2001 is given effect to and the same is not beneficial to the petitioner and he having moved for withdrawal of the application for VRS, before he being effectively relieved from due date, i.e., 30.04.2001, it cannot be said that the withdrawal application cannot be considered pursuant to communication made on 13.10.2001. Thereby, the authorities have acted unreasonably and arbitrarily.

It is further contended that the circular issued on 07.04.2001 can only apply prospectively and as such it cannot have any retrospective application as the petitioner had applied on 22.01.2001 under the scheme floated on 16.11.2000. For making a retrospective effect of the circular dated 07.04.2001 the benefit available to the petitioner under the scheme in Annexure-1 is being curtailed, thereby the same cannot be given effect to. More so, the VRS being a contract, the terms of the contract cannot be changed subsequently. Therefore, he seeks for interference of this Court.

To substantiate his contention, he has relied upon the judgment of the apex Court rendered in the cases of ***Power Finance Corporation Ltd. v. Promod Kumar Bhatia,*** (1997) 4 SCC 280, ***J.N. Srivastava v. Union of India***, (1998) 9 SCC 559, ***Sambhu Murari Singha v. Project & Development India Ltd***., (2002) 3 SCC 437 and ***Bank of India v. O.P. Swarnakar***, (2002) 9 Scale 519.

4. Mr. Somanath Mishra, learned counsel for the opposite parties contended that the petitioner having applied for voluntary retirement under the VRS scheme, 2000 floated by the bank and the same having been acted upon and consequentially the petitioner paid all the dues in accordance with the scheme, subsequently the petitioner cannot turn round and claim for withdrawal of the application for voluntary retirement submitted by him. Having accepted the application for voluntary retirement on 16.04.2001, the petitioner would have been relieved from bank service at the close of the business on 30.04.2001, and on the very same day, i.e., 30.04.2001 when the petitioner submitted application for withdrawal of the application for voluntary retirement before he was relieved, the same should not have been permitted. More particularly, the acceptance of application for voluntary retirement on 16.04.2001 under the VRS scheme was conditional one to the extent that he would be relieved from service on 30.04.2001, therefore on 30.04.2001 the petitioner was relieved from service itself. As such, the petitioner had already been paid Rs.39, 108.03 towards leave encashment on 18.06.2001 and Rs.2,61,042.040 was adjusted for different loans/advances against the petitioner. The bank had paid Rs.2,64,802/- to the petitioner on 21.12.2002, out of which Rs.2,13,315.60 was adjusted towards remaining loans of the petitioner and Rs.51,486.40 was left in his SB account. To substantiate his contention, he has relied upon the judgment the judgment of the apex Court rendered in ***Vice Chairman and Managing Director. A.P. Sidc Ltd. v. R. Varaprasad and others***, (2003) 11 SCC 572 and also judgment of this Court rendered in the case of ***Chandrakanta Tripathy v. State of Orissa and others***, 2014 SCC Online Ori 258.

5. This Court heard Mr. Debasis Nayak, learned counsel for the petitioner, as well as Mr. Somanath Mishra, learned counsel for the opposite party and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. The undisputed fact being that opposite party floated a VRS scheme on 16.11.2000 (annexure-1 to the writ petition), pursuant to which the petitioner applied for voluntary retirement on 22.01.2001 and the same was also accepted on 16.04.2001 stating inter alia that the petitioner would be relived from service of the bank at the closure of the business on 30.04.2001. On 30.04.2001, the petitioner filed an application for withdrawal of the application for voluntary retirement, but the same was not considered.

7. For just and proper adjudication of the case in hand, causes-10.5 and 10.9 of UCO Bank Employees' Voluntary Retirement Scheme, 2000 are reproduced below:-

" *xxx* *xxx* *xxx*

10.5 It will not be open for an employee to withdraw the request made for voluntary retirement under the scheme after having exercised such option.

xxx xxx xxx

10.9 All payments under the scheme and any other benefit payable to an employee will be subject to the prior settlement/repayment in full of loans, advances, returning of bank's property and any other outstanding dues against him and payable by him to the bank. However, in case of Housing Loan, employee shall have the option of getting it converted into UCO Shelter Scheme applicable for customers. Repayment period will be decided by the Bank. At the discretion of the Bank Interest accrued on Housing Loan has to be paid in full before conversion under UCO Shelter Scheme."

8. As per the above provisions, it is not open for an employee to withdraw the request made for voluntary retirement under the scheme, after having exercised such option, and more so all payments under the scheme and any other benefit payable to an employee will be subject to the prior settlement/repayment in full of loans, advances, returning of bank's property and any other outstanding dues against him and payable by him to the bank. However, it is also clarified that in case of any "housing loans", employee shall have the option of getting it converted into "UCO shelter loan" applicable for customers and the repayment period will be decided by the bank. Further, on the discretion of bank, interest accrued on housing loan has to be paid in full before conversion under UCO shelter scheme. When such scheme dated 16.11.2000 is in force, on 07.04.2001 another circular was issued, and in terms of clause-10.9 of the scheme to convert the "housing loans" of VRS optees into "UCO bank shelter loan" and for that purpose it is required that *option has to be sought from the VRS optees*. Nothing has been placed on record to indicate that any option has been sought for from the petitioner for conversion of "housing loans" to "UCO bank shelter loan". Had this opportunity been given to the petitioner, he might or might not have exercised his option for conversion of "housing loan" to "UCO bank shelter loan". Without calling for any option, the bank has deducted the entire amount from the VRS benefit admissible to the petitioner, which is not in conformity with the provisions contained in clause-10.9 read with circular issued on 07.04.2001. More particularly, by the time the petitioner filed his application for VRS on 22.01.2001, the circular dated 07.04.2001 had not seen the light of the day. Therefore, the petitioner had no occasion to exercise his option for conversion of "housing loan" to the "UCO bank shelter loan" account. Admittedly, the petitioner's application for voluntary retirement had been accepted on 16.04.2001, which was to be given effect to after the closure of business hour on 30.04.2001. Thereby, the acceptance of application for voluntary retirement of the petitioner is purely conditional, meaning thereby, the petitioner was allowed to continue till the end of business hour on 30.04.2001, even though the order of acceptance had been

communicated vide letter dated 16.04.2001. If the petitioner moved for withdrawal of the application for voluntary retirement under VRS on 30.04.2001, before closure of the business hour, then what would be the consequence that has to be examined on the basis of the law laid down by the apex Court.

9. In ***Dinesh Chandra Sangma v. State of Assam***, AIR 1978 SC 17, the apex Court held that voluntary retirement is a condition of service which (unless a different intendment is disclosed) gives an option in absolute terms to a public servant to voluntarily retire after giving the requisite notice and after he has reached the qualifying age or rendered the qualifying service, as the case may be.

10. In ***State of Haryana v. S.K. Singhal***, (1994) 4 SCC 293, the apex Court held that the position at what point of time voluntary retirement takes effect has been exhaustively considered. The Court identified two classes of cases:

> *"(a) Where rules are couched in language which results in automatic retirement on expiry of period specified in employees' notice;*
>
> *(b) Where even after the expiry of the specified notice retirement is not automatic but an express order granting permission is required to be communicated i.e. master-servant relationship continue after the period specified in the notice till such acceptance is communicated."*

11. In ***New India Assurance Co. Ltd. v. Raghuvir Singh Narang,*** (2010) 5 SCC 335, the apex Court held that where a statutory scheme specifically prohibited the employee from withdrawing option of voluntary retirement, such a scheme would prevail over general principles of contract and that an offer could be withdrawn at any time before its acceptance stands concluded.

12. In ***A.K.Bindal v. U.O.I.,*** (2003) 5 SCC 163, the apex Court held that upon accepting the money due, the jural relationship between the employer and employee cases to exist.

13. In ***Power Finance Corporation Ltd.*** (supra), while considering the scheme of voluntary retirement which had been floated and pursuant thereto respondent filed application for voluntary retirement, but subsequently the corporation had withdrawn the scheme, although the offer had been accepted and such acceptance was to take effect from 31.12.1994, the apex Court held that the acceptance of the offer to voluntarily retire being subject to adjustment of the amount payable to the respondent, the same did not attain finality, therefore it was observed as follows:

> *"It is now settled legal position that unless the employee is relieved of the duty after acceptance of the offer of voluntary retirement or resignation, jural relationship of the employee and the employer does not come to an end. Since the order accepting the voluntary retirement was a conditional one, the conditions ought to have been complied with. Before the conditions could be complied with,*

the appellant withdrew the scheme. Consequently, the order accepting voluntary retirement did not become effective. Thereby no vested right has been created in favour of the respondent. The High Court, therefore, was no right in holding that the respondent has acquired a vested right and, therefore, the appellant has no right to withdraw the scheme subsequently."

14. In ***J.N. Srivastava*** (supra), the apex Court held as follows:-

"It is now well settled that even if the voluntary retirement notice is moved by an employee and gets accepted by the authority within the time fixed, before the date of retirement is reached, the employee has locus poenitentiae to withdraw the proposal for voluntary retirement."

15. In ***Shambhu Murari Sinha*** (supra), the apex Court held as follows:-

"Coming to the case in hand the letter of acceptance was a conditional one inasmuch as, though option of the appellant for the voluntary retirement under the Scheme was accepted but it was stated that the "release memo along with detailed particulars would follow". Before the appellant was actually released from the service, he withdrew his option for voluntary retirement by sending two letters dated 7-8-1997 and 24-9-1997, but there was no response from the respondent. By office memorandum dated 25-9-1997 the appellant was released from the service and that too from the next day. It is not disputed that the appellant was paid his salaries etc. till his date of actual release i.e. 26-9-1997, and therefore, the jural relationship of employee and employer between the appellant and the respondents did not come to an end on the date of acceptance of the voluntary retirement and the said relationship continued till 26-9-1997. The appellant admittedly sent two letters withdrawing his voluntary retirement before his actual date of release from service. Therefore, in view of the settled position of the law and the terms of the letter of acceptance, the appellant had locus poenitentiae to withdraw his proposal for voluntary retirement before the relationship of employer and employee came to an end."

16. The question, which has been raised in the present application, was similar in the case of ***O.P. Swarnakar*** (supra), and the apex Court, while considering the same, took into consideration the request of the employee seeking for VRS and held as follows:-

"The request of employees seeking voluntary retirement was not to take effect until and unless it was accepted in writing by the competent authority. The Competent Authority had the absolute discretion whether to accept or reject the request of the employee seeking voluntary retirement under the scheme. A procedure has been laid down for considering the provisions of the said scheme to the effect that an employee who intends to seek voluntary retirement would submit duly completed application in duplicate in the prescribed form marked "offer to seek voluntary retirement" and the application so received would be

considered by the competent authority on first come first serve basis. The procedure laid down therefor, suggests that the applications of the employee would be an offer which could be considered by the bank in terms of the procedure laid down therefor. There is no assurance that such an application would be accepted without any consideration."

17. Even though the bank has floated a scheme and the same has no statutory flavor but the same has been floated by way of contract, therefore, the principle of Indian Contract Act would be applicable. Keeping in view the parameters prescribed under the scheme, it can safely be deduced:

"(i) The banks treated the application from the employees as an offer which could be accepted or rejected.

(ii) Acceptance of such an offer is required to be communicated in writing.

(iii) The decision making process involved application of mind on the part of several authorities.

(iv) Decision making process was to be formed at various levels.

(v) The process of acceptance of an offer made by an employee was in the discretion of competent authority.

(vi) The request of voluntary retirement would not take effect in praesenti but in future.

(vii) The Bank reserved its right to alter/rescind the conditions of the scheme."

18. If the scheme is admittedly contractual in nature, the provisions of Indian Contract At, 1872 would be applicable. Once it is found that by giving the option under the scheme, the employee did not derive an enforceable right, the same in absence of any consideration would be void in terms of Section 2(g) of the Contract Act as opposed to Section 2(h) thereof. Admittedly, the offer made by the petitioner on 22.01.2001 was accepted on 16.04.2001 on conditional basis stating that he would be relieved from service of the bank on the closure of the business hour on 30.04.2001 and he was to submit his application for settlement of terminal benefits in normal course, which clearly indicates that there was no passing of consideration to the petitioner even though the same had been accepted on 16.04.2001 giving a rider that he would be relieved from 30.04.2001. Therefore, if the petitioner submitted his application on 30.04.2001 for withdrawal of his application for voluntary retirement before he was relieved from office after closure of business on the very same day, the same could not have been denied after long lapse of six months period, i.e., on 13.10.2001 stating inter alia that his withdrawal application cannot be considered.

19. In ***R. Varaprasad*** (supra), as relied upon by Mr. Somanath Mishra, learned counsel for the opposite party, consideration has altogether been made to a different context wherein the apex Court held that question of withdrawal of the applications

made for voluntary retirement, after their acceptance, did not arise and the employee could not be permitted to do so in law. The factual matrix of the said case was that the employees are covered by VRS Phase-III and the Corporation fixed the cut-off date as 31.10.1998 for VRS Phase-III. The employees had applied under the scheme on 31.10.1998 and 10.10.1998 respectively. The Corporation accepted their options on 24.11.1998 and 27.10.1998 which were acknowledged by the employees on 26.11.1998 and 02.11.1998. Thereafter, they applied for withdrawal of the option given for VRS on 08.01.1999 and 26.02.1999 respectively. The employees could not be relieved from service along with large number of other employee, who were relieved on 31.07.1999 under VRS Phase-III because of the interim order granted by the High Court. Therefore, the apex Court held that question of withdrawal of their applications made for seeking voluntary retirement, after their acceptance, did not arise and they could not be permitted to do so in law. It is settled principle of law that voluntary retirement once accepted in terms of the scheme or rules, as the case may be, cannot be withdrawn.

20. In ***State Bank of Patiala v. Romesh Chander Kanoji***, (2004) 2 SCC 651, it is categorically held that after the date of closure of VRS, the parties stood precluded from withdrawing it in view of the judgment of the Apex Court in ***Bank of India v. O.P. Swarnakar***, (2003) 2 SCC 721. The view taken in ***State Bank of Patiala v. Jagga Singh***, (2004) 2 SCC 201 has also impliedly affirmed the view taken in ***O.P. Swarnakar*** case (supra)

21. In ***Chandrakanta Tripathy*** (supra) this Court held that the petitioner is entitled to get his dues as per the VRS which had been released by the P.E. Department in favour of the Corporation to be paid to the petitioner within a period of three months.

22. Considering the law as discussed above, this Court is of the considered view that the petitioner's application for voluntary retirement having been accepted, may it be conditional basis, the same cannot be permitted to be withdrawn. So far as applicability of the circular dated 07.04.2001 is concerned, the same has got prospective application and on that basis the deduction made, without giving opportunity and without asking for any option from the petitioner, cannot be held to be justified and thus is contrary to clause-10.9 of the VRS Scheme, 2000. The deduction of the housing loan from the VRS benefit unilaterally, without calling for an option, cannot sustain in the eye of law. More particularly, the entire action has been taken pursuant to the circular issued on 07.04.2001, which has no application to the case of the petitioner, when he submitted his application on 22.01.2001 and as such by that time the circular in question had not seen the light of the day. Thereby, the impugned action of the authorities is arbitrary, unreasonable and contrary to the provisions of law.

23. In view of the aforesaid facts and circumstances, this Court is of the considered view that by the time the petitioner had approached this Court by filing the present application on 22.11.2002, he was of 43 years, and by this time he must have attained 59 years of age and his application for voluntary retirement had been accepted on conditional basis on 16.04.2001 giving effect from closure of business of 30.04.2001 and as such the petitioner has received his terminal benefits. But deduction of his financial benefits towards housing loan, having been done arbitrarily, unreasonably and without calling for any option in terms of clause-10.9 of scheme, the bank is directed to call for an option from the petitioner for conversion of "housing loan" of employees under the UCO bank VRS optee into "UCO shelter loan" in terms of clause 10.9 of the scheme and if any financial benefit is accrued to the petitioner, the same shall be released/refunded in favour of the petitioner accordance with law forthwith as per the Voluntary Retirement Scheme, 2000.

25. The writ petition is allowed to the extent indicated above. However, there shall be no order as to cost.

2018 (II) ILR - CUT- 474

D. DASH, J.

RSA. NO. 489 OF 2016

BRAHMANANDA MAHANTA & ORS. ……...Appellants

.Vs.

KALIA MAHANTA & ORS. ……Respondents

CODE OF CIVIL PROCEDURE, 1908 – Sections 96, 97, 100 read with Section 47 – Provisions under – Suit for partition – Preliminary decree challenged in First Appeal – Dismissed – Final decree signed and sealed – Execution proceeding – Objection filed under Section 47 rejected and decree held to be executable – After this a regular second appeal filed challenging the final decree – Whether maintainable, Held, No – In the appeal the matter cannot again be gone into on merit so as to nullify a prior order of the Competent Court holding the decree to have been facing with no such jurisdictional issues or any other obstacles for its fruitful execution – Once a party takes that risk, he cannot again turn back to file the appeal on merit by filing appeal or even in a pending appeal be permitted thereafter to question the decree on merit.

"There is no quarrel over the position of law that an appeal lies against a final decree. However, the rider remains in section 97 of the Code that where any party aggrieved by a preliminary decree does not appeal from such decree, he is precluded from disputing the correctness of said preliminary decree in the appeal carried against the final decree." *(Paras 8 to 12)*

For Appellants : M/s. Amit Pr. Bose, N. Hota, R.K. Mohanta, S.K. Dwibedi, D.J. Sahoo & S.S. Dash.
For Respondents : None

JUDGMENT Date of Hearing 31.07.2018 Date of Judgment- 21.08.2018

D.DASH, J.

This appeal under section 100 of the Code of Civil Procedure (for short, called as "the Code") has been filed assailing the judgment dated 05.11.2016 passed by the learned District Judge, Keonjhar in RFA No. No. 11 of 2015.

The above noted first appeal had been filed by the defendant no. 1 and the successors-in-interest of defendant nos. 2 and 3 of T.S. No. 56 of 1977-I challenging the final decree dated 18.07.2012 passed therein by the learned Civil Judge, Senior Division, Keonjhar.

The respondent nos. 1 and 2 are the son and daughter of plaintiff no.1 of the said suit whereas respondent nos. 3, 4 and 5 are the widow, son and daughter of original plaintiff no.2 respectively. The plaintiff no.3 of the suit is the respondent no. 6 when respondent no. 7 is the original plaintiff no.4 and respondent no. 8 is the defendant no.4. Rest of the respondents were not parties to the suit, still arraigned.

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 arraigned in the trial court.

3. The Title Suit No. 56 of 1977-I for partition of the joint family property has been decreed preliminarily on 06.09.1980 allotting shares to the parties as under:-

(i) Plaintiff nos. 1 to 1/Gha- 1/3rd;
(ii) plaintiff nos. 2 to 5-1/3rd; and
(iii) defendant nos. 1 to 4-1/12th each.

There was a challenge to the preliminary decree at the behest of these defendants by carrying a first appeal to this Court i.e. F.A. No. 04 of 1981, said appeal has been dismissed on 23.06.2008. So the correctness of the preliminary decree is no more open to challenge and in that way it has reached finality.

4. The plaintiffs having filed an application for making that preliminary decree final so as to cause division of the properties in accordance with the share allotted to

the parties under the preliminary decree, the Civil Court Commissioner was deputed to make the division of the properties in consonance with the preliminary decree allotting separate parcels of the land to the parties in accordance with the share determined under the preliminary decree. The report of the Civil Court Commissioner having been accepted, the preliminary decree has been made final and has been sealed and signed on 18.05.2012.

Shortly, thereafter, the said final decree was put to the execution in Execution Case No. 69 of 2012. These defendants then filed another suit bearing C.S. No. 12 of 2014-I in the court of learned Civil Judge (Sr.Divn.), Champua with a prayer for partition of the entire family properties afresh. Then they moved this Court in Civil Miscellaneous Petition under CMP No. 817 of 2013 with a prayer which is very unusual, invoking the jurisdiction of this Court under Article 227 of the Constitution of India. The prayer was for clubbing the said execution case with the later suit filed by them.

By order dated 28.07.2014, this Court disposed of the said Civil Miscellaneous Petition with observation that it is open to the defendants to file their objections under section 47 of the Code, if so advised. The defendants then filed an application under section 47 of the Code which stood numbered as CMA No. 47 of 2014. Said application after hearing has been dismissed holding that the pleas taken therein are vague and untenable in the eye of law. Its only thereafter that those defendants as the appellants woke up to question the very final decree passed in the T.S. No. 56 of 1977-I on 18.07.2012 by filing the first appeal i.e. RFA No. 11 of 2015.

In that first appeal, they questioned the acceptance of the report of the Civil Court Commissioner by the court in seisin of the final decree proceeding contending therein that their objections to the said report have not been duly considered and have been overruled without any legal and justifiable reason despite the glaring disparity in the report in effecting the division of the property which has not been in consonance with the preliminary decree as ordained therein.

5. The objections which have been raised against the report of the Civil Court Commissioner before the lower appellate court are the followings:-

> "(i) Though the total extent of the scheduled land is A.37.56 decimals the Commissioner's report shows the same as A.38.46 decimals which proves that the report is erroneous;
>
> (ii) The report does not indicate that the plots in question were allotted after due comparison between the Sabik ad Hal settlement maps;
>
> (iii) Even though the allotment of plots is said to have been made on the basis of previous possession of the parties but the Commissioner has ignored the vital fact that some of the plots have been encroached upon and under possession of 3rd parties;

(iv) The Civil Court Commissioner has not complied with the provisions of O.26 R-14 (2) of C.P.C. (Orissa Amendment) while preparing the sketch map.

(v) Though a plot has been allotted in favour of the defendants but it being recorded as a homestead land is of no benefit to the defendants inasmuch as there is no approach or excess to the said plot."

The above objections have been countered by the opponents as under:-

"(i) the objections to the Commissioner's report raised in the present appeal were never specifically raised before the learned lower court and whatever objections were raised by them, have all been addressed properly;

(ii) the objections relating to non-comparison between Sabik and Hal settlement maps viz-a-viz the allotted plots is entirely misconceived and factually incorrect.

(iii) the defendants have failed to substantiate their pleas through oral or documentary evidence;

(iv) the final decree is entirely in conformity with the preliminary decree in letter and spirit; and

(v) the objections raised by the defendants are actuated with an unholy intent to delay the fruits of the decree from reaching the plaintiff-D.Hrs."

6. The lower appellate court keeping in view the above objections and counter objections framed the following points for determination:-

"(i) whether the report of the Civil Court Commissioner is in conformity with the preliminary decree;

(ii) whether the defendants have any basis to challenge the Civil Court Commissioner's report; and

(iii) whether the learned court below committed any illegality in accepting the Civil Court Commissioner's report and in passing the final decree."

The lower appellate court has then proceeded to judge the legality and propriety of the order of acceptance of the report of the Civil Court Commissioner which has formed a part of the final decree. It has found that the objections to the Commissioner's report as have been raised before it, had not been raised before the court in seisin of the final decree proceeding despite the opportunity being provided. It has further found that even the objections which had been raised, have been rightly overruled in the absence of any document in support for such constructions and existence of house over the relevant plot which as per their contention, have not been duly taken into consideration in proper perspective for doing needful in the matter of allotment by the Civil Court Commissioner. It has then held that the defendants have failed to show any reasonable or legal basis to challenge the report of the Civil Court Commissioner.

With the above view, the lower appellate court has also gone to address the objections relating to the increase of the extent of total area of land and that has been answered to be of no such significance and more so when the same has been well taken note of by the Civil Court Commissioner. As regards non-comparison of the Sabik and Hal maps by the Commissioner; in the absence of any such inconsistency, discrepancy or error in allotment of the share being shown, said objections have been whittled down. The last objection relating to the non-compliance of the procedure laid down under order 26 rule 14(2) of the Code (Orissa Amendment), has been held to be untenable. The ultimate conclusion is that the report of the Commissioner is in conformity with the preliminary decree and there is no such cogent reason to hold that the division effected by the Civil Court Commissioner by metes and bounds are irrational or unjustified in any manner. With such conclusions, the first appeal has been dismissed.

7. Learned counsel for the appellants submitted that the courts below are not correct in accepting the report of the Commissioner whereby the lands have been allotted to the parties on the basis of the records and maps of the Hal settlement and without corelating the same with the records of the Sabik settlement; furthermore, by completely overlooking the physical possession of these defendants in respect of the properties since the time of their forefathers. He further submitted that as per the said report of the Civil Court Commissioner which has been accepted, these defendants have been allotted with sizable extent of the lands under Hal Khata no.51 which are useless and without even having any ingress or egress. He thus submitted that these are the substantial questions of law which arise in the case so as to be formulated for being answered in the appeal.

8. Before going to address the submission of the learned counsel for the appellants, one very important legal aspect strikes to me which is seen to have been completely lost sight of by the lower appellate court.

There is no quarrel over the position of law that an appeal lies against a final decree. However, the rider remains in section 97 of the Code that where any party aggrieved by a preliminary decree does not appeal from such decree, he is precluded from disputing the correctness of said preliminary decree in the appeal carried against the final decree.

9. In the present case, final decree has been passed upon acceptance of the report of the Civil Court Commissioner overruling the objections then raised by these defendants on 18.05.2012. The final decree has been sealed and signed on 18.5.2012. Thereafter no such appeal was carried out by any of the parties

questioning the said final decree. On the other hand, a suit for partition afresh was filed. In the interregnum period much before the second suit, the plaintiff-decree holders had already levied Execution Case No. 69 of 2012 putting that very final decree passed in T.S. No. 56 of 1977-I to the execution. Taking a cue from the observation of this Court made in CMP 817 of 2013, these defendants opted to file an application under section 47 of the Code in that execution proceeding. That application has been rejected and that order is no more challenged. The implication of that order of rejection dated 2.4.2018 passed by the executing court in CMA No. 47 of 2014 is that the final decree in question is executable and thus there is no legal obstacle for the execution case to proceed for its fruitful culmination. This gives rise to a question as to whether a party challenging the execution part of the decree under execution by filing an application under section 47 of the Code, if can further challenge the very decree on merit after being unsuccessful in that move in getting the decree held as in executable, by carrying a regular appeal.

10. Section 47 of the Code is very clear that all the questions arising between the parties to the suit or their representatives relating to the execution, discharge and satisfaction of the decree shall be determined by the court executing the decree and no separate suit is maintainable. As per the provision of section 47 of the Code which stood before the coming into force of Code of Procedure Amendment Act, 1976 (w.e.f. 1.2.1977), it was there in sub-section (2) of said section that the court may subject to any objection as to limitation or jurisdiction treat a proceeding under the section as a suit. This has been omitted and consequentially the order passed on an application under section 47 of the Code no more remains within the ambit of the definition of 'decree' under section 2(2) of the Code. In a proceeding under section 47 of the Code, the scope remains to raise the objections with regard to the execution, discharge and satisfaction.

11. Present is a case, where the objections are in relation to the execution. So the question of the executability of the decree has been held in the affirmative by the competent executing court. The decree therefore stood valid for its due execution and these defendants have surrendered to said decision without further assailing the same in the appropriate higher forum as provided in law. Therefore, those aggrieved parties in my considered view cannot thereafter take recourse of filing a regular appeal assailing the very final decree on merit and even after taking the chance of questioning the execution of the decree even they cannot further pursue a pending appeal for a decision with regard to the merit of said appeal and that pending appeal then in that event does not survive for decision. The decision on the application under section 47 of the Code would operate as 'resjudicata'. Thus they are precluded from questioning the said decree on its merit after failure to get it declared as in executable. A decree can be put to jeopardy by filing an appeal and when the appeal is pending and the execution of the decree is complete, certainly provision of restitution as provided in section 144 of the Code will come to the

rescue of the party coming out successful in the appeal and the culmination of execution proceeding would not frustrate the appeal having any adverse impact on its merits which is standing for decision. Its only, we may say, a deprivation/suspension for the time being. In the case on hand, the defendants having failed to get the decree declared in-executable have further moved to question the decree on merit, particularly assailing the report of the Civil Court Commissioner and its acceptance which forms a part of the final decree whose executability has been upheld.

So now in the appeal the matter cannot again be gone into on merit so as to nullity a prior order of the Competent Court holding the decree to have been facing with no such jurisdictional issues or any other obstacles for its fruitful execution. Once a party takes that risk, he cannot again turn back to file the appeal on merit by filing appeal or even in a pending appeal be permitted thereafter to question the decree on merit.

12. Furthermore, a careful reading given to the very order passed by the Executing Court in CMA No. 47 of 2014 reveals that these appellant-defendants had raised all such objections pointing out the deficiencies in the said report of the Civil Court Commissioner as to be not in consonance with the preliminary decree and those have been overruled. It has ultimately been held that the decree would proceed for its fruitful execution. The executing court was competent having the jurisdiction to decide the objections with regard to the execution of the decree in an application under section 47 of the Code. Keeping in view the objections and the counter objections made therein, when the executing court decides one way or other, it is not so permissible to be decided by another court in another proceeding between the parties, be it in any pending or a newly instituted proceeding, other than carrying appropriate proceeding to the forum prescribed for challenging the said order.

The fundamental reason is that once a competent court has given a seal for approval in respect of the merit of the matter which has attained finality, another proceeding between the parties to unsettle the same is not entertainable. So here, a competent court has overruled the objections as to the execution of the decree and that order having not been challenged as provided in law, the appellate court coming to be in seisin of an appeal against that very decree after that order, even if finds some merit as to said objections, there remains no jurisdiction with that court, to unsettle that order overruling the objections. In other words, that those conclusions overruling the objections as to whether given rightly or wrongly stand as *res judicata* in any other subsequent proceeding between the parties.

13. The tenacity and stamina with which the appellants have been litigating for decades must be admired but nothing else. It appears that they have been taking several courts for a ride through continuous and fruitless litigation spanning several decades.

In that view of the matter, the appellants are accordingly cautioned and warned in so far as their future courses of action are concerned.

14. For the aforesaid discussion and reasons, the submission of learned counsel for the appellant stands repelled. This Court thus finds no such substantial question of law for being formulated to be answered, meriting admission of this appeal. Accordingly, the second appeal stands dismissed.

2018 (II) ILR - CUT- 481

B. RATH, J.

W.P.(C). NO.11052 OF 2008

BIJAY KISHORE DAS .....….Petitioner

.Vs.

ORISSA FOREST DEVELOPMENT CORPORATION LTD & ORS. ……..Opp. Parties

DISCIPLINARY PROCEEDING – Punishment – Scope of interference by exercising Writ jurisdiction – Held, while doing judicial review of Administrative action, Courts can only examine the decision making process of administrative authorities, but not the decision itself.

Case Laws Relied on and Referred to :-

1. (2017) 13 SCC 621-B : Gohil Vishvaraj Hanubhai & Ors .Vs. State of Gujarat & Ors.

For Petitioner : M/s. B.N. Samantaray, G.N. Mishra.
For Opp.Parties : M/s. S.K. Pattnaik, Sr. Adv., U.C. Mohanty, P.K. Pattnaik, D.P. Das, Devashish Pattnaik.

JUDGMENT Date of hearing : 11.07.2018 Date of Judgment : 17.07.2018

B. RATH, J.

This is a writ petition challenging the imposition of penalty in the way of recovery of 50% of the loss sustained in the process for the reason attributable to the petitioner passed in the Disciplinary proceeding vide Annexure-4 and the appellate order confirming the above vide Annexure-6.

2. Short background involved in the case is that the petitioner while continuing as Field Assistant, was proceeded on charges framed under Annexure-1. Explanation of the petitioner remaining not satisfactory, allegations involving the petitioner were

enquired into and on completion of the enquiry, the Enquiry Officer suggested that considering that the petitioner was in the verge of retirement while awarding the punishment of make good the pecuniary loss caused to the OFDC on account of shortage of stock on the delinquent-petitioner, the petitioner was also censured severely with direction for release of withheld pay and treating the period from 13.09.2001 to 03.01.2002 as leave. It was also directed therein to charge-sheet the S.D.M. as he is also responsible for the losses. Upon receipt of the show-cause to the enquiry report, the Disciplinary Authority taking stock of the matter while computing misappropriation to the tune of Rs.1,48,366/- made the delinquent liable for 50% of the stock and directed for recovery of this amount from the delinquent with further direction for stoppage of one increment without having cumulative effect in future, further warning while confirming the recommendation nos.3 and 4 of the Enquiry Officer as it is appearing at Annexure-4.

3. Petitioner preferred Appeal vide Annexure-5. The appeal was disposed of by the appellate authority vide Annexure-6 on further computation of the loss reducing the amount to be recovered, directed recovery for Rs.22,977/- only. It may be stated here that in the meantime the petitioner had also approached this Court in W.P.(C) No.1076 of 2008 which was disposed of with permission to the petitioner for preferring an appeal.

4. Assailing the orders at Annexures-4 and 5, Shri G.N. Mishra, learned counsel appearing for the petitioner submitted that for no service of the enquiry report along with the show-cause for proposed punishment, there is no following of the principle of natural justice. Shri Mishra, learned counsel appearing for the petitioner further contended that looking to the discussions in the enquiry report, it appears that the Enquiry Officer has proceeded beyond the charges. Further, taking this Court to the discussions of the Disciplinary Authority, particularly the observation of the Disciplinary Authority that the Enquiry Officer acted in perfunctory and hastened manner and failed to consider the matter appropriately, the Disciplinary Authority instead of remanding the matter back entered into the merit involving this and decided it finally. Further, since the Enquiry Officer found the S.D.M. also guilty of the offence, for no initiation of Disciplinary proceeding involving the S.D.M., petitioner has been discriminated thereby. In the above premises, Shri G.N. Mishra, learned counsel appearing for the petitioner prayed this Court for interference and setting aside the orders at Annexures-4 and 5.

5. Shri S.K. Pattnaik, learned senior counsel appearing for the Orissa Forest Development Corporation Limited (for short "the Corporation") taking this Court to the discussions in the enquiry as well as in the appellate order while strongly disputing that the punishment has been awarded by the Disciplinary Authority in absence of supply of copy of enquiry report, further contended that there has been full compliance of natural justice in the enquiry proceeding as well as in the

Disciplinary proceeding. On proper analysis of the entire materials, the Enquiry Officer concluded the proceeding finding the petitioner at least liable to loss to the extent of 50%. Taking to the specific plea of the delinquent, the petitioner in his statement during course of personal hearing in the Departmental proceeding to the effect "since the stock was of two years old in the meanwhile those had been seriously detrimental due to weathering effect, white ant attack the stocks are dismantled naturally". Shri Pattnaik, learned senior counsel appearing for the Corporation submitted that at one hand the delinquent while denying his liability and shifting the responsibility of transportation to the higher officer, at the same time also was contending that there is natural loss of bamboos for the delayed transportation as indicated hereinabove. Shri Pattnaik, learned senior counsel further taking this Court to the explanation submitted by the petitioner vide Annexure-2 where the delinquent-petitioner took the same stand as reflected hereinabove, contended that there has been divergent response by the petitioner while denying the liability or loss of property of the Corporation. It is in the above situation of the case and for the detail consideration by the Enquiry Officer as well as the further consideration of the matter, thereby drastically reducing the award of recovery by the appellate authority or re-computation of the loss aspect, the petitioner though was liable to be punished under major misconduct, but considering his service was at the fag end of the career, the Disciplinary Authority choose to impose a lenient punishment requiring no interference in the writ petition.

5. Considering the rival contentions of the parties, this Court finds, the petitioner faced two charges as follows :-

> "**Charge No.I**.
>
> While he was working in Haladiaseni BCD for the year 1999-2000 crop, he has produced 4670 IDB. Full bundle and 8530 CDB. Out of said stock he transported 1357 IDB and 5633IDB to depot within the working period. A joint physical verification was made in Haladiaseni BCD conducted by Range Officer, Baramba and S.D.M. Narsinghpur on 15.1.2000 in presence of Sri Dash and Sri R.C. Kar, F/A and concerned Forester. During the physical verification it is found that no bamboo stock were available in the coupe. It is clearly evident that he has misappropriated the OFDC stock with malafied intention for which O.F.D.C. Ltd. has sustained the loss amounting to Rs.1,48,366/- being the cost of 3313 I.D.B. and 2897 C.D.B. For such loss, Sri Dash, F/A is fully responsible for the same.
>
> **Charge No.II.**
>
> Sri Bijoy Kishore Dash, F/A was transferred from Haladiaseni B.C.D. to Chandragiri (A) B.C.D. vide O.O. No.129 dt. 22.6.01 and has been directed to handed over the stock to Sri R.c. Kar, F/A with immediate effect. But, he has failed to handedover the stock to his successor Sri Kar, F/A who joined thereon 27/7/01. He has been reminded to handed over the stock of Haladiaseni B.C.D. to Sri Kar, F/A by 31/8/01 vide this office letter No.3887 dt.30.8.01. But he did not handover

the charges in time and applied leave on 12/9/01 for availing C.L. from 13/9/01 to 15/9/01 (3 days) and left his headquarter unauthorisedly without permission of the S.D.M. Narsinghpur. Due to disobedience of order for non-handing over the charges within the time limit given to Sri Dash, F/A the salary for the period from 28/7/01 to 12/9/01 has been held up. Further, Sri Dash, F/A extended his leave from time to time with effect from 16/9/01 to 30/9/-1, 1/10/01 to 20/10/01, 21/10/01 to 3/1/02 (113 days) and did not resume his duty. Inspite of repeated reminder issued by the S.D.M. Narsinghpur vide S.D.M. Narsinghpur office letter No.1256 dt. 17.10.01, Telegram dt.23/1/01 and Regd. Letter No.1449 dt.1/12/01 to resume duty and to handover charges. But he did not turn up to his duty and extended leave from time to time at his sweet will. It is clearly understood that he has avoided to handover the charges, as there is no stock of bamboo were available which is well known to him. For such willful absent and negligence in duty the O.F.D.C. has sustained a great loss amounting to Rs.1,48,366/-."

