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ORISSA HIGH COURT, CUTTACK

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M.C, Harihareswar Panchayat High School & Ors. -V- State of Odisha & Ors.

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ODISHA PROTECTION OF INTERESTS OF DEPOSITORS (in Financial Establishments) Act, 2011 – Section 13 – Appeal under – Challenging the order rejecting an application filed under

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SERVICE – Claim of Pension – Opp. Party worked as Secretary of Gram Panchayat from 1974 to 2009 – Subsequently promoted to the post of Village Level Worker and thereafter superannuated in 2010 – Original application filed claiming minimum pension by adding the previous service period – Allowed – Writ petition by State challenging the order of SAT – Plea of State that post of GP Secretary not being a civil post the period of service rendered cannot be counted towards pension – Held, No, the Opp. party is entitled for the relief – No interference in the order of Tribunal called for.

State of Odisha & Ors. -V- Niranjan Biswal.

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Satyanarayan Mishra -V- Board of Secondary Education of Orissa & Ors.
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Satyanarayan Mishra -V- Board of Secondary Education of Orissa & Ors.

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

CIVIL APPEAL NO. 8145 OF 2018
(ARISING OUT OF SLP(C) NO. 6760/2017)

RAM CHANDRA SINGH ……..Appellant(s)

.Vs.

RAJARAM & ORS. .....Respondent(s)

MOTOR ACCIDENT CLAIMS – Question was as to whether the Tribunal was right in holding that the insurer was not liable as the driver had a fake license – Held, No.

"Suffice it to observe that it is well established that if the owner was aware of the fact that the license was fake and still permitted the driver to drive the vehicle, then the insurer would stand absolved. However, the mere fact that the driving licence is fake, *per se,* would not absolve the insurer. Indubitably, the High Court noted that the counsel for the appellant did not dispute that the driving license was found to be fake, but that concession by itself was not sufficient to absolve the insurer." *(Para 11)*

Case Laws Relied on and Referred to :-

1. (2013) 10 SCC 217 : PEPSU Road Transport Corporation .Vs. National Insurance Company.
2. (2008) 3 SCC 193 : Premkumari and Ors. .Vs. Prahlad Dev & Ors.
3. (2003) 3 SCC 338 : United India Insurance Co. Ltd. .Vs. Lehru & Ors..
4. (2004) 3 SCC 297 : National Insurance Co. Ltd. .Vs. Swaran Singh & Ors..
5. (2007) 3 SCC 700 : National Insurance Co. Ltd. .Vs. Laxmi Narain Dhut.

For Appellant(s) : Mr. Yash Pal Dhingra
For Respondent(s) : Mr. Sudhir Naagar

JUDGMENT Date of judgment : 14.8. 2018

A.M. KHANWILKAR, J.

1. The singular question involved in this appeal against the judgment and order dated 28th November, 2016 passed by the High Court of Judicature at Allahabad in First Appeal From Order No.3290 of 2016, is whether the Motor Accident Claims Tribunal, Firozabad, was right in holding that the insurer was not liable as the driver had a fake licence.

2. Shorn of unnecessary details, the respondent Nos.1 to 5 filed a motor accident claim before the Motor Accident Claims Tribunal, Firozabad, bearing M.A.C.P. No.169 of 2012, consequent to the death of Sanoj Kumar on account of motor accident which occurred on 10th May, 2012 at 6.30 A.M., when he was going for his morning walk towards Mustafabad Chauraha. At that time, the driver of Bolero loader bearing registration No.UP-71/0084 while driving the vehicle in a high speed and in rash and negligent manner, hit the deceased from behind. The Tribunal partly allowed the claim petition and awarded compensation amount of Rs.6,27,000/-, but absolved the Oriental Insurance Company Ltd. (for short, "the insurer") on the finding that the offending vehicle was driven by one Shivgyani (respondent No.6) who did not have a valid driving licence. The Tribunal, however,

directed the insurer to pay the compensation amount as determined in terms of the award dated 24th August, 2016, with liberty to recover the same from the vehicle owner (appellant herein) and the driver (respondent No.6) jointly and severally.

3. The appellant, being the vehicle owner, alone filed an appeal before the High Court of Judicature at Allahabad which was dismissed on the finding that the counsel for the appellant did not dispute that the driving licence was found to be fake and no evidence was adduced before the Court to show that the driving licence was genuine. This concurrent view is the subject matter of challenge in the present appeal.

4. It is contended by the appellant that even if the finding of the Tribunal, that the driving licence relied upon by the owner of the vehicle and driver was fake, is maintained as it is, even then the Tribunal could not have absolved the insurer and made the owner of the vehicle liable, in the absence of a clear finding that the owner of the vehicle was aware about the factum of fake licence and despite the same, he made no attempt to take corrective measures, including to verify the genuineness thereof. In absence of such a finding, the insurer cannot be straightaway absolved. In support of this proposition, reliance was placed on ***PEPSU Road Transport Corporation Vs. National Insurance Company***[1], and ***Premkumari and Ors. Vs. Prahlad Dev and Ors.***[2].

5. The counsel for the insurer submits that the appellant having admitted the fact that the driving licence was fake and failing to produce any other evidence to prove otherwise, cannot be heard to make any grievance about the finding recorded by the Tribunal and affirmed by the High Court absolving the insurer from the liability to pay the compensation amount.

6. We have heard Mr. S.R. Singh, learned senior counsel appearing for the appellant and Mr. Abhishek Gola, learned counsel appearing for the respondents.

7. We have perused the entire pleadings and the evidence on record as also the judgments of the Tribunal and the High Court. It is noticed that the insurer had taken a specific plea in the written statement filed before the Tribunal, that the driving licence of the driver was not a valid licence. In the alternative, it was asserted that the owner of the vehicle must produce the driving licence so that it can be verified from the licencing authority. Additionally, the insurer placed on record an investigation report, verification report and photocopy of the driving licence to establish the fact that the driving licence relied upon by the owner and the driver was fake and not valid. For, it was authenticated that no such driving licence was issued by the authority concerned.

8. It is also noticed that in the oral evidence, the appellant had stated that he had seen the photocopy of the driving licence of Shivgyani and was also satisfied about his driving skills, before employing him as the driver for driving the vehicle. In his cross-examination by the insurer, the appellant stated thus:

> "……I have not sold the vehicle. Driver Shiv Gyani was working with me from February 2012. He was permanent resident of District – Fatehpur. I never got verified the driving licence of Shiv Gyani. …… This was not in my knowledge that he has no driving licence. This is incorrect to say that I provided my vehicle to him to drive despite I was aware that he has bogus licence. I am aware of this that licence is issued on the address one resides. ……This is incorrect to say that I am giving false evidence to save my skin."

9. The Tribunal while answering issue No.3, however, made no attempt to analyse the pleadings and evidence on record to ascertain whether the appellant (owner) was aware of the fake driving licence possessed by the driver (respondent No.6). The Tribunal merely adverted to the investigation and verification report and found that the stated driving licence was invalid. The High Court also made no attempt to enquire into the relevant aspect, as has been consistently expounded by this Court and restated in ***PEPSU Road Transport Corporation*** (supra). Even in the case of ***Premkumari*** (supra), the Court after considering the judicial precedents opined as follows:

> "It is clear from the above decision when the owner after verification satisfied himself that the driver has a valid licence and was driving the vehicle in question competently at the time of the accident there would be no breach of Section 149(2)(*a*)(*ii*), in that event, the insurance company would not then be absolved of liability. It is also clear that even in the case that the licence was fake, the insurance company would continue to remain liable unless they prove that the owner was aware or noticed that the licence was fake and still permitted him to drive."

10. The decision in ***PEPSU Road Transport Corporation*** (supra) was relied upon by the appellant before the High Court which, however, distinguished the same by observing that it was on the facts of that case, where the Court opined that there was no evidence to prove that the driving licence produced by the authorities was fake. That approach, in our opinion, is manifestly wrong. Whereas, even in that case, the Court was called upon to deal with the similar question as is involved in this appeal. In that case, the Court first adverted to the decision in ***United India Insurance Co. Ltd. Vs. Lehru and Ors.***[3], and then to the three-Judge Bench decision in ***National Insurance Co. Ltd. Vs. Swaran Singh & Ors.***[4]. Paragraphs 99-101 of ***Swaran Singh*** (supra) have been extracted, which read thus:

> "99. So far as the purported conflict in the judgments of *Kamla* and *Lehru* is concerned, we may wish to point out that the defence to the effect that the licence held by the person driving the vehicle was a fake one, would be available to the insurance companies, but whether despite the same, the plea of default on the part of the owner has been established or not would be a question which will have to be determined in each case.
>
> 100. This Court, however, in *Lehru* must not be read to mean that an owner of a vehicle can under no circumstances have any duty to make any enquiry in this respect. The same, however, would again be a question which would arise for consideration in each individual case.
>
> 101. The submission of Mr Salve that in *Lehru case*, this Court has, for all intent and purport, taken away the right of an insurer to raise a defence that the licence is fake does not appear to be correct. Such defence can certainly be raised but it will be for the insurer to prove that the insured did not take adequate care and caution to verify the genuineness or otherwise of the licence held by the driver."

The Court then went on to advert to a two-Judge Bench decision of this Court in ***National Insurance Co. Ltd. Vs. Laxmi Narain Dhut,***[5] before dealing with the facts of the case before it.

11. Suffice it to observe that it is well established that if the owner was aware of the fact that the licence was fake and still permitted the driver to drive the vehicle, then the insurer would stand absolved. However, the mere fact that the driving licence is fake, *per se,* would not absolve the insurer. Indubitably, the High Court noted that the counsel for the appellant did not dispute that the driving licence was found to be fake, but that concession by itself was not sufficient to absolve the insurer.

12. As aforementioned, in the present case, neither the Tribunal nor the High Court has bothered to analyse the pleadings and evidence adduced by the parties on the crucial matter. Be that as it may, in this appeal, the limited grievance of the appellant-owner of the vehicle is about unjustly absolving the insurer merely on the finding that the driving licence of the driver (respondent No.6) was fake. No other aspect has been raised by the appellant nor do we intend to analyse or consider the same.

13. We, therefore, deem it appropriate to relegate the parties before the High Court for fresh consideration of the appeal filed by the appellant (owner) only on the question of liability of the owner or of the insurer (respondent No.7) to pay the compensation amount.

14. We make it clear that the High Court shall not examine any other issue in the remand proceedings. For, the compensation amount, as determined and directed by the Tribunal, has already been made over to the claimants.

15. Accordingly, we set aside the impugned judgment and order passed by the High Court of Judicature at Allahabad and restore the First Appeal From Order No.3290 of 2016, to the file of the High Court to its original number for being decided afresh, on the limited question of whether the liability to pay compensation amount, is cast upon the appellant (owner of the vehicle) or respondent No.7 (insurer). That aspect be decided on its own merits in accordance with law. We may not be understood to have expressed any opinion, either way, on the efficacy of the pleadings and the evidence produced by the parties adverted to in this judgment or in any other evidence on record. All questions in that behalf are left open.

16. The appeal is allowed in the aforementioned terms with no order as to costs.

2018 (II) ILR - CUT- 197

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

W.P.(C) No.2698 of 2018

M/S RUTUPARNA CONSTRUCTION ……..Petitioner

.Vs.

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

CONSTITUTION OF INDIA,1950 – Articles 226 and 227 – Writ petition – Challenge is made to the award of contract in favour of second lowest Bidder – Plea that since the second lowest Bidder being a Schedule Caste Contractor, the award was made by applying the benefit as enumerated in Govt. Notification dated 11.10.1977 – Records show the benefit as per the circular dated 11.10.1977 has not been specifically made applicable to the present contract – Held, award of contract is totally illegal, quashed. (Paras 8 to 11)

For Petitioner : M/s B.K.Routray, R.P.Mohapatra, A.Routray, B.Panigrahy, K.C.Rath,R.K.Bhoi & K.C.Sahoo.

For Opp. Parties : Mr. B.P. Pradhan, Addl. Government Advocate
M/s Sidharth Prasad Das & L.N.Sahoo.

JUDGMENT Decided on : 02.08.2018

VINEET SARAN,CJ.

The Superintending Engineer, P.H. Circle, Cuttack-opposite party no.3 invited Percentage Rate Bid through e-procurement, vide Bid Identification No. SEPHCTC-05/2017-18 dated 30.10.2017, in conformity with the terms and conditions mentioned therein, for the work "Laying of Distribution System in Un-covered Areas and Laying of dedicated feeder Line from Chandabali Chhak to Banikanthnagar and Hemamalapur in Athagarh Town". The Detailed Tender Call Notice (DTCN), which contained two bid system (Part-I:General and Technical Bid and Part-II: Price Bid), invited bids from 'B' Class or 'A' Class contractors registered with the State Government and contractors of equivalent grade/class registered with Central Government/ any other State Government/MES/Railways and Reputed Engineering Firms fulfilling minimum eligibility criteria as prescribed in the DTCN itself. The bid was directed to be submitted on-line by eligible class of contractors. The bidders were to have the necessary Portal Enrolment (with their own digital signature certificate). The approximate value of the work was Rs.136.64 lakhs and EMD Rs.1.37 lakhs. The cost of documents was Rs.10,000/- which should be deposited by way of demand draft in favour of Executive Engineer, P.H. Division-II, Cuttack and the required period of completion was 4 (four) months. The last date/time of receipt of bids in the portal was 22.11.2017 up to 5.00 P.M. and the date and time of opening of bids was 25.11.2017 at 12.30 P.M.

2. The petitioner, being a registered 'A' Class contractor and otherwise eligible in all respects, pursuant to the conditions stipulated in the DTCN, submitted his bid for the aforesaid work with all required documents. Besides the petitioner, opposite party no.5-Raghumani Sethi and opposite party no.6-Saroj Kumar Singh also submitted their bids. On opening of the technical bids, the petitioner, as well as opposite parties no.5 and 6, having been qualified, their financial bids were opened in which petitioner was found L-1, having quoted 3.06% less than the tender value, whereas opposite party no.5 was found the second lowest bidder. The tender inviting authority-opposite party no.3, did not issue work order in respect of first lowest bidder, the petitioner herein. Instead of doing so, opposite party no.3 decided to award the work in favour of opposite party no.5, on the ground that he belonged to Scheduled Caste community, hence this writ petition.

3. Mr. B.K. Routray, learned counsel for the petitioner contended that all the three tenderers, being found to be technically qualified, their price bids were opened, in which the price of the petitioner was found to be lowest at 3.06% less than the estimated cost. The price offered by opposite party no.5-Raghumani Sethi was 0.00% less than the estimated cost, that means, at par with the estimated cost, and the price offered by opposite party no.6-Saroj Kumar Singh was 4.99% above the estimated cost. The estimated cost of the work in question being Rs.136.64 lakhs, the offer of the petitioner, which was at 3.06% less, came to Rs.132.45 lakhs. But opposite party no.3, instead of awarding the work in favour of the petitioner, on 20.01.2018 awarded the same in favour of opposite party no.5, illegally, arbitrarily and unreasonably by calling opposite party no.5 for negotiation, at the price which was offered by the petitioner, i.e., 3.06% less than the estimated cost, as he is a Scheduled Caste Contractor. Therefore, interference of this Court is warranted.

4. Mr. B.P. Pradhan, learned Additional Government Advocate, with reference to the pleadings made in the counter affidavit filed by opposite party no.3, justified the action taken by the authorities. It is contended that following Sl. No.7 of Executive Instructions regarding calling for and acceptance of tender in e-procurement of Govt. of Odisha, vide Office Memorandum No.7885/W dated 23.07.2013, which is a part of DTCN and Statutory Govt. Instruction for granting of concession to Scheduled Caste and Scheduled Tribe Contractors in relaxation of Rule-18 of OGFR, Vol-1 and Para-3.4.14 of OPWD Code vide Govt. Resolution No.16/37-27748 dated 11.10.1977 of Govt. of Odisha at Para (a), Raghumani Sethi-opposite party no.5, who belonged to Scheduled Caste category and whose rate was within 10% of the rate quoted by L-1 bidder, the petitioner herein, for the work in question was accepted, after negotiating his quoted rate to that of the 1st lowest bidder. Accordingly, the agreement was executed with opposite party no.5, vide Agreement No.424 P1/2017-18, and the work order was issued, vide letter No.1068 dated 07.02.2018, by Executive Engineer, P.H. Division-II, Cuttack-opposite party no.4. Consequentially, the work has already been started by opposite party no.5 in shape of procurement of pipes. Therefore, no illegality or irregularity has been

committed in awarding the work in question in favour of opposite party no.5, and as such, the evaluation has been made in strict adherence to statutory Government Instructions, Codal Provisions/Rules and e-procurement guidelines, for which the same may not be interfered with at this stage.

5. Notices were issued to opposite parties no.5 and 6 and the same were made sufficient against them. But, opposite party no.5 did not choose to appear and opposite party no.6 appeared through Sri S.P. Das, learned counsel who states that opposite party no.6 is a formal party and does not propose to file any counter affidavit.

6. We have heard Mr. B.K.Routray, learned counsel for the petitioner, Mr. B.P.Pradhan, learned Addl. Government Advocate for the State-opposite parties no. 1 to 4 and Mr. Sidharth Prasad Das, learned counsel for opposite party no.6 and have perused the record.

7. On 6.4.2018, a detailed interim order was granted to the effect that no agreement be executed in favour of opposite party no.5 in pursuance of the order dated 20.1.2018.

8. Admittedly, the petitioner is a general caste contractor whereas opposite parties no. 5 and 6 are Scheduled Caste contractors. In the counter affidavit filed by the State-opposite parties, it is contended that the benefit of the notification of the State Government dated 11.10.1977 is to be given to the Scheduled Caste contractors, according to which 10% price benefit is to be given to such class contractors, meaning thereby that when the offer of the Scheduled Caste contractor is at par with the estimated cost, the same is to be treated as 10% less than the estimated cost. Since the opposite party no.5 is a Scheduled Caste contractor, his offer has been treated as lowest and after negotiation, the contract has been awarded to him, not at par with the estimated cost but at par with the offer made by the petitioner, which was 3.06% less than the estimated cost.

9. From the record, it is clear that the notification dated 11.10.1977 was not specifically made applicable to the present Tender Call Notice. In the absence of the notification dated 11.10.1977 having been made applicable, which grants benefit of 10% price preference in favour of Scheduled Caste and Scheduled Tribe contractors, the benefit of the said notification cannot be given to the Schedule Caste candidates for awarding contract in pursuance of such Tender Call Notice, which did not specifically make the notification applicable.

10. A Division Bench of this Court has, by judgment and order dated 18.12.2017 passed in **W.P.(C) No. 20802 of 2017** (**Tarun Mohanty Vrs. State of Odisha and others**), specifically held that in the absence of the Tender Call Notice specifying the applicability of the notification dated 11.10.1977 granting benefit of 10% price preference to the Scheduled Caste and Scheduled Tribe contractors, the said benefit cannot be given.

11. Nothing has been placed on record with regard to applicability of the codal provision, notification issued by the Government granting relaxation to Scheduled Caste and Schedule Tribe contractors nor the learned Additional Government Advocate has pointed out for extension of benefit to the Scheduled Caste and Scheduled Tribe contractors with reference to DTCN issued by opposite party no.3. In such view of the matter, when the notification dated 11.10.1977 is not applicable in the present case, no such benefit could have been given to the opposite party no.5, who is a Scheduled Caste contractor. Once the price offered by the petitioner was the lowest, which was 3.06% less than the estimated cost, there was no occasion for the State-opposite parties to invite opposite party no.5 for negotiation and thereafter on the opposite party no.5 matching the price offered by the petitioner, award the contract in favour of opposite party no.5. As such, the acceptance of the offer of opposite party no.5 to work at 3.06% less than the estimated cost put to tender is totally illegal and liable to be quashed. The contract if any, awarded to opposite party no.5 is thus to be quashed and is accordingly quashed, and it is directed that the petitioner would be entitled to be awarded the said contract.