6. Petitioner on being asked to file a show-cause, submitted his response at Annxure-2 apart from other response, petitioner had a clear admission that there has been damage of some properties on account of exposure of the material to hit and rain and further for white ant attack and thereby there is natural decaying of the materials. Therefore, it appears that this is not a case that there is no collection of the volume of materials, put under the custody of the petitioner and further could not be transported. Even though the petitioner took the plea of innocence but from the entire statements of the petitioner recorded during the enquiry, this Court nowhere finds, the petitioner being able to satisfy his such contention. Further, looking to the discussions in the enquiry report, this Court also finds, there is elaborate discussions on the loss of materials with document in proof. The Enquiry Officer even though recommended for higher recovery, the appellate authority, however, entering into the details as well as the calculation part while observing that the Enquiry Authority assessed the material in perfunctory manner but however on taking fresh stock of the annual loss, has drastically reduced the amount and the petitioner has been punished simply with award of recovery and censure. Admittedly, the petitioner has been superannuated immediately thereafter. Law has been settled to the extent that High Court in exercise of power under Article 226 of the Constitution of India cannot sit in these matters as appellate authorities. The Hon'ble Supreme Court in a judgment in the case of ***Gohil Vishvaraj Hanubhai and others vrs. State of Gujarat and others,*** reported in ***(2017) 13 SCC 621-B*** has categorically held that while doing judicial review of Administrative action, Courts can only examine the decision making process of administrative authorities, but not the decision itself.

Applying the principle indicated hereinabove, for the authorities going to the depth of the matter, since this Court finds, there is no infirmity in the decision making process and for the findings of the Disciplinary Authority as well as the Appellate Authority being based on sound reasoning, this Court has no scope for interfering in such Administrative action.

7. Resultantly, the writ petition stands dismissed. No cost.

2018 (II) ILR - CUT- 485

B. RATH, J.

W.P.(C) NO. 4414 OF 2003

M.YELLAIAH .....Petitioner

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition challenging the order of dismissal – Petitioner, a Constable in CISF challenges the order of dismissal – Petitioner was arrested being involved in a criminal case– Disciplinary proceeding initiated which was stayed by High court till disposal of the criminal case – Second proceeding initiated on the charges that the petitioner did not accept the order of suspension and had not intimated about his arrest in a criminal case – Second proceeding culminated with the punishment of dismissal – Whether the punishment awarded was disproportionate to the charges levelled ? – Held, Yes – Order of punishment set aside – Matter remitted back to impose lesser penalty as per Rule 34 of the CISF Rules, 2001. (Para 11)

Case Laws Relied on and Referred to :-

1. AIR 2001 SC 24 : Kumaon Mandal Vikas Nigam Ltd. .Vs. Girja Shankar Pant & Ors.
2. AIR 2001 SC 343 : State of Punjab .Vs. V.K. Khanna & Ors.
3. (2002) 7 SCC 168 : Regional Manager & Disciplinary Authority, State Bank of India, Hyderabad & Anr. .Vs. S. Mohammed Gaffar.
4. 1994 (2) SCC 537 : State Bank of India & Ors. .Vs. Samarendra Kishore Endow & Anr.
5. AIR 1996 SC 736 : State of U.P. & & Ors. .Vs. Ashok Kumar Singh & Anr.
6. (2005) 13 SCC 228 :Union of India & Ors. .Vs Ghulam Mohd. Bhat.

For petitioner : M/s.S.K.Rath & R.K.Parida

For Opp. Parties. : Mr.A.Mohanty, Central Government Counsel

JUDGMENT Date of hearing : 23.08.2018 Date of Judgment : 05.09.2018

B. RATH, J.

This writ petition has been filed assailing the order of removal from service, vide Annexure-2 passed by the Commandant, CISF Unit, NALCO, Angul, further to quash the order of the appellate authority, vide Annexure-6 and further seeking a direction for reinstatement of the petitioner in service with all financial and service benefits with effect from 13.9.2002, the date of dismissal.

2. Short background involved in the case is that while the petitioner was working as a Constable under the CISF Establishment at FCI Unit, Talcher was

placed under suspension for alleged misconduct and involving the same is also facing criminal proceeding, vide G.R. Case No.574/1999. In the first round of litigation the petitioner filed O.J.C. No.1179/2000 challenging the continuance of the departmental proceeding simultaneously with continuance of G.R. Case No.574/1999 pending before the S.D.J.M., Talcher. This writ petition was however disposed of with an order of this Court dated 7.2.2000 thereby directing to stall the departmental proceeding till the criminal case indicated herein above is over. During course of hearing on 23.8.2018 both the Counsel appearing for the respective parties made a fair statement that G.R. Case No.574/1999 has not been concluded as of now. Be that as it may while the position stood thus, the petitioner has been charge-sheeted for second time and was directed to face a fresh departmental proceeding on the subsequent charges framed therein. The departmental proceeding on the second charge though was initially stayed by the interim order in O.J.C. No.6298/2000 but subsequently on vacation of the stay order, the second departmental proceeding was taken up and was concluded in participation of the petitioner with the order of dismissal from service, copy of which finds place at Annexure-2. The Appeal being filed also went against the petitioner and has ended in confirmation of the order passed by the departmental authority in the disciplinary proceeding as appearing at Annexure-6.

3. Assailing the impugned order orders at Annexures-2 and 6, Sri S.K.Rath, learned counsel for the petitioner suffering on account of an order of dismissal submitted that the second charge-sheet is a deliberate attempt of the department keeping in view the approach of petitioner for his moving the writ petition to this Court involving the first departmental proceeding. It is also contended by Sri Rath, learned counsel for the petitioner that looking to the charges framed in the second departmental proceeding, it clearly appears, the charges are additional charges to the first departmental proceeding. Sri Rath, learned counsel for the petitioner thus contended that for pendency of the first departmental proceeding, the disciplinary authority should not have proceeded in the second departmental proceeding and as a consequence, the outcome in the second departmental proceeding becomes bad. Sri Rath further taking this Court to the documents available on record submitted that the evidence collected in the second departmental proceeding remains perverse, as it is in absence of consideration of the request of the petitioner, subsequently to allow him to receive the suspension and further in spite of the fact that the fact of arrest of the petitioner was well-known to the Arresting Officer, which was clearly disclosed by the petitioner during the roll-call in custody. Sri Rath taking this Court to the punishment aspect submitted that the punishment for dismissal of such nature of proceeding is highly disproportionate and shocking to the charges leveled against the petitioner. For the provision contained in Rule 34 of the CISF Rules, 2001, the departmental authority in the worse could have imposed a lesser punishment. Sri Rath for the petitioner also relying upon two decisions of the Hon’ble apex Court in

Kumaon Mandal Vikas Nigam Ltd. vrs. Girja Shankar Pant & others, AIR 2001 SC 24 and ***State of Punjab vrs. V.K. Khanna & others,*** AIR 2001 SC 343 submitted that for the support of the decisions referred to by him, the impugned orders become bad and the same thus require interference and granting appropriate relief in favour of the petitioner. Sri Rath, learned counsel for the petitioner on the above premises submitted that the Enquiring Officer, the disciplinary authority and the appellate authority have all failed in appreciating the above aspects of the matter thereby have committed error of law in dealing with the disciplinary proceeding.

4. In his opposition, Sri Aurobinda Mohanty, learned Central Government Counsel appearing for the opposite parties while opposing the objection to the order of disciplinary authority as well as the appellate authority by the learned counsel for the petitioner submitted that the second charge-sheet has nothing to do with the first charge-sheet as the second disciplinary proceeding was initiated under Annexure-1 on a complete new and separate aspect involving the petitioner. The petitioner neither in the appeal memorandum nor in the writ petition has alleged violation of natural justice. Sri Mohanty thus submitted that there is no infirmity in the disciplinary proceeding as well as the appellate authority requiring to be interfered with by this Court. Further for the admission of the petitioner about his detention in custody, one of the charges in the second charge-sheet involved herein is clearly established. Sri Mohanty also submitted that for the petitioner's admission to the effect that he had requested the employer to allow him to accept the suspension order though after some hour for this admission of the petitioner, other charge involving the second charge-sheet also got established. Taking this Court to the finding of the Enquiring Officer, Sri Mohanty, learned Central Government Counsel submitted that the petitioner has no case at all. Sri Mohanty thus requested this Court for rejecting the writ petition outright. Sri Mohanty while concluding his submission submitted that the action of the petitioner amounts to gross-misconduct, and therefore, there has been right punishment awarded in exercise of power under Rule 36(2) of the CISF Rules, 2001, consequently requiring no interference in the impugned orders and the writ petition deserves to be dismissed.

5. Considering the rival contentions of the parties, this Court finds, admittedly the petitioner is facing two charge-sheets, consequently two departmental proceedings. From the pleadings involving paragraph-2 of the writ petition, it appears, the first charge-sheet is involving initiation of a criminal case following an F.I.R. lodged by the Inspector, Sri Balaji Mishra requiring the petitioner along with another to face trial of offences under Sections 294, 341, 333, 307 and 34 of I.P.C. pending before the S.D.J.M., Talcher in G.R. Case No.574/1999. The first departmental proceeding was initiated under Rules 32 of the CISF Rules. It further appears that pending such departmental proceeding following Rule 33 it issued a suspension order involving the petitioner. For the petitioner's refusing to accept the suspension order instantly and further for the information with the employer that in

the meantime, the petitioner has been arrested and kept in custody for some days, which fact has not been informed by the petitioner, delinquent to the authority, the departmental authority charged the petitioner for second time and article of charges therein reads as follows :-

"Article-I

No.921433126 Constable M.Yellaiah of CISF Unit FCI, Talcher was placed under suspension by Asst.Commandant, CISF Unit FCI Talcher vide Order No.V-13014/CISF/Disc/FCI(T)/99/2317 dated 13.12.99. While SI/Exe A.N.Tiwari along with SI/Min.MD. to receive the suspension order, he flatly refused to receive the same on 13.12.99 at about 1740 hrs. In this connection a GD entry has been made at CISF Unit FCI Talcher vide GD No.411 dated 13.12.99.

Article-II

No.921403126 Constable M.Yellaiah of CISF Unit FCI Talcher was arrested by P9lice on 10.1.2000 at 1900 hrs. Later on he was forwarded to Court on 11.1.2000 at 11 A.M. by Police. In this regard, OIC Bikrampur Police Station has submitted a report dated 11.1.2000 to Asst. Commandant, CISF Unit, FCI Talcher. But Constable M.Yellaiah did not inform about his arrest to susperior officer and deliberately suppressed the fact. Hence, the charge."

In between both the charge-sheets, it appears that for simultaneous continuance of the criminal proceeding as well as the departmental proceeding, the petitioner moved the High Court in O.J.C. No.1179/2000 wherein by order dated 7.2.2000 this Court passed the following order :-

"Heard learned counsel for the parties.

Prayer has been made in this writ application for staying the Disciplinary Proceeding initiated against the petitioners pending before the Commandant, Central Industrial Security Force Unit, Nalco, Angul (Opp.Party No.1) during pendency of G.R. Case No.574 of 1999 before the learned S.D.J.M., Talcher.

Having perused the charge-sheet and the prosecution report, we of the view that in the facts and circumstances of the case the Disciplinary Proceeding initiated against the petitioners pending before the opp.party no.1 shall remain stayed till the disposal of aforesaid criminal case.

It further appears that during pendency of the Departmental Proceeding the petitioners have been asked to vacate the quarters in question by notice dated 15th January, 2000 issued by the Assistant Commandant, C.I.S.F., Unit, F.C.I., Talcher contained in Annexure-5.

In our view, when the Departmental Proceeding is pending, the authority ought not to have passed such order. We accordingly, direct that so long the Departmental Proceeding will remain pending, the aforesaid order contained in Annexure-5 shall not be implemented.

With the aforesaid direction the writ application as well as the misc. case are disposed of."

From reading the aforesaid order, it appears, this Court in disposal of the aforesaid writ petition has directed stay of the first departmental proceeding till disposal of the criminal case, i.e., G.R. Case No.574/1999. From the statement of both the Counsel and as recorded herein above in paragraph-3, this Court finds, G.R. Case No.574/1999 is still pending. From the submission and counter-submission of the respective parties, this Court since finds, there is no allegation of the petitioner regarding violation of natural justice in holding the second disciplinary proceeding except the allegation that the second disciplinary proceeding since had a bearing on the disposal of the first disciplinary proceeding, the second disciplinary proceeding should have waited till disposal of the first disciplinary proceeding and secondly, for the offences involved in the second disciplinary proceeding, the punishment of dismissal awarded by Annexure-2 and confirmed in Annexure-6 is disproportionate to the quantum of offences, this Court proceeds in the writ petition to consider whether for the pendency of the first disciplinary proceeding as of now, the second disciplinary proceeding should have been concluded or not ? and further whether the offences involved invited a final punishment in the nature of dismissal from service or not ?

6. Coming to the background involved in the case, this Court finds, both the proceedings are of different nature. For the first provision involving the petitioner's facing a criminal charge and trial, vide G.R. Case No.574/1999 and for initiation of the first disciplinary proceeding, it was incumbent on the part of the department, the disciplinary authority to exercise its power under Rule 33 of the CISF Rules, 2001. Consequently, this Court finds, there is no infirmity in issuing the suspension order. It is also admitted by the petitioner that he at the first instance declined to receive the suspension order but however subsequently, i.e., after ten minutes he requested the authority to receive the suspension order. Further from the background of the case, it also appears, there is admission by the petitioner himself that he was kept in custody involving the G.R. Case No.574/1999 for some days.

7. It is in the above circumstance, this Court finds no difficulty in observing that both the charges framed involving the second disciplinary proceeding are independent charges and have nothing to do with the charge involving the first disciplinary proceeding. Accordingly there is no wrong in proceeding in the second disciplinary proceeding. The question no.1 is answered against the petitioner and this Court observes that there is no illegality in concluding the second proceeding.

8. Now coming to the second question involved herein, this Court finds, the suspension order issued against the petitioner is on account of the petitioner's facing a criminal charge, vide G.R. Case No.574/1999. This matter is appearing admittedly pending as of now. Therefore, the suspension aspect might be maximum continued and consequently order, if any, would have been passed depending on the outcome in the G.R. Case No.574/1999 and also the outcome of the first disciplinary proceeding. It is at this stage, considering the allegation in the first charge that the

petitioner denied to receive the suspension order on its being served on the petitioner by the disciplinary authority, this Court from the facts, narrations and pleadings of the parties finds, though the petitioner on the first instance refused to receive the suspension order but within a few minutes, he received the same. Secondly, the petitioner's remaining under the custody of the police involving the pendency of the G.R. Case is only a matter of interim custody pending final adjudication of the criminal proceeding. Therefore, the interim custody of the petitioner pending final adjudication of the G.R. Case cannot be construed as the petitioner is facing conviction. The CISF Rules nowhere prescribe any provision for dealing with such person remaining in custody for some days that too pendency of a criminal proceeding. Coming to Rules 35, 36 & 37 of the CISF Rules, 2001, this Court finds, Rule 35 deals with petty punishments whereas Rule 36 deals with procedure for imposing major penalties and Rule 37 prescribes procedure for imposing minor penalties. Rule 36 while deals with major penalty while prescribing the procedure has a clear indication of imposing penalties, as specified in Clause-i to Clause-iv of Rule 34, which includes several type of punishment.

9. This Court has also gone through the decisions cited by Sri Rath, learned counsel for the petitioner. Going through both decisions, this Court finds, both the decisions have no application to the case at hand.

10. In the case of ***Regional Manager & Disciplinary Authority, State Bank of India, Hyderabad and another vrs. S. Mohammed Gaffar***, (2002) 7 SCC 168, their Lordships of Hon'ble apex Court mandated that the only scope for interfering in the punishment arises only when the penalty is either impermissible or shocking to the conscience of the High Court, in such event also the High Court has to direct the disciplinary authority to impose punishment of its choice instead of itself imposing or substituting the punishment. Similarly, in the case of ***State Bank of India and others vrs. Samarendra Kishore Endow and another***, 1994 (2) SCC 537, their Lordships of the Hon'ble apex Court held that in the circumstances wherein the punishment of removal imposed upon the delinquent employee is harsh but it is to be left for the consideration of the disciplinary authority and not by the High Court or the Tribunals. In another case, in the case of ***State of U.P. & others vrs. Ashok Kumar Singh & another***, AIR 1996 SC 736 involving removal of a police constable after entering into a disciplinary proceeding, the Hon'ble Apex Court also interfered in the impugned order of punishment disproportionate with the quantum of offence. In the case of ***Union of India & others vrs. Ghulam Mohd. Bhat*** (2005) 13 SCC 228, the Hon'ble apex Court held the order of removal from service passed against the respondent, who was a constable in CRPF on ground that he had overstayed his leave by 315 days was confirmed, it was therein held that the misconduct alleged called for a minor punishment and not a punishment of removal from service.

11. Considering the aforesaid provisions and the law of the land discussed herein above and though this Court finds, there is no infirmity in the disciplinary proceeding in the matter of compliance of natural justice but however considering the nature of offence involved and as discussed herein above, this Court finds, while imposing penalty the disciplinary authority looking to the nature of offences involved could have awarded lesser punishment as envisaged in Clauses-i to iv of Rule 34 of CISF Rules. Considering the imposition of penalty as a matter of fact with the disciplinary authority, this Court while observing that both the disciplinary authority and the appellate authority have not applied their mind in the matter of punishment imposed on the delinquent involved herein and also observing that the punishment imposed is disproportionate to the quantum of offence, this Court interfering in the punishment aspect involving the disciplinary proceeding, vide Annexure-2 remits the matter back to the disciplinary authority to consider the case of the petitioner for alternate punishment, as envisaged in Rule 34 of the CISF Rules, 2001 and impose punishment accordingly. As a consequence of interference in the order of the disciplinary authority, vide Annexure-2 so far it relates to punishment, this Court also interfering in the order of the appellate authority, vide Annexure-6 and sets aside both the orders confining its interference in the matter of imposition of penalty. This Court while answering the question no.2 in favour of the petitioner thus remits the matter back to the disciplinary authority to consider the penalty aspect afresh taking into consideration the observation of this Court and the penalties envisaged in Rule 34 of the CISF Rules, 2001. The benefits involving the petitioner for this period for the substituted penalty to be imposed by the disciplinary authority shall be dependent on the punishment to be awarded by the disciplinary authority against the petitioner. The proceeding will be concluded within a period of three months from the date of communication of this order. This Court also orders for release of consequential benefits after imposition of fresh punishment in favour of the petitioner within a further period of three months with interest @ 6% per annum all through. The writ petition succeeds but however to the extent indicated herein above. No cost.

2018 (II) ILR - CUT- 491

S. K. SAHOO, J.

CRLMC NO. 682 OF 2009

KHALLI BISOI & ANR. .....Petitioners

.Vs.

STATE OF ORISSA & ANR. .....Opp. Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Section 197 – Sanction for prosecution against Govt. Servant – Whether always necessary? – Different Circumstances – Indicated.

Performance of public duty under colour of duty cannot be a camouflage to commit a crime. All the acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of requirement of sanction. Public duty sometimes provide a public servant an opportunity to commit crime. If there is no reasonable connection between the act done and the official duty then absence of sanction cannot vitiate the order of taking cognizance. In the present case, the complainant has alleged outraging of her modesty by the petitioner no.2 by embracing her and pulling her saree in the backside of the outpost on the pretext of recording her statement. Such action cannot by any stretch of imagination be said to have been committed in course of discharge of an official duty as it had no connection whatsoever therewith much less, reasonable. Therefore, in my humble view, absence of sanction under section 197 of Cr.P.C. would not vitiate the order of taking cognizance of offence under section 354 of the Indian Penal Code and issuance of process against the petitioner no.2.

Case Laws Relied on and Referred to :-

1. (2011) 48 OCR(SC)640 : Smt. Mona .Vs. The Hon'ble High Court
2. (2004) 29 OCR 264 : Adalat Prasad .Vs. Rooplal Jindal
3. (1998) 14 OCR (SC) 1 : M/s. Pepsi Foods Ltd. .Vs. Special Judicial Magistrate
4. A.I.R. 1992 S.C. 1815 : Punjab National Bank .Vs. Surendra Prasad.
5. A.I.R. 1976 S.C. 1947 : Nagawwa .Vs. Veerana.
6. Vol.64 (1987) CLT 659 : Abani Chandra Biswal .Vs. State of Orissa.

For Petitioners : Mr. Rajesh Ku. Mahapatra
For State of Orissa : Mr. Arupanannda Das, Addl. Govt. Adv.
For Opp.Party No.2 : None

JUDGMENT Date of Argument: 23.04.2018 Date of Judgment: 02.07.2018

S. K. SAHOO, J.

The petitioners Khalli Bisoi and Bhubaneswar Satapathy have filed this application under section 482 of the Code of Criminal Procedure, 1973 for setting aside the impugned order dated 05.11.2008 passed by the learned J.M.F.C., Digapahandi in I.C.C. Case No.08 of 2007 in taking cognizance of offences under sections 341/323/325/294/448/506/354 of the Indian Penal Code and issuance of process against the petitioner no.1 for offences under sections 341/323/325/294/448/506/354 of the Indian Penal Code and against the petitioner no.2 for the offence under section 354 of the Indian Penal Code.

2. The opposite party no.2 Smt. Renubala Bisoi filed the complaint petition against the petitioners relating to the incident dated 27.05.2007 which took place at about 12.00 noon at village Ghatikanda Gaon in the residential house of the opposite party no.2 and also on 28.05.2007 which took place at 11.00 a.m. at Nuapada Outpost.

According to the complainant, the petitioners are her co-villagers. Due to previous dispute, the petitioner no.1 being armed with lathi, stone and sharp edged weapon came to her house on 27.05.2007 and abused her in filthy language without any cause. When the complainant protested, the petitioner no.1 forcibly entered into her house and finding her alone, started to assault by means of lathi, stone and kati aiming at her head with an intention to kill her but somehow or other she managed to come out of her house to escape from the assault and saved her life at the intervention of the witnesses named in the complaint petition. Due to such attempt of the petitioner no.1, the complainant sustained bleeding injury on her head and other parts of her body. Thereafter, the petitioner no.1 left the place of occurrence and threatened the complainant with dire consequences and to do away with her life, if she would venture to report the matter in the police station. Apprehending risk to her life, she could not proceed to the nearest police station to report the matter and with the help of her husband Basanta Kumar Bisoyi and the witnesses, she came to Nuapada outpost on 28.05.2007 at about 11.00 a.m. to report the matter. On reaching at Nuapada Outpost, she found the petitioner no.2 who was working as A.S.I. so also the in-charge of the said outpost was present there. She narrated the occurrence to the petitioner no.2 in presence of the witnesses who accompanied her to the police station. The complainant was sent to the Nuapada P.H.C. by the petitioner no.2 for medical examination. After necessary treatment and examination, when she again came back to the outpost, the petitioner no.2 asked only her to come to the back side of the outpost to put some questions relating to the assault and the occurrence and asked the witnesses to remain outside of the outpost. Believing on the version of the petitioner no.2, she alone went to the back side of the outpost where she found that the petitioner no.2 was sitting on a bedstead. Finding her alone and taking advantage of her innocence, illiterateness, the petitioner no.2 put many embarrassing and irrelevant questions to the complainant. When the complainant was answering the questions of the petitioner no.2, she noticed that the petitioner no.2 was paying no attention to her grievance rather looking at her constantly and suddenly embraced her by pulling her saree and forcibly made her to lie on the bedstead. At that time, the complainant shouted and hearing her shout, her husband and other witnesses standing outside the outpost immediately rushed towards the backside of the outpost and intervened and accordingly, the complainant escaped from the clutches of the petitioner no.2. When the complainant left the outpost after being harassed, she was also again threatened by the petitioner no.2 with dire consequences if she would report the matter in the police station or disclose before anybody else. Subsequently the complainant came to know that the petitioner no.2 did not register any case against the petitioner no.1 being influenced and gained over by him, threw the F.I.R. and threatened the complainant not to come to the outpost at any point of time till he continues in the said outpost.

It is the further case of the complainant that being assaulted by the petitioner no.1 and her modesty being outraged by the petitioner no.2, she was harassed both mentally and physically.

3. After filing of the complaint petition, the initial statement of the complainant was recorded. Two witnesses namely Brundaban Gandahasti and Bhakta Charan Bisoi were examined during inquiry under section 202 of Cr.P.C. The learned Magistrate after perusing the complaint petition, initial statement of the complainant and statements of the witnesses recorded during inquiry being prima facie satisfied about the commission of offences by the petitioners passed the impugned order.

4. Mr. Rajesh Kumar Mahapatra, learned counsel appearing for the petitioners while challenging the impugned order contended that there was previous dispute between the petitioner no.1 and the complainant, for which a false complaint petition has been filed. It is further contended that no medical documents have been proved by the complainant and no doctor has been examined during inquiry to prima facie substantiate that the complainant sustained any grievous hurt so as to attract the ingredients of offence under section 325 of the Indian Penal Code. He argued that Nuagam P.S. Case No.35 of 2007 was instituted on the first information report of one Urmila Bisoi against Brundaban Gandahasti, Dukha Bisoi and Kumar Bisoi for commission of offences under sections 448/294/323/354/34 of the Indian Penal Code and after completion of investigation, charge sheet was submitted by the petitioner no.2 against Brundaban Gandahasti (witness no.1 of the complainant), Basanta Kumar Bisoi (husband of the complainant) and Dukha Bisoi under sections 448/294/323/354/34 of the Indian Penal Code on 28.05.2007. It is contended that since charge sheet was submitted against the husband of the complainant by the petitioner no.2 in Nuagam P.S. Case No.35 of 2007, a false complaint petition has been filed wherein another accused of the said case namely Brundaban Gandahasti was shown as witness. It is further submitted that since according to the complainant, while taking her statement, the petitioner no.2 who is a public servant and discharging his official duty is alleged to have committed some overt act against the complainant, without previous sanction as contemplated under section 197 of Cr.P.C. from the competent authority, the impugned order of cognizance is vitiated in the eye of law. It is further submitted that the complaint petition was filed on 02.06.2007 by the complainant-opposite party no.2 indicating the date of occurrence to be 28.05.2007 which is also the date of submission of charge sheet against the husband of the complainant and it makes very clear that the complaint petition has been filed with an ulterior motive just to harass an honest police officer like petitioner no.2. It is further submitted that there are discrepancies in the statement of the complainant vis-à-vis the two witnesses examined during inquiry under section 202 of Cr.P.C. and the ingredients of the offences are not attracted against the

petitioners and the learned Magistrate has not applied his mind properly before passing the impugned order.

Mr. Arupananda Das, learned Addl. Govt. Advocate on the other hand supported the impugned order.

Even though the opposite party no.2 has entered appearance in the case on being noticed through Advocate Harekrushna Panigrahi but none appears on her behalf when the matter was called.

5. In view of section 190 of Cr.P.C., the first mode of taking cognizance of any offence by the Magistrate is upon receiving a complaint of facts which constitute such offence. The particulars of the offence committed by each and every accused and the role played by each and every accused in committing the offences are to be brought to the notice of the Court so that the Court can proceed with the complaint petition in accordance with law. As soon as a Magistrate applies his mind to the suspected commission of an offence, cognizance is taken. Cognizance is taken of an offence and not of an offender. At that stage, the Magistrate has to see whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction which would be determined only at the trial stage and not at the stage of inquiry. While issuing process against an accused after taking cognizance of offences basing on the complaint petition, the Magistrate is required to peruse the complaint petition, the initial statement of the complainant and also the statements of the witnesses recorded under section 202 of Cr.P.C., if any. In case of **Smt. Mona -Vrs.- The Hon'ble High Court reported in (2011) 48 Orissa Criminal Reports (SC) 640**, the Hon'ble Supreme Court held that one of the objects of examination of complainant and his witnesses as mentioned in section 200 of the Code is to ascertain as to whether there is prima facie case against the person accused of the offence in the complaint and to prevent the issue of process on a complaint which is either false or vexatious or intended only to harass such person. Such examination is provided, therefore, to find out whether or not there is sufficient ground for proceeding further. In case of **Adalat Prasad -Vrs.- Rooplal Jindal reported in (2004) 29 Orissa Criminal Reports 264**, the Hon'ble Supreme Court held that after taking cognizance of the complaint and examining the complainant and the witnesses, if the Magistrate is satisfied that there is sufficient ground to proceed with the complaint, he can issue process by way of summons under section 204 of the Code. In Case of **M/s. Pepsi Foods Ltd. -Vrs.- Special Judicial Magistrate reported in (1998) 14 Orissa Criminal Reports (SC) 1**, it is held that summoning of an accused in a criminal case is a serious matter and the order of Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of the allegations made in the complaint and the evidence both oral and documentary in support thereof and decide whether it would be sufficient for the complainant to succeed in

bringing charge home to the accused. The Magistrate has to carefully scrutinize the evidence brought on record to find out the truthfulness of the allegation or otherwise and then examine if any offence is prima facie committed by the accused. In case of **Punjab National Bank -Vrs.- Surendra Prasad reported in A.I.R. 1992 S.C. 1815**, it is held that judicial process should not be an instrument of oppression or needless harassment. The Court should be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of private complainant as vendetta to harass the persons mechanically. In case of **Nagawwa - Vrs.- Veerana reported in A.I.R. 1976 S.C. 1947**, the Hon'ble Court decided the circumstances of quashing or setting aside the order of the Magistrate issuing process against the accused as follows:-

> "(i) where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;
>
> (ii) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;
>
> (iii) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and
>
> (iv) where the complaint suffers from legal defects, such as want of sanction or absence of a complaint by legally competent authority and the like."

6. Adverting to the contentions raised by the learned counsel for the petitioners, so far as petitioner no.1 Khalli Bisoi is concerned, in the complaint petition, the complainant has stated as to how the petitioner no.1 came to her house on 27.05.2007 being armed with weapons, abused her in filthy language without any cause and when the complainant protested against such activities, the petitioner no.1 not only entered inside the house of the complainant but also assaulted her for which she sustained injuries and then the petitioner no.1 left the place of occurrence giving threat to the complainant not to report the matter in the police station or else she would face dire consequences.

In the initial statement, the complainant has stated almost in a similar manner about the overt act committed by the petitioner no.1 on 27.05.2007. During inquiry under section 202 of Cr.P.C., witness no.1 examined on behalf of the complainant namely, Brundaban Gandahansti materially corroborated the version of the complainant relating to the incident dated 27.05.2007. Witness no.2 Bhakta Charan Bisoi examined on behalf of the complainant also to a great extent corroborated the version of the complainant what she had alleged against the

petitioner no.1. Minor discrepancies, if any, in the evidence of the complainant vis-à-vis the witnesses can be duly taken care of by the learned trial Court at the appropriate stage.

It appears that no medical documents have been proved by the complainant and no doctor has been examined during inquiry in support of any injury sustained by her during the occurrence which took place on 27.05.2007 even though according to her version, she was sent to Nuapada P.H.C. by the petitioner no.2 for medical examination and she was treated there. Therefore, there is no prima facie material to show that the petitioner no.1 voluntarily caused any 'grievous hurt' to the complainant as designated under section 320 of the Indian Penal Code and as such the basic ingredients of the offence under section 325 of the Indian Penal Code are not attracted. However, not only in the complaint petition but also in the initial statement of the complainant as well as in the statements of the witnesses recorded under section 202 of Cr.P.C., there are prima facie materials against the petitioner no.1 for commission of offences under sections 341/323/294/448/506/354 of the Indian Penal Code. The submission of the learned counsel for the petitioners that there was previous dispute between the petitioner no.1 and the complainant, for which a false complaint petition has been filed, is not sufficient to disbelieve the case of the complainant in toto at this stage. The essential ingredients of the other offences like 341, 323, 294, 448, 506 and 354 of the Indian Penal Code under which cognizance has been taken and process has been issued are made out against the petitioner no.1 and it cannot be said that the allegations made in the complaint petition against the petitioner no.1 are patently absurd and inherently improbable and therefore, in my humble view the learned Magistrate is quite justified in holding that prima facie case for such offences are well made out. Thus, while setting aside the order of taking cognizance under section 325 of the Indian Penal Code, I uphold the order of taking cognizance of offences under sections 341/323/294/448/506/354 of the Indian Penal Code and issuance of process against the petitioner no.1.

7. Coming to the order of taking cognizance and issuance of process against the petitioner no.2 Bhubaneswar Satapathy for the offence under section 354 of the Indian Penal Code, in the complaint petition, the complainant has stated as to how the petitioner no.2 asked only her to come to the back side of the outpost to put some questions relating to the assault and the occurrence and asked the witnesses to remain outside of the outpost and how when she alone went to the back side of the outpost, she found the petitioner no.2 sitting on a bedstead. She further stated that the petitioner no.2 not only put many embarrassing and irrelevant questions to her but also without paying any attention to her grievance, he was looking at her constantly and suddenly embraced her by pulling her saree and forcibly made her to lie on the bedstead. The complainant in her initial statement has reiterated what she has narrated in the complaint petition. Witness no.1 Brundaban Gandahasti has stated that when they were waiting on the verandah, the petitioner no.2 and the

complainant went inside and after five to ten minutes, hearing hullah they went inside the police station and found the complainant lying on the bedstead and the petitioner no.1 was present at the spot. Witness no.2 Bhakta Charan Bisoi has also stated that hearing hullah of the complainant, they went inside the police station and found that the complainant was lying on a cot and the petitioner was present there. So far as the discrepancies in the statement of the complainant vis-à-vis the two witnesses examined during inquiry under section 202 of Cr.P.C. are concerned, it cannot be lost sight of the fact that the complainant has stated from the beginning what the petitioner no.2 committed with her in the backside of the outpost and obviously at that point of time the two witnesses who were examined during inquiry were not present and therefore, there is likely to be some discrepancies but whether such discrepancies go to the root of the matter and would be sufficient to disbelieve the case of the complainant against the petitioner no.2 has to be adjudicated during trial. At this stage, the Magistrate is not required to weigh the evidence meticulously as if he was the trial Court. The contentions raised by the learned counsel for the petitioners that since charge sheet was submitted against the husband of the complainant by the petitioner no.2 in Nuagam P.S. Case No.35 of 2007, a false complaint petition has been filed wherein another accused of the said case namely Brundaban Gandahasti was shown as witness, are also to be appreciated by the learned trial Court at the appropriate stage after recording the evidence from both the sides.

So far as the contention raised relating to absence of previous sanction as contemplated under section 197 of Cr.P.C. from the competent authority, law is well settled as held in case of **Abani Chandra Biswal -Vrs.- State of Orissa reported in Vol.64 (1987) Cuttack Law Times 659**, that the public servant cannot claim blanket privilege for all the acts and uncalled for overdoing while discharging any public duty.

Performance of public duty under colour of duty cannot be a camouflage to commit a crime. All the acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of requirement of sanction. Public duty sometimes provide a public servant an opportunity to commit crime. If there is no reasonable connection between the act done and the official duty then absence of sanction cannot vitiate the order of taking cognizance. In the present case, the complainant has alleged outraging of her modesty by the petitioner no.2 by embracing her and pulling her saree in the backside of the outpost on the pretext of recording her statement. Such action cannot by any stretch of imagination be said to have been committed in course of discharge of an official duty as it had no connection whatsoever therewith much less, reasonable. Therefore, in my humble view, absence of sanction under section 197 of Cr.P.C. would not vitiate the order of taking cognizance of offence under

section 354 of the Indian Penal Code and issuance of process against the petitioner No.2.

8. In view of the foregoing discussions, the impugned order dated 05.11.2008 passed by the learned J.M.F.C., Digapahandi so far as petitioner no.1 Khalli Bisoi is concerned, is partially set aside and while setting aside the order of cognizance under section 325 of the Indian Penal Code, I uphold the order of taking cognizance of offences under sections 341, 323, 294, 448, 506, 354 of the Indian Penal Code. The impugned order of taking cognizance of offence under section 354 of the Indian Penal Code and issuance of process against the petitioner no.2 Bhubaneswar Satapathy is upheld. The CRLMC application is accordingly disposed of.