12. The writ petition stands allowed to the extent indicated above.

2018 (II) ILR - CUT- 200

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

W.P.(C) NO. 16352 OF 2013

BASANTA KUMAR SAHOO & ORS. ……..Petitioners

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Article 226 and 227 – Writ petition – Challenge is made to the action of shifting of the place of establishment of a Fire Station on the basis of letter of a Minister – No reason indicated for such shifting – Plea of policy decision – Held, decision not sustainable in the eye of law.

"It is well settled principle of law as laid down by the apex Court that the reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial and reveal a rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision reached. Recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is vital for the purpose of showing a person that he is receiving justice." *(Para 20)*

Case Laws Relied on and Referred to :-

1. 117 (2014) CLT 584 : Sarat Kumar Raj .Vs. State of Odisha.
2. AIR 1974 SC 87 : Union of India .Vs. Mohan Lal Capoor.
3. AIR 1981 SC 1915: Uma Charan .Vs. State of Madhya Pradesh.
4. AIR 1978 SC 597 : Maneka Gandhi .Vs. Union of India.
5. AIR 1990 SC 1984 : S.N. Mukherjee .Vs. Union of India.
6. AIR 1990 SC 2205 : State of West Bengal .Vs. Atul Krishna Shaw.
7. (1992) 4 SCC 605= AIR 1993 SC 1407 : Krishna Swami .Vs. Union of India.
8. (1999) 1 SCC 45 : Vasant D. Bhavsar Vs. Bar Council of India.
9. AIR 2003 SC 953: Indian Charge Chrome Ltd. .Vs. Union of India.
10. AIR 2003 SC 3078 : Secretary, Ministry of Chemicals & Fertilizers, Govt. of India, Vs. CIPLA Ltd.,
11. AIR 1952 SC 16 : Commissioner of Police, Bombay .Vs. Gordhandas Bhanji.
12. AIR 1978 SC 851 : Mohinder Singh Gill .Vs. The Chief Election Commissioner, New Delhi.
13. AIR 2003 SC 269 : Subash Ramkumar Bind .Vs. State of Maharashtra.

For Petitioners : M/s. S.P. Sarangi, B.C. Mohanty,P.P. Mohanty, D.K. Das & P.K. Dash.

For Opp. Parties : Mr. P.K. Muduli, Addl. Govt. Advocate

JUDGMENT Decided On : 25.06.2018

DR. B.R. SARANGI, J,

The petitioners, who are villagers of Bahanaga and other Gram Panchayats under Bahanaga Block in the district of Balasore, have filed this writ petition with following prayers:-

> *"In the circumstances, it is therefore prayed that this Hon'ble Court would graciously be pleased to issue a 'Rule-NISI' calling upon the Opposite Parties to show cause as to why the letter dated 27.06.2013 issued by the Additional Secretary to Government, in the Department of Home (Civil Defence) vide Annexure-20, wherein it has been decided to set up the Fire station at Village-Talakurunia in stead of Bahanaga shall not be quashed if the Opposite Parties fail to show cause or show insufficient cause, make the said Rule absolute.*
>
> *And*
>
> *Further direct the Opposite Parties to immediately construct the Fire Station at Village-Sathi under Bahanaga Block in terms of the notification dated 20.12.2012 vide Annexure-14.*
>
> *And*
>
> *Issue such other writ/writs, order/orders, direction/directions as this Hon'le Court may deem it fit and proper in the interest of justice.*
>
> *And for this act of your kindness the Petitioners shall as in duty bound ever pray."*

2. The essence of relief sought before this Court is that the decision of the State Government to set up Bahanaga Fire station at village Talakurunia of Bahanaga Block, instead of village Sathi of the said Block, is not only violative of policy decision of the State Government, but also illegal, arbitrary and mala fide, and thus is liable to be quashed.

3. The factual matrix of the case, in hand, is that the Government of Odisha made a policy decision to establish Fire Stations in 120 numbers of uncovered Blocks of the State. Bahanaga Block, being one of them, was selected for establishment of the Fire Station. Accordingly on 11.01.2011, the Fire Officer,

Cuttack wrote a letter to the Collector-cum-District Magistrate, Balasore intimating therein the decision for opening of the Fire Station at Bahanaga. In the said letter, the Fire Officer, Cuttack requested for identification of land for opening of the said Fire Station. On 17.01.2011, the Additional District Magistrate, Balasore wrote a letter to the Tahasildar, Soro requesting therein to identify two acres of Government land at Bahanaga and to take immediate steps for convening the meeting of the Site Selection Committee.

4. On 24.01.2011, the I.G. of Police, Fire Services and Home Guard, Cuttack wrote a letter to the Collector-cum-District Magistrate, Balasore requesting therein to take necessary steps for early alienation and advance possession of the land in favour of the Home Department for construction of Fire Station building of Bahanaga. On 17.02.2011, the Fire Officer, Odisha, Cuttack requested Sub-Collector, Balasore to take necessary steps to convene the meeting of the Site Selection Committee and for advance possession of the land for construction of Bahanaga Fire Station.

5. On 25.03.2011, the I.G. of Police, Fire Services and Home Guard, Cuttack wrote a letter to the Collector-cum-District Magistrate, Balasore requesting therein to take necessary steps for early alienation/advance possession of the land in favour of Home Department for construction of Fire Station of Bahanaga. Similar request was also made on 07.05.2011 by the Fire Officer, Odisha, Cuttack. Further to expedite the matter the Chief Fire Officer, Odisha, Cuttack on 03.06.2011 wrote a letter to the Collector-cum-District Magistrate, Balasore requesting therein for alienation of land in favour of the Home Department to start construction work of Bahanaga Fire Station. Accordingly, the Site Selection Committee held a meeting on 08.04.2011 and, after visiting a number of sites in the vicinity of Bahanaga, ultimately selected a patch of land bearing Khata No.721, Plot No.1181, area Ac.2.00, mouza-Sathi, Kissam-Gochar. The said proceeding of the Site Selection Committee was sent by the Deputy Collector, Revenue, Balasore to the Tahasildar, Soro, vide communication dated 25.06.2011, and requested therein to take further follow up action as per the provisions of the Orissa Government Land Settlement Act, 1962 (for short "OGLS Act").

6. The I.G. of Police, Fire Services and Home Guard, Cuttack wrote a letter on 09.02.2012 to the Collector-cum-District Magistrate, Balasore requesting therein to initiate immediate action for alienation of the aforesaid Government land and also stating that the timely action should be taken to utilize the Government fund, which was allocated for construction of Bahanaga Fire Station. Similar request was also made by the Chief Fire Officer, Odisha, Cuttack, vide letter dated 18.02.2012, to the Collector-cum-District Magistrate, Balasore for alienation of land in question in favour of Home Department for ultimate construction of Bahanaga Fire Station and further a reminder was also issued on 11.07.2012 by the Chief Fire Officer, Odisha, Cuttack.

7. On 08.08.2012, the Chief Fire Officer, Odisha, Cuttack requested the Sub-Collector, Balasore to send alienation case record with regard to Bahanaga Fire Station to the Collector-cum-District Magistrate, Balasore with necessary recommendation for alienation and advance possession in favour of Home Department for early construction of the Fire Station.

8. Since no action was taken for alienation of land in favour of Home Department, villagers of village Sathi represented to the Collector-cum-District Magistrate, Balasore requesting therein to alienate the land in question in favour of Home Department for construction of Bahanaga Fire Station. When the matter stood thus, on 20.12.2012 the Government of Odisha, in the Department of Home (Civil Defence) issued a notification in exercise of power conferred under Sections 2(g) and 8(ii) of the Orissa Fire Services Act, 1993 declaring therein establishment of 41 Fire Stations at different places of the State. One of the Fire Stations was to be established at Bahanaga under Bahanaga Block in the district of Balasore which has been found place at Serial No.2 of the notification. As such, the said notification was issued in conformity with the policy of the State Government to establish the Fire Station on the side of the main road of the Block headquarters. On 02.01.2013, the Chief Fire Officer, Odisha, Cuttack wrote a letter to the Collector-cum-District Magistrate, Balasore stating therein that Rs.55 lakhs have been provided by the Government for construction of Bahanaga Fire Station and since the land was identified for the purpose, necessary steps be taken for sanction of alienation proposal and to issue instruction to the concerned Tahasildar to handover possession of the site to the Assistant Fire Officer, Balasore to start construction of the Fire Office for timely utilization of the fund itself.

9. When the matter stood thus, on 14.01.2013 the I.G. of Police, Fire Services and Home Guard, Cuttack wrote a letter to the Additional Secretary to Government of Odisha in the Department of Home (Civil Defence) stating therein that pursuant to D.O. letter No.217 dated 15.11.2012 received from the Minister, Housing and Urban Development, Law, Information and Technology, Odisha, the State Government, vide notification dated 20.12.2012, has sanctioned establishment of 41 Fire Stations in the State including a Fire Station at Bahanaga Block of Balasore district. As desired by the Minister, the Chief Fire Officer was requested to report with regard to suitability of the proposed site "Talakurunia" for opening of Bahanaga Fire Station. But the Chief Fire Officer, Odisha Cuttack on 21.01.2013 requested the Collector-cum-District Magistrate, Balasore to take immediate steps for alienation of the land appertaining to Khata No.721, Plot No.1181, area Ac.2.00, Mouza-Sathi, Kissam-Gochar in favour of the Home Department for construction of Bahanaga Fire Station for timely utilization of the fund. Instead of carrying out the same, the Additional Secretary to Government in the Department of Home (Civil Defence), on 27.06.2013, wrote a letter to the Additional D.G. and I.G. of Police, Fire Services, Odisha, Cuttack requiring therein to take immediate steps for construction of Bahanaga Fire Station at Talakurunia village under Bahanaga Block of Balasore district, hence this writ petition.