2018 (II) ILR - CUT- 499

S. K. SAHOO, J.

CRLMC NO. 2097 OF 2010

LAKSHMI NARAYAN DAS .....Petitioner

.Vs.

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

(A) LEGAL PRINCIPLES – Laid down or declared by Supreme Court in different Judgments and its applicability – Whether prospective or retrospective – Held, It is the settled principle that when a law is declared by the Supreme Court, it is the law as it always was and it does not become law only from the date it was so declared. It is also clear from the decision in Golak Nath & others -Vrs.- State of Punjab reported in A.I.R. 1967 S.C. 1643, that it is only within the competence of the Supreme Court to declare the law declared by it to be prospective and that too only on constitutional questions. (Para 4)

(B) CODE OF CRIMINAL PROCEDURE,1973 – Section 482 – Application filed seeking quashing of cognizance in 2010 without indicating the genesis of the case – An additional affidavit indicating the reasons behind the case with some documents filed in 2017 – Whether can be accepted at such belated stage – Held, No, accepting the defence plea and the documents in support of such plea taken at a belated stage would not be proper and justified – Reasons indicated. (Para 6)

(C) SCHEDULED CASTES AND THE SCHEDULED TRIBES (Prevention of Atrocities) Act, 1989 – Section 3(1)(x) read with Rule 7 of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 – Offence under and the investigation – Initially

investigation was entrusted to S.I of Police and subsequently taken over by DSP – DSP re-examined the witnesses and completed investigation – Whether the investigation is vitiated – Held, No.

(Para 7)

(D) CODE OF CRIMINAL PROCEDURE,1973 – CODE OF CRIMINAL PROCEDURE ,1973 – Section 482 – Prayer for quashing of cognizance – Allegation of Offence under Section 3(1)(x) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Plea that the FIR does not disclose about the caste of the Informant – Held, First information report is not the encyclopedia or be all and end all of the prosecution case – It is not a verbatim summary of the prosecution case – Plea not sustainable.

> *"The principal object to the first information report is to set the criminal law into motion. Non-mentioning of some facts or details or meticulous particulars is not a ground to reject the prosecution case. The informant who is a member of either Scheduled Caste or Scheduled Tribe while presenting the first information report might not be aware to mention his caste as well as the caste of the accused while narrating the incident. Whether it would be proper and justified not to register the case under section 3 of 1989 Act even though cognizable offence and particularly, the ingredients of such offence are prima facie made out, merely because of the non-mention of the caste details of the accused as well as the informant? The answer is emphatically 'No'. In the format of formal F.I.R., in Column No.6, it is to be mentioned whether the informant is S.C./S.T. It is the duty of the concerned police officer while registering the F.I.R. to elicit from the informant about his caste particulars. In the instant case, the same has not been done and that part has remained blank. Even if the informant/victim indicates in the F.I.R. that he/she is a member of Scheduled Caste or Scheduled Tribe and the accused is not a member of such caste or tribe, nonetheless it is the duty of the investigating officer to ascertain the caste particulars of the informant/victim so also that of the accused from the competent authority. Where the first information report is registered, inter alia, for commission of offence under section 3 of 1989 Act, the non-ascertainment of the caste particulars of the informant/victim as well as the accused during course of investigation would result in causing grave prejudice to the parties."*
>
> *(Para 8)*

Case Laws Relied on and Referred to :-

1. (2018) 70 OCR (SC) 566 : Dr. Subash Kasinath Mahajan .Vs. The State of Maharashtra.
2. (2002) 22 OCR 92 : Sessions Judsge-0cum-Special Judge, Cuttack
3. (2008) 41 OCR (SC) 614 : Gorige Pentaiah .Vs. State of A.P.
4. A.I.R. 1992 S.C. 604 : State of Haryana.Vs. Ch. Bhajan Lal
5. A.I.R. 1967 S.C. 1643 : Golak Nath & others .Vs. State of Punjab
6. 2002 (I) O.L.R. 250 : Regional Director, E.S.I. Corporation .Vs. P.B.Gupta
7. (2005) 30 OCR (SC) 177 : State of Orissa .Vs. Debendra Nath Padhi

8. (2016) 63 OCR 1131 : Chiranjib Biswal .Vs. Bishnu Charan Das
9. (2016) 65 OCR (SC) 583 : Sampelly .Vs. Indian Renewable Energy
10. (2009) 42 OCR (SC) 162 : R. Kalyani .Vs. Janak C. Mehta
11. 2015 (I) OLR (SC) 1012 : HMT Watches .Vs. M.A. Abida
12. (2011) 48 OCR (SC) 861 : Harshendra Kumar D. .Vs. Rebatilata Koley
13. Vol.64 (1987) CLT 659 : Abani Chandra Biswal .Vs. State of Orissa
14. (2016) 64 OCR (SC) 380 : Devinder Singh and Ors..Vs. State of Punjab
15. A.I.R. 1955 S.C. 196 : H.M. Rishbud .Vs. State of Delhi
16. (2013) 54 OCR 162 : Ashok Kumar Mishra .Vs. State of Orissa
17. (2008) 41 OCR (SC) 414 : Swaran Singh .Vs. State
18. (2008) 41 OCR (SC) 614 : Gorige Pentaiah .Vs. State of A.P.
19. (2014) 57 OCR (SC) 1 : Lalita Kumari .Vs. Govt. of U.P.

For Petitioner : Mr. Sidharth Prasad Das
For Opp. Party : Mr. Prem Kumar Patnaik Addl.Govt.Adv.
For Informants : Mr. Pravash Chandra Jena

JUDGMENT Date of Hearing: 23.07.2018Date of Judgment: 07.08.2018

S. K. SAHOO, J.

> "*Caste has killed public spirit. Caste has destroyed the sense of public charity. Caste has made public opinion impossible. Virtue has become caste-ridden and morality has become caste-bound. Caste is a state of mind. It is a disease of mind. The teachings of the Hindu religion are the root cause of this disease. We practice casteism and we observe untouchability because we are enjoined to do so by the Hindu religion. A bitter thing cannot be made sweet. The taste of anything can be changed. But poison cannot be changed into nectar*."
>
> -**Bharat Ratna Dr. Bhimrao Ramji Ambedkar**

The petitioner Lakshmi Narayan Das is the retired District Inspector of Schools, Aska and he has knocked at the portals of this Court in challenging the order dated 16.01.2010 of the learned J.M.F.C., Aska passed in G.R. Case No.156 of 2008 in taking cognizance of offences under section 294 of the Indian Penal Code and section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereafter '1989 Act') and issuance of process against him. The said case arises out of Aska P.S. Case No.109 of 2008.

2. On 30.04.2008 Smt. Ahalya Patra and others lodged the first information report before the Inspector in charge of Aska police station alleging therein that on that day at about 11.00 a.m. while they along with other Sikshya Sahayaks met the petitioner in his office and asked him as to whether he had been to meet the Director of Odisha Primary Education Programme Authority (hereafter 'OPEPA'), the petitioner all on a sudden got frowned and abused the informants and their companions in filthy language such as, "you are low caste people, Hadi, Pana,

Dhoba and one would not get food if he looks at you. We are Brahmin by caste and we have to change our sacred thread if we touch you". So saying, the petitioner spitted for two to three times and further told "you and your husband Maghia, Sala. You are doing politics and your future would be ruined. Nobody including no police station, Court and even the Education Department can do anything and your lives would be finished with the help of goondas". It is further stated in the first information report that on many occasions, the informants and others had met the petitioner who told them to meet him alone separately in his house and after he would be satisfied financially as well as physically, he would do the needful. The petitioner demanded Rs.1,500/- from each of the Sikshya Sahayaks even though they appealed before him that they are poor persons and would not be in a position to arrange money and requested him to complete the formalities. The petitioner did not pay any heed to the request of the informants rather made false allegation against them and threatened them to see that they would not be able to undergo training. The petitioner told that since the informants did not fulfill his demand, he would not do any of their works so long as he was holding the post of District Inspector of Schools and that he has got connection with political leaders and he would see who would help them. The petitioner further told the informants that he would institute false criminal cases and the informants would be sent to jail and no Scheduled Caste and Scheduled Tribe leader would save them and if contingency arises, he would make their service files go 'missing'.

On the basis of such first information report, Aska P.S. Case No.109 of 2008 was registered under sections 294, 506 of the Indian Penal Code and section 3(1)(x) of 1989 Act. After registration of the case by the Inspector in charge of Aska police station, Sub-Inspector of Police P.K. Sahu was entrusted with investigation of the case. He examined the informants, visited the spot which was the office of D.I. of Schools situated at Niranjan Nagar, Aska. On 15.05.2008 Sri B.P. Dehury, Deputy Superintendent of police, Aska took up investigation of the case as per the official order of the Superintendent of Police, Ganjam. After verification of the case records received from the previous investigating officer, the D.S.P. re-examined all the witnesses and recorded their separate statements. He also visited the spot and the case was supervised by Sri J. Mohapatra, S.D.P.O., Bhanjanagar. On 25.03.2009 the charge of investigation was taken over by Sri B.K. Kamila, S.D.P.O., Aska who sent requisition to the Tahasildar, Aska for obtaining caste particulars of the petitioner as well as the informant party members and received the reports. On completion of investigation, since prima facie case was made out against the petitioner for commission of offences under section 294 of the Indian Penal Code and section 3(1)(x) of 1989 Act, charge sheet was placed.

3. Mr. Sidharth Prasad Das, learned counsel appearing for the petitioner emphatically contended that the criminal proceeding has been instituted against the petitioner with malafide intention. He placed reliance in a recent decision of the

Hon'ble Supreme Court in case of **Dr. Subash Kasinath Mahajan -Vrs.- The State of Maharashtra reported in (2018) 70 Orissa Criminal Reports (SC) 566**, wherein it is held that in respect of offences under the Atrocities Act, to avoid false implication, before F.I.R. is registered, preliminary inquiry may be conducted by the D.S.P. to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated. It is the contention of the learned counsel that since no preliminary inquiry has been conducted by the Designated Officer before the registration of the first information report, the institution of the case is bad and defective which goes to the root of the matter. Learned counsel further pleaded that while the petitioner was working as Dist. Inspector of Schools, Aska in the district of Ganjam in the year 2008, one Sikshya Sahayak namely Biswanath Sethy was the President of Sikshya Sahayak Association of Aska Education District. As per the notification of the Department of Schools and Mass Education, Govt. of Odisha, there was restriction to transfer the Sikshya Sahayaks from one centre to another but in deviation to the same, the predecessor of the petitioner had made some illegal transfers of Sikshya Sahayaks including the said Biswanath Sethy in violation of Government guidelines. The petitioner in his official capacity as D.I. of Schools, Aska reported the illegal transfers to his departmental higher authority despite protest and repeated threatening by some Sikshya Sahayaks under the leadership of Biswanath Sethy. On 30.04.2008 at the behest and leadership of Biswanath Sethy, some Sikshya Sahayaks forcibly entered into the official chamber of the petitioner and threatened him with dire consequences and to file false case against him which was informed to the police by the petitioner and consequently Aska P.S. Case No.110 of 2008 was registered under sections 294, 506 read with section 34 of the Indian Penal Code. It is contended that only to harass and humiliate the petitioner, the false case has been foisted and the police without investigating the case in a fair manner and ignoring the material facts and particulars proceeded against the petitioner and submitted charge sheet. It is argued that the petitioner was not examined by any police officer in connection with the alleged incident which reveals unfairness on the part of the investigating agency and its indifference to arrive at the truth. It is contended that since the petitioner was discharging his duty as a public servant at the relevant point of time and the alleged incident having been taken during the official hour in the office of the petitioner, without obtaining sanction for prosecution of the petitioner from the competent authority as required under section 197 of Cr.P.C., the impugned order of taking cognizance and issuance of process is not sustainable in the eye of law. It is further contended that even though Rule 7 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 (hereafter '1995 Rules') stipulates that an offence under 1989 Act shall be investigated by a police officer not below the rank of a Deputy Superintendent of Police but in this case, Sri P.K. Sahu, S.I. of Police of Aska police station was entrusted with the investigation of the case by the Inspector in charge since the date of lodging of F.I.R. i.e. on 30.04.2008 and he

continued with the investigation till 15.05.2008 whereafter the case was taken over for investigation by Sri B.P. Dehury, Deputy Superintendent of Police, Aska and therefore, in view of the defective investigation contrary to the mandates provided under 1995 Rules, the criminal proceeding against the petitioner is liable to be quashed. He placed reliance in the case of **In Re: Sessions Judge –cum- Special Judge, Cuttack reported in (2002) 22 Orissa Criminal Reports 92**. It is further argued that the official chamber of the petitioner was not within the public view and the contents of the first information report so also the materials collected during course of investigation are silent that any member of the public was present at the time of commission of the alleged offence except the informants who belonged to the SC and ST community and therefore, one of the basic ingredients of the offence under section 294 of the Indian Penal Code that the occurrence should happen in any *public place* and also as per section 3(1)(x) of the 1989 Act, the offence should take place within *public view* is conspicuously absent. It is further contended that the basic ingredients of the offence under section 3(1)(x) of the 1989 Act being absent in the F.I.R., this Court should invoke its inherent power under section 482 of Cr.P.C. to quash the proceeding. He relied upon the decision of the Hon'ble Supreme Court in case of **Gorige Pentaiah -Vrs.- State of A.P. reported in (2008) 41 Orissa Criminal Reports (SC) 614**. It is further contended that some of the signatories of the first information report were of *Koli* Caste and one of them is *Bauri* and the first information report did not disclose that the petitioner ever uttered such caste name and there was never any occasion for the petitioner to know the individual or collective caste of the informants particularly when thousands of Sikshya Sahayaks were working under the Education Department. It is further submitted that the official documents of Director, Elementary Education, Odisha would indicate that the petitioner had submitted the application forms/ biodatas of the informants earlier to the date of occurrence i.e. on 12.02.2008 and 19.02.2008 and therefore, the genesis of the offence is also a doubtful feature. It is further submitted that the opposite party no.7 has filed Misc. Case No.497 of 2017 for passing appropriate order in exonerating her to proceed further in Aska P.S. Case No.109 of 2008 which shows that a malicious prosecution has been instituted against the petitioner and therefore, in view of the ratio laid down in case of **State of Haryana -Vrs.- Ch. Bhajan Lal reported in A.I.R. 1992 S.C. 604**, the proceeding should be quashed. It is submitted that the petitioner is now seventy years of age and he is suffering from many ailments and since the criminal proceeding is vexatious and it is a product of malice, if it is allowed to continue, it would be an abuse of process of the Court.

Mr. Prem Kumar Patnaik, learned Addl. Government Advocate on the other hand contended that the plea taken by the petitioner relating to his false implication cannot be taken into account at this stage which can be taken care of by the learned trial Court at the appropriate stage. He contended that even though at the initial stage, the S.I. of police was investigating the case and he recorded the statements of

the witnesses but after the designated police officer as per Rule 7 of 1995 Rules took over charge of investigation, he re-examined all the witnesses and ultimately charge sheet was submitted by the competent police officer and therefore, there is no violation of the provisions of 1995 Rules. It is further contended that the use of obscene language and derogatory remarks are not the part and parcel of official duty and therefore, no sanction for prosecuting the petitioner is necessary. He argued that the contents of the F.I.R. are corroborated by the statements of the witnesses recorded during investigation which make out the basic ingredients of the offences and there was no illegality in passing the impugned order and therefore, the application filed by the petitioner should be dismissed.

Mr. Pravash Chandra Jena, learned counsel appearing for the informants submitted that the caste certificates obtained by the investigating agency show that the informants are the members of Scheduled Castes/Scheduled Tribes and the petitioner is a member of General Caste. It is contended that the manner in which the petitioner had used the obscene language and passed derogatory remarks against the informants clearly reveal his intention to humiliate them and since the public had access to the office of the petitioner and the occurrence had also taken within public view, there was every justification for the investigating officer to submit charge sheet.

4. The Hon'ble Supreme Court delivered judgment in the case of **Dr. Subash Kasinath Mahajan** (supra) on 20.03.2018. The occurrence in the present case took place on 30.04.2008.

It is the settled principle that when a law is declared by the Supreme Court, it is the law as it always was and it does not become law only from the date it was so declared. It is also clear from the decision in **Golak Nath & others -Vrs.- State of Punjab reported in A.I.R. 1967 S.C. 1643**, that it is only within the competence of the Supreme Court to declare the law declared by it to be prospective and that too only on constitutional questions. (Ref:- **Regional Director, E.S.I. Corporation -Vrs.- P.B. Gupta reported in 2002 (I) Orissa Law Reviews 250**).

Since in **Dr. Subash Kasinath Mahajan** (supra), while giving directions in the concluding paragraph, it was observed that the directions are prospective, the contentions raised by the learned counsel for the petitioner that since no preliminary inquiry has been conducted by the designated police officer before the registration of the first information report, the institution of the case is defective, cannot be accepted.

5. The plea taken by the petitioner relating to the reason for institution of the criminal proceeding is his reporting to the departmental higher authority about the illegal transfers of some of the Sikshya Sahayaks including one Biswanath Sethy, President of Sikshya Sahayak Association of Aska Education District was not taken

in the petition under section 482 of Cr.P.C. when it was filed on 05.08.2018. No document in that connection was also annexed with the petition. Such plea was taken for the first time by way of an additional affidavit filed on 28.07.2017. Some xerox copies of the documents have been annexed to the additional affidavit in that connection. Now the question falls for consideration as to whether the belated plea taken almost after seven years of the presentation of the case and the xerox copies of the documents filed with the additional affidavit are to be taken into consideration at this stage.

In case of **State of Orissa -Vrs.-Debendra Nath Padhi reported in (2005) 30 Orissa Criminal Reports (SC) 177**, it is held that at the time of framing charge or *taking cognizance*, the accused has no right to produce any material.

In case of **Chiranjib Biswal -Vrs.- Bishnu Charan Das reported in (2016) 63 Orissa Criminal Reports 1131**, it is held as follows:-

> "8. Law is well settled that while making a prayer for quashing an order taking cognizance or quashing the entire criminal proceeding, an accused cannot be permitted to use the material which would be available to him only as his defence. The trial Court should be left to consider and weigh materials brought on record by the parties for the purpose of marshalling and appreciating the evidence. While invoking inherent power under section 482 Cr.P.C. to quash a criminal proceeding, the High Court cannot look into any document relied on by the accused which would require proof in accordance with law and may be subjected to rebuttal evidence. The Court has to strictly confine itself to the allegation made in the first information report and charge sheet or the complaint petition and the statements collected under sections 200 and 202 Cr.P.C. A mini trial at that stage is impermissible. The acceptance of the documents filed by the defence or consideration of defence plea by the High Court under section 482 Cr.P.C. at the stage of cognizance would certainly open flood gate for mini trial and should be discouraged as it is not neither proper nor legal."

In case of **Sampelly -Vrs.- Indian Renewable Energy reported in (2016) 65 Orissa Criminal Reports (SC) 583**, it is held that it is well settled that while dealing with a quashing petition, the Court has ordinarily to proceed on the basis of averments in the complaint. The defence of the accused cannot be considered at the stage. The Court considering the prayer for quashing does not adjudicate upon a disputed question of fact.

In case of **R. Kalyani -Vrs.- Janak C. Mehta reported in (2009) 42 Orissa Criminal Reports (SC) 162**, it is held that while exercising its inherent jurisdiction to quash a criminal proceeding, save and except in very exceptional circumstances, the Court should not look into any documents relied upon by the defence.

In case of **HMT Watches -Vrs.- M.A. Abida reported in 2015 (I) Orissa Law Reviews (SC) 1012**, it was held that the High Court committed grave error of law in quashing the criminal complaints filed by the appellant in respect of offence punishable under section 138 of the N.I. Act in exercise of powers under section 482 of the Code of Criminal Procedure by accepting factual defences of the accused which were disputed ones. Such defences, if taken before trial Court, after recording of the evidence, can be better appreciated.

In case of **Harshendra Kumar D. -Vrs.- Rebatilata Koley reported in (2011) 48 Orissa Criminal Reports (SC) 861**, it is held as follows:-

> "21. In our judgment, the above observations cannot be read to mean that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction under Section 482 or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents - which are beyond suspicion or doubt - placed by accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage."

In view of the settled position of law, accepting the defence plea and the documents in support of such plea taken at a belated stage would not be proper and justified. There is nothing on record that the informants acted at the behest of Biswanath Sethy. It is needless to say that the petitioner would get enough opportunity during course of trial to take such plea and adduce evidence in that respect which would be adjudicated by the learned trial Court in accordance with law.

6. Adverting to the contention raised by the learned counsel for the petitioner relating to the absence of sanction from the competent authority as required under section 197 of Cr.P.C., even though it is not disputed that the petitioner was a public servant and he was discharging his duty as a public servant at the relevant point of time and the incident in question took place during the official working hours in the office of the petitioner but the vital question is whether the abusive words allegedly hurled at the informants and threat given to them by the petitioner has got any connection whatsoever with official duty.

In case of **Abani Chandra Biswal -Vrs.- State of Orissa reported in Vol.64 (1987) Cuttack Law Times 659**, a Division Bench of this Court held that the public servant cannot claim blanket privilege for all the acts and uncalled for over doing while discharging any public duty. In that case judging the accusation against the petitioner who was the officer in charge, Komna Police Station in the district of Kalahandi that he had hurled abusive language at the complainant while he was already in the police lock-up, it was held that the action cannot by any stretch of imagination, be said to have been committed in course of discharge of official duty as it had no connection whatsoever therewith much less, reasonable.

Abusing or threatening is no part of the official duty of a government servant when general public approaches him in connection with an official work which has been assigned to him. A government servant is there to serve the people, look into their genuine grievances and to act diligently with all patience and he is paid for that. He has to set an example for others. It is incumbent on a public servant to maintain decency and decorum of the institution/post which he is serving. Public servant is accountable and responsible for what he is advocating. It cannot be lost sight of the fact that the petitioner was serving in the Education Department and he was holding the post of District Inspector of Schools. The languages which are allegedly used are certainly not expected from an educated person. When the act alleged and the official duty are so inter-related that one could postulate reasonably that it was done by the accused government servant in the performance of the official duty though possibly in excess of the needs and requirements of the situation, sanction under section 197 Code of Criminal Procedure is required.

In case of **Devinder Singh and Ors. -Vrs.- State of Punjab reported in (2016) 64 Orissa Criminal Reports (SC) 380**, it is held as follows:-

> "37. The principles emerging from the aforesaid decisions are summarized hereunder:
>
> I. Protection of sanction is an assurance to an honest and sincere officer to perform his duty honestly and to the best of his ability to further public duty. However, authority cannot be camouflaged to commit crime.
>
> II. Once act or omission has been found to have been committed by public servant in discharging his duty, it must be given liberal and wide construction so far its official nature is concerned. Public servant is not entitled to indulge in criminal activities. To that extent Section 197 Code of Criminal Procedure has to be construed narrowly and in a restricted manner.
>
> III. Even in facts of a case when public servant has exceeded in his duty, if there is reasonable connection, it will not deprive him of protection under Section 197 Code of Criminal Procedure. There cannot be a universal rule to determine whether there is reasonable nexus between the act done and official duty nor it is possible to lay down such rule.

> IV. In case the assault made is intrinsically connected with or related to performance of official duties, sanction would be necessary under Section 197 Code of Criminal Procedure, but such relation to duty should not be pretended or fanciful claim. The offence must be directly and reasonably connected with official duty to require sanction. It is no part of official duty to commit offence. In case offence was incomplete without proving, the official act, ordinarily the provisions of Section 197 Code of Criminal Procedure would apply.
>
> V. In case sanction is necessary, it has to be decided by competent authority and sanction has to be issued on the basis of sound objective assessment. The Court is not to be a sanctioning authority.
>
> VI. Ordinarily, question of sanction should be dealt with at the stage of taking cognizance, but if the cognizance is taken erroneously and the same comes to the notice of Court at a later stage, finding to that effect is permissible and such a plea can be taken first time before Appellate Court. It may arise at inception itself. There is no requirement that accused must wait till charges are framed.
>
> VII. Question of sanction can be raised at the time of framing of charge and it can be decided prima facie on the basis of accusation. It is open to decide it afresh in light of evidence adduced after conclusion of trial or at other appropriate stage.
>
> VIII. Question of sanction may arise at any stage of proceedings on a police or judicial inquiry or in course of evidence during trial. Whether sanction is necessary or not may have to be determined from stage to stage and material brought on record depending upon facts of each case. Question of sanction can be considered at any stage of the proceedings. Necessity for sanction may reveal itself in the course of the progress of the case and it would be open to accused to place material during the course of trial for showing what his duty was. Accused has the right to lead evidence in support of his case on merits.
>
> IX. In some case it may not be possible to decide the question effectively and finally without giving opportunity to the defence to adduce evidence. Question of good faith or bad faith may be decided on conclusion of trial."

The petitioner has presented an F.I.R. relating to the occurrence in question, on the basis of which Aska P.S. Case No.110 of 2008 was registered under sections 294, 506 read with section 34 of the Indian Penal Code. In the instant case, the allegation as per the prosecution case is that when the informants who are Sikshya Sahayaks met the petitioner in his office and asked him as to whether he had been to meet the Director of OPEPA, the petitioner all on a sudden got frowned and abused them in filthy language and threatened them whereas the defence of the petitioner is that it was a case of discharge of official duty and at the behest and leadership of one Biswanath Sethy, some Sikshya Sahayaks forcibly entered into his official chamber on the date of occurrence and threatened him with dire consequences and to file false case against him. It is not permissible for this Court at this stage to decide which version is correct. Similarly, it is difficult to arrive at a prima facie conclusion

that the overt act allegedly committed by the petitioner has got any connection with the discharge of official duty much less, reasonable. It would be open to both the sides to adduce their evidence at the stage of trial and the trial Court shall decide the question whether there was any reasonable nexus of the incident with the discharge of official duty by the petitioner.

7. Coming to the next contention raised by the learned counsel for the petitioner relating to infraction of Rule 7 of the 1995 Rules, it appears that even though at the initial stage, the investigation was conducted by the Sub-Inspector of Police P.K. Sahu but on 15.05.2008 Sri B.P. Dehury, Deputy Superintendent of police, Aska took up investigation of the case as per the official order of the Superintendent of Police, Ganjam and after verification of the case records received from the previous investigating officer, he re-examined all the witnesses and recorded their separate statements. The case was supervised by Sri J. Mohapatra, S.D.P.O., Bhanjanagar. On 25.03.2009 the charge of investigation was taken over by Sri B.K. Kamila, S.D.P.O., Aska who ultimately on completion of investigation submitted charge sheet for commission of offences under section 294 of the Indian Penal Code and section 3(1)(x) of 1989 Act.

Learned counsel for the petitioner placed reliance in the case of **In Re: Sessions Judge** (supra), wherein it is held that any investigation made by a police officer below the rank of the officer so provided in the statute is vitiated and a criminal proceeding would be vitiated because of non-compliance with the statutory provision.

In the instant case, after initial investigation by the S.I. of police, the re-investigation has been done by the competent designated police officers as per Rule 7 of 1995 Rules and charge sheet was also submitted by the designated officer. Therefore, it cannot be said that there is either any defect or illegality in investigation or the criminal proceeding is vitiated merely because at the initial stages, the investigation was conducted not by a designated police officer. In case of **H.M. Rishbud -Vrs.- State of Delhi reported in A.I.R. 1955 S.C. 196**, it was held that a defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial.

In view of the above discussions, the contention raised by the learned counsel for the petitioner relating to infraction of Rule 7 of the 1995 Rules is devoid of any merit and deserves to be dismissed.

8. In order to make out an offence under section 294 of the Indian Penal Code, the prosecution has to prove that (i) the offender has done any obscene act in any public place or has sung, recited or uttered any obscene song, ballad or words in or near any public place and (ii) thereby has caused annoyance to others. If the act complained of is not obscene or is not done in any public place or the song sung,

ballad recited or words uttered is not obscene or not so sung, recited or uttered in or near any public place or that it causes no annoyance to others, the offence is not committed.

The meaning of the word 'obscene' in Black's Law Dictionary, Oxford Advanced Learner's Dictionary, Collins Cobuild English Dictionary etc. would leave no doubt that the word 'obscene' is connected with sex and extremely offensive under contemporary community standards of morality and decency grossly repugnant to generally accepted notions of what is appropriate. The concept of 'obscenity' would differ from Country to Country, State to State and even from region to region depending on the standards of morals and contemporary society.

The word 'Maghia' stated to have been used by the petitioner is no doubt an obscene word which means 'mother fucker'.

'Public place' is one to which members of public have free access without any hindrance or interference. Such place is open to the use by public or they are accustomed to resort which includes public offices also. The place to which the public have a legal right of access and they habitually go and there is no restricted entry to it would come within the purview of 'public place'. If the entry is regulated by permission or is otherwise restricted, it is not a 'public place'. However if the access of public to a place is conditional upon payment and subject to reasonable restriction or in other words there is no unlimited right still then the same would come within 'public place'.

As regards the *obscene act*, the term 'public place' is used in section 294(a) of the Indian Penal Code whereas for *obscene song, ballad or words*, the term 'in or near public place' is used in section 294(b) of the Indian Penal Code. The term 'in or near public place' is much wider in its sweep than the term 'public place' as it encompasses even those areas which are in the vicinity of public place meaning thereby that if the obscene words uttered in a 'public place' is heard by someone who is in the vicinity of the public place then offence under section 294 of Indian Penal Code can be made out. The term 'in or near public place' contained in section 294 (b) of the Indian Penal Code does not literally mean that the abusive words should be uttered necessarily in a place which is frequented by members of public. If such utterances though made in private place but are audible in a public place because of being in close vicinity to the private place then in that eventuality also the offence under section 294 of the Indian Penal Code would be attracted. The said offence is not only made out when an obscene act is committed to the annoyance of others in any public place but also when the accused utters words to the annoyance of others *in or near* any public place.

In case of **Ashok Kumar Mishra -Vrs.- State of Orissa reported in (2013) 54 Orissa Criminal Reports 162**, it is held as follows:-

> "5. A 'public place' must be held to be a place which is open to the members of the public though in some cases access to it by members of the public may be on fulfilling certain conditions but the right of access to such place must not be limited to any determinate section of public and the person in charge of the place should have no right or discretion to deny access to any member of the public as long as such member is ready to fulfill the conditions attached for access."

There cannot be any dispute that the office of the D.I. of Schools, Aska is a public place. The contention of the learned counsel for the petitioner that the spot was the official chamber of the petitioner and no public was present at the relevant time and therefore, it cannot be said that the place was within public view, is not acceptable. There is nothing on record that the occurrence took place in the official chamber of the petitioner where there is any restricted entry. In fact, the materials on records indicate as per the statements of the informants that all the nine of them had been to meet the petitioner in the office of the D.I. of Schools, Aska to ventilate their grievances, during course of which the occurrence took place. Therefore, I am of the humble view that prima facie case under section 294 of the Indian Penal Code is made out.

So far as the offence under section 3(1)(x) of 1989 Act is concerned, it requires intentional insult or intimidation by an offender who is not a member of Scheduled Caste or Scheduled Tribe to a member of Scheduled Caste or Scheduled Tribe with intent to humiliate him in *any place within public view*. The F.I.R. indicates the presence of nine persons and even if one is excluded in view of the filing of Misc. Case No.497 of 2017, it makes no difference. Judicial notice can be taken regarding the presence of the staff of the D.I. of Schools during the official hour. The statements of the witnesses recorded during course of investigation corroborate to the facts narrated in the first information report. All the witnesses have stated regarding the intentional insult and intimidation to them and they are the members of Scheduled Castes/Scheduled Tribes. The non-use of names of specific caste of some of the informants like 'Koli Caste' and 'Bauri' by the petitioner makes a little difference. The tenure and the context in which the language is stated to have been used prima facie show the intention of the user to humiliate the informants. Even if one makes remarks or utterances with a view to humiliate a member of the Scheduled Caste or Scheduled Tribe inside the building, he would be liable to be prosecuted provided such remarks or utterances are either visible or audible to the public.

In case of **Swaran Singh -Vrs.- State reported in (2008) 41 Orissa Criminal Reports (SC) 414**, it is held as follows:-

> "28. It has been alleged in the FIR that Vinod Nagar, the first informant, was insulted by appellants 2 and 3 (by calling him a `Chamar') when he stood near the car which was parked at the gate of the premises. In our opinion, this was certainly a place within public view, since the gate of a house is certainly a place within

> public view. It could have been a different matter had the alleged offence been committed inside a building, and also was not in the public view. However, if the offence is committed outside the building e.g. in a lawn outside a house, and the lawn can be seen by someone from the road or lane outside the boundary wall, the lawn would certainly be a place within the public view. *Also, even if the remark is made inside a building, but some members of the public are there (not merely relatives or friends) then also it would be an offence since it is in the public view*. We must, therefore, not confuse the expression `place within public view' with the expression `public place'. A place can be a private place but yet within the public view. On the other hand, a public place would ordinarily mean a place which is owned or leased by the Government or the municipality (or other local body) or gaonsabha or an instrumentality of the State, and not by private persons or private bodies.

Learned counsel for the petitioner submitted that basic ingredients of the offence under section 3(1)(x) of the 1989 Act being absent in the F.I.R., this Court should quash the proceeding. He relied upon the decision of the Hon'ble Supreme Court in case of **Gorige Pentaiah -Vrs.- State of A.P. reported in (2008) 41 Orissa Criminal Reports (SC) 614** wherein it is held as follows:-

> "7. In the instant case, the allegation of respondent No. 3 in the entire complaint is that on 27.5.2004, the appellant abused them with the name of their caste. According to the basic ingredients of Section 3(1)(x) of the Act, the complainant ought to have alleged that the accused-appellant was not a member of the Scheduled Caste or a Scheduled Tribe and he (respondent No. 3) was intentionally insulted or intimidated by the accused with intent to humiliate in a place within public view. In the entire complaint, nowhere it is mentioned that the accused-appellant was not a member of the Scheduled Caste or a Scheduled Tribe and he intentionally insulted or intimidated with intent to humiliate respondent No. 3 in a place within public view. When the basic ingredients of the offence are missing in the complaint, then permitting such a complaint to continue and to compel the appellant to face the rigmarole of the criminal trial would be totally unjustified leading to abuse of process of law."

The citation placed by the learned counsel for the petitioner is no way helpful to him in the facts and circumstances of the case. First of all, the instant case arises out of a first information report and not a complaint petition. In case of **Lalita Kumari -Vrs.- Govt. of U.P. reported in (2014) 57 Orissa Criminal Reports (SC) 1**, it is held that registration of F.I.R. is mandatory under section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not. If the inquiry discloses the commission of a cognizable offence, the F.I.R. must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant

forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further. The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the F.I.R. if information received by him discloses a cognizable offence. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

In the instant case, the first information report discloses commission of a cognizable offence. During course of investigation, the Addl. Tahasildar, Aska submitted his report dated 08.12.2009 which indicates that one of the informants namely, Baruna Kumar Barua is 'Dhoba' by caste. The Tahasildar, Aska submitted his report dated 09.12.2009 which indicates that the informants namely, Ahalya Patra, Abanikant Behera and Bhabani sankar Patra are 'Koli' by caste, informant Prakash Chandra Das is 'Bauri' by caste and the petitioner is 'Brahmin' by caste.

List of Scheduled Castes notified (after addition/deletion) as per the Constitution (Scheduled Castes) Order, 1950, as amended vide Modification Order 1956, Amendment Act, 1976 and the Constitution (Scheduled Castes) Order (Amendment) Act 2002 No. 25 dated 27.5.2002 of Ministry of Law, Justice and Company Affairs, read with The Constitution (SCs) Order (Second Amendment) Act, 2002 No. 61 of 2002 dated 18.12.2002 of Ministry of Law & Justice republished vide Notification No. 7797-I- Legis-5/2002-L dated 7.6.2003 of Law Deptt, Govt. of Orissa and, vide Gazette of India No.381dt.30.8.2007, Gazette of India No.40 dt.18.12.2014, Gazette of India No.7 dt.23.03.2015, Gazette of India No 27 dt 9.05.2016 & Gazette of India No 17 dated 01.05.2017 indicates that 'Bauri' and 'Dhoba' are Scheduled Castes.

Similarly, list of Scheduled Tribes notified (after addition/deletion) as per the Scheduled Castes and Scheduled Tribes Order, 1950 as amended by Modification Order, 1956, Amendment Act, 1976 and The Scheduled Castes and Scheduled Tribes Order (Amendment) Act 2002 No. 10 dated 8.1.2003 of Ministry of Law & Justice republished by the Notification No. 7799/ L dated 7.6.2003 of Law Department, Govt. of Orissa indicates that 'Koli' is Scheduled Tribe. The petitioner is not a member of Scheduled Caste or Scheduled Tribe.

First information report is not the encyclopedia or be all and end all of the prosecution case. It is not a verbatim summary of the prosecution case. The principal object to the first information report is to set the criminal law into motion. Non-mentioning of some facts or details or meticulous particulars is not a ground to reject the prosecution case. The informant who is a member of either Scheduled Caste or Scheduled Tribe while presenting the first information report might not be aware to mention his caste as well as the caste of the accused while narrating the incident. Whether it would be proper and justified not to register the case under section 3 of

1989 Act even though cognizable offence and particularly, the ingredients of such offence are prima facie made out, merely because of the non-mention of the caste details of the accused as well as the informant? The answer is emphatically 'No'. In the format of formal F.I.R., in Column No.6, it is to be mentioned whether the informant is S.C./S.T. It is the duty of the concerned police officer while registering the F.I.R. to elicit from the informant about his caste particulars. In the instant case, the same has not been done and that part has remained blank. Even if the informant/victim indicates in the F.I.R. that he/she is a member of Scheduled Caste or Scheduled Tribe and the accused is not a member of such caste or tribe, nonetheless it is the duty of the investigating officer to ascertain the caste particulars of the informant/victim so also that of the accused from the competent authority. Where the first information report is registered, inter alia, for commission of offence under section 3 of 1989 Act, the non-ascertainment of the caste particulars of the informant/victim as well as the accused during course of investigation would result in causing grave prejudice to the parties.

Therefore, I am of the humble view that the prima facie ingredients of offence under section 294 of the Indian Penal Code and in view of the caste particulars collected during course of investigation, the ingredients of offence under section 3(1)(x) of 1989 Act are attracted.

9. The submission of the learned counsel for the petitioner that the petitioner had submitted the application forms/biodatas of the informants earlier to the date of occurrence i.e. on 12.02.2008 and 19.02.2008 and therefore, the genesis of the offence is also a doubtful feature, cannot be adjudicated at this stage. In spite of submission of application forms/biodatas, why the informants had grievances for which they approached the petitioner on the date of occurrence is not within the scope of purview of this application under section 482 of Cr.P.C. to be decided.

10. The submission of the learned counsel for the petitioner that the petitioner was not examined by any police officer in connection with the alleged incident which reveals unfairness on the part of the investigating agency is not correct. When the S.I. of police was investigating the case, the whereabouts of the petitioner could not be ascertained which is noted in the case diary. When the S.D.P.O., Aska was investigating the matter, the statement of the petitioner was recorded on 09.07.2009 in which he highlighted about the filing of Aska P.S. Case No. 110 of 2008.

11. There is nothing on record to show that a malicious prosecution has been instituted against the petitioner or the criminal proceeding is manifestly attended with malafide or it has been instituted with an ulterior motive for wreaking vengeance on the petitioner and with a view to spite him due to private and personal grudge and therefore, the ratio laid down in case of **Ch. Bhajan Lal** (supra) is not applicable.

12. The submission of the learned counsel for the petitioner that petitioner is now seventy years of age and he is suffering from many ailments, cannot be a ground to quash the criminal proceeding. These aspects may be relevant for determination of the quantum of sentence at the end of trial.

13. In view of the foregoing discussions, I am of the considered opinion that the impugned order does not suffer from any illegality and therefore, it would not be proper to interfere with the same invoking the inherent powers under section 482 of Cr.P.C. which is to be used sparingly and with circumspection

In the result, the CRLMC application being devoid of merit, stands dismissed. Lower Court Record be sent back immediately.

14. Before parting with the case, I must record my deep sense of appreciation for the able assistance rendered by Mr. Sidharth Prasad Das, learned counsel for the petitioner. He had prepared the case minutely and presented it nicely and discharged his duty as an officer of the Court to the best of his ability.

2018 (II) ILR - CUT-516

S.K. SAHOO, J.

CRLMA NO. 184 OF 2018

ENDUA @ MANOJ MOHARANA .....Petitioner

.Vs.

STATE .....Opp. Parties

(A) BAIL – Meaning of – Held, the process by which the liberty of a citizen, which is under cloud, is to be restored, with or without conditions imposed by the competent Court – Every person at the pre-trial stage is presumed to be an innocent person until his guilt is established as per the provisions of law – The trial may take years together and if the liberty of the person is jeopardised for such a long time, it will amount to violation of his fundamental right to protection of life and personal liberty as per provisions contained under Article 21 of the Constitution of India.

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 439(1)(b) – Application for waiving the condition of imposition of cash security while granting bail – Plea of the petitioners that they are under BPL category – Principles for imposing cash security – Discussed.

"The order of bail should not be harsh and oppressive which would indirectly cause denial of bail thus depriving the person's individual liberty. While granting bail, insisting on good behaviour or prompt attendance, executing personal bond, further to safeguard his good behaviour and personal attendance may be supported by insisting upon additional sureties as the Court deems fit but insisting upon cash security is incorrect and indirectly results in denial of bail. The entire chapter of Cr.P.C. which deals with the provisions relating to bail nowhere says that when a person is released on bail, the Court can also insist upon him to give cash security. The power has to be exercised in a proper and judicious manner and not in an arbitrary, capricious or whimsical manner and the discretion exercised shall appear to be just and reasonable one. It is the duty of the Court to see that any order to be passed or conditions to be imposed while granting bail shall always be in the interest of both the accused and the State."

(C) BAIL – Fixing of Surety and Bond amount – Principles – Duty of the Court – Indicated.

For Petitioners : M/s. Debasnan Das, D.Biswal, S.S. Patnaik
For State : Mr. Arupananda Das, Addl. Govt. Adv.

ORDER Date of Order : 21.08.2018

S. K. SAHOO, J.

This is an application under section 439(1)(b) of the Code of Criminal Procedure, 1973 filed by the petitioners for waiving the condition of imposition of cash security amount of Rs.10,000/- (rupees ten thousand) only on each of the petitioners by the learned Asst. Sessions Judge, Kujang while granting bail to them in BLAPL No. 96 of 2018 vide order dated 14.05.2018.

It is contended by the learned counsel for the petitioners that the petitioners are unemployed persons and petitioner no.3 belongs to the family of BPL category. The BPL card in respect of family of petitioner no.3 has been annexed. The offences are triable by the Magistrate and the petitioners are local residents and there is no chance of their absconding. It is contended that even though the bail order was passed on 14.05.2018, the petitioners are unable to furnish the cash security amount for which they are still languishing in judicial custody. It is further contended that there is absolutely no justification for imposing cash security and since it has been done in a mechanical manner without proper application of mind, the same should be set aside.

Learned counsel for the State has no serious objection for waiving out the cash security.

The very word 'bail' means the process by which the liberty of a citizen, which is under cloud, is to be restored, with or without conditions imposed by the competent Court. Every person at the pre-trial stage is presumed to be an innocent

person until his guilt is established as per the provisions of law. The trial may take years together and if the liberty of the person is jeopardised for such a long time, it will amount to violation of his fundamental right to protection of life and personal liberty as per provisions contained under Article 21 of the Constitution of India.

The basic concept of bail is release of a person from the custody and delivery into the hands of sureties, who undertake to produce him in Court whenever required to do so. Such a purpose cannot be achieved by releasing an accused from custody on furnishing of cash security, in the lieu of solvent sureties who can take effort to produce the accused released, at a given date, time and place. There is no specific provision in the Code of Criminal Procedure empowering the Magistrate to insist on furnishing cash security while granting bail to a person. Therefore, it can be reasonably said that the matter is left to the exercise of judicial discretion by the Magistrate concerned subject to the provisions in the Code.

Section 437 of Cr.P.C. which deals with grant of bail by a Magistrate in a case of non-bailable offence, provides in sub-section (3) that when a person accused or suspected of commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI, or Chapter XVII of the Indian Penal Code or abetment of or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), the Court shall impose conditions which are mentioned under (a), (b) and (c) of sub-section (3). The Court has also power to impose any other conditions as would be necessary in the interest of justice. A High Court or Court of Session while dealing with the bail in respect of the nature of offences specified in sub-section (3) of section 437 Cr.P.C. or any other offences can also impose any of the conditions enumerated in sub-section (3), if it considers necessary but such Court is not bound to impose all those conditions.

No doubt the cash deposit in lieu of execution of a bond by the accused is an alternative system of granting bail and can be stated to be no less efficacious than granting bail of certain amount with or without surety or sureties of the like amount. In the cash deposit system, the cash is deposited right down and in the event of failure of accused to appear, the Court has the least trouble to realise as the amount is already in its custody. In case of bail on personal bond of recognisance, the Court has to rely on the personal promise under bail with surety. In case of failure to appear on the part of the accused, the Court has power to realise the amount from the surety. Section 445 of Cr.P.C. provides for taking of deposit instead of recognisance i.e. when any person is required by any Court or officer to execute a bond, with or without sureties, such Court or officer may, except in the case of bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix in lieu of executing such bond. Thus under this section 445 Cr.P.C., the Court has the discretion to allow

the accused to deposit payment in cash or Government promissory notes, if he offers it when he is unable to produce sureties except when the bond is for good behaviour. This concession is however available only to the accused and not to the sureties.

The discretionary power exercised by the Magistrate or the Court, as the case may be, under sections 441 Cr.P.C. and 445 Cr.P.C., is mutually exclusive and not concurrent. On the Court requiring a person to execute a personal bond with sureties or without sureties, it is at the option of the accused to furnish cash deposit in lieu of executing such bond that the Court may make an order under section 445 of Cr.P.C.

The order of bail should not be harsh and oppressive which would indirectly cause denial of bail thus depriving the person's individual liberty. While granting bail, insisting on good behaviour or prompt attendance, executing personal bond, further to safeguard his good behaviour and personal attendance may be supported by insisting upon additional sureties as the Court deems fit but insisting upon cash security is incorrect and indirectly results in denial of bail. The entire chapter of Cr.P.C. which deals with the provisions relating to bail nowhere says that when a person is released on bail, the Court can also insist upon him to give cash security. The power has to be exercised in a proper and judicious manner and not in an arbitrary, capricious or whimsical manner and the discretion exercised shall appear to be just and reasonable one. It is the duty of the Court to see that any order to be passed or conditions to be imposed while granting bail shall always be in the interest of both the accused and the State.

If the Court is satisfied, after taking into account, on the basis of information placed before it, that the accused has his roots in the community and is, not likely to abscond, it can safely release the accused on his personal bond. As held in a catena of decisions, to determine whether the accused has his roots in the community which would deter him from fleeing, the Court should take into account the length of accused's residents in the community, his employment, status, history and his financial condition, his family ties and relationship, his reputation, character and monetary condition, his prior criminal record including any record or, prior release on recognizance or on bail, the identity of responsible members of the community who would vouch for his reliability, the nature of the offence charged and the apparent probability of conviction and the likely sentence in so far as these factors are relevant to the risk of non-appearance, and any other factors indicating the ties of the accused to the community or bearing on the risk of wilful failure to appear.

While releasing the accused even on personal bond, it is necessary to caution the Court that the amount of the bond which it fixes should not be based merely on the nature of the charge. The decision as regards the amount of the bond should be an individualised decision depending on the individual

financial circumstances of the accused and the probability of his absconding. The amount of the bond should be determined having regard to these relevant factors and should not be fixed mechanically according to a schedule keyed to the nature of the charge. The enquiry into the solvency of the accused can become a source of great harassment to him and often result in denial of bail and deprivation of liberty and should not, therefore be insisted upon as a condition of acceptance of the personal bond.

Insistence on furnishing cash security has not been approved by the Courts. Though in the absence of any specific prohibition or any statutory norm for exercise of judicial discretion in the matter of bail, it cannot be said that the Magistrate or Court, as the case may be, has no jurisdiction at all to impose cash security as a condition for bail. Such a condition has been held by the Apex Court and different High Courts to be harsh, oppressive and virtually amounting to denial of bail. From section 445 Cr.P.C., it can be reasonably inferred that it is not the mandate of the Code that the Magistrate should insist on cash security in addition to personal bond with or without sureties.

Surety amount demand is dependent on several variable factors. Heavy amount should not be demanded as surety amount. Courts should be liberal in releasing poor or young or infirm persons and women on their own recognizance putting, however, reasonable conditions if necessary and permissible.

The Magistrates must always bear in mind that monetary bail is not a necessary element of the criminal process and even if risk of monetary loss is a deterrent against fleeing from justice, it is not the only deterrent and there are other factors which are sufficient deterrents against flight. The Magistrate must abandon the antiquated concept under which pre-trial release could be ordered only against monetary bail. It would bring more harm to the justice delivery system than good. Every other feasible method of pre-trial release should be exhausted before resorting to monetary bail. Unless it is shown that there is substantial risk of non-appearance or there are circumstances justifying imposition of such conditions, the same should not be adhered to. If a Magistrate is satisfied after making an enquiry into the condition and background of the accused that the accused has his roots in the community and is not likely to abscond, he can safely release the accused on order to appear or on his own recognizance.

There are very few people in this country who can furnish cash security for availing bail and, therefore, the Court while granting bail should as far as practicable avoid directing deposit of cash security as a condition. Only in exceptional cases where the Court thinks it proper to impose a condition for furnishing cash security, such order may be passed.

Judged in the aforesaid background and taking into account the nature of accusation and the financial condition of the petitioners, the direction to furnish cash security in addition to bail bond of other surety is clearly untenable. No specific reasons has been assigned by the learned Asst. Sessions Judge, Kujang rather the learned Court has observed that the investigation has been completed and the petitioners are the local residents. Therefore, I am of the view that the imposition of cash security is totally unwarranted and reflects gross abuse of power of judicial discretion and therefore, said condition is liable to be set aside.

In the result, the CRLMA application is allowed. The condition of deposit of cash security of Rs.10,000/- (rupees ten thousand) by each of the petitioners as was imposed by the learned Asst. Sessions Judge, Kujang vide order dated 14.05.2018 in BLAPL No.96 of 2018 is waived. All other conditions imposed by the learned Asst. Sessions Judge, Kujang remain unaltered.

2018 (II) ILR - CUT- 521

S. N. PRASAD, J.

F.A.O. NO. 204 OF 2013

ANJAN KUMAR NANDA ……..Appellant

.Vs.

STATE OF ODISHA AND ORS. ……..Respondents

APPOINTMENT – Post of lecturer in Sanskrit – Suitability & eligibilities of the candidates – M.A in Sanskrit is the prescribed qualification in the advertisement – Appellant has not acquired the prescribed qualification but possesses the equivalent qualification i.e. "Acharya" in Sanskrit – Respondent No. 5 possess the prescribed qualification – No stipulation in the advertisement to consider the equivalent qualification – But the selection committee recommended the name of Appellant ignoring the name of respondent No.5 – Power of selection committee to relax the prescribed qualification – Action of selection committee challenged – Held, neither the selection committee has the power to relax the prescribed qualification nor any stipulation with regard to consider the equivalent qualification – Hence the Appointment of Appellant is illegal and accordingly the respondent No.5 is entitled to hold the post – Appeal challenging the order of Education Tribunal Dismissed. (Para 5)

Case Laws Relied on and Referred to :-

1. AIR 1988 SC 902 : R. Prabha Devi and others v. Government of India & Ors.
2. (2003) 3 SCC 541 : P.M. Latha and Another v. State of Kerala & Ors.
3. (2007) 5 SCC 519 : Bihar Public Service Commission & Ors. v. Kamini & Ors.
4. AIR 1984 SC 541 : P.K. Ramachandra Iyer & Ors. v. Union of India & Ors.
5. (2005) 4 SCC 154 : Secretary, A.P. Public Service Commission v. B. Swapna and Others.

For Appellant : Mr. Budhadeb Routray, Senior Counsel.
M/s. D. Routray, P.K. Sahoo, K. Mohanty, S. Das, S. Jena, S.K. Samal, S.P. Nath & S. Rout.

For Respondents : Mr. P.C. Panda, Additional Government Advocate.
M/s. T.K. Mahanta & K.P. Behera.
M/s. S.K. Swain, D.R. Rath, S.K. Rout, S.C. Bairiganjan & A.C. Deo.

JUDGMENT Date of Hearing : 24.08.2018 Date of Judgment : 04.09.2018

S. N. PRASAD, J.

The instant appeal has been filed under Section-24-C of the Odisha Education Act, 1969 wherein the judgment dated 23.03.2013 passed by the Presiding Officer, State Education Tribunal, Odisha, Bhubaneswar in G.I.A. Case No.278 of 2011 has been assailed whereby and whereunder the decision of the Director, Higher Education, Odisha, Bhubaneswar dated 09.06.2011 holding the appointment of the appellant against the 2nd post of Lecturer in Sanskrit vide Resolution No.74 dated 06.03.2009 has been held to be valid, has been negated.

2. The brief fact of the case of the appellant, who has opposite party no.5 before the Tribunal, namely, Anjan Kumar Nanda, is that he has been appointed in pursuant to an advertisement published on 18.7.1993 in Gopabandhu Science College, Athagarh in the district of Cuttack to the post of Lecturer in Sanskrit. He has been selected and engaged after taking into consideration his eligibility and continues since then.

The appellant has approached to this Court by fling a writ petition being W.P.(C) No.12700 of 2005 with a prayer to approve his appointment against 2nd post of Lecturer in Sanskrit and to extend all other consequential service benefits as admissible under the Orissa Education Act and Rules framed thereunder. The aforesaid writ petition was disposed of vide order dated 27.02.2006 with a direction to the petitioner (appellant herein) to file fresh representation before the Director, Higher Education, Odisha, Bhubaneswar, who in turn, was directed to take decision on the aforesaid representation within period of four months thereafter. But the Director, Higher Education, vide its order dated 14.05.2007, has rejected the claim

of the appellant on the ground that the Governing Body has never proposed to create 2nd post of Lecturer in Sanskrit before filling up the said post.

During the relevant time, the State Government has formulated a new Grant-in-Aid Order in the name of Orissa (Non-Government Aided Colleges, Aided Junior Colleges and Aided Higher Secondary Schools) Grant-in-Aid Order, 2009 (in short "Grant-in-Aid Order, 2009") and in pursuant thereto, the Principle of the appellant's college was directed to submit necessary proposal in favour of all eligible persons for approval of their appointment under the Grant-in-Aid Order, 2009.

The Sub-Collector-cum-President of the Governing Body vide letter dated 20.01.2009 has issued a letter to the Director, Higher Education regarding submitting necessary documents in favour of the appellant and further requested the Director, Higher Education to held up the verification of service particulars of the respondent No.5 and thereafter, the Governing Body vide its Resolution No.74 dated 06.03.2009 unanimously resolved that the earlier Resolution No.71 dated 24.09.2008 is cancelled and further resolved that the appointment of the appellant as Lecturer in Sanskrit 2nd post from the date of his joining i.e. from 02.09.2003 has been approved while the appointment of the respondent no.5 has been approved as Lecturer in Sanskrit against the 3rd post and in view of such resolution passed by the Governing Body, a proposal was submitted before the Director, Higher Education in favour of the appellant for approval of his appointment as against 2nd post of Lecturer in Sanskrit under the provision of Grant-in-Aid, 2009.

After such proposal was submitted in favour of the appellant, the State Government has issued letter to the Director, Higher Education seeking certain clarification with regard to the allegations made by the respondent no.5 as against the appellant for which the Director, Higher Education issued a letter dated 09.06.2011 to the State Government clarifying that in view of the merit list of interview and factual report of the President of the Governing Body dated 20.01.1999 and subsequent detailed report submitted by the Principal of the College on 23.12.2010, the appointment of the appellant has been confirmed as against the 2nd post of Lecturer in Sanskrit where the appointment of the respondent no.5 has been confirmed as against the 3rd post of Lecturer in Sanskrit stands valid. Against the aforesaid order, the respondent no.5 has approached to the Tribunal assailing the same which has been answered in favour of the respondent no.5 which is under challenge in this appeal by the appellant.

The Tribunal has answered against the appellant basing upon the reason that he was having Acharya Degree in Sanskrit which is equivalent to the post of M.A. and in the advertisement, there is no stipulation that any equivalent degree of the M.A. will be treated to be the proper eligibility condition of a candidate.

3. Mr. Budhadeb Routray, learned Senior Counsel appearing for the appellant submits that the State Government has already recognized the Acharya Degree awarded by the Rashtriya Sanskrit Sansthan, New Delhi equivalent to M.A. Degree in Sanskrit for the purpose of employment under the State Government and as such, this aspect of the matter ought to have been taken into consideration by the Tribunal but not taken into consideration. The finding given by the Tribunal, so far as it relates to awarding marks in the interview has not been taken into consideration and the question of seniority cannot be raised after long lapse of time.

Mr. Routray has made oral submission raising the point of jurisdiction that the Sub-Collector was appointed as an administrator due to expiry of tenure of Governing Body, who has taken decision by approving the service of respondent no.5 as against 2nd post and as such, the same was without jurisdiction. To strengthen his argument, he has taken aid of the provision of the Orissa Education (Establishment, Recognition and Management of Private Colleges) Rules, 1991 wherein as per the provision made under the provision of Rule-22, the decision is to be taken by the Governing Body and Governing Body consist of several members headed by the President.

He submits that in view of the provision contained under the provision of sub-section (6) of Section-7 of Orissa Education Act, 1969, provision has been made conferring power upon the Prescribed Authority to allow the Governing Body or the Managing Committee whose term has expired under sub-section (4) or sub-section (2) of Section 7-A to continue in office till the Governing Body or the Managing Committee is reconstituted or appoint any person or persons to exercise the powers and discharge the functions of the Governing Body or the Managing Committee during the intervening period. Hence, he submits that the Managing Committee or the Governing Body cannot exercise power after expiry of tenure and Sub-Collector has been conferred with the power to act as Governing Body, the decision taken by the Governing Body vide Resolution dated 24.09.2008 has been reversed vide Resolution dated 06.03.2009, as such, there is no illegality.

According to him, the power and functions of the Governing Body has been provided under the provision of Rule-29 of the Orissa Education (Establishment, Recognition and Management of Private Colleges) Rules, 1991.

4. *Per contra*, Mr. P.C. Panda, learned Additional Government Advocate appearing for the State-respondents no.1, 2 & 4 and Mr. S.K. Swain, learned counsel representing the respondent No.5 submit that the Tribunal has not erred in passing the order rather the Tribunal after taking into consideration the fact that the advertisement has been published only to fill up one post of Lecturer in Sanskrit, as would be evident from Annexure-1 annexed to the memo of appeal. In pursuant thereto, the respondent no.5 as also the appellant and others had participated in the selection process. The required qualification as stipulated in the aforesaid

advertisement is that the candidates securing 55% of marks in M.A./M.S. Examination and within the age of 28 years have been allowed to appear in the interview and admittedly, the appellant has not got 55% marks in M.A. Degree rather he, on the strength of the Acharya Certificate, which according to the appellant, is equivalent to the M.A. Degree Examination, has been considered and engaged. Hence, he cannot prevail over and above the respondent no.5 and thereby his selection and appointment against the 2nd post of Lecturer in Sanskrit cannot be said to be illegal in terms of the advertisement.

It has been submitted that this is not the case for determination of the *inter se* seniority rather the dispute all along is regarding the approval of the service of the appellant vis-à-vis respondent no.5 as against the 2nd post of Lecturer in Sanskrit and admittedly, since the respondent no.5 is holding the requisite qualification as per the advertisement and as such, she will be said to be the proper selectee and engagee to the aforesaid post.

It has been submitted that this issue has been raised by the appellant way back in the year 2005 by filing a writ petition being W.P.(C) No.12700 of 2005 which has been disposed of by this Court vide order dated 27.02.2006 directing the Director, Higher Education, Orissa, Bhubaneswar to consider the claim of the appellant, if he files representation. In pursuant thereto, a representation was filed by him making therein in the prayer (i) to confirm his appointment as Lecturer in Sanskrit against the 2nd post; and (ii) approving his appointment accordingly enabling all admissible benefits under Orissa Education Act, 1969. The Director vide order dated 14.05.2007 has rejected the claim of the appellant on the ground that the Governing Body of the college in question although issued an advertisement for filling of one post of Lecturer in Sanskrit but appointed two persons, namely, the appellant and the respondent no.5 on the same date i.e. on 27.8.1993, however, without mentioning their position of appointment against which post whether 2nd post or the 3rd post.

It has been submitted that the aforesaid order dated 14.05.2007 has never been challenged by the appellant.

In the meanwhile, it has been submitted that the appellant has managed to got a decision in his favour in supersession to the decision taken under the Resolution No.71 dated 24.09.2008 whereby and whereunder he has been placed against the 3rd post of Lecturer in Sanskrit from the date of his joining i.e. 2.9.1993. Vide Resolution No.74 dated 06.03.2009 against which respondent no.5 has made a complaint on the ground that the appellant since been not possessing the requisite qualification as stipulated in the advertisement, hence his appointment is void *ab initio* but the Director, without taking into consideration the legal position of not fulfilling the educational qualification as provided under the advertisement and taking note of its equivalence, has given a declaration regarding validity of the

decision taken by the Governing Body under Resolution No.74 dated 06.03.2009, against which, the respondent no.5 has filed an application under the provision of Section-24-B of the Orissa Education Act, 1969 wherein the Tribunal, after taking into consideration the legal position of possessing prescribed qualification as per the advertisement which the appellant was not possessing since he was possessing the equivalent qualification as that of the M.A. i.e. having Acharya Degree, has given a finding that his appointment is not proper.

In view thereof, it has been submitted that the Tribunal has not committed any illegality rather the Tribunal, after taking into consideration the legal settled position of law, has passed the order.

Mr. Swain, learned counsel appearing for the respondent no.5 has submitted that the question of jurisdiction, as has been raised by Mr. Routray, learned Senior Counsel appearing for the appellant, has never been taken at any time either before the administrative authority or before the Tribunal or even in the instant memo of appeal. Hence, this point is not worst to be considered.

He has further submitted that this is an appeal filed by the appellant under the provision of Section-24-C of the Orissa Education Act, 1969 and the jurisdiction of the appellate court is only to see the legality and propriety or perversity or the finding given by the Tribunal in the court and if any point has not been raised on that basis, the finding given by the Tribunal cannot be said either perverse or incorrect finding.

5. Heard the learned counsel for the parties and gone into the relevant documents available on record and after appreciation of their rival submissions, this Court has found that one advertisement was published for fulfilling one post of Lecturer in Sanskrit requiring applications from the candidates who have securing 55% in M.A./M.S. Examination. The content of the advertisement is being referred herein below:-

"ADVERTISEMENT
GOPABANDHU SCIENCE COLLEGE
ATHAGARH

Candidates securing 55% of marks at M.A./M.S. Examination and within the age of 28 years are hereby informed to appear interview on 25.07.93 at 11 A.M. in the office of the undersigned along with a college cash receipt of Rs.35/- Bio-data, original and attested copies of all certificate for one post of lecturer each in English, Oriya, History, Sanskrit, Logic & Philosophy, Physics, Botany, Zoology, Education and one leave vacancy each in Oriya, Economics, Botany, Physics & Chemistry.

Sd/- B.K. Tripathy,
Principal cum Secreary
G.Sc. College, Athagarh."

The appellant as well as respondent no.5 along with others had participated in the selection process. Admittedly, the appellant was having no P.G. Degree in M.A. having 55% marks. The respondent no.5 was having 55% marks in the M.A. in Sanskrit Examination. The Selection Committee has accepted the candidature of the appellant and selected him along with respondent no.5, as would be evident from Annexure-2, in which, the name of the appellant has been placed at Serial No.1 while the name of respondent no.5 is placed at Serial No.4.

The dispute arose with respect to 2nd and 3rd post in the Department of Sanskrit. The appellant as well as respondent no.5 has claimed to be appointed against the 2nd post of Lecturer in Sanskrit.

During the relevant time, the Governing Body of the college in question was not functioning and in its place the Sub-Collector, Athagarh has assumed the charge of President by virtue of the power conferred under provision of Section-7(6) of the Orissa Education Act, 1969. When the complaint has been made by the respondent no.5 before the Sub-Collector, Athagarh in the capacity of the President of the Governing Body of the college, he has felt non-cooperation by the Principal of the said college and as such, he has reported the matter before the Director, Higher Education to held him for verification of service particulars of the appellant. The Governing Body has taken a resolution being Resolution No.71 dated 24.09.2008, by which, the selection and engagement of the respondent no.5 has been approved but the same has been superseded by another resolution being Resolution No.74 dated 06.03.2009 approving the appointment of respondent no.5 against 3rd post of Lecturer in Sanskrit from the date of her joining. The respondent no.5 has raised a dispute questioning the legality and propriety of the Resolution No.74 dated 06.03.2009 on the ground of lack of educational qualification having been possessed by the appellant thereby questioning his appointment but the Director has given a declaration regarding the validity of the decision taken vide Resolution No.74 dated 06.03.2009. Prior to that, the appellant has approached to this Court by filing a writ petition being W.P.(C) No.12700 of 2005 for giving a declaration regarding approval of his service against the 2nd post, this Court has given liberty to the petitioner to file representation before the Director for its onward consideration at his end and in view thereof, the Director has passed an order on 14.05.2007 mentioning therein that against one post, two persons have been appointed on the same day without mentioning their position and hence the claim of the appellant has been rejected for its approval upon the said post.

Admittedly, the decision taken by the Director has not been challenged by the appellant at any time earlier, by which, the approval against the 2nd post of Lecturer in Sanskrit being rejected. The respondent no.5 has raised a dispute before the Tribunal as against the decision taken on 9.6.2011 *inter alia* on the ground that the appellant has been appointed without possessing valid requisite qualification

having 55% marks in the M.A. in Sanskrit rather on the basis of the equivalent certificate of Acharya which has been directed to be treated as equivalent by the State authority, his candidature has been accepted and he has been engaged, but if the advertisement has been published without mentioning for acceptance of any requisite qualification of the equivalent certificate, the candidature of the appellant ought to have been rejected at the threshold but it has not been done and against the single post, two candidates have been appointed.

Her, further case before the Tribunal, was that the appellant for approval of his appointment against the 2nd post, has approached to this Court by filing a writ petition being W.P.(C) No.12700 of 2005. In pursuant thereto, the Director has passed an order rejecting the prayer of the appellant for approval of his service against the 2nd post of Lecturer in Sanskrit on the ground that on the same day, two persons have been appointed without earmarking under which post either against 2nd or 3rd post, the appointment has been made. However, the same has never been challenged by him but by getting favour from the management, the decision which has been taken vide Resolution No.71 dated 24.09.2008, it has been superseded by another Resolution taken on 06.03.2009 vide Resolution No.74 holding the selection of the appellant as valid as against the 2nd post of Lecturer in Sanskrit.

The contention raised by the appellant that the Tribunal would have taken note of the fact that the Governing Body, while taking the decision vide Resolution No.71 dated 24.09.2008, is having no jurisdiction after lapse of the period of 10 years and that is the reason the Sub-Collector under the authority of law, has cancelled the same and taken new decision vide Resolution No.74 dated 06.03.2009 and further taken the ground that as per the decision of the competent authority dated 31.03.1984, Acharya Examination conducted by the Rastriya Sanskrit Sansthan, New Delhi has been treated to be equivalent to M.A. Degree Examination in Sanskrit of the Utkal University. Hence, it cannot be said that the appellant has no academic qualification as stipulated under the advertisement.

This Court, before going through the legality and propriety of the finding given by the Tribunal, thinks it proper to discuss about the legal position regarding eligibility condition.

It is settled position of law that the stipulation made in the advertisement is to be adhered to and there cannot be any deviation. If the advertisement contains any eligibility condition, the candidature is to be tested on the basis of the same.

If in the advertisement, there is no stipulation to treat the equivalent certificate as the eligibility condition, the authority cannot take it into consideration.

This Court, after going through the content of the advertisement, has found that the candidates have been required to possess 55% marks in M.A. / M.S.

Examination and there is no stipulation with respect to giving relaxation regarding the equivalent degree possessed by any of the candidate and on this ground, the legal position is to be taken into consideration as to whether in absence of any equivalent certificate to be treated at par with the requisite eligibility qualification can candidature of a candidate be accepted?

It is not in dispute that the suitability and eligibility of a candidate has to be established, in this regard, reference may be made to the judgment rendered by Hon'ble the Supreme Court in the case of ***R. Prabha Devi and others v. Government of India and others***, reported in ***AIR 1988 SC 902*** wherein at paragraph-15 their Lordships have been pleased to hold as follows:-

> *"xxx xxx xxx xxx xxx xxx xxx*
> *when qualifications for appointment to a post in a particular cadre are prescribed, the same have to be satisfied before a person can be considered for appointment. Seniority in a particular cadre does not entitle a public servant for promotion to a higher post unless he fulfills the eligibility condition prescribed by the relevant rules. A person must be eligible for promotion having regard to the qualifications prescribed*
> *xxx xxx xxx xxx xxx xxx xxx"*

In the case of ***P.M. Latha and Another v. State of Kerala and Others, reported in (2003) 3 SCC 541*** wherein their Lordships have held at paragraphs-10 and 13 which are being quoted herein below:-

> *"10. xxx xxx xxx xxx xxx xxx*
> *BEd qualification is a higher qualification than TTC and therefore, the Bed candidates should be held to be eligible to compete for the post. On behalf of the appellants, it is pointed out before us that Trained Teacher's Certificate is given to teachers specially trained to teach small children in primary classes whereas for BEd degree, the training imparted is to teach students of classes above primary. BEd degree-holders, therefore, cannot necessarily be held to be holding qualification suitable for appointment as teachers in primary schools. Whether for a particular post, the source for recruitment should be from the candidates with TTC qualification or BEd qualification, is a matter of recruitment policy. We find sufficient logic and justification in the State prescribing qualification for the post of primary teachers as only TTC and not BEd. Whether BEd qualification can also be prescribed for primary teachers is a question to be considered by the authorities concerned but we cannot consider BEd candidates, for the present vacancies advertised, as eligible."*
>
> *"13. Equity and law are twin brothers and law should be applied and interpreted equitably but equity cannot override written or settled law. The Division Bench forgot that in extending relief on equity to BEd candidates who were unqualified and yet allowed to compete and seek appointments contrary to the terms of the advertisement, it is not redressing the injustice caused to the appellants who were TTC candidates and would have secured a better position in the rank list to get*

appointment against the available vacancies, had BEd candidates been excluded from the selections. The impugned judgment of the Division Bench is both illegal, inequitable and patently unjust. The TTC candidates before us as appellants have been wrongly deprived of due chance of selection and appointment. The impugned judgment of the Division Bench, therefore, deserves to be set aside and of the learned single judge restored."

In the case of ***Bihar Public Service Commission and Others v. Kamini and Others,*** reported in ***(2007) 5 SCC 519*** wherein their Lordships have held at paragraph-8 which is being quoted herein below:-

"8. Again, it is well settled that in the field of education, a court of law cannot act as an expert. Normally, therefore, whether or not a student/candidate possesses requisite qualifications should better be left to educational institutions [vide University of Mysore v. C.D. Govinda Rao. This is particularly so when it is supported by an Expert Committee. The Expert Committee considered the matter and observed that a person can be said to be Honours in the subject if at the graduate level, he/she studies such subject as the principal subject having eight papers and not a subsidiary, optional or side subject having two papers. Such a decision, in our judgment, cannot be termed arbitrary or otherwise objectionable. The learned Single Judge, in our opinion, was, therefore, right in dismissing the petition relying upon the report of the Committee and in upholding the objection of the Commission. The Division Bench was in error in ignoring the well-considered report of the Expert Committee and in setting aside the decision of the learned Single Judge. The Division Bench, while allowing the appeal, observed that the 'litmus test' was the admission granted to the first respondent by the Central Institute of Fisheries Education, Mumbai. According to the Division Bench, if the first respondent did not possess Bachelor of Science degree with Zoology, the Institute would not have admitted her to the said course. The Division Bench observed that not only the first respondent was admitted to the said course, she had passed it with "flying colours". In our opinion, the Division Bench was not right in applying 'litmus test' of admission of the first respondent by the Central Institute of Fisheries Education, Mumbai. The controversy before the Court was whether the first respondent was eligible for the post of District Fisheries Officer, Class II. The correct test, therefore, was not admission by the Mumbai Institution. If the requirement was of Honours in BSc with Zoology and if the first respondent had cleared BSc Honours with Chemistry, it could not be said that she was eligible to the post having requisite educational qualifications. By not treating her eligible, therefore, the Commission had not committed any illegality."

It is evident from the aforesaid judgments that the requirement, as has been provided in the advertisement, is strictly to be followed and there cannot be any deviation from the same.

So far as the power of relaxation as to whether it is to be given by the selection committee or the selection body or not?