10. Mr. S.P. Sarangi, learned counsel appearing for the petitioners strenuously contended that the notification for establishment of Fire Station, having been issued on 20.12.2012 in exercise of power conferred on the authority under Sections 2(g) and 8(ii) of the Orissa Fire Services Act, 1993 and the same being a statutory notification, cannot be altered by way of a letter written by the Additional Secretary to Government in the Department of Home (Civil Defence) on 27.06.2013 in Annexure-20. As such, for the change of place for establishment of Bahanaga Fire Station from village Sathi to Talakurunia village under Bahanaga Block no reason has been assigned, save and except the same is to be changed as desired by the Minister of Housing and Urban Development, Law, Information Technology, Odisha, who has no jurisdiction to issue such instruction, because the construction has to be done by the Home Department. It is further contended that once the funds have been allocated on behalf of the Home Department, Government of Odisha for construction at a site, i.e., Sathi, which has been selected by the Site Selection Committee to which the Assistant Fire Officer, Fire Station, Balasore is a signatory, the same cannot be modified or cancelled or changed at the caprice and whims of the Government by cancelling statutory notification, which is contrary to the provisions of law. Thereby, the entire action of the authority is illegal and mala fide, hence the order so issued under Annexure-20 dated 27.06.2013 is to be quashed.

11. Mr. P.K. Muduli, learned Additional Government Advocate contended that both Sathi and Talakurunia villages are under Bahanaga Block. Since the land demarcated for Bahanaga Fire Station at village Sathi was objected to, for which the alienation of land was not possible, and the proposed site at village Talakurunia is nearest to Soro Fire Station, thus Talakurunia is more suitable than Sathi, for which Talakurunia is selected. Since selection has been made by complying all the formalities, it cannot be said that any illegality or irregularity has been committed by the authority so as to warrant interference of this Court. In support of his contention he has relied upon the judgment of this Court in ***Sarat Kumar Raj v. State of Odisha***, 117 (2014) CLT 584.

12. We have heard Mr. S.P. Sarangi, learned counsel for the petitioners and Mr. P.K. Muduli, learned Additional Government Advocate for the opposite parties. Pleadings between the parties having been exchanged, with the consent of learned counsel for the parties the matter is being disposed of finally at the stage of admission.

13. The factual matrix, as delineated above, is not in dispute. As per the policy decision of the Government, it was decided on 27.10.2011 to establish 120 numbers of Fire Stations in uncovered Blocks of the State. Accordingly, the Site Selection Committee, which was constituted headed by the Sub-Collector, Balasore; Fire Officer, Balaosre; Tahasildar, Soro; Sub-Divisional Officer (R & B), Soro; Sub-Divisional Officer (RWSS); Chief District Medical Officer, Balasore; and Assistant Fire Officer, Balasore, in its proceeding held on 18.04.2011 in Annexure-8 allotted

the land at mouza-Sathi, Khata No.721, Plot No.1181 measuring Ac.2.00, having free from encroachment, for construction of Bahanaga Fire Station. As it was a Gochar land, the same could be de-reserved. The site having been selected, funds have also been allocated for construction of Bahanaga Fire Stating building at village Sathi by the Executive Engineer, Orissa Police Housing Corporation.

14. By virtue of statutory notification dated 20.12.2012, the location to establish the Fire station has been notified, wherein against Sl. No.2 under the heading name of the place, it has been mentioned as "Bahanaga" under Block Bahanaga in the district of Balasore. But, on 14.01.2013 a D.O. letter was issued by the Minister, Housing and Urban Development, Law, Information and Technology, Odisha for establishment of Fire station at village Talakurunia under Bahanaga Block in the district of Balasore, wherein the Minister desired to report about suitability of the proposed site at village Talakurunia for opening of said Fire Station. By the time such D.O. letter was issued by the Minister, Housing and Urban Development, Law, Information and Technology, Odisha, the Government had already provided requisite funds for construction of Bahanga Fire Station at village Sathi where the Site Selection Committee had selected the land measuring Area Ac.2.00, Khata No.721, Plot No.1181 and necessary alienation proceeding had also been progressed. But all on a sudden on 27.06.2013, a communication was made by the Additional Secretary to the Government in Home (Civil Defence) Department to the Additional D.G. and I.G. of Police, Fire Service, Odisha Cuttack to the following effect:-

> *"Sub :Establishment of a Fire Station at Talakurunia Village in Bahanaga Block.*
>
> *Sir,*
>
> *I am directed to invite reference to your letter No. 431/FS, dated 14-1-2013 on the subject noted above and to say that permission is hereby accorded to set up the Fire Station at Talakurunia Village in Bahanaga Block instead of at Bahanaga of Balasore District. Immediate steps may be taken for construction of the Fire Station building at Talakurunia."*

15. The aforesaid communication, on careful perusal, does not indicate any reason why the decision taken by the Site Selection Committee to establish Bahanaga Fire Station at village Sathi under Bahanaga Block shall not be constructed, save and except that permission has been accorded to set up Bahanaga Fire Station at Talakurunia village in Bahanaga Block. Since the said communication dated 27.06.2013 under Annexure-20 does not indicate any reason why Bahanaga Fire Station should be set up at village Talakurunia and why not at village Sathi, where the Site Selection Committee has already selected the land, same cannot sustain in the eye of law.

16. In the counter affidavit filed by opposite parties no.1 to 4, the reasons for establishment of Bahanaga Fire station at village Talakurunia have been assigned in paragraph-30, which reads as follows:-

> "*30. That, the contentions urged in Ground-I of the Writ Petition are incorrect, wholly misconceived, disputed and denied herewith. It is submitted that the land demarcated for Bahanaga Fire Station at Village Sathi was objected for which alienation of land was not possible and the proposed site at Village-Talakurunia is nearest to Soro Fire Station. Talakurunia is more suitable than Sathi for which Talakurunia is selected. The letter dated 27.06.2013 issued by the Addl. Secretary to Government, Home Department, Government of Odisha to set up the Fire Station at Talakurunia Village in Bahanaga Block instead of Village-Sathi of Balasore District is legal, valid and justified in the facts of the present case since it has been done complying all the formalities. There is no illegality in the matter of selection of Village-Talakurunia for setting up the Fire Station. For political gain, the Petitioners have filed the present Writ petition."*

17. Much has been said that in view of objection raised with regard to establishment of Bahanaga Fire Station at village Sathi under Bahanaga Block, the decision has been taken to have it at village Talakurunia and reliance has been placed on Annexure-A/3 to the counter affidavit, the so-called representation filed by the inhabitants of Bahanaga Block. On perusal of the said representation, paragraph-4 states as follows:-

> *"4.While the process for Establishment of Fire Station was processed erroneously Ganjina has been proposed by some Officials without judicious mind. The proposed place cannot serve the people of this locality in a better way. So far other infrastructure facilities are concerned Talakurunia is much useful than Ganjina.*
>
> *Under the above circumstances, we therefore pray and request your augustself to issue necessary instruction to the concerned department to review the establishment proposal at Ganjina and necessary order may be passed to establish Fire Station at Talakurunia under Bahanaga Block for which act of your kindness we shall remain ever grateful to you."*

From the above, it is evident that inhabitants of Bahanaga had never objected for establishment of Bahanga Fire Station at village Sathi, rather objection was with regard to establishment of Fire Station at village Ganjina. Therefore, request has been made to establish the Bahanaga Fire Station at village Talakurunia under Bahanaga Block. As such, nowhere there was any objection with regard to establishment of Fire Station at village Sathi, where the selection committee has selected the land and for the said purpose alienation proceeding was continuing.

18. Apart from the above, as stated in paragraph 30 of the counter affidavit which has been quoted above, that establishment of Fire Station at village Talakurunia is nearest to Soro Fire Station, cannot and could not have been a ground for establishment of Fire Station at village Talakurunia. As a matter of principle, a Fire Station has to be established at a place where there is no Fire Station even in nearby places. As has been admitted, at Soro there is already a Fire Station and in the event Bahanga Fire Station is established at village Talakurunia under Bahanaga Block, it will be nearer to the said Fire Station, which is undesirable.

19. As the impugned communication dated 27.06.2013 does not indicate any reason why Fire Station should be established a t Talakurunia village under

Bahanaga Block, this Court, in absence of any reason, is unable to accept the subsequent explanation submitted in the counter affidavit.

20. It is well settled principle of law as laid down by the apex Court that the reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial and reveal a rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision reached. Recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is vital for the purpose of showing a person that he is receiving justice.

This view has been taken into consideration by the apex Court in ***Union of India v. Mohan Lal Capoor***, AIR 1974 SC 87 and ***Uma Charan v. State of Madhya Pradesh***, AIR 1981 SC 1915.

21. 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."*

22. 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.

23. In ***State of West Bengal v. Atul Krishna Shaw*****,** AIR 1990 SC 2205, the Apex Court observed that giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review.

24. In ***Krishna Swami v. Union of India*****,** (1992) 4 SCC 605= AIR 1993 SC 1407, the Apex Court observed that the rule of law requires that any action or decision of a statutory or public authority must be founded on the reason stated in the order or borne-out from the record.

The Court further observed that,

> *"reasons are the links between the material, the foundation for these erection and the actual conclusions. They would also administer how the mind of the maker was activated and actuated and their rational nexus and synthesis with the facts considered and the conclusion reached. Least it may not be arbitrary, unfair and unjust, violate Article 14 or unfair procedure offending Article 21".*

25. In ***Vasant D. Bhavsar v. Bar Council of India***, (1999) 1 SCC 45, the Apex Court held that an authority must pass a speaking and reasoned order indicating the materials on which its conclusions are based. Similar view has also been reiterated in ***Indian Charge Chrome Ltd. v. Union of India*****,** AIR 2003 SC 953 and ***Secretary, Ministry of Chemicals & Fertilizers, Govt. of India, v. CIPLA Ltd.***, AIR 2003 SC 3078.

26. The opposite parties cannot justify their action by assigning reasons in the counter affidavit, in absence of any reasons placed on record in its proper perspective. This proposition no more remains *res integra* in view of law laid down by the apex Court in ***Commissioner of Police, Bombay v. Gordhandas Bhanji***, AIR 1952 SC 16 and subsequently followed in catena of decisions including the Constitution Bench judgment in ***Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi,*** AIR 1978 SC 851.