It is the legal settled position that the relaxation can only be given if there is any power to relax, which is the essential qualification, reference in this regard may be made to the judgment rendered by Hon'ble the Supreme Court in the case of ***P.K. Ramachandra Iyer and others v. Union of India and Others, reported in AIR 1984 SC 541*** wherein their Lordships have held at paragraph-31 which is being quoted herein below:-

> *"xxx xxx xxx xxx xxx xxx xxx*
> *Once it is most satisfactorily established that the Selection Committee did not have the power to relax essential qualification pertaining to experience, the entire process of selection of the 6th respondent was in contravention of the established norms prescribed by advertisement and power of the Selection Committee and procedure of fair and just selection and equality in the matter of public employment and to rectify resultant injustice and establish constitutional value this Court must interfere. Selection of respondent No.6 is contrary to rules and orders and in violation of prescribed norms of qualification. He was ineligible for the post when selected. His selection and appointment would be required to be quashed and set aside."*

In the case of ***Secretary, A.P. Public Service Commission v. B. Swapna and Others,*** reported in ***(2005) 4 SCC 154*** wherein their Lordships have held at paragraphs-15 and 18 which are being quoted herein below:-

> *"15. xxx xxx xxx xxx xxx xxx*
> *Once it is most satisfactorily established that the Selection Committee did not have the power to relax essential qualification, the entire process of selection so far as the selected candidate is concerned gets vitiated. In P.K. Ramachandra Iyer v. Union of India this Court held that once it is established that there is no power to relax essential qualification, the entire process of selection of the candidate was in contravention of the established norms prescribed by advertisement. The power to relax must be clearly spelt out and cannot otherwise be exercised."*
>
> *"18. In Dr. Krushna Chandra Sahu (Dr.) v. State of Orissa it was held as under: (SCC p. 13, paras 34-36)*
>
> > *"34. The Selection Committee does not even have the inherent jurisdiction to lay down the norms for selection nor can such power be assumed by necessary implication. In P.K. Ramachandra Iyer v. Union of India it was observed: (SCC pp.180-81, para 44)*
> > *"By necessary inference, there was no such power in the ASRB to add to the required qualifications. If such power is claimed, it has to be explicit and cannot be read by necessary implication for the obvious reason that such deviation from the rules is likely to cause irreparable and irreversible harm."*
>
> *35. Similarly, in Umesh Chandra Shukla v. Union of India it was observed that the Selection Committee does not possess any inherent power to lay down its own standards in addition to what is prescribed under the Rules. Both these decisions were followed in Durgacharan Misra v. State of Orissa and the limitations of the*

Selection Committee were pointed out that it had no jurisdiction to prescribe the minimum marks which a candidate had to secure at the viva voce.

36. It may be pointed out that rule-making function under Article 309 *is legislative and not executive as was laid down by this Court in B.S. Yadav v. State of Haryana. For this reason also, the Selection Committee or the Selection Board cannot be held to have jurisdiction to lay down any standard or basis for selection as it would amount to legislating a rule of selection."*

The Commission has been given right to freeze any ranking list. The selection from the ranking list from amongst the posts advertised was limited to the cases where the selected candidates had relinquished the selection or who had not joined the duties within the given time and also new requisitions sent by the appointing authority. The Commission did not think it appropriate to make appointment from the new requisitions. The fact that the Commission had directed that fresh advertisements were to be made is clearly indicative of the fact that the Commission did not want the new requisitions to be filled up by appointing from the ranking list in force. The Tribunal and the High Court were therefore not justified in holding by referring to the amended rule that the fallout vacancies were to be filled up from the ranking list. The fallout vacancies in terms of the amended notification were to be notified in the next recruitment. Case of the applicant all through has been that her claim was relatable to the 14 vacancies indented on 14.4.1997 and in particular the open category. It is not her case that Commission had directed fresh advertisement though it had not frozen the rank list. It is not disputed that there cannot be direction for fresh advertisement unless the rank list is frozen. The materials placed on record clearly show that before directing fresh advertisement, the Commission had in fact for reasons recorded directed freezing. Unfortunately, the Tribunal did not grant adequate time to the Commission to produce relevant records and the High Court proceeded on erroneous premises that the amended Rules applied. Therefore, looked at from any angle, the High Court's judgment affirming Tribunal's judgment cannot be maintained. The same is set aside. The appeal is allowed with no order as to costs."

In view of the aforesaid provision of law, the factual aspect of the instant case has been appreciated by this Court.

Undisputedly, the appellant is having no qualification of M.A. rather he is claiming his selection against the 2nd post by virtue of having Acharya pass examination, which has been given recognition by the order of the Deputy Registrar of the Utkal University.

Question is that when there is only one post as per the advertisement and several candidates are there, the scrutiny of the candidature is to be made strictly on the basis of the terms and conditions of the advertisement.

Here in the instant case, when the respondent no.5 as also the appellant and others were the candidates and admittedly respondent no.5 having requisite qualification as per the advertisement, there was no question of taking any adverse

decision against her by not approving her service against 2nd post rather the selection committee has committed illegality in accepting appellant's application in absence of requisite qualification as provided in the advertisement and even if it has accepted, the Sub-Collector by reversing the earlier Resolution dated 24.09.2008 by virtue of the Resolution dated 06.03.2009 has committed illegality in approving the service of the appellant against the 2nd post of Lecturer in Sanskrit.

Further, the Sub-Collector, while cancelling the decision taken vide Resolution dated 24.09.2008 by virtue of Resolution dated 06.03.2009, has given go by to the Office Order No.21935 dated 14.05.2007 which has been passed by the Director, Higher Education, Orissa, Bhubaneswar in pursuant to the order passed by this Court in W.P.(C) No.12700 of 2005 whereby and whereunder the approval of the appellant has not been accorded and the aforesaid order has never been challenged by him rather thereafter he has got the decision by the Managing Committee headed by Sub-Collector in the capacity of the President of the Governing Body who has taken decision by virtue of Resolution dated 06.03.2009 by cancelling the Resolution dated 24.09.2008 approving the service of the appellant against the 2nd post and the service of the respondent no.5 against the 3rd post.

Here question is that the Director, Higher Education, Orissa, Bhubaneswar in the capacity of the Prescribed Authority and in pursuant to the order passed by this Court in W.P.(C) No.12700 of 2005, has rejected the claim of the appellant by not approving his service against the 2nd post on what ground and on what basis the Sub-Collector has changed the aforesaid decision.

At this juncture, the submission of Mr. Routray, learned Senior Counsel appearing for the appellant is to be taken into consideration, who has submitted that when the Resolution dated 24.09.2008 was passed, the Governing Body was having no jurisdiction and as such, the Sub-Collector, in pursuant to the power conferred to it under the provision under Section-7(6) of the Orissa Education Act, 1969, has cancelled the aforesaid decision taken in the said Resolution by superseding it by virtue of the Resolution dated 06.03.2009 (Annexure-5), but according to the considered view of this Court, the Governing Body might have got no jurisdiction but the decision of the Director dated 14.05.2007 was there wherein the entire facts were stated by the Director and furthermore, the Sub-Collector, while reversing the decision taken by the Governing Body, said to have got no jurisdiction taken on 24.9.2008 ought to have taken into consideration the legal position of law that possessing the requisite qualification is mandatory and also to consider that how two persons have been appointed against a single post advertised that too the selection committee has not scrutinized the documents in terms of the advertisement that goes to show that the selection committee has shown favour to the appellant.

This Court also wants to deal with the contention of the learned Senior Counsel appearing for the appellant that the Acharya Examination conducted by

Rastriya Sanskrit Sansthan, New Delhi has been directed to be treated equivalent to the M.A. Degree Examination and to support his contention, he has annexed document dated 30.03.1984 issued by the Deputy Registrar of the Utkal University.

This Court is not making any comment upon the aforesaid fact, but the fact remains that when there is no stipulation in the advertisement to treat any equivalent certificate to that of the M.A. Degree in Sanskrit treating it for the purpose of accepting the candidature of a candidate but certainly will be said to be deviation from the terms and conditions of the advertisement which is not as per the settled position of law as discussed hereinabove.

It is further evident that the Tribunal has taken note of the fact that the advertisement contains only interview to face the suitability of the candidate, but the Governing Body has taken decision to ask the candidate to go for teaching test which has been said by the Tribunal beyond the scope of the advertisement and by doing so, the opposite party no.5, the appellant herein, has been awarded 50 out of 50 marks in the teaching test to him which has been said to be illegality.

This Court is also of the firm view that the selection process, if once started, cannot be changed on the settle principle of law that once the game starts, the rule cannot be changed.

Here in the instant case, the advertisement only contains to test suitability of a candidate by asking one or other candidates to participate in the interview, but the teaching test has also been conducted by the selection committee. Hence, the same is beyond the scope of the advertisement and in the teaching test awarding 50 out of 50 marks to the appellant herein is also found to be untrustworthy.

In view thereof, the view taken by the Tribunal regarding the illegality committed by the selection committee in selecting the appellant cannot be said to be any infirmity.

Hence, I am in agreement with such finding of the Tribunal.

For other reason also that if the equivalent certificate was being treated to be equivalent and considered for accepting the candidature, the same should have been reflected in the advertisement so that the other candidates having Acharya Examination Certificate might have got an opportunity to participate in the selection process.

Be that as it may, the selection body ought to have gone into the terms and conditions of the advertisement and in absence of any stipulation made therein and if any deviation, the selection made of a person will be said to be improper.

The Tribunal, after taking into consideration all these aspects of the matter, has passed the order which has got no infirmity.

6. In view thereof, this Court finds no perversity in the finding rather the finding is based upon the legal position. Hence, this Court declines to interfere with the same. Accordingly, the F.A.O. is dismissed.

2018 (II) ILR - CUT- 535

S.N. PRASAD, J.

F.A.O. NOS.194 OF 2016 & 58 OF 2017

STATE OF ODISHA & ANR. (In both the appeals) ……..Appellants

.Vs.

LOKANATH BEHERA & ANR.
(In F.A.O. No.194 of 2016)
JAYANTA KUMAR MOHANTY & ANR. ……..Respondents
(In F.A.O. No.58 of 2017)

(A) EDUCATION – Grant-in aid – Whether can be claimed as a matter of right? Answer – No. Held, since the entitlement to receive the aid flows from the Government order, until & unless an order to that extent is passed, no right is accrued merely satisfying the eligibility.

"There is no dispute in the position of law that grant cannot be claimed as a matter of right and it cannot be attached to a post like that of salary and if the Government has made out a provision in order to give financial aid to the Non-Government Aided Institution by way of grant to the teaching and non-teaching staffs that solely depend upon the financial condition of the State Government and that is the reason the State Government by way of enactment as contained under Section 7-C(4) of the Orissa Education Act, 1969 has provided that the grant-in-aid would be given on the basis of the order or enactment made in this regard and under the authority of the aforesaid provision, the different Grant-in-Aid Orders have been issued by the Government. Paragraph-8 of the Grant-in-Aid Order, 1994 stipulates that the Non-Government Educational Institutions which has been notified as an aided educational institution shall not ipso facto be eligible to receive grant-in-aid such institution will only be eligible to receive grant-in-aid towards salary cost of teaching and non-teaching post of that institutions who are eligible to receive grant-in-aid in accordance with the provision of this order, meaning thereby, merely if a Non-Government Educational Institution has been notified as an aided institution, the benefit of grant-in-aid would not be released rather for extending the aforesaid benefit, the condition stipulated under the provision of paragraph-9 of the Grant-in-Aid Order, 1994 as quoted above will have to be fulfilled." *(Para 6)*

(B) EDUCATION – Grant-in-aid – Repeal of Grant-in-Aid Order, 1994 – Claim of grant-in-aid by virtue of such repealed Order – Entitlement – Held, if the monetary benefit would be granted on the basis of repealed Act, there would be no meaning of repealment of the Act and it will go contrary to the principle of repealment as laid down under the provision of section 6 of the General Clauses Act.

"Further, the eligibility to receive grant-in-aid is to seen as on the 1st day of June, 1994 in accordance with the Grant-in-Aid Order, 1994, meaning thereby, the eligibility part has remain untouched by enacting either Grant-in-Aid Order, 2004 or 2008 or 2009, but the determination of the quantum of Block Grant has been decided to be determined by taking into account the salaries and allowances as on the 1st day of January, 2004 and if in this situation, an incumbent either teaching or non-teaching staff approaching to the court of law by making claim that he is entitled to get the benefit of Grant-in-Aid Order, 1994 that is for claiming the full salary cost, then it would not be permissible after repealment of the Grant-in-Aid Order, 1994 and coming into effect of the subsequent Grant-in-Aid Orders either Grant-in-Aid Order, 2004 or 2008 or 2009.

If by virtue of the repealment of the Grant-in-Aid Order, 1994, if the respondent No.1 (in both the appeals) would be extended the monetary benefit on the basis of repealed Act, there would be no meaning of repealment of the Act and it will go contrary to the principle of repealment as laid down under the provision of Section-6 of the General Clauses Act, since repealment means that any Act if repealed will be said to be not in existence from the date of its enactment and the benefit or right already accrued will not be adversely affected but the prime question to get the benefit of repealed Act would be that any benefit must have been granted under the provision of the Act which has subsequently been repealed." (Para 6)

(C) Grant-in-aid – Whether grant-in-aid is released to a post or institution? – Held, this court after going across the provisions of proviso to section 7C (4) of the Orissa Education Act,1969 read with clause as contained in paragraph-4 of the grant-in-aid Order, 2004, it would be evident that it is not only included the institution but also include the post.

"This Court, after applying the aforesaid judgment and after going across the provision of proviso to Section-7C(4) of the Orissa Education Act, 1969 read along with repeal clause as contained in paragraph-4 of the Grant-in-Aid Order, 2004, is of the view that the word inserted in proviso to Section-7C(4) of the Orissa Education Act, 1969, if read together with the provision of paragraph-4 of the Grant-in-Aid Order, 2004, it would be evident that it is not only institution rather the institution also includes the post." (Para 6)

Case Laws Relied on and Referred to :-

1. AIR 2000 SC 634 : Chandigarh Administration & Ors..Vs. Mrs. Rajni Vali & Ors.
2. AIR 2013 SC 2113 : The Government of Andhra Pradesh & Ors. .Vs. Ch. Gandhi.

3. JT 2000 (9) SC 170 : Govt.of Andhra Pradesh & Ors. .Vs. G.V.K. Girls High School
4. AIR 2005 SC 648 : Nathi Devi .Vs. Radha Devi Gupta.
5. 1996 (I) OLR 152 : Laxmidhar Pati and Ors. .Vs. State of Orissa & Ors.
6. 2003 (I) OLR-91 : Prafulla Kumar Sahoo .Vs. State of Orissa & Ors.
7. 2014 (I) ILR-CUT-205 : Aruna Kumar Swain & Anr. .Vs. State of Orissa & Ors.
8. (F.A.O. No.154 of 2016) : Santosh Kumar Mohanty .Vs. State of Odisha & Ors.
9. (F.A.O. No.424 of 2015) : State of Orissa and Anr. .Vs. Satyananda Sahoo & Anr.
10. (F.A.O. No.426 of 2015) : State of Odisha and another .Vs. Hrushikesh Mishra & Ors.
11. (F.A.O. No.614 of 2015) : State of Orissa & Anr. .Vs. Dr. Chittaranjan Das & Anr
12. (F.A.O. No.75 of 2017) : State of Odisha and Anr. .Vs. Prabhakar Padhi & Ors.
13. 2003 (1) OLR 1991 : Prafulla Kumar Sahoo .Vs. State of Orissa & Ors.
14. (2011) 5 SCC 305 : State of Utter Pradesh and Ors. .Vs. Hirendra Pal Singh & Ors.
15. (2018) 6 SCC 287 : Board of Control for Cricket in India .Vs. Kochi Cricket Private Ltd. & Ors.
16. 1993 (I) OLR-77 : Jalada Delanga Uchha Bidyapith .Vs. State of Orissa.
17. 1995 (I) OLR 310 : Kartik Ch. Mohanta & Ors. .Vs. State of Orissa & Ors.
18. 2003 (I) OLR-91 : Prafulla Kumar Sahoo .Vs. State of Orissa & Ors.
19. (2004) 3 SCC 628 : Union of India & Ors..Vs. Mohanlal Likumal Punjabi & Ors.
20. (2013) 14 SCC 81 : Basawaraj and Anr. .Vs. Special Land Acquisition Officer.
21. AIR 2014 SC 3640 : Chaman Lal .Vs. State of Punjab & Ors.

For Appellants : Mr. Bikram Senapati, Addl. Govt. Adv.

For Respondents : M/s. Dillip Kumar Mohapatra, A. Sahoo & N. Nayak.
Mr. Sangram Jena.

JUDGMENT Date of hearing : 27.08.2018 Date of judgment : 11.09.2018

S. N. PRASAD, J.

Mr. D.K. Mohapatra, learned counsel appearing for respondent no.1 (in both the appeals) has submitted that both the appeals may be taken up together. He has further insisted upon the Court that F.A.O. No.194 of 2016 may be heard first, since pleadings are complete.

Mr. B. Senapati, learned Additional Government Advocate appearing for the State-appellants (in both the appeals) has fairly submitted that since the issues raised in both the appeals are similar, same may be heard together.

In view of such submissions, this Court, after going across the judgments passed by the Tribunal and the grounds taken in both appeals, has found that the issues raised in both the appeals are similar and as such, heard both the appeals together and accordingly are being disposed of by this common judgment.

2. Both the appeals have been filed by the State of Odisha, represented through the Commissioner-cum-Secretary to Government, Department of Higher Education, Bhubaneswar under the provision of Section 24-C of the Orissa Education Act, 1969 assailing the judgments dated 11.01.2016 and 26.11.2016 passed by the Presiding Officer, State Education Tribunal, Odisha, Bhubaneswar in G.I.A. Case Nos.471 of 2012 and 469 of 2012 respectively whereby and whereunder the Tribunal, while

allowing the applications filed by the respondent no.1 (in both the appeals), has extended the benefit of grant-in-aid by virtue of the Grant-in-Aid Order, 1994.

3. The grounds for assailing the aforesaid judgments as has been taken in the instant appeals are :-

(i) That the G.I.A. applications preferred before the Tribunal is not maintainable, since it is in violation of the provision of sub-section(3) of Section 24-B of the Orissa Education Act, 1969 which is a condition precedent for maintainability of grant-in-aid as before the Tribunal.

(ii) That the post held by the respondent no.1 (in both the appeals) is admissible to the college i.e. Gop College, Gop, District-Puri from the academic session 1993-94, they have joined in the college on 01.08.1993 and 2.11.1993 respectively and as such, the post held by them has completed the qualifying period of 5 years as on the cut-off date i.e. 1.6.1994 as per Grant-in-Aid Order, 1994.

(iii) That the Tribunal has not taken into consideration the order passed by Hon'ble the Supreme Court in Civil Appeal No(s).796 of 2008 i.e. in the case of ***State of Orissa & Ors. v. Prabhawati Padhihari*** wherein it has been held that the said cut-off date of 1.6.1994 for the purpose of extension of grant-in-aid in respect of the post of Non-Aided Colleges as per the Grant-in-Aid Order, 1994.

(iv) That the Tribunal has failed to appreciate the mandate of this Court that merely satisfying the eligibility by an institution, post cannot claim grant-in-aid until and unless an order is passed to that effect by the competent authority with respect to the particular post in a subject in an institution.

(v) The ratio laid down by Full Bench of this Court in the case of ***Laxmidhar Pati and Ors. Vs State of Orissa and Ors.,*** reported in ***1996 (I) OLR 152*** has not been taken into consideration.

4. While, on the other hand, respondent no.1 (in both the appeals) have defended the order passed by the Tribunal by taking the ground that the Tribunal has not committed any error in passing the order.

The institution in question has become entitled to get the benefit of Grant-in-Aid Order, 1994 and since respondent no.1 (in both the appeals) were working in the aforesaid institution having joined in service there w.e.f. 1.8.1993 and 2.11.1993 as Lecturer in Mathematics and Botany respectively which have been approved. Hence, after completion of 5 years from their date of joining i.e. 1.6.1994, they became eligible to get the benefit of the provision of Grant-in-Aid Order, 1994 i.e. from 1.6.1999 in view of the provision of paragraph-9 of the Grant-in-Aid Order, 1994.

The Tribunal, after taking into consideration the fact that the institution in question has come under the fold of Grant-in-Aid Order, 1994 and taking note of the fact that the proposals to extend the benefit of grant-in-aid in favour of the

respondent no.1 (in both the appeals) were lying pending before the competent authority, but no decision had been taken and as such, if the decision would not have been taken by the competent authority in view of the provision of law prevalent during the relevant time, they cannot be made to suffer. The Tribunal, after considering this aspect of the matter, has allowed the benefit of grant-in-aid in terms of the Grant-in-Aid Order, 1994. Hence, there is no illegality in the same.

The contention raised by the appellants-State of Odisha (in both the appeals) through its Higher Education Department before the Tribunal that after coming into effect of Grant-in-Aid Order, 2004 which contains the provision of repealment that does not come in the way of extending the aforesaid benefit for the reason that under the provision of repealment, as contained in paragraph-4 of the Grant-in-Aid Order, 2004, if the institution has been extended the benefit of the Grant-in-Aid Order, 1994, it will continue to get.

Here in the instant appeals, the institution in question has came into the grant-in-aid fold and also receiving the benefit by virtue of the Grant-in-Aid Order, 1994. Hence, the provision of repealment will entitle the respondent no.1 (in both the appeals) in getting the benefit of grant-in-aid by virtue of Grant-in-Aid Order, 1994. The Tribunal has taken note of this legal position and after answering the same, the benefit has been extended. Hence, there is no illegality.

The several incumbents, who even though have not completed 5 years or 3 years of service, as the case may be, have been given benefit and hence the same cannot be denied to the respondent no.1 (in both the appeals) and taking this fact into consideration, the Tribunal has passed the order treating it as violation the provision of Article-14 of the Constitution of India and as such, there is no illegality in the same.

The contention raised by the State-appellants (in both the appeals) that Grant-in-Aid Order, 2004 has came into force w.e.f. 5th February, 2004. Even though it has came into force by virtue of the order passed by this Court, all the incumbents, who have not been extended the benefit of grant-in-aid by virtue of Grant-in-Aid Order, 1994, has been granted the benefit in course of the subsistence period of the Grant-in-Aid Order, 2004 and in that view of the order, it can well be said that the provision of Grant-in-Aid Order, 2004 has become redundant. The Tribunal has also taken note of this aspect of the matter.

5. Learned counsel for the respondent no.1 (in both the appeals) has relied upon some orders/judgments in support of his arguments rendered by Hon'ble the Supreme Court in the cases of ***State of Orissa & Ors. v. Prabhawati Padhihari (Civil Appeal No(s).796 of 2008); Chandigarh Administration and Others v. Mrs. Rajni Vali and Others, reported in AIR 2000 SC 634; State of Orissa & Anr. V. Sushmita Tripathy & Anr. (Special Leave Petition to Appeal (Civil) No(s).18772 of***

2007); J.S. Yadav v. State of U.P. & Anr. (Civil Appeal No.3299 of 2011 arising out of SLP (C) No.16427 of 2009); The Government of Andhra Pradesh & Ors. v. Ch. Gandhi, reported in AIR 2013 SC 2113; Government of Andhra Pradesh and Ors. v. G.V.K. Girls High School, reported in JT 2000 (9) SC 170; and Nathi Devi v. Radha Devi Gupta, reported in AIR 2005 SC 648 as also orders/judgments rendered by this Court in the cases of ***Laxmidhar Pati and Ors. v. State of Orissa and Ors., reported in 1996 (I) OLR 152; Prafulla Kumar Sahoo v. State of Orissa and others, reported in 2003 (I) OLR-91; Aruna Kumar Swain & Anr. V. State of Orissa & Ors., reported in 2014 (I) ILR-CUT-205; Santosh Kumar Mohanty v. State of Odisha & others, (F.A.O. No.154 of 2016); State of Orissa and Anr. V. Satyananda Sahoo and Anr. (F.A.O. No.424 of 2015); State of Odisha and another v. Hrushikesh Mishra and others (F.A.O. No.426 of 2015); State of Orissa and another v. Dr. Chittaranjan Das and another (F.A.O. No.614 of 2015); and State of Odisha and Anr. V. Prabhakar Padhi and Others (F.A.O. No.75 of 2017).***

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

Before going into the legality and propriety of the order, it is relevant to mention some factual aspect which is necessary to come to the rightful conclusion.

Respondent no.1 (in both the appeals) have joined their services as Lecturer in Mathematics and Botany on 1.8.1993 and 2.11.1993 respectively as per the yardstick prevalent in an institution which was opened during the academic session 1993-94 after receiving necessary permission or recognition from the Government in its letter dated 20.12.1994 and 4.7.1995 respectively and got affiliation from the Council of Higher Secondary Education, Orissa, Bhubaneswar vide letter dated 1.6.1996. The aforesaid institution has got the benefit of grant-in-aid much before the commencement of Amendment Act, 1994 and as such, it is Category-I College.

The college in question has got permanent recognition from the Government during the academic session 2002-2003 vide order dated 24.10.2003 passed by the Regional Director of Education, Bhubaneswar.

The Governing Body of the college in question has invited applications from the eligible candidates to fill up the post and in terms thereof, the respondent no.1 (in both the appeals), have made applications being found successful, were appointed in Lecturer in Mathematics and Botany on 1.8.1993 and 2.11.1993 respectively and since then, they are discharging their duties. They have completed qualifying period of 5 years and as such, necessary proposal was submitted before the concerned authority for approval of the post of the respondent no.1 (in both the appeals) and release of grant-in-aid, but no action was taken, rather after implementation of the Grant-in-Aid Order, 2009, the State-appellants (in both the appeals) took the case of the respondent no.1 (in both the appeals) to the zone of their consideration and

released grant-in-aid in their favour as per the Grant-in-Aid Order, 2009 in the shape of Block Grant vide order dated 17.2.2010.

They, being aggrieved with the aforesaid decision of the competent authority, have approached to this Court by filing writ petitions being W.P.(C) Nos.7981 of 2011 and 7973 of 2011 respectively, which were disposed of with direction to the authorities to consider the case of the respondent no.1 (in both the appeals) under Grant-in-Aid Order, 1994 in accordance with the law laid down in the case of ***Prafulla Kumar Sahoo v. State of Orissa and others,*** *reported in* ***2003 (1) OLR 1991***, but no action was taken by the State-appellants (in both the appeals), which led them to file contempt applications being CONTC Nos.1667 of 2011 and 1668 of 2011 respectively and after receipt of notice in the aforesaid contempt applications, an order was communicated to them whereby and whereunder their claim were rejected, against which, they have approached to the Tribunal under the provision of Section-24-B of the Orissa Education Act, 1969 wherein the order has been passed in their favour which are under challenge in the instant memo of appeals by the Higher Education Department of the State of Orissa.

Before dealing with the legality and propriety of the order passed by the State Government or the Tribunal, certain provision needs to be referred herein.

The Orissa Education Act, 1969 has been enacted upon in order to regulate the education system within the State. The State was more concerned with respect to the private educational institutions so that the educational institutions within the State may be strengthened and standard of education may be improved and for that, provision to extend the benefit of grant-in-aid has been made as per the Amendment Act brought by virtue of Orissa Act No.13 of 1994 by inserting a provision as Section 7-C wherein the relevant is sub-section (4) which is being referred herein below:-

> *"7-C(4) Notwithstanding anything contained in any law, rule' executive order or any judgment, decree or order any Court, no grant-in-aid shall be paid and no payment towards salary costs or any other expense shall be made to any private educational institution or for any post or to any person employed in any such institution after the commencement of the Orissa Education (Amendment) Act, 1994, except in accordance with an order or rule made under this Act. Grant-in-aid where admissible under the said rule or order, as the case may be, shall be payable from such date as may be specified in that rule or order or from such date as may be determined by the State Government.*
>
> ***Provided that pending framing of such rule or issue of order, the State Government may, without prejudice to such rule or order, direct that private educational institutions which were receiving grant-in-aid and the posts in such educational institutions in respect of which grant-in-aid was being released shall continue to be paid such amount as grant-in-aid as was being paid to them immediately prior to commencement of the Orissa Education (Amendment) Act, 1994.***

(4-a) The grant-in-aid to be borne by the State Government on account of placement of a teacher in an aided educational institution receiving University Grants Commission scales of Pay under the Career Advancement Scheme, shall be limited to the extent as may be admissible by computing the period of service rendered by him against an approved post with effect from the date of completion of five years of service against such approved post :

Provided that nothing in this Sub-section shall be construed as to affect the seniority or any other conditions of service of such a teacher.

(4-b) Notwithstanding anything contained in any judgment, decree or order of any Court to the contrary, any instructions issued, actions taken or things done on or after the 1st day of January, 1986 in regard to matters provided in Sub-section (4-a) shall be deemed to have been validly issued, taken or done as if the said Sub-section were in force at all material points of time."

The provision of Section 7-C of the Orissa Education Act, 1969 was not in the original statute enacted in the year 1969 rather it has been brought by way of an amendment in the Orissa Education Act, 1969 by way of Orissa Act No.13 of 1994 solely for the object of providing a provision for payment of grant-in-aid, since the original Act contains a number of provisions laying down the circumstances in which the grant-in-aid may be withdrawn, there is no provision in the Act providing for payment of grant-in-aid. The Bill provides for payment of grant-in-aid to specified categories of Private Educational Institutions subject to such terms and conditions as may be prescribed or specified in an order. The Bill also seeks to supersede all previous authority including executive instructions, orders etc. issued from time to time with regard to payment of grant-in-aid and provides for formulation of consolidated rules/orders laying down conditions of eligibility and criteria for payment of grant-in-aid in accordance with the policies of Government. The Bill also seeks to consolidate, elaborate and reformulate the circumstances in which grant-in-aid may be withdrawn. Such provisions have been considered necessary with a view to making the system efficient and expenditure from public funds more purposeful.

It is evident from the provision of Section-7-C(4) that no grant-in-aid shall be paid and no payment towards salary costs or any other expense shall be made to any private educational institution or for any post or to any person employed in any such institution after the commencement of the Orissa Education (Amendment) Act, 1994, except in accordance with an order or rule made under this Act.

The State Government, therefore, in pursuant to the Section-7-C(4) of the Orissa Education Act, 1969, has come out with the Grant-in-Aid Order, 1994.

The Grant-in-Aid Order, 1994 has been enacted upon in exercise of powers conferred by Sub-section (4) of Section-7-C of the Orissa Education Act, 1969 to regulate payment of grant-in-aid to private educational institutions or for any post or to any person employed in such institutions being a Non-Government

College, Junior Colleges or Higher Secondary School of the purpose of this order. The institutions have been classified into the following three categories for the purpose of the G.I.A. Order, 1994:-

> ***A Category-I*** *(i) Non-Government Educational Institutions and approved Posts in such institution which have received grant-in-aid from Government or in respect of which grant-in-aid has been sanctioned by Government prior to the commencement of the Amendment Act;*
>
> *(ii) Other posts in Non-Government Educational Institutions covered under Category-I(i) which were admissible on the basis of workload and prevalent yardstick and had been filled up prior to commencement of the Amendment Act, but in respect of which no grant-in-aid had been sanctioned.*
>
> ***Note*** *: If a question arises whether a post was admissible on the basis of work-load and prevalent yardstick, the decision of the Director shall be final.*
>
> ***B- Category-II*** *(i) Colleges imparting instructions in and presenting regular candidates for the B.A., B.Sc. or B.Com examinations with or without Honours of any of the Universities which have been functioning regularly for five years or more by the 1st June, 1994 after obtaining Government Concurrence recognition and affiliation of any University, or for three years of more if such institution is located in an educationally backward district, which has not been notified as an Aided Educational Institution and has not received grant-in-aid from Government for any post.*
>
> *(ii) Higher Secondary Schools and Junior Colleges conducting courses in Arts, Science and Commerce which have been functioning regularly for 5 years or more by the 1st June, 1994 after obtaining Government concurrence or recognition and of the Council, or for 3 years or more if such an institution is located in any educationally backward district, but which have not been notified as aided Educational Institution and have not received grant-in-aid from Government for any post.*
>
> ***C-Category-III*** *Non-Government Educational Institutions of the categories specified in sub-paras (1) and (2) of para 3 which have already been established and have received recognition of Government and affiliation prior to the commencement of the Amendment Act but do not come within Categories I or II of this paragraph, and such institutions which may be established and granted recognition by Government under the Act or the provision made thereunder and affiliation by the University by the Council, as the case may be after the commencement of this order.*

It is evident from the stipulation made in Category-I(i) which includes Non-Government Educational Institutions and approved Posts in such institution which have received grant-in-aid from Government or in respect of which grant-in-aid has been sanctioned by Government prior to the commencement of the Amendment Act; while Category-I(ii) stipulates with respect to other posts in Non-Government Educational Institutions covered under Category-I(i) which were admissible on the

basis of workload and prevalent yardstick and had been filled up prior to commencement of the Amendment Act, but in respect of which no grant-in-aid had been sanctioned.

Category-II(i) stipulates colleges imparting instructions in and presenting regular candidates for the B.A., B.Sc. or B.Com examinations with or without Honours of any of the Universities which have been functioning regularly for five years or more by the 1st June, 1994 after obtaining Government concurrence recognition and affiliation of any University, or for three years or more if such institution is located in an educationally backward district, which has not been notified as an Aided Educational Institution and has not received grant-in-aid from Government for any post.

Under Category-II(ii) there are other categories which are Higher Secondary Schools and Junior Colleges conducting courses in Arts, Science and Commerce which have been functioning regularly for 5 years or more by the 1st June, 1994 after obtaining Government concurrence or recognition and of the Council, or for 3 years or more if such an institution is located in any educationally backward district, but which have not been notified as aided Educational Institution and have not received grant-in-aid from Government for any post.

Category-III stipulates Non-Government Educational Institutions of the categories specified in sub-paras (1) and (2) of para 3 which have already been established and have received recognition of Government and affiliation prior to the commencement of the Amendment Act but do not come within Categories I or II of this paragraph, and such institutions which may be established and granted recognition by Government under the Act or the provision made thereunder and affiliation by the University by the Council, as the case may be after the commencement of this order.

Under paragraph-5 of the Grant-in-Aid Order, 1994, it has been provided that all Non-Government Educational Institutions included in Category-I(i) of para 4 shall be deemed to be Aided Educational Institutions for the purpose of this Order.

Sub-para (2) of paragraph-5 of the Grant-in-Aid Order 1994 stipulates that no Non-Government Educational Institution falling within Category-II or Category-III of para 4 shall be eligible to be notified as an Aided Educational Institution under this Order unless it has fulfilled certain conditions as stipulated therein.

Paragraph-8 of the Grant-in-Aid Order, 1994 stipulates that a Non-Government Educational Institution which has been notified as an Aided Educational Institution shall not *ipso facto* be eligible to receive grant-in-aid such an institution will only be eligible to receive grant-in-aid towards salary cost of teaching and non-teaching posts in that institution which are eligible to receive grant-in-aid in accordance with the provisions of this order.

Paragraph-9 of the Grant-in-Aid Order, 1994 stipulates the eligibility condition which is reflected herein below:-

> *"9. (1) A teaching or a non-teaching post in a Non-Government Educational Institution coming under category-1 in respect of which grant-in-aid has been sanctioned at any time prior to the commencement of the Amendment Act shall be deemed to be an approved post for the purpose of this order.*
>
> *(2) A teaching or a non-teaching post not covered by sub-para (1) of this para shall be treated as admissible and shall be eligible for approval subject to satisfying the following conditions:-*
>
> *(A) The post in respect of which approval is sought is a post in an educational institution which has been notified as an Aided Educational Institution.*
>
> *(B) (i) a post in a Non-Government Educational Institution coming under Category-I for which no grant-in-aid has been sanctioned prior to commencement of the Amendment Act, if;*
>
> *(a)The post was admissible as per workload and yardstick prevalent prior to commencement of the amendment Act.*
> *(b)has been filled up prior to that date; and*
> *(c)it has completed the qualifying period of five years or more, or of 3 years or more in case the institution is situated in backward area.*
>
> *(ii) a post in a Non-Government Educational Institution coming under Category-II if-*
>
> *(a) the post was admissible as per workload and yardstick prescribed in this order vide Annexure-III.*
> *(b) has been filled up prior to commencement of the Amendment Act, and*
> *(c) it has completed qualifying period of 5 years or more or of 3 years or more in case that institution is situated in an educationally backward district.*
>
> *(iii) A post in an educational institution coming under category-III or a post in institutions coming under Category-I and II which do not come within clauses (B) (ii) of Sub-para (2) of this para, if-*
>
> *(a) the post is admissible as per workload and yardstick prescribed in this order; and*
> *(b) it has completed qualifying period of 5 years or more from the date of its admissibility or of 3 years or more in the case of an educational institution situated in an educationally backward district or is a Women's Educational Institution.*
> *(c) The workload for determining admissibility of a post shall be computed by taking into account the total workload on account of Degree course and Higher Secondary course in all streams conducted in that institution. If a question arises as to whether a post is admissible on the basis of workload and/or yardstick the decision of the Director thereon shall be final.*
> *(d) The workload shall be determined with reference to the actual enrolment during the academic year in which the post is admissible, limited to the strength of students for which recognition and affiliation has been received*

and the number of candidates presented at the Higher Secondary or the Degree examination, as the case may be, from the same batch of students.

(e) A post shall not be deemed to have completed the qualifying period unless-

(i) the post has been filled up on full time basis during entire qualifying period.

(ii) the post has not been filled up on honoraria or part-time basis at any time during the entire qualifying period.

(iii) the post has been filled up by person recruited in accordance with the procedure laid down in the Act Rules and instructions as applicable at the relevant time.

(iv) the post has been filled up at all times during the qualifying period by a person duly qualified to hold such a post.

Note:- *Duly qualified means a person possessing the minimum qualification and experience prescribed for the post at the time when the post was admissible or on the date recruitment was made whichever is later.*

(f) If any post admissible on the basis of workload and yardstick has not been filled up in the manner indicated in Clause (E), the period during which the post was not filled up in such manner shall not count towards completion of the qualifying period.

Illustration : *A post of a lecturer is admissible on 1.6.1985. Since the college is not situated in an educationally backward district, it would ordinarily have completed the qualifying period on 31.5.1990. It is found that this post was not filled up by the management for a 6 months, was filled up by an under-qualified person for 4 months and was filled up by a lecturer on part-time basis for 2 months. This period of 12 months shall not count towards qualifying period. The post would now be eligible for approval with effect from 1.6.1986 and grant-in-aid with effect from 1.6.1991.*

(G) An application has been made for approval of the post in the manner laid down.

(3) Application for approval of posts which are eligible for approval by that date and application for notification of that educational institution as an Aided Educational Institution shall be made simultaneously in Form "A" Application for approval of any post which becomes eligible for approval thereafter shall be made in Form "B" prescribed in Annexure-II within three months from the date of its eligibility for approval. An application received in Form "B" shall be deal with in the manner laid down in para 7. Where the Director is satisfied that a post is eligible for approval, he shall issue an order to that effect with prior concurrence of State Government indicating the date from which the post has been approved and the date of eligibility of that post to receive grant-in-aid.

(4) (i) The date of eligibility of a post in respect of which grant-in-aid has been sanctioned prior to commencement of the Amendment Act shall be the date on which the posts were admitted to the fold of grant-in-aid for the first time.

(ii) The date of eligibility of a post for which grant-in-aid has not been sanctioned shall be the first day of the academic year following the date on which an approved post completes the qualifying period as applicable to the post.

Provided that the date of eligibility in respect of a post in an educational institution coming within category II and III shall in no case be date prior to 1.6.1994.

Paragraph-9(2)(B)(i) of the Grant-in-Aid Order, 1994 provides that a post in a Non-Government Educational Institution coming under Category-I for which no grant-in-aid has been sanctioned prior to commencement of the Amendment Act, if;

(a) The post was admissible as per workload and yardstick prevalent prior to commencement of the amendment Act;

(b) has been filled up prior to that date; and

(c) it has completed the qualifying period of five years or more, or of 3 years or more in case the institution is situated in backward area.

Paragraph-13 of the Grant-in-Aid Order, 1994 reads as follows:-

"When more than one scale of pay are admissible for a post based on qualifications and /or experience, the higher scale of pay shall not be taken into account for computing the grant-in-aid if the grant-in-aid is payable to a person who does not possess the qualifications and/or experience required for the higher scale of pay and has not been selected for the post carrying the higher scale in accordance with procedures and selection process applicable."

Paragraph-15(f) of the Grant-in-Aid Order, 1994 provides **date of appointment**.

Paragraph-15(h) of the Grant-in-Aid Order, 1994 reads as follows:-

"Whether any other person was appointed against that post at any time in the post with detailed reasons for their non-continuance in the post. In case of termination of services by the management or resignation full particulars along with copies of documents in support may be furnished."

Paragraph-16 of the Grant-in-Aid Order, 1994 reads as follows:-

*"**16.** (1) On receipt of a proposal from the Governing Body under para-15, the Director shall examine each case and if he is satisfied that the person proposed by the Governing Body is eligible to receive grant-in-aid against an approved post he shall make an order to that effect. Where the Director is satisfied that a person proposed by the Governing Body is not eligible to receive grant-in-aid his decision shall be communicated to the Governing Body. For the purpose of satisfying himself as to eligibility of a person to receive grant-in-aid, the Director may call for any information, clarification or document that he considers necessary for the purpose.*

(2) No person shall be eligible to receive grant-in-aid against an aided post unless:-

(i) he has been lawfully and validly appointed to that post by the competent authority in accordance with the law, rules and instructions in force at the time of his appointment and has been continuing to hold that post on and beyond the date of eligibility of the post to receive grant-in-aid; and

(ii) he possessed educational qualifications and experience required holding that post at the time of his recruitment or on the date of the post was admissible to grant-in-aid, whichever is later."

Thus, there are three conditions which are to be filled up for getting the benefit of grant-in-aid;

(i) the post is to be admissible as per the workload and yardstick prevalent prior to 1.6.1994;

(ii) has been filed up prior to that date i.e. prior to 1.6.1994 and;

(iii) is qualifying period of five years for the urban areas or three years for the rural areas as the case may be, meaning thereby, the provision made under Paragraph-9(2)(B)(i)(a)(b) is with respect to the post and Paragraph-9(2)(B)(i)(c) stipulates with respect to the qualifying period of five years or more, or of 3 years or more.

The provision as contained in paragraph-9(iii)(e) of Grant-in-Aid Order, 1994 stipulates that the post is to be filled up at all times during the qualifying period by a person duly qualified to hold the post, meaning thereby, the post is to be filled up by a person for the entire qualified period.

The provision at paragraph-13 of Grant-in-Aid Order, 1994 provides that the Grant-in-Aid is not payable to a person, who does not possess the qualifications and/or experience required the higher scale of pay, has not been selected for the post in accordance with law.

The paragraph-15 of Grant-in-Aid Order, 1994 contains the provision to furnish information, the two of the information contained in (f) and (h) reflects the information regarding date of appointment and details of any person, if appointed on such posts.

The paragraph-16 of Grant-in-Aid Order, 1994 confers power upon Director to examine each case to ascertain regarding fulfilling eligibility conditions of the person proposed by Governing Body to get the benefit of Grant-in-Aid.

If these provisions along with the eligibility conditions as provided under paragraph-9(2)(B) of the Grant-in-Aid Order, 1994, it would mean the conditions required to be filled up for getting the benefit of Grant-in-Aid Order, 1994 is that post is to be admissible as per workload and the post is to be filled up prior to

1.6.1994 and the incumbent who is seeking the benefit of Grant-in-Aid Order, 1994 is to hold the post for a period of 5 years, if the institution is in urban areas or 3 years, if the institution is in rural areas.

Under the note, the definition of "duly qualified" has been given which is being reflected herein below along with illustration:-

> *"**Note**:- Duly qualified means a person possessing the minimum qualification and experience prescribed for the post at the time when the post was admissible or on the date recruitment was made whichever is later.*
>
> *(f) If any post admissible on the basis of workload and yardstick has not been filled up in the manner indicated in Clause (E), the period during which the post was not filled up in such manner shall not count towards completion of the qualifying period.*
>
> ***Illustration :** A post of a lecturer is admissible on 1.6.1985. Since the college is not situated in an educationally backward district, it would ordinarily have completed the qualifying period on 31.5.1990. It is found that this post was not filled up by the management for a 6 months, was filled up by an under-qualified person for 4 months and was filled up by a lecturer on part-time basis for 2 months. This period of 12 months shall not count towards qualifying period. The post would now be eligible for approval with effect from 1.6.1986 and grant-in-aid with effect from 1.6.1991."*

It is evident from the aforesaid note that duly qualified means a person possessing the minimum qualification and experience prescribed for the post at the time when the post was admissible or on the date recruitment was made whichever is later. Further, if any post admissible on the basis of workload and yardstick has not been filled up in the manner indicated in clause(E), the period during which the post was not filled up in such manner shall not count towards completion of qualifying period.

As per the illustration as referred above, which speaks that a post of lecturer is admissible on 1.6.1985. Since the college is not situated in an educational backward district, it would ordinarily have completed the qualifying period on 31.5.1990. It is found that this post was not filled up by the management for a period of 6 months, was filled by an under-qualified person for 4 months and was filled up by a lecturer on part-time basis for 2 months. This period of 12 months shall not count towards qualifying period. The post would now be eligible for approval with effect from 1.6.1986 and grant-in-aid with effect from 1.6.1991.

Paragraph-10(1) of the Grant-in-Aid Order, 1994 stipulates that Grant-in-aid payable to an Aided Educational Institution shall be the sum total of grant-in-aid admissible towards salary cost at rates specified below for each admissible and approved post from and after the date of eligibility and the grant-in-aid so payable shall be disbursed directly to the incumbents validly appointed and holding the post

eligible for grant-in-aid either by the Director or through any other agency so authorised by Government, Government may from time to time determine the mode and form of disbursement.

Sub-para (2) of paragraph-10 of the Grant-in-Aid Order, 1994 stipulates that grant-in-aid for a post in a Non-Government Educational Institution coming under Category-I in respect of which grant-in-aid has been sanctioned at any time prior to the commencement of the Amendment Act shall continue to be paid at the rate at which grant-in-aid was admissible on the date of commencement of the Amendment Act and such a post shall also be eligible to get grant-in-aid at the rate of 2/3rd of the approved salary cost 2 years after the date of receipt of grant at the rate of 1/3rd and at the rate of full admissible salary cost 2 years thereafter, if not already paid at such rates.

Sub-para (3) of paragraph-10 of the Grant-in-Aid Order, 1994 stipulates that a post in an Aided Educational Institution coming under Category-I for which no grant-in-aid has been sanctioned prior to commencement of the amendment Act shall be eligible to receive grant-in-aid at the rate of 2/3rd of the admissible salary cost from the date of eligibility, at the rate of 1/3rd of the admissible salary cost 2 years after receipt of grant-in-aid at the rate of 1/3rd and at the rate of full admissible salary cost 2 years thereafter.

Admissible salary cost has been defined under paragraph-11 of the Grant-in-Aid Order, 1994 which stipulates that admissible salary cost for the purpose of computation of grant-in-aid payable against any post shall mean pay at the lowest stage in the scale of pay with one increment for each completed year of service after the date of commencement of payment of grant-in-aid and shall include D.A. at the rates made applicable by the State Government from time to time. The scale of pay for the purpose of computation of grant-in-aid shall mean a scale of pay prescribed by the State Government for Non-Government institutions for that post. Provisions of the Orissa Service Code relating to grant of increment shall *mutatis mutandis* apply for determining eligibility for earning increments subsequent to the first date of admission of a post into the fold of grant-in-aid. Provisions of the Orissa Service Code relating to payment of subsistence allowance shall *mutatis mutandis* apply to an employee holding an aided post who is placed under suspension by the competent authority provided that approval of Director has been obtained within the period stipulated in the relevant Rules.

Thus, it is evident from reading out the provision as contained in Grant-in-Aid Order, 1994 that in entirety, the purpose for enacting the aforesaid Order was to provide the salary cost by way of grant-in-aid.

Government, after considering the financial viability, has decided to repeal the Grant-in-Aid Order, 1994 by substituting it by Grant-in-Aid Order, 2004 enacted w.e.f. 5th February, 2004 in exercise of powers conferred by Sub-section (4) of

Section 7-C of the Orissa Education Act, 1969, the remarkable change has been made in between the Grant-in-Aid Order, 1994 and Grant-in-Aid Order, 2004 replacing the admissible salary cost to be given to the institution of the staff of the aided institution to that of the block grant which shall be a fixed sum of grant-in-aid determined by taking into account the salaries and allowances, as on the 1st day of January, 2004, of the teaching and non-teaching employees of the educational institution which has become eligible to receive grant-in-aid by the 1st day of June, 1994 in accordance with the Grant-in-aid, 1994, but the determination of the quantum of such block grant shall be within the limits of economic capacity of Government as mentioned in Sub-section (1) of Section 7-C of the Act and shall have no linkage with the salary and allowance payable to any such employee by the Governing Body from time to time.

Sub-para (2) of paragraph-3 of the Grant-in-Aid Order, 2004 is being referred herein below:-

> *"The block grant payable to the private educational institutions under sub-para (1) shall be a fixed sum of grant-in-aid, which shall be determined by taking into account the salaries and allowances, as on the 1st day of January, 2004, of the teaching and non-teaching employees of the educational institution which has become eligible to receive grant-in-aid by the 1st day of June, 1994 in accordance with the Grant-in-aid, 1994, but the determination of the quantum of such block grant shall be within the limits of economic capacity of Government as mentioned in Sub-section (1) of Section 7-C of the Act and shall have no linkage with the salary and allowance payable to any such employee by the Governing Body from time to time."*

Grant-in-Aid Order, 2004 also contains the provision of repeal and saving under paragraph-4, which is being quoted herein below:-

> *"**4. Repeal and saving** – (1) The Orissa (Non-Government Colleges, Junior Colleges and Higher Secondary Schools) Grant-in-aid Order, 1994 is hereby repealed, save for the purposes mentioned in sub-para (1) of para 3.*
>
> *(2) Notwithstanding the repeal under sub-para (1), the private educational institutions which are in receipt of any grant-in-aid from Government under the Order so repealed immediately before the date of commencement of this Order, shall continue to receive such grant-in-aid, as if the Grant-in-aid Order, 1994 had not been repealed."*

Thus, it is evident from the repeal provision that the Grant-in-Aid Order, 1994 has been repealed, save for the purposes mentioned in sub-para (1) of para-3 with a stipulation contained therein at sub-para (2) of paragraph-4 that the repealment made under sub-para (1) shall not affect to the private educational institutions which are in receipt of any grant-in-aid from Government under the Order so repealed immediately before the date of commencement of this Order and shall continue to receive such grant-in-aid, as if the Grant-in-aid Order, 1994 had not been repealed.

It is evident from the repeal and saving clause that the benefit given to such institutions, which are in receipt of **any** grant-in-aid from Government, shall not be affected from repeal clause and they will continue to get it, as if the Grant-in-Aid Order, 1994 had not been repealed.

Government thereafter has come out with Grant-in-Aid Order, 2008 notified w.e.f. 7th January, 2009 wherein at paragraphs-3 and 4 stipulate eligible educational institutions; and eligibility, criteria for consideration for Block Grant, which are being referred herein below:-

> *"**3. Eligible Educational Institutions** – The following Non-Government Educational Institutions shall only be eligible for consideration for Block grant for being notified as Aided Educational Institutions under Clause (b) of Section 3 of the Act, namely :-*
>
> *(1) Higher Secondary Schools or Junior Colleges recognized by Government and affiliated to the Council imparting instructions and presenting regular candidates for Higher Secondary Examinations in Arts, Science or Commerce streams conducted by the said Council.*
>
> *(2) Colleges recognized by Government and affiliated to any of the Universities imparting instruction and presenting regular candidates for the +3 Arts, +3 Science and +3 Commerce Degree Examinations of the Utkal, Berhampur, Sambalpur, Fakir Mohan, North Orissa Universities and Ravenshaw Unitary University with or without Honours.*
>
> *"**4. Eligibility, criteria for consideration for Block Grant**-(1) The educational institutions described in Para 3 which have been established with recognition of Government and affiliation of the Council or the Universities as the case may be on or before the 1st June 1998 in respect of Educationally Advanced Districts, on or before the 1st June 2000 in respect of Educationally Backward Districts and Women's Educational Institutions established with such recognition and affiliation on or before the 1st June 2000 in both Educationally Advanced Districts and Educationally Backward Districts are eligible for Block Grant to be determined in the manner specified in Paragraph-16.*
>
> *(2) The educational institution to be considered for Block Grant in accordance with this order shall have received recognition and affiliation for each course, stream and subject taught in that institution for each academic year for a continuous period of minimum 5 years in respect of Educationally Advanced District and 3 years and in respect of Educationally Backward District and Women's Educational Institution without any break or discontinuity from the date of establishment subject to the provisions of sub-Para(1) :*
>
> *Provided that in case of break or discontinuity, to acquire eligibility, the said qualifying period shall be computed from the date of revival."*

It is evident from the eligibility criteria as quoted above that the educational institutions described in Para 3 which have been established with recognition of

Government and affiliation of the Council or the Universities as the case may be on or before the 1st June 1998 in respect of Educationally Advanced Districts, on or before the 1st June 2000 in respect of Educationally Backward Districts and Women's Educational Institutions established with such recognition and affiliation on or before the 1st June 2000 in both Educationally Advanced Districts and Educationally Backward Districts are eligible for Block Grant to be determined in the manner specified in Paragraph-16.

Paragraph-16 of the Grant-in-Aid Order, 2008 stipulates as follows:-

> *"**16. Components and admissibility of Block Grant** – (1) The Block Grant payable to the Non-Government Educational Institution under paragraph 9 shall be a fixed sum of Grant-in-aid, which shall be determined at the rate of 40% of the emoluments calculated at the initial of the existing time scale of pay applicable to the employees including existing. Dearness Pay and existing Dearness Allowance as admissible prospectively from the date of Notification of the Grant-in-Aid Order, 2008 in favour of the teaching and non-teaching employees of the educational institution who have become eligible to receive Grant-in-aid by 1st day of June, 2003.*
>
> *(2) The balance emoluments including Dearness Pay and Dearness Allowance after payment under sub-Para (1) shall be borne by the concerned Governing Body of the Aided Educational Institution."*

It is evident from the paragraph-16 as quoted above that the Block Grant payable to the Non-Government Educational Institution under paragraph 9 shall be a fixed sum of Grant-in-aid, which shall be determined at the rate of 40% of the emoluments calculated at the initial of the existing time scale of pay applicable to the employees including existing. Dearness Pay and existing Dearness Allowance as admissible prospectively from the date of Notification of the Grant-in-Aid Order, 2008 in favour of the teaching and non-teaching employees of the educational institution who have become eligible to receive Grant-in-aid by 1st day of June, 2003.

The Grant-in-Aid Order, 2008 also contains the repeal and saving clause under paragraph-20, which is being quoted herein below:-

> *"**20. Repeal and Saving** – (1) The Orissa (Non-Government Colleges, Junior Colleges and Higher Secondary Schools) Grant-in-aid Order, 2004 hereinafter referred to as the Grant-in-aid order is hereby repealed, save for the purposes of such private educational institution being a non-Government College, Junior College or Higher Secondary School which has become eligible under the said order to be notified as Aided Educational Institution to be entitled to receive Grant-in-aid by way of Block Grant determined in the manner provided in the sub-para (2) of Paragraph 3 of the Grant-in-aid Order, 2004.*
>
> *(2) Notwithstanding the repeal under sub-para (1), the private educational institutions which are in receipt of any Grant-in-aid or Block Grant from Government under the orders so repealed immediately before the date of*

commencement of this Order, shall continue to receive such Grant-in-aid or Block Grant as the case may be as if the Orissa (Non-Government Colleges, Junior Colleges and Higher Secondary Schools) Grant-in-Aid Order, 1994 and the Grant-in-Aid Order, 2004 had not been repealed."

It is evident from the repeal and saving clause as quoted above that the Grant-in-Aid Order, 2004 has been repealed, save for the purposes of such private educational institution being a non-Government College, Junior College or Higher Secondary School which has become eligible under the said order to be notified as Aided Educational Institution to be entitled to receive Grant-in-aid by way of Block Grant determined in the manner provided in the sub-para (2) of Paragraph 3 of the Grant-in-aid Order, 2004 while sub-para (2) of paragraph-20 of the Grant-in-Aid Order, 2008 stipulates that notwithstanding the repeal under sub-para (1), the private educational institutions which are in receipt of any Grant-in-aid or Block Grant from Government under the orders so repealed immediately before the date of commencement of this Order, shall continue to receive such Grant-in-aid or Block Grant as the case may be as if the Orissa (Non-Government Colleges, Junior Colleges and Higher Secondary Schools) Grant-in-Aid Order, 1994 and the Grant-in-Aid Order, 2004 had not been repealed.

Then, the Government has come out with Grant-in-Aid Order, 2009 in exercise of powers conferred by Sub-section (4) of Section 7-C of the Orissa Education Act, 1969 notified and implemented w.e.f. 6th June, 2009. The eligibility of the educational institutions has been provided under paragraph-3, which is being quoted herein below:-

*"**3. Eligible Educational Institutions** – Employees of teaching and non-teaching categories of the following Educational Institutions notified as Aided Educational Institutions under clause (b) of Section 3 of the Act who have not received Grant-in-Aid or Block Grant shall only be eligible for consideration for receiving Block Grant for its employees if they have been appointed in accordance with the yardstick prevalent during the time of their appointment and after following due procedure for appointment in the posts which are admissible to such educational institutions, namely :-*

(a) 255 Non-Government Aided Junior Colleges receiving full Grant-in-Aid prior to commencement of the Orissa Education (Amendment) Act, 1994 as at Annexure-'A';

(b) 193 Non-Government Aided Junior Colleges receiving Grant-in-Aid in accordance with the Orissa (Non-Government Colleges, Junior Colleges and Higher Secondary Schools) Grant-in-Aid Order, 1994 as at Annexure-'B';

(c) 40 Non-Government Block Junior Colleges receiving Grant-in-Aid in shape of Block Grant in accordances with the Orissa (Non-Government Colleges, Junior Colleges and Higher Secondary Schools) Grant-in-Aid Order, 2004 as at Annexure-'C';

(d) 108 Non-Government Aided Degree Colleges receiving Grant-in-Aid prior to commencement of the Orissa Education (Amendment) Act, 1994 as at Annexure-'D';

(e) 28 Non-Government Aided Degree Colleges receiving Grant-in-Aid in accordance with the Orissa (Non-Government Colleges, Junior Colleges and Higher Secondary Schools) Grant-in-Aid Order, 1994 as at Annexure-'E';

(f) *113 Non-Government Block Grant Degree Colleges receiving grant-in-aid in the shape of Block Grant in accordance with the Orissa (Non-Government Colleges, Junior Colleges and Higher Secondary Schools) Grant-in-Aid Order, 2004 as at Annexure-'F'."*

The admissibility of the Block Grant has been provided in paragraph-4 and the rate and disbursement of Block Grant has been provided under paragraph-5, which are being quoted herein below:-

*"**4. Admissibility of the Block Grant** – Employees of the categories mentioned in Para-3 appointed prior to imposition of ban on recruitment by the Higher Education Department vide letter No.18074/HE., dated the 20th April 1988 shall be entitled to receive Grant-in-Aid by way of block grant determined in the manner provided in Para 5 :*

Provided that in the Educational Institutions mentioned in Para 3, where one stream (Arts or Science or Commerce) had been admitted into the Grant-in-Aid fold and subsequently other streams or new subjects in the aided stream have been opened with Government recognition and affiliation by 1st June, 1998 in Educationally Advanced Districts and by 1st June, 2000 in Educationally Backward Districts including the first Women's Jr. College or Higher Secondary School or Women's College of a Sub-Division aided earlier, the additional posts which were admissible as per the yardsticks prevalent at that time shall be taken into consideration to receive Grant-in-Aid by way of block grant."

*"**5. Rate and disbursement of Block Grant** – (1) The Block Grant payable to the employees of the Aided Educational Institutions under Para 4 shall be a fixed sum of Grant-in-Aid, which shall be determined by taking into account the initial of the basic pay at the pre-revised time scale of pay plus 7 increments plus Dearness Allowance at the rate of 41 percent as on the 1st day of January, 2004 of the teaching & non-teaching employees of the Aided Educational Institution, who have not received Grant-in-Aid or Block Grant, but the determination of the quantum of such Block Grant shall be within the limits of economic capacity of Government as mentioned in Sub-section (1) of Section 7-C of the Act and shall have no linkage with the salary and allowances payable to any such employee by the Governing Body, from time*

(2) The Block shall be placed, through the Director, at the disposal of the Secretary ofGoverning Body of the concerned educational institution proportionately either on quarterly or monthly basis."

(3) The Secretary of the Governing Body of each Aided Educational Institution at whose disposal the Block Grant is so placed shall utilize the grant in the manner and for the purpose, as may be specified by the Director and furnish the utilization certificate thereof at such interval as may be specified by the Director while releasing such grant.

(4) The Block Grant shall not be utilized in respect of posts other than those for which it is sanctioned.

(5) Payment of Block Grant under this Order shall be made w.e.f. February, 2009, which is payable on or after the 1st day of March, 2009.

(6) No claim on account of Block Grant under this Order shall be made or entertained for any period prior to the month of February, 2009."

It is evident from the rate and disbursement of Block Grant as provided under paragraph-5 of the Grant-in-Aid Order, 2009 as quoted above that the Block Grant payable to the employees of the Aided Educational Institutions under Para 4 shall be a fixed sum of Grant-in-Aid, which shall be determined by taking into account the initial of the basic pay at the pre-revised time scale of pay plus 7 increments plus Dearness Allowance at the rate of 41 percent as on the 1st day of January, 2004 of the teaching & non-teaching employees of the Aided Educational Institution, who have not received Grant-in-Aid or Block Grant, but the determination of the quantum of such Block Grant shall be within the limits of economic capacity of Government as mentioned in Sub-section (1) of Section 7-C of the Act and shall have no linkage with the salary and allowances payable to any such employee by the Governing Body, from time to time.

The Grant-in-Aid Order, 2009 has gone into amendment brought by way of Notification dated 22nd August, 2014 inserting some provision under paragraph-4 which relates to filling of the vacancies lawfully in between the period from 1st June, 1998 to the 1st June, 2003 due to vacancy caused on account of death or resignation or retirement or otherwise of the incumbent shall be considered to receive Grant-in-Aid by way of block grant.

Thus, it is evident that the Grant-in-Aid Order, 1994 contains the provision to give full cost salary while in the Grant-in-Aid Order, 2004, the remarkable change has been made, so far as the quantum of block grant is concerned. Likewise, in Grant-in-Aid Order, 2008 and 2009, meaning thereby, the Government, according to its financial viability, has taken decision, so far as the quantum of the grant is concerned.

There is no dispute in the position of law that grant cannot be claimed as a matter of right and it cannot be attached to a post like that of salary and if the Government has made out a provision in order to give financial aid to the Non-Government Aided Institution by way of grant to the teaching and non-teaching staffs that solely depend upon the financial condition of the State Government and

that is the reason the State Government by way of enactment as contained under Section 7-C(4) of the Orissa Education Act, 1969 has provided that the grant-in-aid would be given on the basis of the order or enactment made in this regard and under the authority of the aforesaid provision, the different Grant-in-Aid Orders have been issued by the Government.

In the present context, the implication of the repealment is of paramount consideration, since the respondent no.1 (in both the appeals) have claimed the benefit on the basis of Grant-in-Aid Order, 1994 which has been repealed by virtue of the Grant-in-Aid Order, 2004 and after its repealment, the claim is being sought.

The provision of Section-6 of General Clauses Act, 1897 needs to be referred herein to consider this aspect of the matter which stipulates as follows:-

> "***6. Effect of repeal***.- *Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-*
>
> *(a) revive anything not in force or existing at the time at which the repeal takes effect; or*
>
> *(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or*
>
> *(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or*
>
> *(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or*
>
> *(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."*

The above provision stipulates that if by virtue of the Act which has been repealed, the benefits if given to the person concerned shall not be affected.

Reference may be made to the judgment rendered by Hon'ble the Supreme Court in the case of ***State of Utter Pradesh and Others v. Hirendra Pal Singh and Others***, reported in ***(2011) 5 SCC 305*** wherein their Lordships have held at paragraphs-22 and 24 which are being quoted herein below:-

> *"22. It is a settled legal proposition that whenever an Act is repealed, it must be considered as if it had never existed. The object of repeal is to obliterate the Act from the statutory books, except for certain purposes as provided under Section 6 of the General Clauses Act, 1897. Repeal is not a matter of mere form but is of substance. Therefore, on repeal, the earlier provisions stand obliterated/abrogated/wiped out wholly i.e. pro tanto repeal."*

"24. Thus, there is a clear distinction between repeal and suspension of the statutory provisions and the material difference between both is that repeal removes the law entirely; when suspended, it still exists and has operation in other respects except wherein it has been suspended. Thus, a repeal puts an end to the law. A suspension holds it in abeyance."

In the case of ***Board of Control for Cricket in India -vs- Kochi Cricket Private Limited and Others***, reported in ***(2018) 6 SCC 287*** wherein their Lordships have held at paragraph-43 which is being quoted herein below:-

"43. *Shri Sundaram's submission is also not in consonance with the law laid down in some of our judgments. The approach to statutes, which amend a statute by way of repeal, was put most felicitously by B.K. Mukherjea, J. in State of Punjab v. Mohar Singh, SCR at pp. 899-900, thus: (AIR p. 99, para 8).*

"8. In our opinion the approach of the High Court to the question is not quite correct. Whenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material. It is in the light of these principles that we now proceed to examine the facts of the present case."

This statement of the law has subsequently been followed in Transport and Dock Workers' Union v. New Dholera Steamships Ltd. at para 6 and T.S. Baliah v. ITO, SCR at pp. 71-72."

It is further relevant to deal with certain judgments rendered by this Court on the subject after coming into effect of Orissa Education Act, 1969, the benefit of grant-in-aid was being extended on the basis of the executive instructions prevalent thereof and for the first time, the Government, in pursuant to the provision contained under Section-7(4) of the Orissa Education Act, 1969, has enacted Grant-in-Aid Order, 1994 known as Orissa (Non-Government Colleges, Junior Colleges and Higher Secondary Schools) Grant-in-Aid Order, 2004.

A dispute arose as to whether the grant-in-aid can be claimed by virtue of right and mere satisfying the eligibility qualification, the said benefit can be given.

This Court in the case of ***Jalada Delanga Uchha Bidyapith v. State of Orissa and Ors.,*** reported in ***1993 (I) OLR-77*** wherein a Division Bench of this Court has taken the view that since the entitlement to receive aid flows from the order of the Government, until and unless an order is passed no right is accrued and on mere satisfying the eligibility qualification an institution cannot claim the grant-in-aid.

The second judgment has come rendered by another Division Bench of this Court in the case of ***Kartik Ch. Mohanta and Ors. v. State of Orissa and Ors.,*** reported in ***1995 (I) OLR 310*** wherein it has been held that a school when satisfies the pre-conditions contained in the grant-in-aid principles would become entitled to grant-in-aid and, therefore, the Government must release grant-in-aid with effect from that date.

The matter due to divergent opinion, in between the two Division Bench, has been referred to the Larger Bench in the case of *Laxmidhar Pati* (supra), the Full Bench, after taking note of executive instruction prevalent at that time and also referring to the provision of Grant-in-Aid Order, 1994 at paragraph-12 of the aforesaid judgment, has come to the conclusive finding that the ratio laid down by the Division Bench of this Court in the case of *Jalada Delang Uchha Bidyapith* (supra) is correct view, meaning thereby, the entitlement to receive aid flows from the order of the Government will only come until and unless an order is passed and in absence of any order, no right is accrued by merely satisfying the eligibility qualification.

Thereafter, another order has come by this Court in the case of ***Prafulla Kumar Sahoo v. State of Orissa and others***, reported in ***2003 (I) OLR-91*** concurring with the view taken by the Full Bench of this Court in the case of *Laxmidhar Pati* (supra) at paragraph-13 whereby and whereunder the Division Bench of this Court in the *Prafulla Kumar Sahoo's* case has held that only on the basis of eligibility and admissibility, no grant-in-aid is to be extended, if not decided by the competent authority in accordance with the Grant-in-Aid Order, 1994.

Further, the ratio has been laid down that if the incumbent is entitled to get the benefit as per Grant-in-Aid Order, 1994, cannot be denied merely on the ground of financial stringency.

Another judgment has come in the case of ***Chittaranjan Mohapatra and Others vrs. State of Orissa and Others*** (O.J.C. No.7574 of 2004 disposed of on 1.11.2002) which has been decided on the basis of *Prafulla Kumar Sahoo's* case.

One order has been annexed to the memo of appeals passed by this Court in a writ petition (c) No.9586 of 2008 (**Smt. Prabhawati Padhihari v. State of Orissa & Ors.**) disposed of on 28.9.2005 wherein the issue fell for consideration as to whether the petitioner of the aforesaid writ petition whose appointed has been approved w.e.f. 23.7.2002 as against the first post of Lecturer in Education can be extended the benefit of grant-in-aid by virtue of the Grant-in-Aid Order, 1994, this Court, while dealing with the issue, has quashed the decision taken by the authority and directed him to approve the appointment of the petitioner as against the first post of Lecturer in Education and released the benefit. The aforesaid order has been challenged before Hon'ble the Supreme Court in Civil Appeal No(s).796 of 2006 in the year 2008 and Hon'ble the Supreme Court, after taking into consideration the provision of law as contained in Rules-4, 5(2)(A), 9(2)(B)(ii), 9(4) and 10 of the Grant-in-Aid Order, 1994, has come to the finding that the order, by which, the claim of the petitioner of the aforesaid writ petition by which her appointment has been approved w.e.f. 23.7.2002 entitling to get the benefit of Grant-in-Aid Order has been rejected on the ground that the requirement of the Grant-in-Aid Order, 1994 is that eligibility to get the benefit of the Grant-in-Aid Order, 1994 is to acquire eligibility on or before 1.6.1994 and hence the claim ordered to be given in her favour has been rejected, however, with an observation that the order of rejection will not come in the way of the State Government in considering the case of the respondent for grant of relief, if she becomes subsequently eligible for whatsoever reasons.

It is in the light of the statutory provision as referred hereinabove as also the judgment pronounced by this Court as well as Hon'ble the Supreme Court, the factual aspect needs to be considered.

This Court, after appreciating the argument advanced on behalf of the parties and after going through the pleadings and materials available on record, has found that the following questions need to be answered by this Court:-

> (i) Whether the applications filed by the respondent no.1 (in both the appeals) before the Tribunal under Section-24-B of the Orissa Education Act, 1969 are maintainable?
>
> (ii) Whether respondent no.1 (in both the appeals) will be held to be eligible to get the benefit of Grant-in-Aid Order, 1994 after completion of 5 years of service w.e.f. 1.8.1993 and 2.11.1993 respectively? and
>
> (iii) Whether the respondent no.1 (in both the appeals) are entitled to get any benefit after coming into effect of the Grant-in-Aid Order, 2004 containing a provision of repealment of Grant-in-Aid Order, 1994?

Issue No.(i).

The question of maintainability of an application under Section-24-B of the Orissa Education Act, 1969 has been raised by the State-appellants (in both the appeals) on the ground that Section-24-B contains the provision that before approaching to the Tribunal in view of the provision of Section-24-B(1), the person aggrieved by an order pertaining to any matter within the jurisdiction of the Tribunal, may make an application for the redressal of his grievance and an application, if not filed within period of one year from the date of expiry of the period of two months referred in sub-section(3), an application shall not be entertained. For ready reference, the provision of Section-24-B of the Orissa Education Act, 1969 is referred herein below:-

> *"**24-B. Adjudication by Tribunal** – (1) The Tribunal shall have jurisdiction, power and authority to adjudicate all disputes and differences, between the Managing Committee or, as the case may be, the Governing body of any private educational institution and any teacher or employee of such institution or the State Government or any officer or authority of the said Government, relating to or connected with the eligibility, entitlement, payment or non-payment of grant-in-aid.*
>
> *(2) Any person, aggrieved by an order pertaining to any matter within jurisdiction of the Tribunal, may make an application to the Tribunal for the redressal of his grievance.*
>
> *(3) On receipt of an application under Sub-section (2), the Tribunal shall, if satisfied after such inquiry as it may deem necessary that the application is a fit case for adjudication by it, admit such application, but where the Tribunal is not so satisfied, it may summarily reject the application after recording its reasons :*
>
> *Provided that no application before the Tribunal seeking a claim of grant-in-aid against the State Government or any officer or authority of the said Government shall be admitted, unless the applicant has served a notice on the State Government or concerned officer or authority furnishing the details of the claim and a period of two months has expired from the date of receipt of the said notice by the State Government or, as the case may be, the concerned officer or authority.*
>
> *(4) The Tribunal shall not admit an application under Sub-section (2), unless it is made within one year from the date of expiry of the period of two months referred to in Sub-section (3).*
>
> *(5) The Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and subject to any rules made by the Government, shall have power to regulate its own procedure.*
>
> *(6) All the proceedings before the Tribunal shall be deemed to be judicial proceedings within the meaning of Sections 193, 219 and 228 of the Indian Penal Code,1860."*

The factual aspect related to this issue is that the respondent no.1 (in both the appeals) have stated that they have submitted representations sent through postal receipt on 25.11.2011, the xerox copy of the postal receipts were submitted before the Tribunal which fact has not been denied by the State-appellants (in both the appeals) and hence the Tribunal has come to the conclusion that before invoking the jurisdiction of the Tribunal, representations, which are required under the provision of Section-24-B(2) of the Orissa Education Act, 1969, have been filed.

This Court, after consideration the factual aspect of the mater, is in agreement with the finding given by the Tribunal in this regard holding therein the maintainability of an application under the provision of Section-24-B of the Orissa Education Act, 1969.

Accordingly, Issue No.(i) is answered.

Issue Nos.(ii) and (iii)

Since both the issues are interrelated, the same are being dealt with herein below:-

This issue pertains to the eligibility of the respondent no.1 (in both the appeals) to get the benefit of Grant-in-Aid Order, 1994.