Similar view has also been taken by this Court in ***M/s. Umesh Cycle and Rickshaw Stores, Baripada v. State of Odisha and others*** (W.P.(C) No. 26687 of 2017) decided on 24.04.2018.

27. The State legislature has enacted an Act to provide for the fire prevention and fire safety measures in the State and for the constitution of a State Fire Service to carry out firefighting measures called "The Odisha Fire Service Act, 1993". Section 2(g) thereof provides as follows:-

> *"2(g) "Fire Station" includes any post or place as the State Government may by general or special order, declare to be a Fire Station"*

28. Chapter-II of the Odisha Fire Service Act, 1993 deals with Powers and functions of State Government, Director and other members, and Section-8 thereof deals with Powers of State Government to make orders with respect to Fire Service. Section-8(ii), being relevant for the purpose of the case, is extracted hereunder:-

> *"8(ii) for building or providing Fire Stations, or hiring places or accommodating the members and keeping its Fire-fighting appliances;"*

29. In exercise of power conferred under Sections 2(g) and 8(ii) of the Act, 1993, the State Government has declared for establishment of 41 Fire Stations at different places in different districts, vide notification dated 20.12.2012, wherein against serial no.2 the name of the place for establishment of Fire Station has been indicated as "Bahanaga" under Block Bahanaga in the district of Balasore. The notification is statutory one and the same has been done in conformity with the policy of the Government. Meaning thereby, the Government has been pleased to decide to establish 120 numbers of Fire Stations in left out Blocks of the State. If establishment of such Fire Stations, including the one at Bahanaga under Bahanaga Block in the district of Balasore, has been done in conformity with the policy decision as well as by virtue of the statutory notification issued on 20.12.2012, the said notification cannot be modified or altered or cancelled by the Addl. Secretary to

the Government in Home (Civil Defence) by issuing executive instruction on 27.06.2013 in Annexure-20. In ***Subash Ramkumar Bind v. State of Maharashtra***, AIR 2003 SC 269 the apex Court held that administrative instructions cannot possibly be a substitute for a notification which stands as a requirement of the statute. Therefore, the executive fiat cannot issue any administrative institution to substitute for a notification which stands as requirement of the statute. Consequentially, the impugned communication issued on 27.06.2013 in Annexure-20 cannot sustain in the eye of law.

30. Mr. P.K. Muduli, learned Addl. Government Advocate relies upon the Division Bench judgment of this Court in ***Sarat Kumar Raj*** mentioned supra. On perusal of the same, it appears that fixation of the headquarters of Tahasil office was the subject-matter of challenge in the said case and this Court held that by exercising the power of judicial review the Court cannot strike down a policy decision taken by the State Government, merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The Court can interfere only if the policy decision is contrary to any statutory provisions or the Constitution, or it is patently illegal, arbitrary, discriminatory, or mala fide. From the pleadings available on record, this Court finds that the opposite parties have not made out a case that the decision taken by the Government in exercise of statutory power is in any way contrary to law or the Constitution or is patently illegal, arbitrary, discriminatory or mala fide. Therefore, the judgment as mentioned supra, on which reliance has been placed by learned Addl. Government Advocate appearing for the opposite parties, has no assistance to the opposite parties, rather it supports the case of the petitioners.

31. In view of the aforesaid facts and circumstances and law discussed above, this Court is of the considered view that the communication made in Annexure-20 dated 27.06.2013 is not supported by any reason and subsequent explanation given in the counter affidavit cannot be accepted, and more particularly, when the decision has been taken in exercise of statutory powers in Annexure-14 dated 20.12.2012, the same cannot be altered, modified or cancelled by exercising executive powers in Annexure-20 dated 27.06.2013. Thereby, the communication dated 27.06.2013 in Annexure-20 is liable to be quashed and is hereby quashed. Accordingly, it is directed that necessary follow up action should be taken by the authorities immediately to establish Bahanaga Fire Station at village Sathi, the site which has been selected by the Site Selection Committee, by alienating the land measuring Ac.2.01 decimal appertaining to Khata No. 721, Plot No. 1181 in favour of Home Department forthwith, by utilizing the fund already sanctioned, for betterment of the public at large.

32. The writ petition is allowed. No order as to costs.

2018 (II) ILR - CUT- 210

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

A.H.O. NO. 40 OF 2001

DIVISIONAL MANAGER, NEW INDIA ASSURANCE CO. LTD., CUTTACK ……..Appellant

.Vs.

SMT. MINAKSHI PAL & ORS. ……..Respondents

MOTOR ACCIDENT CLAIMS – Liability – Plea of the Insurer that the driver had no valid and effective driving license –The vehicle involved in the accident is a Mini Truck, a Light Motor Vehicle used for transport – The only question for determination is whether a driver having possessed a driving license to drive 'light motor vehicle' can be construed to drive 'transport vehicle' – Held, Yes.

"In order to effectively answer the said question, definition of 'light motor vehicle' has to be given full effect to and it has to be read with Section 10(2)(d) of the Motor Vehicles Act, 1988, as amended by Act 54 of 1994, which makes it abundantly clear that 'light motor vehicle' is also a 'transport vehicle', gross vehicle weight or 'unladen weight' does not exceed 7500 Kg, as specified in the provision. Thus, a driver is issued a licence as per class of vehicle, i.e., light motor vehicle, transport vehicle or omnibus or another vehicle of other categories as per gross vehicle weight or unladen weight as specified in Section 2(21) of the Act. Provision of Section 3 of the Act requires that a person in order to drive a 'transport vehicle' must have authorization. Once a licence is issued to drive light motor vehicle, it would also mean specific authorization to drive a transport vehicle or omnibus, gross vehicle weight or motor car, road roller, or tractor, unladen weight of which, as the case may be, does not exceed 7500 Kg. Insertion of 'transport vehicle' category in Section 10(2)(e) has no effect of obliterating the already defined category of transport vehicles of class of light motor vehicle. A distinction is made in Act if heavy goods vehicle, heavy passenger motor vehicle, medium goods vehicle and medium passenger motor vehicle in basis of 'gross vehicle weight' or 'unladen weight' for heavy passenger motor vehicle, heavy goods vehicle, weight, as the case may be, exceed 12000 Kg.

In view of the law laid down by the Court, as discussed above, this Court is of the considered opinion that if the driver of the offending vehicle has possessed driving licence of 'light motor vehicle', he having been driving the mini truck, may be considered to be a "transport vehicle", but it does not exceed the gross vehicle weight or unladen weight of 7500 Kg, that itself means that the driver possessed a valid driving licence. (Paras 13 & 15)

Case Laws Relied on and Referred to :-

1. AIR SCW 2017 SC3668 : Mukund Dewangan .Vs. Oriental Insurance Company Ltd.
2. AIR 1999 S.C. 3181 : Ashok Gangadhar maratha .Vs. Oriental Insurance Company Ltd..

For Appellant : M/s M. Sinha, S. Sen and D. Sahoo.

For Respondents : M/s L.M. Nanda and G.S. Namatoar.

JUDGMENT Decided On : 28.06.2018

DR. B.R. SARANGI, J.

This is an intra-Court appeal filed by the Insurance Company challenging the judgment dated 25.10.2000 passed by the learned Single Judge in Misc. Appeal

No. 285 of 1996 confirming the award dated 15.01.1996 passed by the 2nd Motor Accident Claims Tribunal, Cuttack in Misc. Case No. 205 of 1994 directing to settle the claim as per the compromise in the Lok Adalat by paying an amount of Rs. 1.00 lakh, subject to verification of driving licence.

2. The factual matrix of the case, in hand, is that on account of death of the deceased-Dhruba Charan Pal, who died in a vehicular accident, the claimant-respondents no.1 to 3 filed claim misc. case no. 205 of 1994 in the Court of Second M.A.C.T., Cuttack for grant of lump sum compensation to the tune of Rs.3,50,000/-.

3. The claimant-respondents no.1 to 3 alleged that on 15.10.1993, while the deceased was walking on the left side of the road, the offending vehicle (mini truck) bearing registration no. OR-02-A-4314 coming at high speed, negligently dashed against the deceased, as a result of which the deceased sustained serious head injuries and was shifted to S.C.B. Medical College and Hospital, Cuttack, but despite all possible treatment, the deceased died on the next date, i.e., on 16.10.1993.

4. The owner-respondent no.4 did not contest the case and was set ex-parte. On the other hand, the appellant Insurance Company appeared and filed its written statement refuting all the allegations contained in the claim petition. The above claim misc. case no. 205 of 1994 was listed in the Lok Adalat. The appellant-Insurance Company agreed to settle the case for a sum of Rs.1.00 lakh towards full satisfaction subject to the condition that the claimants shall prove that the driver of the offending vehicle holds a valid driving licence and accordingly, claimants undertook that they will produce materials to show that the driver of the offending offence had valid and effective driving licence at the time of accident.

5. The appellant–Insurance Company enquired into the matter from the office of the R.T.O., Bhubaneswar wherefrom it transpired that the driver-Deba Kumar Tarai was not authorized to drive any transport vehicle. During the period of accident the driver had a driving licence to drive only light motor vehicle and he had no P.S.V. Badge.

6. The appellant-Insurance Company thereafter filed a petition before the tribunal to recall the conditional compromise on the ground that the driver had no valid and effective driving licence and also prayed for regular hearing of the case. But the tribunal rejected the prayer of the appellant and directed it to pay a sum of Rs. 1.00 lakh as per Lok Adalat compromise.

7. Being aggrieved by award dated 15.01.1996 passed by the 2nd M.A.C.T., Cuttack in Misc. Case No. 205 of 1994, the appellant preferred misc. appeal before this Court on the ground of ineffective driving licence. It was specifically pleaded by the appellant-Insurance Company that in order to drive a transport vehicle, the driver has to possess a 5 transport endorsement specifically entitling him to drive such vehicle and in absence of such authorization, the driving licence becomes in-effective and the appellant is not liable.