The respondent no.1 (in both the appeals) claim that they are entitled to get the benefit under the Grant-in-Aid Order, 1994 on account of the fact that the posts which were approved w.e.f. 1.8.1993 and 2.11.1993 respectively and joined on that post. Hence, the post is held to be admissible and filled up prior to 1.6.1994 and since the institution in question falls within the urban area, hence five years qualifying period has already been completed w.e.f. 1.8.1993 and 2.11.1993 respectively and by virtue of shifting of date of joining i.e. 1.6.1994, they have become eligible to get Grant-in-Aid Order, 1994.

This Court has referred hereinabove the provision of Section-7C of the Orissa Education Act, 1969 which confers power upon the State Government to extend the benefit of grant-in-aid.

Sub-section(4) of Section-7C stipulates that the benefit of grant-in-aid would be given to any private educational institution or for any post or to any person employed in any such institution after commencement of the Orissa Education (Amendment) Act, 1994.

The State has come out with an order known and relevant for the present case is the Orissa (Non-Government Colleges, Junior Colleges and Higher Secondary Schools) Grant-in-Aid Order, 1994.

The Grant-in-Aid Order, 1994 stipulates by formulating the categories of Non-Government Educational Institutions holding it eligible for consideration forbeing notified as Aided Educational Institutions. For the purpose of the Order,

Non-Government Educational Institutions as specified in sub-para(1) of paragraph-3 and the post in such institutions shall be classified into the following categories, namely, Category-I, Category-II and Category-III.

Category-I stipulates that such Non-Government Educational Institutions and approved post in such institution which have received grant-in-aid from Government or in receipt of which grant-in-aid has been sanctioned by the Government prior to commencement of the Amendment Act.

The present institution since is coming into Category-I, which is not in dispute, as such, Category-I is being discussed herein.

Paragraph-8 of the Grant-in-Aid Order, 1994 stipulates that the Non-Government Educational Institutions which has been notified as an aided educational institution shall not *ipso facto* be eligible to receive grant-in-aid such institution will only be eligible to receive grant-in-aid towards salary cost of teaching and non-teaching post of that institutions who are eligible to receive grant-in-aid in accordance with the provision of this order, meaning thereby, merely if a Non-Government Educational Institution has been notified as an aided institution, the benefit of grant-in-aid would not be released rather for extending the aforesaid benefit, the condition stipulated under the provision of paragraph-9 of the Grant-in-Aid Order, 1994 as quoted above will have to be fulfilled.

It is evident from the provision as contained in paragraph-9(1) of the Grant-in-Aid Order, 1994 that a teaching or a non-teaching post in a Non-Government Educational Institution coming under category-1 in respect of which grant-in-aid has been sanctioned at any time prior to the commencement of the Amendment Act shall be deemed to be an approved post for the purpose of this order.

Sub-para(2) of paragraph-9(1) of the Grant-in-Aid Order, 1994 stipulates that a teaching or a non-teaching post not covered by sub-para (1) of this para shall be treated as admissible and shall be eligible for approval subject to satisfying the following conditions:-

> *(a) the post was admissible as per workload and yardstick prescribed in this order vide Annexure-III.*
>
> *(b) has been filled up prior to commencement of the Amendment Act, and*
>
> *(c) it has completed qualifying period of 5 years or more or of 3 years or more in case that institution is situated in an educationally backward district.*

The condition stipulated under paragraph-9(2)(B)(i)(a)(b) of the Grant-in-Aid Order, 1994 relates to the post, but so far as it relates to paragraph-9(2)(B)(i)(c) of the Grant-in-Aid, 1994, the same relates to the qualifying period of 5 years or 3 years as the case may be.

It is also important to refer herein that in order to consider the fact that what would be the meaning of the 'qualified'. For this, if the provision as contained in paragraph-9(2)(B)(i)(c) of the Grant-in-Aid Order, 1994 is to be read out along with paragraphs-13, 15(f)(h) and 16 of the Grant-in-Aid Order, 1994 along with the note appended to under paragraph-9 of the Grant-in-Aid Order, 1994 which stipulates "duly qualified" means a person possessing the minimum qualification and experience prescribed for the post at the time when the post was admissible or on the date recruitment was made whichever is later.

This stipulation made in the note quoted above does suggest that a person possessing the minimum qualification and experience prescribed for the post at the time when the post was admissible or on the date recruitment was made whichever is later.

On conjoint reading of all these provisions, the qualifying period does not only include the period for posts rather it would mean the person, seeking claim, either completed five years or three years as the case may be.

The qualifying period always relates to the incumbent, e.g., for getting the pensionary benefit applicable under rule, the minimum qualifying period of ten years is required, and if the qualifying period of post would be taken into consideration, all the incumbents joined service on substantive basis in a pensionable service will became entitled for pension even if worked for a year or two.

Moreover, it is to be seen as to whether the completion of the period of 5 years or 3 years as the case may be would be 1.6.1994. This Court has taken into the consideration of the judgment passed by the Hon'ble the Supreme Court in the case of *State of Orissa & Others v. Prabhawati Padhihari* wherein the Hon'ble Supreme Court has been pleased to hold that the eligibility of a teaching and non-teaching staff is to be seen as on 1.6.1994.

Therefore, this Court, after taking into consideration the statutory provision as quoted hereinabove as also the judgment rendered by the Hon'ble Supreme Court in the case of *State of Orissa & Others v. Prabhawati Padhihari*, is of the view that an incumbent will be said to be entitled to get the benefit of Grant-in-Aid Order, 1994 only he fulfills the condition as on 1.6.1994.

Admittedly, in the instant case, respondent no.1 (in both the appeals) have been appointed on 1.8.1993 and 2.11.1993 respectively and on shifting principle, their date of joining said to have been shifted on 1.6.1994. Hence, the respondent no.1 (in both the appeals) are claiming the benefit of the Grant-in-Aid Order, 1994 w.e.f. 1.6.1999 i.e. after completion of qualifying period of 5 years counting from 1.6.1994 which has been denied by the Tribunal by not interfering with the decision taken by the State authorities, by which, he has been given the benefit of grant-in-aid in view of the Grant-in-Aid Order, 2009. As has been stated hereinabove by this

Court on the basis of statutory provision as also the judgment passed by the Hon'ble Supreme Court in the case of *State of Orissa & Others v. Prabhawati Padhihari* that an eligibility of an incumbent who is seeking the benefit under the Grant-in-Aid Order, 1994 shall be seen as on 1.6.1994. However, it is admitted case of the respondent no.1 (in both the appeals) that they are not eligible to get the benefit as on 1.6.1994, since they have joined on the post w.e.f. 1.8.1993 and 2.11.1993 respectively and on shifting principle, their joining were shifted to 1.6.1994. Hence, they have claimed the benefit after completion of period of 5 years i.e. w.e.f. 1.6.1999 on the grounds as stated hereinabove.

Admittedly, under the Orissa Education Act, 1969, there is no statutory provision governing the field for extending the benefit of grant-in-aid rather there was executive instructions. Hence, the legislature has taken decision to come out with a statutory provision as contained in Section-7C by virtue of Orissa Act No.13 of 1994 by inserting a provision as Section-7C making process therein to extend the benefit of grant-in-aid which shall be paid to the teaching and non-teaching staff of the educational institutions who have been brought under the fold of recognized institutions in view of the provision of Section-3(b) of the Orissa Education Act, 1969 on the basis of the orders to be enacted time to time and in pursuant thereto, the first Grant-in-Aid Order was issued in the shape of Grant-in-Aid Order, 1994 wherein provision has been made to extend the full salary cost in favour of the incumbents working under the recognized institutions in view of the provision of Section-3(b) of the Orissa Education Act, 1969. Thereafter, the Government, considering its financial implication, has brought another Grant-in-Aid Order i.e. Grant-in-Aid Order, 2004 notified on 5th February, 2004 wherein a repeal clause has been inserted to the effect that the institutions, who are in receipt of the grant-in-aid, shall be deemed to be continued, as if the Grant-in-Aid Order, 1994 has not been repealed. Thereafter, the Grant-in-Aid Order, 2008 or 2009 has come.

The claim which has been put-forth by respondent no.1 (in both the appeals) that since they have completed 5 years of qualifying service as on 1.6.1999, they will entitle the benefit of the grant-in-aid in pursuant to the Grant-in-Aid Order, 1994 and not on the basis of Grant-in-Aid Order, 2009.

In order to answer this issue, it would be relevant to look into the effect of the repealment and for this, the provision of Section-6 of the General Clauses Act which has already been quoted hereinabove needs to be discussed in the present scenario.

Section-6 of the General Clauses Act deals with the effect of repeal which provides that the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect; or affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or affect any penalty, forfeiture or punishment incurred in respect of any

offence committed against any enactment so repealed; or affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, meaning thereby, the effect of repeal would be, if anything has been granted in favour of anybody that cannot be taken away, since by virtue of the repealed Act, the right has said to have been accrued and if the right has been accrued, the same cannot be taken away by repealment of the provision of the statute. The effect of repealment has been discussed by Hon'ble the Supreme Court in the cases of *State of Utter Pradesh and Others* (supra) and *Board of Control for Cricket in India* (supra) and after going across the detailed discussion made by Hon'ble the Supreme Court in both the judgments with respect to the effect of repeal, it would not come in the way of the benefit or right already accrued in favour of anybody under the repealed statute.

In the light of this legal settled position, the factual aspect of the instant case has been assessed by this Court.

Admittedly, the respondent no.1's institution (in both the appeals) has been recognized under the provision of Section-3(b) of the Orissa Education Act, 1969 where getting the benefit of grant-in-aid with respect to certain approved posts.

Emphasis has been given by the learned counsel appearing for the respondent no.1 (in both the appeals) that since the institution has been given the benefit of grant-in-aid and the respondent no.1 (in both the appeals) are working under the said institution, hence in view of the effect of repeal as stipulated under the provision of paragraph-4 of the Grant-in-Aid Order, 2004, they will be held to be entitled to get the benefit of grant-in-aid by virtue of the Grant-in-Aid Order, 1994. Hence, the emphasis has been given upon the institution.

This Court, in order to answer this, has gone into the provision of Section-7C(4) of the Orissa Education Act, 1969, as referred above, wherein a saving clause has been inserted under the provision of sub-section(4) of Section-7C to save the interest of such incumbents, who were getting the benefit on the basis of the executive instructions prevalent prior to enactment of Grant-in-Aid Order, 1994 till framing of the subsequent Orders, which reads as follows:-

> *Provided that pending framing of such rule or issue of order, the State Government may, without prejudice to such rule or order, direct that private educational institutions which were receiving grant-in-aid and the posts in such educational institutions in respect of which grant-in-aid was being released shall continue to be paid such amount as grant-in-aid as was being paid to them immediately prior to commencement of the Orissa Education (Amendment) Act, 1994.*

This proviso does suggest that it is not the institution rather the post in such educational institution in respect of which grant-in-aid was being released has been decided not to be disturbed who were getting the benefit of grant-in-aid prior to commencement of the Orissa Education (Amendment) Act, 1994.

It is not in dispute that in paragraph-4 of the Grant-in-Aid Order, 2004 under the repeal and saving clause, the word 'institutions' has been inserted, which reads as follows:-

> *Notwithstanding the repeal under sub-para (1), the private educational institutions which are in receipt of any grant-in-aid from Government under the Order so repealed immediately before the date of commencement of this Order, shall continue to receive such grant-in-aid, as if the Grant-in-aid Order, 1994 had not been repealed."*

Respondent no.1 (in both the appeals) cannot be held to be entitled to get the grant-in-aid in pursuant to the provision of Grant-in-Aid Order, 1994 for the reason that the Grant-in-Aid, 1994 has been enacted upon by the State in exercise of powers conferred under the provision of Section 7-C(4) of the Orissa Education Act, 1969. The aforesaid provision stipulates that no grant-in-aid shall be paid and no payment towards salary costs or any other expense shall be made to any private educational institution or for any post or to any person employed in any such institution after the commencement of the Orissa Education (Amendment) Act, 1994, except in accordance with an order or rule made under this Act, meaning thereby, the benefit of grant-in-aid can only be extended on the basis of the prevalent grant-in-aid order.

Admittedly, the Grant-in-Aid Order, 1994 contains the provision to give the salary cost as per the provision stipulated in paragraph-11 of the Grant-in-Aid Order, 1994 but by making remarkable shift by incorporating the Grant-in-Aid Order, 2004 effected w.e.f. 5th February, 2004, the Government has taken decision to extend the benefit of grant which shall be a fix sum of grant-in-aid determined by taking into account the salaries and allowances, as on the 1st day of January, 2004, of the teaching and non-teaching employees of the educational institution which has become eligible to receive grant-in-aid by the 1st day of June, 1994 (para-2 of the Grant-in-Aid Order, 2004) and thereafter, Grant-in-Aid Order, 2008 has come which has also been enacted by giving remarkable change in the monetary benefit by changing the quantum from the fix sum of grant-in-aid which shall be determined by taking into account the salaries and allowances as on the 1st day of January, 2004.

It has been provided in the Grant-in-Aid Order, 2008 that by way of fix sum of grant-in-aid which shall be determined @ 40% of the emoluments calculated at the initial of the existing time scale of pay applicable to the employees including existing Dearness Pay and existing Dearness Allowance as admissible prospectively from the date of Notification of the Grant-in-Aid Order, 2008 (para-16 of the Grant-in-Aid Order, 2008) and again the Government has come out with Grant-in-Aid

Order, 2009, by which, the rate and disbursement of Block Grant has been stipulated which shall be a fixed sum of Grant-in-Aid determined by taking into account the initial of the basic pay at the pre-revised time scale of pay plus 7 increments plus Dearness Allowance at the rate of 41 percent as on the 1st day of January, 2004 (para-5 of the Grant-in-Aid Order, 2009).

Thus, it is evident while the Grant-in-Aid Order, 1994 stipulates for full salary cost, but the Government, taking into consideration its viability, has taken decision by way of policy decision by enactment of Grant-in-Aid Order, 2004 or 2008 or 2009 reducing the quantum part from full salary cost to fix sum.

It is further evident from the Grant-in-Aid Order, 2004 that the benefit on the basis of the fix sum of grant-in-aid by determining it on the basis of salaries and allowances as on the 1st day of January, 2004. Likewise, in the Grant-in-Aid, 2008 or 2009, the cut-off date is 1st January, 2004.

Further, the eligibility to receive grant-in-aid is to seen as on the 1st day of June, 1994 in accordance with the Grant-in-Aid Order, 1994, meaning thereby, the eligibility part has remain untouched by enacting either Grant-in-Aid Order, 2004 or 2008 or 2009, but the determination of the quantum of Block Grant has been decided to be determined by taking into account the salaries and allowances as on the 1st day of January, 2004 and if in this situation, an incumbent either teaching or non-teaching staff approaching to the court of law by making claim that he is entitled to get the benefit of Grant-in-Aid Order, 1994 that is for claiming the full salary cost, then it would not be permissible after repealment of the Grant-in-Aid Order, 1994 and coming into effect of the subsequent Grant-in-Aid Orders either Grant-in-Aid Order, 2004 or 2008 or 2009.

If by virtue of the repealment of the Grant-in-Aid Order, 1994, if the respondent No.1 (in both the appeals) would be extended the monetary benefit on the basis of repealed Act, there would be no meaning of repealment of the Act and it will go contrary to the principle of repealment as laid down under the provision of Section-6 of the General Clauses Act, since repealment means that any Act if repealed will be said to be not in existence from the date of its enactment and the benefit or right already accrued will not be adversely affected but the prime question to get the benefit of repealed Act would be that any benefit must have been granted under the provision of the Act which has subsequently been repealed.

Much emphasis has been given that in view of the saving clause as provided under the provision of paragraph-4 of the Grant-in-Aid Order, 2004 by which the educational institutions in whose favour the grant-in-aid has been continued to receive, as if the Grant-in-Aid Order, 1994 has not been repealed.

Now the question would be what would be the meaning of institution, whether along with posts or without posts?

If institution means without posts, certainly the private respondents would be held to be entitled to get the benefit. But if it would mean with posts, certainly they would not be entitled to get the benefit.

This Court, after going through the provision of Section 7-C(4) of the Orissa Education Act, 1969 as also the Grant-in-Aid Order, 1994, is of the view that the two conditions have been laid down for getting the benefit of grant-in-aid.

First is that the institution must be an aided under the provision of Section-3(b) of the Orissa Education Act, 1969 and other is that the post is to be admissible as per workload and prevalent yardstick, as would be evident from the provision of paragraph-9(2)(B) of the Grant-in-Aid Order, 1994 which does mean that if an institution workload is not there as per yardstick, no post can be said to be admissible. Hence, post is an integral part of an institution to be created on the basis of workload as per the yardstick prevalent. No doubt, under the provision of paragraph-4 while saving the benefit already extended, the educational institutions have been decided to be given the benefit of grant-in-aid, as if the Grant-in-Aid Order, 1994 has not been repealed.

It is not in dispute that Grant-in-Aid Order, 1994 or the subsequent Orders have been enacted upon by the State authorities in the light of the provision as contained under Section 7-C of the Orissa Education Act, 1969. The said provision contains under sub-section(4) that no grant-in-aid shall be paid and no payment towards salary costs or any other expense shall be made to any private educational institution or for any post or to any person employed in any such institution after the commencement of the Orissa Education (Amendment) Act, 1994, except in accordance with an order or rule made under this Act.

The said provision contains a proviso to the effect that pending framing of such rule or issue of order, the State Government may, without prejudice to such rule or order, direct that **private educational institutions which were receiving grant-in-aid and the posts in such educational institutions in respect of which grant-in-aid was being released shall continue to be paid such amount as grant-in-aid as was being paid to them immediately prior to commencement of the Orissa Education (Amendment) Act, 1994**.

It is evident from the proviso to sub-section (4) of Section 7-C of the Orissa Education Act, 1969 that **"private educational institutions which are receiving grant-in-aid and the posts in such educational institutions in respect of grant-in-aid was being released"**, does suggest that the grant-in-aid is to be released to a post in an educational institution.

Although under the repeal clause as contained under Grant-in-Aid Order, 2004 or 2008, it has been referred that the educational institutions which were

getting the benefit of grant-in-aid will continue to get it, as if the Grant-in-Aid Order, 1994 has not been repealed. Since the same have been saved and the respondent no.1 (in both the appeals) are appointees of such institution will continue to get it is not acceptable for the reason that the saving clause is also contained under the proviso to Section 7-C(4) of the Orissa Education Act, 1969 and the said proviso provides that the benefit of grant-in-aid is to be given against a post in an institution.

Hence, merely because the word 'post' has not been reflected under the saving clause in paragraph-4(2) of the Grant-in-Aid Order, 2004, it does not mean that the institution which were getting the benefit of Grant-in-Aid Order, 1994 will continue to get it, even though the benefit of Grant-in-Aid Order has not been extended to the post.

As such, by virtue of the repealment of the Grant-in-Aid Order, 1994, no benefit can be granted even if an incumbent will complete the five years of service after 01.06.1994.

There is no dispute in settled position of law that if there is any ambiguity in subordinate legislation from the principal enactment, it is the principal law that will prevail. The Grant-in-Aid Order, 1994 or 2004 or 2008 is subordinate legislation, enacted in terms of the provision of Section-7C(4) of the Orissa Education Act, 1969. Hence, provision contained in principal Act i.e. under Section-7-C(4) of the Act, 1969 will prevail which contains under its proviso by which the institutions which are receiving grant-in-aid and post in respect of which grant-in-order was being released has been saved, as such, the repeal clause as contained in Grant-in-Aid Order, 2004 or 2008, the reference of institutions means along with posts.

Learned counsel appearing for the respondent no.1 (in both the appeals) has vehemently argued that a right has been created in their favour due to the saving clause by which the institution which was extended the benefit as per the Grant-in-Aid Order, 1994, will continue to get it and since the respondent no.1 (in both the appeals) are in the same institution, hence a vested right has been accrued in their favour.

This Court is not in agreement with this submission due to the reason that the word 'vested', as has been defined in Black's Law Dictionary (6^{th} Edition) at page-1563, means fixed; accrued; settled; absolute; complete. Having the character or given the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent. Rights are 'vested' when right to enjoyment, present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute vested rights.

In Webster's Comprehensive Dictionary (International Edition) at page-1397, the word 'vested' is defined as a tenure subject to no contingency; complete; established by law as a permanent right, vested interest.

The word 'vested' is normally used where an immediate fixed right in present or future enjoyment in respect of a property is created. With the long usage the said word 'vest' has also acquired a meaning as "an absolute or indefeasible right". It had a 'legitimate' or "settled expectation" to obtain right to enjoy the property etc. Such "settled expectation" can be rendered impossible of fulfillment due to change in law by the legislature. Besides this, such a "settled expectation" or the so-called "vested right" cannot be countenanced against public interest and convenience which are sought to be served by amendment of the law. Thus, "vested right" is a right independent of any contingency. Such a right can arise from a contract, statute or by operation of law. A vested right can be taken away only if the law specifically or by necessary implication provide for such a course.

In the light of the definition of the "vested right", it is evident that right accrues to person or persons attached to an institution or building or anything whatsoever, meaning thereby, if an incumbent is claiming a vested right, he is to substantiate before the court of law that the right has been created in his favour by an order passed by the competent authority in accordance with law.

In the context of this position, admittedly, the respondent no.1 (in both the appeals) have not been extended the benefit of grant-in-aid as per the Grant-in-Aid Order, 1994. Although the institution under which they are working, some of the incumbents have been extended with the benefit of grant-in-aid by virtue of the Grant-in-Aid Order, 1994, but that does not mean that since others who are fulfilling the eligibility criteria as per the law, if given the benefit, the respondent no.1 (in both the appeals) cannot claim the said benefits merely because they are working in the same institution rather they have to show the eligibility to get the benefit as per the prevalent law.

The respondent no.1 (in both the appeals), on the strength of an additional affidavit, has tried to impress upon the Court that the Additional Director, Higher Education, Orissa, Bhubaneswar vide its letter No.59771 dated 28.12.2004 has directed all the Principals of Non-Govt. Aided Colleges to furnish the required information in favour of the non-aided employees of the college who were appointed/recruited in due procedure by the Governing Body on or before 31.12.98 as per required workload. The said information was directed to be received on or before 10.1.2005 positively through special messenger as per proforma enclosed to the letter. In terms thereof, the proposal was sent by covering letter dated 10.01.2005 wherein the name of respondent no.1 (in both the appeals) is at Serial Nos. 13 and 14 respectively and as such, it has been contended that since the proposal has been asked by the authority of the State Government, there is no reason to deny the benefit in view of the Grant-in-Aid Order, 2009.

This Court, after going through the aforesaid documents as annexed with the additional affidavit, is of the view that merely by asking details about one or the others teaching and non-teaching staff of the college, does not create any right and even if the information has been sought for by the authority of the State Government, the benefit cannot be said to be extended contrary to the statutory provision.

Learned counsel appearing for the respondent no.1 (in both the appeals) has orally argued that their applications were pending consideration before the authority while the Grant-in-Aid Order, 1994 was in existence and as such, if there is any delay or laches on the part of the State authority, they cannot be made to suffer but respondent no.1 (in both the appeals) have failed to brought any record on what date they have made request before the authority. Moreover, even accepting the plea of the respondent no.1 (in both the appeals) is correct, then also they cannot be entitled to get the benefit after repealment of the legislation.

Respondent no.1 (in both the appeals) have also relied upon one communication issued by the Deputy Secretary to Government of Orissa, Department of Higher Education, Bhubaneswar address to the Director, Higher Education, Orissa, Bhubaneswar vide letter No.39446 dated 1.6.1996 wherein it has been stated that for a post to be eligible for grant-in-aid, it must have been filled up for the full qualifying period of 5 years or three years as the case may be a regularly recruited person possessing requisite qualifications.

It has further been stated therein that under the provisions of grant-in-aid order, submission of application is a continuous process and as and when an institution or post in an institution qualifies for receiving grant-in-aid applications have to be submitted in the prescribed form and, therefore, it has been submitted that the intention of the aforesaid communication is very clear, even after 1.6.1994, the benefit of grant-in-aid is to be extended in favour of teaching and non-teaching staff, if completed 5 years or 3 years qualifying period as the case may be, but this contention is also not acceptable to this Court for the reason that the communication dated 1.6.1996 has been issued on 31.05.1996, the day when there was existence of Grant-in-Aid Order, 1994 and once Grant-in-Aid Order, 1994 has been superseded by its repealment by virtue of Grant-in-Aid Order, 2004, there will be no force of the communication dated 1.6.1996.

However, learned Additional Government Advocate appearing for the State-appellants (in both the appeals) has submitted that the communication dated 1.6.1996 has been recalled by the State authority, but he has not produced any document to that effect.

Be that as it may, the fact remains that after repealment of the Grant-in-Aid Order, 1994, during the existence period of the aforesaid order, the communication dated 1.6.1996 was issued but after its repealment by virtue of Grant-in-Aid Order, 2004, there will be no force of the communication dated 1.6.1996.

As has been settled by this Court that the benefit of grant cannot be claimed as a matter of right rather the eligibility is to be seen for an incumbent as has been laid down by Full Bench of this Court rendered in the case of *Laxmidhar Pati and Ors.* (supra). Hence, applying the aforesaid ratio vis-à-vis the provision of law is stated hereinabove and according to the considered view of this Court, respondent no.1 cannot be held to be eligible to get the benefit of Grant-in-Aid Order, 1994.

This Court is also discussing the orders/judgments relied upon by the learned counsel appearing for the respondent no.1 (in both the appeals).

So far as the order rendered by the Hon'ble Supreme Court in the case of *State of Orissa & Ors. v. Prabhawati Padhihari* is concerned, wherein the Hon'ble Supreme Court has been pleased to held that the eligibility is to be seen as on 1.61994 by reversing the judgment passed by this Court in W.P.(C) No.9586 of 2005. Hence, the issue which has been raised by the petitioner in that writ petition as to whether she is entitled to get the benefit after 1.6.1994 was not the exact issue fell for consideration before the Hon'ble Supreme Court in the aforesaid case. However, it has been laid down therein that if an incumbent is not eligible to get the benefit of grant-in-aid as on 1.6.1994, he cannot be held to be entitled to get the same.

In the instant case, the admitted case of the respondent no.1 (in both the appeals) are that they became eligible to get the benefit as on 1.6.1999 and hence in view of the judgment of Hon'ble the Supreme Court in the Prabhawati Padhihari's case, they are not eligible to get the benefit of grant-in-aid as per Grant-in-Aid Order, 1994.

So far as the judgment rendered by this Court in the case of *Laxmidhar Pati and Ors.* (supra) is concerned, that judgment pertains to the eligibility and merely on account of the fact that the incumbent is satisfying the eligibility qualification, cannot be claim the grant-in-aid.

So far as the judgment rendered by this Court in the case of *Prafulla Kumar Sahoo* (supra) is concerned, the same is also based upon the judgment in the case of *Laxmidhar Pati* and it has been laid down therein by a Division Bench of this Court that the eligibility is to be seen as on 1.6.1994.

So far as the judgment rendered by this Court in case of *Aruna Kumar Swain & Anr.* (supra) is concerned, the same pertains to a case where the claim was rejected due to paucity of funds but that is not the case herein.

So far as the judgment rendered by the Hon'ble Supreme Court in the case of *Chandigarh Administration and Others* (supra) is concerned, the same pertains to issue of shirking the responsibility of ensuring proper education in schools and colleges on the plea of lack of resources, but that is not the case herein rather the case herein is regarding the eligibility and affect of repealment of a legislation.

So far as the judgment rendered by the Hon'ble Supreme Court in the case of *State of Orissa & Anr. v. Sushmita Tripathy & Anr.* is concerned, the same has been passed on admission but without considering the effect of repealment and it is settled that if an order on concession is being passed, which is contrary to the statutory provision, is not binding. Reference in this regard may be made to the judgment rendered by the Hon'ble Supreme Court in the case of ***Union of India and Others v. Mohanlal Likumal Punjabi and Others, reported in (2004) 3 SCC 628*** wherein their Lordships have held at paragraph-9 which is being quoted herein below:-

> *"9. In Uptron India Ltd. v. Shammi Bhan, (1998) 6 SCC 538, it was held that a case decided on the basis of wrong concession of a counsel has no precedent value. That apart, the applicability of the statute or otherwise to a given situation or the question of statutory liability of a person/institution under any provision of law would invariably depend upon the scope and meaning of the provisions concerned and has got to be adjudged not on any concession made. Any such concessions would have no acceptability or relevance while determining rights and liabilities incurred or acquired in view of the axiomatic principle, without exception, that there can be no estoppels against statute."*

So far as the judgment rendered by the Hon'ble Supreme Court in the case of *J.S. Yadav* (supra) is concerned, the issue fell for consideration in the aforesaid case is with respect to the effect of an amendment made in the Act and in that context, the issue of vested right has been considered, but here the case is not the amendment of the Act. It is not in dispute, so far as the legal position is concerned that the vested right cannot be taken away, even by way of repealment of the Act, but question is of accruing the vested right as has been discussed hereinabove. The respondent no.1 (in both the appeals), since have not been given the benefit of grant-in-aid by virtue of Grant-in-Aid Order, 1994, no right has been accrued rather the respondent no.1 (in both the appeals) in order to take aid of the right having been accrued in their favour merely on the basis of the fact that the institution in question has been given the benefit of grant-in-aid, but as has been discussed hereinabove, the institution includes post also and admittedly, the post upon which the grant-in-aid is claimed by the respondent no.1 (in both the appeals) has not been extended the benefit with the grant-in-aid. Hence, the judgment is not applicable in the facts and circumstances in the instant appeals.

So far as the judgment rendered by the Hon'ble Supreme Court in the case of *The Government of Andhra Pradesh & Ors. v. Ch. Gandhi* is concerned, the same is with respect to the effect of the repeal and there is no dispute in the settled position of law regarding the effect of repeal as has been elaborately discussed hereinabove.

So far as the judgment rendered by the Hon'ble Supreme Court in the case of *Govt. of Andhra Pradesh and Ors. v. G.V.K. Girls High School* is concerned, that pertains to the conferment of rights.

So far as the judgment rendered by the Hon'ble Supreme Court in the case of *Nathi Devi* (supra) is concerned, the Hon'ble Supreme Court, while dealing with the issue related to interpretation of a statute, has been pleased to hold that in interpreting a statute, effort should be made to give effect to each and every word used by the legislature.

This Court, after applying the aforesaid judgment and after going across the provision of proviso to Section-7C(4) of the Orissa Education Act, 1969 read along with repeal clause as contained in paragraph-4 of the Grant-in-Aid Order, 2004, is of the view that the word inserted in proviso to Section-7C(4) of the Orissa Education Act, 1969, if read together with the provision of paragraph-4 of the Grant-in-Aid Order, 2004, it would be evident that it is not only institution rather the institution also includes the post. Hence, this judgment nowhere is in favour of the respondent no.1 (in both the appeals), if taken along with the factual aspect and legal position in the instant appeals.

So far as order passed by this Court in F.A.O. Nos.424, 426, 614 of 2015, 154 of 2016, 75 of 2017, but this Court, after going into the factual aspect raised therein, has found that this Court has gone into the principle of equality and since the others have been given benefit, hence the order has been passed, but the issue which has been raised by the State-appellants (in both the appeals) herein has not been dealt with and it is settled that the order/judgment, if passed without taking into consideration the effect of the statutory provision, the same would not be binding, since the said order/judgment will be said to be *per incuriam*.

This Court, while discussing the things elaborately hereinabove by dealing with the effect of repealment, has found that the respondent no.1 (in both the appeals) are not entitled to get the benefit of Grant-in-Aid Order, 1994. The effect of repealment has not been discussed and further, it has not been taken into consideration by the coordinate Bench of this Court that if the benefit would be granted even after repealment of the Grant-in-Aid Order, 1994, then what would be the purpose of repealment.

Much emphasis has been given in these judgments that since similarly situated employees have been given the benefit, hence others must be given. But it is settled legal position that if anybody has been given benefit contrary to the statutory provision, the same would not create a right upon the others that is on the basis of principle of negative equality, since Article-14 always envisages positive equality. Reference in this regard may be made to the judgment rendered by the Hon'ble Supreme Court in the case of ***Basawaraj and Another v. Special Land Acquisition Officer, reported in (2013) 14 SCC 81*** wherein their Lordships have held at paragraph-8 which is being quoted herein below:-

> *"8. It is a settled legal proposition that Article 14 of the Constitution is not meant to perpetuate illegality or fraud, even by extending the wrong decisions made in other cases. The said provision does not envisage negative equality but has only a positive aspect. Thus, if some other similarly situated persons have been granted some relief/benefit inadvertently or by mistake, such an order does not confer any legal right on others to get the same relief as well. If a wrong is committed in an earlier case, it cannot be perpetuated. Equality is a trite, which cannot be claimed in illegality and therefore, cannot be enforced by a citizen or court in a negative manner. If an illegality and irregularity has been committed in favour of an individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing a similarly wrong order. A wrong order/decision in favour of any particular party does not entitle any other party to claim benefits on the basis of the wrong decision. Even otherwise, Article 14 cannot be stretched too far for otherwise it would make functioning of administration impossible."*

In the case of ***Chaman Lal v. State of Punjab & Ors., reported in AIR 2014 SC 3640*** wherein their Lordships have held at paragraph-15 which is being quoted herein below:-

> *"15. Moreso, it is also settled legal proposition that Article 14 does not envisage for negative equality. In case a wrong benefit has been conferred upon someone inadvertently or otherwise, it may not be a ground to grant similar relief to others. This Court in Basawaraj & Anr. v. The Spl. Land Acquisition Officer, AIR 2014 SC 746 considered this issue and held as under:*
>
> *"It is a settled legal proposition that Article 14 of the Constitution is not meant to perpetuate illegality or fraud, even by extending the wrong decisions made in other cases. The said provision does not envisage negative equality but has only a positive aspect. Thus, if some other similarly situated persons have been granted some relief/benefit inadvertently or by mistake, such an order does not confer any legal right on others to get the same relief as well. If a wrong is committed in an earlier case, it cannot be perpetuated. Equality is a trite, which cannot be claimed in illegality and therefore, cannot be enforced by a citizen or court in a negative manner. If an illegality and irregularity has been committed in favour of an individual or a group of individuals or a wrong order has been passed by a judicial*

forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing a similarly wrong order. A wrong order/decision in favour of any particular party does not entitle any other party to claim benefits on the basis of the wrong decision. Even otherwise, Article 14 cannot be stretched too far for otherwise it would make functioning of administration impossible. (Vide: Chandigarh Administration & Anr. v. Jagjit Singh & Anr., AIR 1995 SC 705; M/s. Anand Button Ltd. v. State of Haryana and Ors., AIR 2005 SC 565; K.K. Bhalla v. State of M.P. & Ors., AIR 2006 SC 898; and Fuljit Kaur v. State of Punjab, AIR 2010 SC 1937)."

So far as the observation part of the judgment as contained in *Prabhawati Padhihari's* case is concerned, according to my considered view, it does not confer any right upon the respondent no.1 (in both the appeals) to get the benefit of the grant-in-aid on the basis of Grant-in-Aid Order, 1994, since the Hon'ble Supreme Court has been pleased to observe that the said order passed in the case of *State of Orissa & Ors. v. Prabhawati Padhihari* will not come in the way to be Smt. Padhihari become subsequently eligible for whatsoever reasons and at a later point of time the State Government may consider her case and according to my considered view that observation does not confer any right upon the respondent no.1 (in both the appeals) rather the State authorities after taking into consideration the aforesaid observation made by the Hon'ble Supreme Court and taking into consideration the fact that the respondent no.1 (in both the appeals) have become eligible to get the benefit of grant-in-aid by virtue of Grant-in-Aid Order, 2009 considered it and extended the said benefit in their favour.

On the basis of the detailed discussion made, this Court now is considering the finding given by the Tribunal in the judgment impugned.

It is evident from the impugned judgment that the Tribunal has gone into the fact that since the institution has already been extended the benefit of grant-in-aid, the repealed provision will not be applicable but as has been dealt with hereinabove merely on account of fact if an institution has came into fold of the grant-in-aid, the incumbent holding any post in the aforesaid institution will not become eligible to get the benefit of grant-in-aid, if not eligible as per prevalent legislation.

The Tribunal has also not taken into consideration the order rendered by the Supreme Court in the case of *State of Orissa & Ors. v. Prabhawati Padhihari* passed in Civil Appeal No(s).796 of 2008 in right prospective as has been discussed hereinabove.

So far as the question of negative equality, the Tribunal has also not considered this aspect in the manner it should have been considered and without giving any conclusive finding to that effect as dealt with hereinabove in detail.

Accordingly, Issue Nos.(ii) and (iii) are answered.

7. This Court, after making the elaborate discussion of legal as well as factual aspect as above, is of the view that the Tribunal has committed illegality in passing the orders. Hence, not sustainable in the eye of law. Accordingly, the same are quashed. In the result, both the appeals stand allowed.