8. The learned Single Judge, after hearing both the sides, held that it is for the Insurance Company to plead and prove that at the time of accident the particular vehicle was being used as a transport vehicle as per the decision reported in ***Ashok Gangadhar maratha v. Oriental Insurance Company Ltd., AIR 1999 S.C. 3181***. The learned Single Judge observed that a mini truck is also a light motor vehicle and a person having licnece to drive a light motor vehicle can drive such vehicle provided that at the relevant time the mini truck was not being used as a transport vehicle and accordingly dismissed Misc. Appeal No. 285 of 1996 by judgment dated 25.10.2000 confirming the award passed by the claims tribunal. Hence this intra-Court appeal.

9. Mr. M. Sinha, learned counsel appearing for the appellant argued with vehemence that the Insurance Company is not liable to pay compensation in absence of valid and effective driving licence. It is contended that the claim was settled in Lok Adalat and when the petition to revoke the conditional compromise was rejected by the tribunal, it ought to have been held that there was no scope on the part of the appellant to take a positive plea relating to in-effectiveness of the driving licence in its written statement. It is further contended that whether the vehicle used as transport vehicle at the time of accident is a matter of evidence, which could have been elicited during crossexamination, had an opportunity been afforded to the appellant to enter into regular trial of the case by recalling the conditional compromise and, the same having not been done, the award passed by the claims tribunal and confirmed by the learned Single Judge cannot sustain in the eye of law and is liable to be quashed.

10. Learned counsel for the respondents contended that the award has been passed on the basis of the Lok Adalat compromise. May it be a conditional one, but subsequently, when the petition for recall of such award at the instance of the appellant was filed, the same having been rejected by the claims tribunal and consequentially the award so passed by the tribunal having been confirmed by the learned single Judge, the same should not be interfered with at this stage.

11. Though notice was issued to the respondents, in response to the same, respondent no. 1 has entered appearance, respondents no. 2 and 3 reported as dead, and notice as against respondent no.4 was served on affixture. But as it appears, respondent no.1 is the main contestant, who is the claimant, and the respondents no. 2 and 3 were children of respondent no.1, and respondent no.4 is the owner of the vehicle in question. Since the award has already been passed and in the meantime more than 17 years have elapsed, the matter is finally disposed of at the stage of admission, as the correctness of the judgment passed by the tribunal and confirmed by the learned Single Judge, is under challenge in the present intra-Court appeal.

12. On the basis of the factual matrix delineated above, the undisputed facts are that the deceased Dhruba Charan Pal died in a vehicular accident on 16.10.1993 having sustained injury on 15.10.1993. The respondents no. 1 to 3 filed claim

petition before the claims tribunal claiming compensation of Rs.3,50,000/-. But on a Lok Adalat compromise, the claimants have been awarded a sum of Rs.1.00 lakh towards full and final settlement of the claim subject to proof of driving licence of the driver of the offending vehicle. The appellant-Insurance Company filed a petition before the tribunal to recall the said conditional compromise on the ground that the driver had no valid and effective driving licence and claimed for regular hearing of the case. But the tribunal rejected the said petition and directed the appellant-Insurance Company to pay a sum of Rs. 1.00 lakh as per Lok Adalat compromise. The award of the claims tribunal has been confirmed by the learned Single Judge by order dated 25.10.2000 in Misc. Appeal No. 205 of 1996.

13. The only question for determination is whether a driver having possessed a driving licence to drive 'light motor vehicle' can be construed to drive 'transport vehicle'. In order to effectively answer the said question, definition of 'light motor vehicle' has to be given full effect to and it has to be read with Section 10(2)(d) of the Motor Vehicles Act, 1988, as amended by Act 54 of 1994, which makes it abundantly clear that 'light motor vehicle' is also a 'transport vehicle', gross vehicle weight or 'unladen weight' does not exceed 7500 Kg, as specified in the provision. Thus, a driver is issued a licence as per class of vehicle, i.e., light motor vehicle, transport vehicle or omnibus or another vehicle of other categories as per gross vehicle weight or unladen weight as specified in Section 2(21) of the Act. Provision of Section 3 of the Act requires that a person in order to drive a 'transport vehicle' must have authorization. Once a licence is issued to drive light motor vehicle, it would also mean specific authorization to drive a transport vehicle or omnibus, gross vehicle weight or motor car, road roller, or tractor, unladen weight of which, as the case may be, does not exceed 7500 Kg. Insertion of 'transport vehicle' category in Section 10(2)(e) has no effect of obliterating the already defined category of transport vehicles of class of light motor vehicle. A distinction is made in Act if heavy goods vehicle, heavy passenger motor vehicle, medium goods vehicle and medium passenger motor vehicle in basis of 'gross vehicle weight' or 'unladen weight' for heavy passenger motor vehicle, heavy goods vehicle, weight, as the case may be, exceed 12000 Kg. This question has been considered by 3-Judge Bench of the apex Court in ***Mukund Dewangan v. Oriental Insurance Company Limited, AIR SCW 2017 SC 3668.***

14. Otherwise also on perusal of the provisions of the Act, mainly Section 2(e) to (h), it is apparent that the use of language is very clear, meaning thereby, the words which cannot be read into an Act, unless clear reason for it is to be found within four corners of the Act itself. It is one of the principles of the statutory interpretation that may matter which should have been weighed, but has not been provided for in a statute, cannot be supplied by Courts as to do so will be legislation and not construction. Thus, it is apparent that plain and simple meaning has to be given to Section 10(2). When legislature has not amended the provisions, Court cannot rewrite definition of Section 2(21) of 'light motor vehicle' and Section

10(2)(d) and full effect has to be given to omission which has been made in provisions of Section 10(2)(e) to (h), by substituting 'transport vehicle' under Section 10(2)(e) and plain and literal interpretation of existing provisions and amended provisions it is not for Court to legislate by making insertion in Section 10(2)(e). What has not been provided in statute with a purpose cannot be supplied by Courts. Court has to construe a provision and not to act as a legislature. Therefore, the interpretation, as suggested by the insurer, would mean re-writing of provision, which is not permissible in law.

15. In view of the law laid down by the Court, as discussed above, this Court is of the considered opinion that if the driver of the offending vehicle has possessed driving licence of 'light motor vehicle', he having been driving the mini truck, may be considered to be a "transport vehicle", but it does not exceed the gross vehicle weight or unladen weight of 7500 Kg, that itself means that the driver possessed a valid driving licence.

16. Apart from the above, if the parties have entered into a compromise with eyes wide open before the Lok Adalat and settled the dispute for all time to come by making a full and final award of Rs.1.00 lakh, as against the claim of Rs.3,50,000/-, and more particularly when the accident took place on 15.10.1993 consequence thereto the deceased succumbed to death on 16.10.1993, and in the meantime more than 25 years have elapsed, and as such the same has been confirmed by the learned Single Judge, we do not find any infirmity in the impugned judgment and order itself so as to call for interference in this intra-Court appeal.

17. There is thus no merit in this appeal, which is hereby dismissed.

2018 (II) ILR - CUT- 214

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

WRIT APPEAL NO. 320 OF 2018

NATIONAL BANK FOR AGRICULTURE AND RURAL DEVELOPMENT (NABARD) & ANR. ……..Appellants

.Vs.

CHITA RANJAN PATNAIK & ORS. ……..Respondents

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition against NABARD, whether maintainable – Held, Yes.

"As such, in view of the law discussed above, taking into account the nature of constitution of NABARD and discharge of its duties and keeping in view the parameters provided in the cases of ***Dr. S.L. Agarwal****,* ***Ajay Hasia*** *and* ***Pradeep Kumar Biswas*** *(supra),*

we are of the considered opinion that NABARD can be construed as a 'State' within the meaning of Article 12 of the Constitution of India, being an instrumentality of the State and an 'authority'. Thus, writ application against NABARD is maintainable." (Para 16)

Case Laws Relied on and Referred to :-

1. (1970) 1 SCC 171 : Dr. S.L. Agarwal .Vs. The General Manager, Hindustan Steel Ltd.
2. (1981) 1 SCC 722 : Ajay Hasia .Vs. Khalid Mujib Sehravardi.
3. (2002) 5 SCC 111 : Pradeep Kumar Biswas v. Indian Institute of Chemical Biology.
4. AIR 1979 SC 1628 : R.D.Shetty .Vs. The International Airport Authority of India.
5. AIR 1981 SC 2198 : Gulam Abbas & Ors .Vs. State of U.P. & Ors.
6. AIR 1981 SC 212 : Som Prakash .Vs. Union of India.
7. AIR 1981 SC 487 : Ajay Hasia .Vs. Khalid Mujib Sehravardi and ors.
8. AIR 1988 SC 469 : Tekraj Vasandi alias Basandi .Vs. Union of India.
9. AIR 1992 SC 76 : Chandra Mohan .Vs. NCERT.
10. AIR 1980 SC 840 : U.P.Warehousing Corporatioin .Vs. Vijay Narain.
11. AIR 1975 SC 1329 : Sabhaijit Tewary .Vs. Union of India.
12. (2002) 5 SCC 111 : Pradip Kumar Biswas .Vs. Indian Institute of Chemical Biology.
13. AIR 2005 SC 411 : Virendra Kumar Srivastava .Vs. U.P. Rajya Karmachari Kalyan Nigam & Anr.

For Appellant : Mr. J.K. Tripathy, Sr. Advocate
M/s. B.P. Tripathy, D. Pradhan, G.S. Das &
Ms. P.R. Mishra.

For Respondents : None

JUDGMENT Date of Hearing : 31.07.2018 Date of Judgment: 03.08.2018

DR. B.R. SARANGI, J.

This is an intra Court appeal filed by the appellants challenging the judgment dated 27.04.2018 passed in W.P.(C) No. 15402 of 2012, by which the learned Single Judge has remitted the matter to the competent authority to consider the case of respondent no.1 and to take final decision in accordance with law for promotion to the post of Executive Director notionally within reasonable period, preferably within three months from the date of production of certified copy of the order.