2018 (II) ILR - CUT- 578

J.P. DAS, J.

CRIMINAL MISC CASE NO. 3311 OF 2016

SUSHMITA DAS @ PATNAIK .....Petitioner

.Vs.

SOUMYA RANJAN TRIPATHY .....Opp-Party.

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent Power – Order taking cognizance of the offences punishable under Section 420/506/34, I.P.C. – Plea for quashing the order of cognizance on the basis of the submission that there is absolutely no material to show that there was any inducement or cheating by the present petitioner against the complainant – Principles – Held, the position of law is undisputed that at the time of taking cognizance and issuing process against the accused persons, the Magistrate is merely concerned with the allegations made out in the complaint and has only to be prima-facie satisfied whether there are sufficient grounds to proceed against the accused and it is not the province of the Magistrate to enter into a detailed discussion on the merits and demerits of the case. (Para 6)

Case Laws Relied on and Referred to :-

1. AIR 2014 SC 957 : (Fiona Shrikhande .Vs. State of Mharashtra & Anr.)

For Petitioner : M/s. M.Mohapatra, S.S.Mohanty, S.R.Pati
For Opp. Party : M/s. S.Pradhan,A.K.Dash & C.Mohanty

JUDGMENT Date of Hearing : 12.01.2018 Date of Judgment : 20.06.2018

J.P.DAS, J

This is an application under Section 482 of the Code of Criminal Procedure (in short, "Cr.P.C.") assailing the order of cognizance passed by the learned S.D.J.M. Bhubaneswar in I.C.C. No.35 of 2012 taking cognizance of the offences punishable under Section 420/506/34, I.P.C. against the present petitioner and three others and directing issuance of summons.

2. The present opposite party filed a complaint petition on 04.01.2012 alleging that the present petitioner, the accused no.1 in the complaint petition, was engaged as Public Relation Officer in the Company of the opposite party at the request of her mother, the

accused no.2, since the complainant and the accused persons had good family relation. Thereafter, in the year 1999 being requested by accused no.2, the complainant agreed to purchase a piece of land on Puri-Konark road. But, the accused no.2 got the sale deed registered in the name of a fictitious person namely, Sasmita Tripathy. One building was also constructed on the said land at the expenses of the Company and one restaurant was opened there by engaging other co-accused no.3. The accused no.2 also withdrew Rs.90,000/- of the Company without the knowledge of the complainant. The accused persons allegedly misappropriated the entire income from the hotel and on being asked by the complainant, they assured to refund the amount which was not complied with. The complainant alleged that exploiting his good faith, the accused persons cheated him by misappropriating huge amount of the Company. The learned S.D.J.M., Bhubaneswar made an enquiry under Section 202, Cr.P.C. by examining the witnesses and by the impugned order dated 01.10.2012 finding a prima-facie case under Sections 420/506/34, I.P.C. against the accused persons, directed to issue summons for their appearance to face their trial.

3. It has been submitted on behalf of the petitioner that there being absolutely no material to make out the alleged offences against the present petitioner, the learned trial court has issued process against the petitioner along with other co-accused persons in a mechanical manner. It has been submitted that all the allegations as made in the complaint petition, were against the accused no.2 namely, Kamal Das, the mother of the present petitioner and excepting the fact that the petitioner worked in the Company of the complainant for a period of about one year, there is absolutely no allegation against her so as to make her liable for the alleged offences. It was also submitted that the petitioner had also left the job of the Company much prior to the alleged purchase of land and construction of building etc.. It was further submitted that although the alleged occurrence took place prior to 2000, still the complaint petition was filed in the year 2012. It was further submitted that the petitioner had got married since 25.01.1998 and has been residing with her husband at Hyderabad and hence, she could not have any complicity with the allegations as made by the complainant. In course of hearing, it was also submitted that in the year 2011 the wife of the complainant had filed one Civil Proceeding before the learned Civil Judge (Senior Division), Bhubanesar arraying the present petitioner and other co-accused as defendants with the pleadings that there was some relationship between her husband and the present petitioner who was also employee in the company and taking advantage thereof the present petitioner along with other defendants misappropriated huge amounts of the company for which her husband lost his mental balance. Placing the copy of the plaint in the said suit it was submitted that all the allegations as made like purchase of property, spending of money of the Company were all within the knowledge of the complainant and with his consent as per the pleadings in the said Civil Suit. But subsequently, the said suit was withdrawn and the complaint was filed by the present opposite party making allegations of cheating and misappropriation.

4. Per contra, it was submitted by the learned counsel for the opposite party that the present application of the petitioner is not maintainable either in law or facts. It was submitted that the mother of the petitioner had approached this Court for quashing of the

cognizance in CRLMC No.3825 of 2012 but it was disposed of by order dated 30.04.2013 giving liberty to the petitioner to approach the revisional forum since the order of cognizance is a revisable order. Thereafter, the mother of the petitioner approached the learned Sessions Judge, Khurdha in criminal Revision No.27 of 2013 against the order of cognizance but the said criminal revision was dismissed for being devoid of merit by a reasoned order passed by the learned Sessions Judge on 18.01.2014. Thus, it was submitted that since a similar application has been rejected by the revisional court which has also not been challenged before any higher authority, the present application is not maintainable, apart from the fact that the said facts have been suppressed by the present petitioner while moving the present application. It was further submitted that the present petitioner along with her mother as accused no.2 had moved an application before the learned trial court to discharge them from the offences under Section 245(1) Cr.P.C. and the said application had also been rejected by the learned trial court by order dated 30.11.2015 a copy of which, has been placed before the Court. Thus, it was submitted tht the prayer of the petitioner to be discharged from the offences having been rejected, the petitioner instead of challenging the said order, has come up with the application against the order of cognizance which is not maintainable in law. Lastly, it was contended that while exercising the power under Section 482, Cr.P.C. the order of cognizance passed by the learned trial court should not be ordinarily interfered with unless there is gross miscarriage of justice, moreso in a case where the learned trial court after making an enquiry himself under Section 202, Cr.P.C. has taken cognizance of the offences to proceed against the accused persons finding a prima-facie case against them on the material evidence placed before it. In support of such contention, reliance was placed on a decision of the Hon'ble Apx court reported in **AIR 2014 SC 957 (Fiona Shrikhande Vrs State of Mharashtra and Anr)** wherein referring to an earlier decision of the Hon'ble Apex Court reported in (1976) 3 SCC 736 (Smt. Nagawwa Vrs. Veeranna Shivlingappa Kanjalgi & Ors.) it was observed by Their Lordships that.

> "Once the Magistrate has exercised his discretion in forming an opinion that there is ground for proceeding, it is not for the Higher courts to substitute its own discretion for tht of the Magistrate. The Magistrate has to decide the question purely from the point of view of the complaint, without at all adverting to any defence that the accused may have."

5. Lastly, it was contended on behalf of the petitioner that it is the settled proposition of law that mere averments in the complaint petition without materials to make out a case of inducement or cheating, there could not have been an offence under Section 420 of the I.P.C, and in this case there is absolutely no material to show that there was any inducement or cheating by the present petitioner against the complainant. It was also submitted that rejection of such prayer in respect of any co-accused does not take away the right of the present petitioner to assail the order of cognizance. Lastly, it was submitted that there was a delay of more than 12 years in filing the complaint after the alleged acts.

6. The position of law is undisputed that at the time of taking cognizance and issuing process against the accused persons, the Magistrate is merely concerned with the allegations made out in the complaint and has only to be prima-facie satisfied whether

there are sufficient grounds to proceed against the accused and it is not the province of the Magistrate to enter into a detailed discussion on the merits and demerits of the case. The contention as made on behalf of the petitioner before this Court are materials of defence and those could not have been before the learned trial court nor could have been considered by the said court while directing for issuance of process against the accused persons after completing an enquiry under Section 202,Cr.P.C.. Further it is on record that an application filed by the present petitioner and another co-accused her mother to discharge them from the offences has been rejected by the learned trial court and that order has not been challenged by her. Of course, it is not known as to whether these materials as submitted, were placed before the learned trial court while considering such application for discharge since the relevant order did not disclose any such details.

7. However, considering the facts and circumstances besides the settled position of law in the field, I do not find any merit in the case of the petitioner to quash the order of cognizance passed by the learned trial court, in exercising the power under Section 482,Cr.P.C. The CRLMC is dismissed accordingly.

2018 (II) ILR - CUT- 581

J.P. DAS, J.

CRLA NO. 645 OF 2011

PUSHPENDRA SONWANE & ORS. .....Appellants

.Vs.

STATE OF ODISHA .....Respondent

NARCOTIC DRUGS & PSYCHOTROPIC SUBSTANCES ACT, 1985 – Sections 42 & 57 – Provisions under – Report about arrest and seizure of contraband – Whether mandatory? – Held, Yes. – Non-communication of such report and Non production seized articles before the court – Effect of – Held, it is the settled position of law that failure to established the safe custody of the materials gives a benefit of doubt to the accused persons leading to their acquittal.

(Para 6)

For Petitioner : M/s. P.Panda, M.K.Panda, J.M.Behera, A. Pattanaik
For Opposite Party : Standing Counsel

JUDGMENT Date of Hearing : 03.08.2018 Date of Judgment : 03.09.2018

J.P.DAS, J.

The three appellants stood convicted under Section 20(b)(ii)(C) of the Narcotic Drugs Psychotropic Substances Act (in short "the N.D.P.S. Act") by the learned Additional Sessions Judge-cum-Special Judge, Malkangiri in Criminal Trial No.52 of 2010 and have been sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.2,00,000/-(two lakhs) in default, to undergo further rigorous imprisonment for two years each.

2. The prosecution case is that on 30.05.2010 night the S.I. of Police one H.R. Dash of Orkel Police Station while performing Anti-naxal night patrolling duty along with other staff, found a vehicle coming from Balimela side in high speed without having number plate. On suspicion, the vehicle was detained in front of the Orkel P.S. and three persons namely, the present three accused persons were found as occupants of the vehicle who tried to run away but were apprehended by the Police. On interrogation, they disclosed their identity but on demand, could not produce any document in respect of the vehicle, for which under suspicion, the officers asked the accused persons to open the tarpolin cover put on the carrier. Eighteen numbers of jute bags were found inside the carrier and on opening the same, it was found out that all those bags carried contraband ganja giving foul smell. It is further case of the prosecution that on interrogation, the accused persons confessed to have been carrying the contraband ganja from one Malia Parida and Sunil Agrawal of Chitrakunda to deliver the same to one Sunil Patel at Jeypore. The concerned S.I. of Police informed the Inspector In-charge of the Orkel police station and since it was chance detection, the formalities required under Section 42 and Section 57 of the N.D.P.S. Acts could not be complied with. Thereafter, the two independent witnesses and a weighman were called to the spot. One Photographer was also called to take photographs. In presence of the witnesses, the contraband ganja was weighed and was found to be 577.5 Kgs. The samples in duplicate were taken from each of the packets found in the bags and were sealed putting paper slip and personal seal of the officer who left the brass seal in zima of the independent weighman namely, Bipin Kumar Nayak. Thereafter, the officer produced the accused persons along with the seized articles and a written F.I.R. before the Inspector In-charge of Orkel police station who directed one Inspector D.N.Bhoi to take up the investigation of the case. The said Inspector of Police resealed the sample packets and the bulk articles and kept those in police station malkhana. He, thereafter, forwarded the accused persons as well as the seized materials to the court of learned Special Judge, Malkanagiri. As per direction of the learned Special Judge, the materials were produced before the learned S.D.J.M., Malkanagiri on the next day, who directed to send the sample packets for chemical examination to R.F.S.L., Berhampur, and asked the police officer to keep bulk articles in the police station malkhana due to want of space in the court Malkhana. The charge of the investigation was subsequently handed over to another S.I. of Police due to transfer of the first Investigating Officer, who submitted the charge-sheet in the case.

3. The accused persons took a plea of complete denial with a further plea advanced through one witness examined on behalf of the defence who was the owner of the seized vehicle that the vehicle had gone to bring jackfruits but it was falsely and illegally detained and seized by the Police Officers with fake allegation.

4. Thirteen witnesses were examined on behalf of the prosecution as against one preferred by the accused persons in defence besides exhibiting some documents. P.Ws 1 and 3 are independent seizure witnesses, P.W.2 is a constable present at the

time of detection. P.W.4 is another constable who produced the accused persons and the seized articles before the learned S.D.J.M., Malkanagiri and also carried the sample packets to R.F.S.L., Berhampur. P.Ws. 5 and 6 are two Home-guards examined as seizure witnesses, P.W.7 is the concerned S.I. of Police who submitted the charge-sheet, P.W.8 is the Photographer, P.W.9 is the detecting officer and the informant, P.W.10 is the weighman, P.W.11 is the Investigating Officer who completed the most part of the investigation, P.W.12 was the driver of the police jeep at the time of detection and P.W.13 was another seizure witness. The D.W.1 was the owner of the vehicle.

5. The learned trial court on analysis of the evidence and materials placed during trial reached the conclusion that the prosecution successfully established the allegation of recovery and seizure of 577.5 Kgs of contraband ganja from the illegal and unauthorized possession of the accused persons and accordingly convicted the accused persons under Section 20(b)(ii)(C) of the N.D.P.S. Act and passed the impugned judgment of conviction and sentence.

6. It has been submitted on behalf of the appellants that the accused persons have been falsely implicated in this case and the learned trial court accepted the case of prosecution ignoring the settled position of law besides a number of material discrepancies and lacunae in the prosecution case. It was submitted by the learned counsel for the appellants that it is the settled position of law and in view of the severity of the punishment in case of a conviction under Section 20(b)(ii)(C) of the N.D.P.S.Act, it has been repeatedly observed by the Hon'ble Apex Court as well as Hon'ble High Courts that all the mandatory provisions under the N.D.P.S. Act must be strictly complied with by the Investigating Agency and the detail requirements to establish the allegation, must be proved before the trial court beyond all reasonable doubts so as to establish that the contraband articles were recovered and seized from the conscious possession of the accused persons and those were kept in safe custody during the period from recovery till the production of the same before the court as well as before the Chemical Examiner apart from compliance of required formalities by the Detecting as well as by the Investigating Officer. It was further submitted that in this case all the independent witnesses did not support the prosecution case. The prosecution simply relied upon the evidence of the official witnesses. Further the accused persons were not identified in the court during trial. The safe custody of the seized materials was absolutely lacking thereby creating serious doubt about the articles actually seized and sent for chemical examination. The required formality under Sections 57 of the N.D.P.S. Act was not complied with. Lastly, the bulk quantity of ganja was not produced before the court during trial. Hence, it was submitted that the learned trial court seriously erred in law by reaching the conclusion of guilt, against the accused-appellants.

7. At the outset, it was submitted on behalf of the appellants that although it was the case of the prosecution that since it was a chance detection in course of night patrolling against naxal activities for which the mandates of Section 42 of the

N.D.P.S. Act could not be complied with, still the place of detection as well as the place of entire search and seizure was admittedly in front of the Orkel Police Station which created serious doubt regarding the veracity of the prosecution case.

8. It was submitted that the alleged detection was made at around 4 A.M. and as per the Detecting Officer, P.W.9, the independent witnesses were called to the spot at around 8 A.M. in whose presence the search and seizure were made. But, the seizure list shows the time of seizure to be around 1.50 P.M. vide Exhibit-1/1. It was further submitted that as per P.W.9, the Detecting Officer, after his detection and taking of sample packets, he put his personal seal on the materials and left the seal in zima of the weighman one Bipin Kumar Nayak. Thereafter, as per the prosecution case when the materials were produced at the Police Station and investigation was taken over by another Inspector of Police, he again sealed those bags with his personal seal and kept the materials in the Police Malkhana. In this regard it was submitted on behalf of the appellants that the said independent witness namely, Bipin Kumar Nayak did not support the prosecution case nor the brass seal of the Detecting Officer was produced before the court. It was further submitted that the Investigating Officer who again put his seal, has also not stated as to whether his seal was left in zima of any person or the sample thereof was sent to the court and the forensic laboratory. In this context, drawing attention of the court to the chemical examination report vide Exhibit-19, it was submitted that as per the report, a cardboard packet enclosed within the cloth cover was received containing nineteen sealed paper packets. It was further mentioned that the impression of the seal corresponded to the seal impression forwarded. Thus, it was submitted that if two separate seals were put by two Officers, it is not known as to the sample of which seal was forwarded to the R.F.S.L.. Most importantly, it was submitted that although the Detecting Officer, P.W.9 stated that he handed over his personal seal to the weighman Bipin Kumar Nayak, who turned hostile, under proper zimanama vide Exhibit-14, still the Exhibit14 simply showed zima of weighing scale and did not show zima of any brass seal given to the said witness. Thus it was doubtful as to whether any seal was at all used by the seizing officer, much less the seal was left in zima of any independent witness. Obviously, the prosecution had no answer for the same.

9. In respect of safe custody, it was further submitted on behalf of the appellants that it was stated by the second Investigating Officer that he had seized the malkhana register of the Police station under proper seizure list along with the relevant station diary entry, but neither the malakhana register nor the station diary entry was produced before the learned trial court except exhibiting the seizure list and the signatures thereon. Thus, it was submitted that the prosecution has not established sufficiently that the seized articles were duly kept in the police station malakhana before those were produced before the court. In this regard, it was further submitted that as per the prosecution case, the seized contraband materials along with sample packets and the accused persons were produced before the learned

Special Judge, Malkanagiri on 31.05.2010 and the learned Special Judge directed to produce the same before the learned S.D.J.M., Malkanagiri. The concerned constable of Police who carried the accused persons and produced before the court, appearing as P.W.4 stated that on the next day he produced the bulk contraband ganja and the samples before the learned S.D.J.M., Malkanagiri who passed the order for taking the samples to R.F.S.L., Berhampur and to return the bulk quantity to the police station malkhana due to want of space in the court malkhana. He again stated that on 02.06.2010 i.e. on the next day, he carried samples to the R.F.S.L, Berhampur and deposited the same there on 03.06.2010. In his cross-examination, he has stated that the articles were brought to the court in the seized vehicle and after direction by the learned Special Judge, the vehicle with the bulk ganja and sample packets therein was kept in the court premises till those were produced before the learned S.D.J.M. on the next day. On the next day, the S.I. of Police produced the same before the learned S.D.J.M.. Thus, it was submitted that admittedly as per the prosecution case, the seized articles after being produced before the learned Special Judge, were kept in a vehicle inside the court premises till the next day and there is no whisper from the prosecution side as to what steps were taken for safe custody of those articles during the relevant period. Further the concerned constable P.W.4 stated that he took the sample packets on 02.06.2010 and deposited the same on 03.06.2010. The prosecution case is also absolutely silent as to how the samples were carried during transit. Stressing on the aforesaid circumstances, it was submitted on behalf of the appellants that the prosecution has miserably failed to establish the safe custody of the materials between the period from alleged recovery till chemical examination, the benefit of which, must go to the appellants.

10. Going through the evidence and documents as placed, I do not find any acceptable answer in the impugned judgment passed by the learned trial court to the questions raised on behalf of the appellants in respect of the safe custody of the seized articles. It is the settled position of law that failure to establish the safe custody of the materials gives a benefit of doubt to the accused persons leading to their acquittal.

11. It was also submitted on behalf of the appellants that although it is the case of the prosecution that the bulk quantity of ganja was reported to be kept in police malkhana due to want of space in the court malkhana still those were not produced before the court during trial. As per the position of law held by the Hon'ble Apex Court, non-production of bulk materials before the trial court is a serious lacuna in the prosecution case.

12. As regards the oral evidence adduced on behalf of the prosecution, it was submitted that the independent witnesses did not support the prosecution case and the Detecting Officer appearing as P.W.9 though stated about the prosecution story did not even whisper as to whether the accused persons standing in the dock were the persons detected with possession of contraband articles.

13. Lastly, it was submitted that Section 57 of the N.D.P.S. Act mandates that whenever any person makes any arrest or seizure under the Act, he shall within forty eight hours next after such arrest and seizure make a full report of all the particulars of such arrest and seizure to his immediate official superior. In this case P.W.9, the concerned S.I. of Police made the seizure and arrest but he has not submitted any report. Such a report is said to have been submitted by P.W.11, the subsequent Investigating Officer. Hence, it was submitted that the Section 57 of the N.D.P.S.Act was not complied with apart from the fact that although the P.W.11 stated to have seized the said report from the office of the S.D.P.O., Chitrakunda and proved the seizure list, still the said report was not brought into evidence.

14. It was submitted by learned counsel for the State that the oral evidence of the official witnesses amply established detection and seizure from the possession of the accused persons and the said officers could not have been disbelieved since they had no axe to grind against the accused persons. It was also submitted that as per the settled position of law, mere absence of independent corroboration cannot be a ground to throw away the evidence of the official witnesses if it is otherwise consistent and reliable. But, the serious lacunae in the prosecution case as to safe custody of the materials, as discussed in detail hereinbefore, creates a serious doubt as to the nature of the articles allegedly recovered and seized from the possession of the accused persons, even if it is accepted for the sake of argument that some materials were recovered and seized from the possession of the accused persons accepting the version of the official witnesses. The safe custody of the materials during transit taken from the time of detection till production before the R.F.S.L., Berhampur was not sufficiently established, the brass seal said to have been given in zima of one independent witness did not find place in the concerned zimanama vide Exhibit 14, there was no explanation as to existence of two separate seals put by two officers on the seized articles, the concerned malkhana register was not produced before the court during trial and in the last but not the least, the bulk quantity of seized materials was also not produced before the court during trial. Taking all these aspects into consideration, there can be no escape from the conclusion that the prosecution did not succeed to establish the alleged recovery and seizure of contraband ganja from the possession of the accused-appellants and the benefit must go to them.

15. Accordingly, the impugned judgment of conviction and sentences passed by the learned Additional Sessions Judge,-cum Special Judge, Malkanagiri in C.T. No.52 of 2010 convicting the accused-appellants under Section 20(b)(ii)(C) of the N.D.P.S Act is set-aside and the accused persons being acquitted of the charge are set at liberty. Since it was submitted that the accused-appellants are in custody, they be set at liberty forthwith if not required for detention in any other case.The seized materials be dealt with according to law. A copy of this judgment along with the L.C.R. be sent back to the trial court forthwith for information and compliance.

2018 (II) ILR - CUT- 587

J.P. DAS, J.

BLAPL NO. 2273 OF 2018

DEBA PRITAM MAJUMDAR ……...Petitioner

.V*s.*

CENTRAL BUREAU OF INVESTIGATION ……Opp-Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Bail application – Petitioner involved and charge sheeted under Sections 120-B/420/409 of the I.P.C. and Sections 4, 5 and 6 of the Prize Chit Money Circulation Scheme Banning Act 1978 – In custody for more than two years – Grant of bail – Held, it has been the observation of the Hon'ble Apex Court as well as by this Court in different cases that pre trial detention of an accused, cannot be taken as a substitute for imprisonment after conviction, of course depending on the facts and circumstances of each case. However, taking into consideration the period of detention of the petitioner in custody and the specific amount alleged to have been found out to have been transferred to the personal account of the petitioner, I am of the considered view that the petitioner can be released on bail on stringent conditions. (Paras 5 & 6)

For Petitioner : M/s. B.P.Mohanty,S.Sahani
For Opposite Party : Additional Standing Counsel

JUDGMENT Date of Hearing : 16.08.2018 Date of Judgment : 03.09.2018

J.P.DAS, J

This is an application under Section 439 of the Criminal Procedure Code.

2. The petitioner is an accused in S.P.E. Case No.08 of 2014 corresponding to R.C. Case No.13/S/2014 on the file of learned Special C.J.M., C.B.I, Bhubaneswar charge-sheeted under Sections 120-B/420/409 of the I.P.C. and Sections 4, 5 and 6 of the Prize Chit Money Circulation Scheme Banning Act 1978.

3. Originally, two cases were registered; one as Baliapal P.S. Case No.84 of 2013 and the other as Kalimela P.S. Case No.65 of 2013 for the alleged offences as aforesaid with the allegation that the officials and the agents of one M/s Remac Reality India Ltd. with its Head Office at Kolkata collected huge amount of public deposits illegally by floating different alluring schemes promising high returns within a short span of time, but ultimately the depositors were cheated not being given with assured returns. Subsequently, the investigation of the cases was taken over by the C.B.I as per direction of the Hon'ble Apex Court. In course of investigation, the present petitioner along with other co-accused persons were arrested and it was alleged that the present petitioner was one of the Additional Directors of the Company and was actively engaged in the illegal collection of deposits and criminal misappropriation of those funds for personal benefit. A charge-sheet was submitted on 18.07.2016 keeping the further investigation open. The application for bail of the present petitioner stood rejected by the learned trial court as well as by the learned Sessions Judge, Khurdha at Bhubaneswar

with the observation that the petitioner is involved in serious economic offences and further investigation has been kept open.

4. It was submitted by learned counsel for the petitioner that the petitioner was merely an employee in the Company having no direct nexus with the alleged collection of deposits and use of such amounts. It was further submitted placing some documents that the petitioner was originally appointed as a Sales Manager and subsequently got some promotion and was ultimately designated as an Additional Director only for the name sake. It was further submitted that the Principal Director namely, one Partha Pritam Tiwari and his wife Leena Tiwari held 34,985 and 14,985 numbers of equity shares respectively whereas the petitioner held only five equity shares, which would show that the petitioner was a Director only for the name sake. It was also submitted placing some further documents that the petitioner has informed the Company intending his resignation since 2013 and at no relation with the day-to-day affairs of the Company. Lastly, it was submitted that the petitioner being arrested is in custody since 04.06.2016 and the trial of the case has not yet been commenced, though charges have been framed only on 12.07.2018.

5. The bail application was strongly objected to on behalf of the C.B.I with the submissions that in course of the investigation, it was found out that the Company had collected deposits from general public to a tune of Rs.163,26,51,550.00 and had refunded only Rs.78,06,94,325.00, thus, leaving a huge liability of Rs.105,41,50,105.00. It was further submitted that the petitioner was actively participating in the affairs of the Company and was the Additional Director of the Company for the period from 2010 to 2013. It was further submitted that the investigation of the case has been kept open and there is every possibility of tampering with the prosecution evidence, if the petitioner would be released on bail. It was also submitted that it was found out in course of investigation that an amount of Rs.11,14,711/- was transferred to the personal account of the petitioner from the accounts of the Company. Of course, in this regard it was submitted on behalf of the petitioner that the said amount was received by the petitioner towards his remunerations and not for any illegal purpose.

6. The petitioner is in custody since 04.06.2016 and the charge-sheet having been submitted, the charges have already been framed. As seen from the documents placed on behalf of the petitioner, he held only five equity shares of the Company and the other documents as placed also show that the petitioner was originally a Sales Manager of the Company. It has been the observation of the Hon'ble Apex Court as well as by this Court in different cases that pre trial detention of an accused, cannot be taken as a substitute for imprisonment after conviction, of course depending on the facts and circumstances of each case. In this case, the petitioner has remained in custody for more than two years and as seen from the documents, the Principal Operators of the company were Partha Pritam Tiwari and his wife Leena Tiwari. Of course on the materials placed on behalf of the C.B.I, there are prima-facie allegations against the petitioner to have been involved in the affairs of the Company.

6. However, taking into consideration the period of detention of the petitioner in custody and the specific amount alleged to have been found out to have been transferred

to the personal account of the petitioner, I am of the considered view that the petitioner can be released on bail on stringent conditions. Accordingly, it is directed that let the petitioner be released on bail by furnishing a bond of Rs.2,00,000/-(two lakhs) with two solvent sureties for the like amount to the satisfaction of the learned trial court with the following conditions:

i. he shall furnish cash security of Rs.5,00,000/-(five lakhs) to the satisfaction of the learned trial court;

ii. he shall surrrender his pass-port before the learned trial court , if not surrendered earlier and if he does not have pass port, he shall file an affidavit to that effect before the learned trial court;

iii. he shall not tamper with the prosecution evidence in any manner whatsoever;

iv. he shall appear before the Investigating Agency as and when required for the purpose of further investigation and

v. he shall not default in personal attendance of court during trial on each date, of course subject to the discretion of the learned trial court under Section 317 of the Cr.P.C.

2018 (II) ILR - CUT- 589

J.P. DAS, J.

CRIMINAL MISC CASE NO. 2957 OF 2016

DR.PRASANTA KUMAR SAMAL .....Petitioner

.Vs.

STATE OF ODISHA .....Opp-Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Application assailing the order rejecting the application of the petitioner to discharge him from the alleged offences punishable under Sections 23 and 25 of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 – Framing of charge in a private complaint – Principles to be followed – Held, it is right that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. But if the materials placed on behalf of the complainant do not make out a prima facie case, there can be no alternative than to discharge the accused. (Para 6)

For Petitioner : M/s. B.K.Sharma & A.U. Senapati
For Opp. Parties : Addl. Standing Counsel

JUDGMENT Date of Hearing : 21.08.2018 Date of Judgment : 03.09.2018

J.P.DAS, J

This is an application under Section 482, Cr.P.C. assailing the order dated 31.08.2016 passed by the learned S.D.J.M., Dhenkanal in 2 (C) C.C. No.44 of 2014 partially rejecting the application of the present petitioner to discharge him from the alleged offences punishable under Sections 23 and 25 of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (in short 'the Act').

2. The Tahasildar, Dhenkanal lodged the complaint before the learned S.D.J.M., Dhenkanal against the present petitioner that being authorized by the District Magistrate-cum-District Appropriate Authority under the Act, he along with the ADMO Dhenkanal made a joint inspection of the ultra sound clinic of the present petitioner on 30.05.2014. It was allegedly found out that there were two ultra sound in the clinic and the petitioner was using one Phillips ultra sound machine unauthorisedly without intimating regarding installation of the said machine to the District Appropriate Authority, Dhenkanal. It was also alleged that the records required to be maintained as per the MTP Act, were not available in the clinic and that the clinic was also not registered as required under the Act. It was further alleged in the complaint petition that several allegations were received in the office of the CDMO, Dhenkanal over telephone that the petitioner was conducting sex determination test of the foetus in the said clinic by misusing the technology thereby violating the provisions of the Act. It was further mentioned that two photos, one of Lord Shiva and one Goddess Saraswati were found inside the room which suggested that the sex of the foetus was being informed to the patient by indicating to those photographs. On these submissions it was alleged that the petitioner as accused had violated the provisions of Sections 5/6 of the Act and Rule 9 (6) and 13 of the PC & PNDT Rules, punishable under Sections 23/25 of the Act.

3. The complainant Tahasildar and the ADMO Dhenkanal were examined as P.Ws. 1 and 2 on behalf of the complainant prior to framing of charge and after their examination the petitioner filed an application before the learned trial court to discharge him from the offences with the submissions that on the admitted facts and the specific depositions of the two witnesses, no offence was absolutely made out against the petitioner as accused. It was also submitted that non-compliance of Rule 13 of the PC & PNDT Rules alleging that the installation of machine was not intimated to the appropriate authority was earlier challenged before this Court in a writ application vide W.P. (C) No.15781 of 2014 alleging the suspension of registration of the clinic by the District Appropriate Authority, and observing that the appropriate authority was duly communicated by the petitioner about installation of the new machine, the said order of suspension was quashed with a further observation that the impugned suspension order passed by the District Appropriate Authority was a colourable exercise of power which did not satisfy the requirements of Section 20 (3) of the Act. After calling for the relevant documents and files this Court observed that the petitioner had duly intimated the District Appropriate Authority regarding installation of the new machine and his clinic was registered since 2003 and has been renewed with such registration till 2018. It was also observed in the said judgment that apparently there was no allegation or report that the petitioner had undertaken sex determination test in his clinic which is punishable under Section 23 of the Act. The learned S.D.J.M., Dhenkanal in his impugned order observed that there could not be a roving enquiry at the time of framing of charge and at that stage the defence plea raised by the accused cannot be taken into consideration. It was further observed by the learned trial court relying upon certain

decisions that if on the basis of the materials on record, a court could come to the conclusion that commission of the offence is a probable consequences, a case for framing of charge exists. It further observed that if the court thinks that the accused might have committed the offence, charges can be framed, though in order to reach a conviction, there must be a conclusion that the accused has committed the offence. With such observations the learned S.D.J.M. discharging the accused petitioner from the offence punishable under Section 25 of the Act, decided to frame charge under Section 23 of the Act against the petitioner and proceeded accordingly.

4. It was submitted by learned counsel for the petitioner that the positions of law as have been observed by the learned S.D.J.M. is not disputed that there cannot be a roving enquiry into the allegations at the time of framing of charge and that the plea of defence could not have been considered. But when the materials placed on behalf of the prosecution or complainant do not make out any offence against the petitioner, a charge cannot be framed merely on presumption that the accused might have committed the offence. There must be some material to show or to create a presumption that the accused might have committed the offence. It was further submitted that the specific allegations as made against the accused petitioner were that the clinic was not registered, the installation of new machine was not intimated to the appropriate authority, the required registers and documents were not maintained in the clinic as per the PC & PNDT Rules and most importantly unauthorized and illegal sex determination test was conducted in the clinic. It was submitted that in the earlier writ application filed by the present petitioner, this Court has categorically observed that the clinic was duly registered and the installation of the new machine in the clinic of the petitioner was duly intimated to the appropriate authority. Further the complainant Tahasildar himself in paragraph-12 of his cross-examination has stated that at the time of inspection the accused had a valid renewal certificate of his clinic. He also admitted in paragraph-13 that one Xerox certificate of registration for the period from 2013 to 2018 was available on record which he had filed at the time of filing the complaint. He also admitted that one of the machines was defective and was not running at the time of inspection. So far as the installation of the new machine is concerned, it has already been decided by this Court in the writ application as stated herein before. As regards the maintenance of the registers, the complainant Tahasildar has also admitted in paragraph-14 of his cross examination that the accused was maintaining the registers under the Act. So far as the allegation of illegal sex determination test, no acceptable material was brought on record by the two witnesses examined before the charge. In this regard the complainant Tahasildar stated in paragraph-5 of his examination before the court that prior to their inspection a number of allegations were received orally by the CDMO regarding sex determination by the accused, and being asked in that regard he stated in paragraph-15 of his cross examination that he had not verified the phone calls which were received by the ADMO and also did not know as to whether such phone calls were received personally by the ADMO or somebody else. But peculiarly the concerned ADMO as PW 2 before charge stated in paragraph-6 of his cross examination that he had never told the Tahasildar regarding receipt of several allegations over phone regarding sex determination in the clinic of the accused. The Tahasildar stated that they seized two photographs one of Lord Shiva and one of Goddess Saraswati from inside t he clinic and suspected that those photographs were used to intimate the patient as to the sex determination of the foetus. Being specifically asked, he stated that he presumed that those photographs might have been used by the accused petitioner. Stressing on this, it was

submitted on behalf of the petitioner that an accused cannot be proceeded against merely on presumption there being no material to make out the alleged offence prima facie. Thus it was submitted that mere reading of all the depositions of the two witnesses before charge taken together with the earlier judgment of this Court, it was sufficient to hold that there was no offence made out against the petitioner as alleged in the complaint petition. It was further submitted that no defence plea was raised so as to justify the observation of the learned trial court that it could not have been considered at the stage of framing of charge.

5. In a private complaint, before framing of charge against the accused persons, evidence is taken before charge to find out as to whether there are sufficient materials to frame the charge against the accused. As detailed herein before in the submissions made on behalf of the petitioner which are based on record, it was the specific case of the petitioner that one of the allegations has earlier been quashed by this Court and there is absolutely no material on record even for presumption that the accused petitioner was conducting sex determination test thereby violating Sections 5/6 of the Act punishable under Section 23 of the Act. Initially when the registration of the clinic of the petitioner was suspended, the petitioner assailed the same before this Court and it was quashed. Thereafter the complaint petition was filed basing on the findings during such inspection with the allegation that sex determination test was conducted in the clinic of the petitioner. But as stated, it was observed by this Court earlier that apparently there was no allegation of sex determination test in the clinic. Both P.Ws. 1 and 2 examined before charge have not whispered a word as to what was the basis of such presumption except mentioning that two photographs were found which might have been used to indicate the sex of the foetus to the patient. No person with a reason can accept such a contention. No private individual was examined in support of such allegations and as seen from the evidence of the two witnesses, the P.W. 1 stated that there were some patients at the time of inspection, whereas the P.W.2 stated that there was no patient at the time of their inspection P.W. 1 also admitted that the statements of such patients were not recorded.

6. It is right that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. But if the materials placed on behalf of the complainant do not make out a prima facie case, there can be no alternative than to discharge the accused. As discussed here in before the materials as placed before the learned trial court taken together with the earlier order of this Court make out absolutely no offence against the petitioner and hence, the impugned order passed by the learned S.D.J.M., Dhenkanal is not sustainable in law.

7. Accordingly, the impugned order dated 31.08.2016 passed by the learned S.D.J.M., Dhenkanal in 2 (C) C.C. No.44 of 2014 is hereby quashed and the petitioner stands discharged of the offence punishable under Section 23 of the Act. The CRLMC is accordingly disposed of.