2. The factual matrix of the case, in hand, is that respondent no.1 joined the Reserve Bank of India (RBI) on 22.10.1971 and subsequently in the year 1979 he was selected as a Direct Recruit Officer in Grade-B (Manager) in the erstwhile ARDC, the then subsidiary of RBI, and then he joined in National Bank for Agriculture and Rural Development (NABARD) after its formation in the year 1982. The respondent no.1, after working in various capacities, was promoted to the rank of Chief General Manager (CGM) in the year 2002. The next promotion due to the respondent no.1 was in the rank of Executive Director. The selection committee convened a meeting to select two Executive Directors in the year 2011. The respondent no.1, being eligible for the same, his name was short listed at serial no.2, along with other three candidates. As against the candidate at serial no.1, since departmental cases were pending, his case was not considered. Consequently, the

respondent no.1 ought to have been extended with the benefit of promotion by promoting him to the post of Executive Director, but the claim of the respondent no.1 was rejected in gross violation of the National Bank for Agriculture and Rural Development (Staff) Rules, 1982.

3. The respondent no.1 filed writ application and the writ Court, after considering the grievance of respondent no.1, disposed of the same by judgment dated 27.04.2018 stating inter alia that the respondent no.1 cannot take the benefit of actual service even if he would be promoted to the post of Executive Director, since he has already retired from service w.e.f. 30.04.2011, but if he would be found to be suitable, certainly he would be entitled to get monetary benefit by getting the notional promotion, and therefore remitted the matter to the competent authority to consider the case of the respondent no.1 and to take final decision in accordance with law for promotion to the post of Executive Director notionally within reasonable period, preferably within three months from the date of production of certified copy of the order. Even though an objection was raised before the writ Court with regard to maintainability of the writ application against the NABARD, the answer was given in affirmative by learned Single Judge. Hence this application.

4. Mr. J.K. Tripathy, learned Senior Counsel appearing for the appellants submitted that although the appellants raised a preliminary question with regard to maintainability of the writ application before the learned Single Judge stating that NABARD is not a 'State' within the meaning of Article 12 of the Constitution of India and therefore the writ application was not maintainable, the learned Single Judge, without considering such objection in proper perspective, passed the impugned judgment. Hence, the appellants have filed this appeal to nullify the judgment of the learned Single Judge dated 27.04.2018. It is contended that the writ application was not maintainable, as the appellant- organization is not a 'State' for the purpose of ventilating grievance of its employees like that of the respondent no.1 relating to service conditions. It is further contended that the learned Single Judge did not at all refer to decisions, which were cited before him, and thereby completely missing the point canvassed on the maintainability issue and came to a wrong conclusion that the appellant-institution was a 'State' within the meaning of Article-12 of the Constitution of India. Therefore, the appellants have sought for interference of this Court by means of this appeal. To substantiate his contention, he has relied upon the judgments rendered in ***Dr. S.L. Agarwal v. The General Manager, Hindustan Steel Ltd.,*** (1970) 1 SCC 171; ***Ajay Hasia v. Khalid Mujib Sehravardi,*** (1981) 1 SCC 722; and ***Pradeep Kumar Biswas v. Indian Institute of Chemical Biology,*** (2002) 5 SCC 111.

5. We have heard Mr. J.K. Tripathy, learned Senior Counsel for the appellants and perused the records. Since the appellants had raised a preliminary question with regard to maintainability of the writ petition, the same question has already been

reiterated here in appeal. Therefore, the moot question which arises for consideration is whether the writ application as against NABARD is maintainable or not.

6. It is the admitted case that NABARD has been constituted under the provisions of the National Bank for Agriculture and Rural Development Act, 1981 and as such, it is a creation of statute. The prerogative writ of mandamus confined only to public authorities to compel performance of public duty. The 'public authority' for them means everybody which is created by statute and whose powers and duties are defined by statute. Therefore, the Government departments, local authorities, police authorities and statutory undertakings and corporations, are all 'public authorities'. Thereby, there is no such limitation for the High Court to issue writ in the nature of mandamus under Article 226 of the Constitution of India. But the preliminary question raised with regard to maintainability of the writ application, is against the NABARD, as it is not a 'State' within the meaning of Article 12 of the Constitution. Therefore, the minimum requirement is that unless NABARD is a 'State' or "instrumentality of the State" or "other authority", the writ application is not maintainable.

7. Article 12 of the Constitution of India reads as follows:-

> *"12.Definition- In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the State and all local or other authorities within the territory of India or under the control of the Government of India."*

8. The definition of 'State' is not confined to Governmental function and the legislature but extends to any action administrative (whether statutory or non-statutory), judicial or quasi judicial, which may be brought within the fold of State action being the action, which violates fundamental rights. It appears that prima facie protection against infraction of Article 14 is available only against the State and complaint of arbitrariness and denial of equality can therefore, be sustained against the NABARD only if the NABARD can be shown to be State for the purpose of Article 14. The 'State' is defined in Article 12 to include inter alia the Government of India and the Government of each of the States and all local or other authorities within the territory of India or under the control of the Government of India and the question therefore is whether the NABARD can be said to be 'State' within the meaning of this definition. Obviously the NABARD cannot be equated with the Government of India or the Government of any State nor can it be said to be a local authority and therefore, it must come within the expression of "other authorities" if it is to fall within the definition of 'State'. Therefore, the question is what are "other authorities" contemplated in the definition of 'State' in Article 12. While considering this question, it is necessary to bear in mind that an authority falling within the expression "other authorities" is, by reason of its inclusion within the definition of 'State' in Article 12, subject to the same constitutional limitations

as the Government and is equally bound by the basic obligation to obey the constitutional mandate of the Fundamental Rights enshrined in Part III of the Constitution. Similar question as to whether a corporation can be regarded as an 'authority' within the meaning of Article 12 arose for consideration in ***R.D.Shetty v. The International Airport Authority of India***, AIR 1979 SC 1628 and the apex Court though has given wide enlargement of the meaning of "other authorities", but cautioned that it must be tempered by a wise limitation.

9. If the NABARD is an 'authority' and therefore, "State" within the meaning of 'Article 12, it must follow that it is subject to the constitutional obligation under Article 14.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 and it is sufficient to state that the content and reach of Article-14 must not be confused with the doctrine of classification because the view taken was that 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; (ii) that the differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action. Reference can also be made to other judgments of the apex Court in ***Gulam Abbas & Ors vs State Of U.P. & Ors*** AIR 1981 SC 2198, ***Som Prakash v. Union of India*****,** AIR 1981 SC 212. But all these questions have been considered by the Constitution Bench of the apex Court in ***Ajay Hasia v. Khalid Mujib Sehravardi and others***, AIR 1981 SC 487.

10. In ***Tekraj Vasandi alias Basandi v. Union of India*****,** AIR 1988 SC 469 (paragraphs 17-A and 20), with the approval, the observations of Justice Shah in Uajm Bai case, it is held that the expression 'authority' in its etymological sense means a body invested with power to command or give an ultimate decision, or enforce obedience, or having a legal right to command and be obeyed. But in paragraph 20 the Court observed as follows:

> *"In a Welfare State, as has been pointed out on more than one occasion by this Court, Governmental control is very pervasive and in fact touches all aspects of social existence in the absence of a fair application of the tests to be made, there is possibility of turning every non-governmental society into agency or instrumentality of the State. That obviously would not serve the purpose and may be far from reality."*

11. In ***Chandra Mohan v. NCERT***, AIR 1992 SC 76, in paragraph-3, the apex Court held as follows:

> *"It must not be lost sight of that in the modern concept of Welfare State, independent institution, corporation and agency are generally subject to State control. The State control does not render such bodies as 'State' under Art.12. The State control, however, vast and pervasive is not determinative. The financial contribution by the State is also not conclusive. The combination of State aid coupled with an unusual degree of control over the management and policies of the body and rendering of an important public service being the obligatory functions of the State may largely point out that the body is 'State'."*

12. In ***Ajay Hasia (supra)*** the Constitution Bench summarized the relevant tests gathered from the decision in R.D.Shetty for determining whether an entity is a 'State' or "instrumentality of the State" as follows:

> (1) "One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicting that the corporation is an instrumentality or agency or Government.
>
> (2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.
>
> (3) It may also be a relevant factor whether the corporation enjoys monopoly status which is the State conferred or State protected.
>
> (4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.
>
> (5) If the functions of the corporation of public importance and closely related to governmental functions, it would be a relevant factor in classified the corporation as a instrumentality or agency of Government.
>
> (6) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government. "

It was held in ***Ajay Hasia*** that if on consideration of the relevant factors, it is found that the Corporation is an instrumentality or agency of Government, it would as pointed out in the International Airport Authority's case, be an 'authority' and, therefore, 'State' within the meaning of the expression in Article 12. The same view has also been taken into consideration by the apex Court in **U.P.Warehousing Corporatioin v. Vijay Narain,** AIR 1980 SC 840.

13. The tests, which have been determined in **Ajay Hasia (supra)** are also held not rigid set of principles so that a body falling within any one of them must be considered to be 'State'. The question in case would be: whether on facts, the body is financially, functionally and administratively dominated by or under the control of Government and such control must be particular to that body and must be pervasive. Therefore, the decision in ***Sabhaijit Tewary v. Union of India,*** AIR 1975 SC 1329**,** has been overruled by the 7-Judge Bench judgment of the apex Court in **Pradip Kumar Biswas v. Indian Institute of Chemical Biology, (**2002) 5 SCC 111 and the apex Court by over-ruling **Sabhaijit Tewary (supra)** held as follows:

> *"(1) simply, by holding a legal entity to be an instrumentality or agency of the State it does not necessarily become an authority within the meaning of " other authorities" in Article 12. To be an authority, the entity should have been created by a statute or under a statute and functioning with liability and obligations to the public. Further, the statute creating the entity should have been vested that entity with power to make law or issue binding directions amounting to law within the meaning of Article 13(2) governing its relationship with other people or the affairs or other people- their rights, duties, liabilities or other legal relations. It created under a statute, then there must exist some other statute conferring on the entity such powers. In either case, it should have been entrusted with such*

functions as are governmental or closely associated therewith by being of public importance or being fundamental to the life of the people and hence governmental. Such authority would be the State, for, one who enjoys the powers or privileges of the State must also be subjected to limitations and obligations of the State. It is this strong statutory flavor and clear indicia of power- constitutional or statutory, and its potential or capability to act to the detriment of fundamental rights of the people, which makes it an authority; though in a given case, depending on the facts and circumstances, an authority may also be found to be an instrumentality or agency of the State and to that extent they may overlap. Tests 1, 2 and 4 in Ajay Hasia enable determination of governmental ownership or control. Tests 3, 5 and 6 are "functional" tests. The propounder of the tests himself has used the words suggesting relevancy of those tests for finding out if an entity was instrumentality or agency of the State. Therefore, the question whether an entity is an "authority" cannot be answered by applying Ajay Hasia tests.

(2) The tests laid down in Ajaya Hasia case relevant for the purpose of determining whether an entity is an instrumentality or agency of the State. Neither all the tests are required to be answered in the positive nor a positive answer to one or two tests would suffice. It will depend upon a combination of one or more of the relevant factors depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be by removing the mask or piercing the veil disguising the entity concerned."

14. Taking into consideration **Pradip Kumar Biswas (supra)** the apex Court in **Virendra Kumar Srivastava v. U.P. Rajya Karmachari Kalyan Nigam and another,** AIR 2005 SC 411 has held that the question in each case would be- whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a 'State within the meaning of Article 12'. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.

15. As it has been pleaded by the appellants that the definition of "State", as finds place in Article 12 of the Constitution, is only applicable to Part-III of the Constitution of India which deals with the fundamental rights of Citizen of India and Part-IV of the Constitution which imports the meaning of word 'State' as occurs in Article-12 of Part-III of the Constitution. The definition of 'State' and 'other authority' as find place in Article-12 of the Constitution of India, is only limited to Part-III and part-IV thereof. Against any grievance relating to illegality/infirmity/violation of service rules could only be challenged by a Civil Servant ventilating any grievance against the Government only and therefore, it is not applicable to the employees of NABARD. This contention is a fallacious one.

16. As such, in view of the law discussed above, taking into account the nature of constitution of NABARD and discharge of its duties and keeping in view the parameters provided in the cases of ***Dr. S.L. Agarwal***, ***Ajay Hasia*** and ***Pradeep Kumar Biswas*** (supra), we are of the considered opinion that NABARD can be construed as a 'State' within the meaning of Article 12 of the Constitution of India, being an instrumentality of the State and an 'authority'. Thus, writ application

against NABARD is maintainable. In view of such position, we are unable to accept the arguments advanced by Sri J.K. Tripanty, learned Senior Counsel appearing for the appellants that NABARD is not a 'State'. Even though we have held that the writ application is maintainable, so far as merits of the case is concerned no arguments were advanced. More so, the learned Single Judge has considered the same elaborately and as a matter of fact, the case has been remitted back to the authority for consideration. In that view of the matter, we are not inclined to interfere with the same.

17. Accordingly, the writ appeal stands dismissed being bereft of merit. No order to costs.

2018 (II) ILR - CUT- 221

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

W.P.(C) NO. 6267 OF 2018

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

.Vs.

NIRANJAN BISWAL ……Opp. Party.

SERVICE – Claim of Pension – Opp. Party worked as Secretary of Gram Panchayat from 1974 to 2009 – Subsequently promoted to the post of Village Level Worker and thereafter superannuated in 2010 – Original application filed claiming minimum pension by adding the previous service period – Allowed – Writ petition by State challenging the order of SAT – Plea of State that post of GP Secretary not being a civil post the period of service rendered cannot be counted towards pension – Held,No, the Opp. party is entitled for the relief – No interference in the order of Tribunal called for. (Para 7)

Case Laws Relied on and Referred to :-

1. AIR 1983 SC 130 : D.S. Nakara .Vs. Union of India.

For petitioners : M/s. M.S. Sahoo, Additional Government Advocate.
For Opp.Party. : Mr. Manoj Kumar Mishra, Sr. Advocate
M/s. Tanmay Mishra & D.K. Patnaik.

JUDGMENT Date of Judgment: 30.08.2018

S. PANDA, J.

The State of Odisha in Panchayati Raj Department along with its functionaries, being the petitioners have assailed the order dated 17.02.2016 passed by the Odisha Administrative Tribunal,Cuttack Bench, Cuttack in O.A. No.4396 (C) of 2010 wherein the present petitioners were directed to consider the grievances of

the applicants for grant of minimum pension by adding so much period of service from G.P. Secretary service with their regular service as Village Level Workers to make them eligible to get minimum pension and accordingly to pay them minimum pension admissible from time to time from the date of their retirement.

2. The short fact of the case as delineated in the writ petition tends to reveal that the present opposite party was initially joined as Grama Panchayat Secretary on 05.09.1974. While he was so continuing, pursuant to the resolution of the Panchayat Raj Department dated 31.03.2008 and 07.02.2009 he was promoted to the post of Village Level Worker ('V.L.W.' in short) by order dated 28.05.2009. While working as V.L.W., he retired from Government service on 31.08.2010 on attaining the age of superannuation. After his retirement, however, his case was not considered to get pension and other retiral benefits on the plea that the service rendered by him as Gram Panchayat Secretary prior to promotion as V.L.W. is not a civil post and thereby he had not completed the minimum qualifying period of 10 years of service to get the pension and retiral benefits. Thus, the present opposite filed O.A. No. 4396 (C) of 2010 for a direction to the present petitioners to grant minimum pension in faovur of the applicant by taking into account of his past service rendered by him in the post of Gram Panchayat Secretary prior to his appointment as V.L.W. to the extent of short fall in accordance with the OCS (Pension) Rules, 1992. He further prayed to release all consequential and financial service benefits in favour of the applicant accordingly. Similarly situated other employees have also filed number of Original Applications with the self same prayer. All such Original Applications were taken up together and disposed of by the common impugned order dated 17.02.2016.

3. Learned Additional Government Advocate for the petitioners submitted that the post hold by the applicant as Gram Panchayat Secretary was not a civil post. The said service was controlled under Gram Panchayat Act and Rules. Whereas the post of V.L.W., which is a civil post was controlled by Orissa Village Level Workers (Recruitment and Conditions of Service) Rules, 2008. According to him the post of Gram Panchayat Secretary is not a pensionable post under the Orissa Civil Service (Pension) Rules, 1992. In support of his contentions, he drew our attention of the said rule to the following extent:-

Rule-18 provides the conditions subject to which service qualifies. Sub Rule-2 (iii) prescribes the period of service paid from contingencies shall not be counted for the purpose of pension.

Sub Rule-6 of Rule-18 prescribes Notwithstanding anything contained in Clauses (i) and (iii) of Sub-rule (2), a person who is initially appointed in a job contract establishment and is subsequently brought over to the post created under regular/pensionable establishment, so much of his job contract service period shall be added to the period of his qualifying service in regular establishment and would render him eligible for pension. Sub-Rule-6 was inserted by way of amendment on 01.09.2001.

4. He therefore, submitted that in view of these two provisions, the person who are regularized after job contract period and period of service paid from contigencies are getting pension. Since the applicant is not coming under such provisions, his service rendered as Gram Panchayat Secretary cannot be added for computing the qualifying period of service for minimum pension. The Tribunal since has not considered all such facts and passed the impugned order, the same needs to be interfered with.

5. Learned counsel for the opposite party-applicant before the Tribunal, however supported the impugned order and contended that by notification dated 30.10.1998 the State Government has promulgated an ordinance wherein the salaries of the Gram Panchayat Secretary has been fixed. The Government has decided to pay them monthly consolidated remuneration of Rs.2200/- with effect from 01.11.1998. The total expenses towards such remuneration shall be borne by the State Government from government contingencies. Therefore, they were getting salary from the State Government. While working as Gram Panchayat Secretaries, Orissa Village Level Workers (Recruitment and Conditions of Service) Rules, 2008 came into force.

Rule-4 prescribes the Recruitment of Village Level Worker.

Sub Rule-1 of Rule-4 prescribes that the vacancies in the post of Village Level Worker shall be filled up by means of selection from amongst the Gram Panchayat Secretaries of the District in accordance with Rule-8.

Sub Rule-2 of Rule-4 prescribes in case of non-availability of eligible Gram Panchayat Secretaries the posts remaining unfilled, shall be filled up by direct recruitment in accordance with Rule-9.

Rule-8 prescribes the Eligibility criteria and Procedures for filling up the vacancies. Sub Rule-1 of Rule-8 prescribes as follows:-

"In order to be eligible for appointment to the service, a Gram Panchayat Secretary must have passed High School Certificate Examination or any xamination equivalent thereto or have passed the Middle English School Examination or other examination of equivalent standard and have rendered at least fifteen years of continuous services as Gram Panchayat Secretary."

Sub-Rule 2 of Rule-8 provides that a Committee shall meet to prepare a list of Gram Panchayat Secretaries of the district, suitable for promotion to the post of V.L.W.. The case of such Gram Panchayat Secretaries will be considered for promotion to the post of V.L.W. in case they found suitable by the committee constituted for such promotion. The Committee shall prepare a list of all Gram Panchayat Secretaries of the district according to their date of substantive appointment in the post of Gram Panchayat Secretary. The Committee while considering the promotion cases of the suitable employees and preparation of the list shall follow the provisions of

(i) The Orissa Civil Services (Zone of Consideration for Promotion) Rules, 1988.

(ii) The Orissa Civil Services (Criteria for Promotion) Rules, 1992 and

(iii) The Orissa Civil Services (Criteria for Selection for Appointment including Promotion) Rules, 2003.

Rule-9 of 2008 Rules however prescribes the procedure for filling up the vacancies by direct recruitment.

6. Learned counsel for the opposite party, therefore, submitted that even if the Full Bench decision of this Court in the case of Sri Adwait Chndra Jena v. Khandahata Grama Panchayat and others, reported in 1998 (II) OLR 410 held that the post of Gram Panchayat Secretary is not a civil post, however they are discharging the duties under the State Government and getting their salaries from the State Government as stated above. Their only contention before the Tribunal was that after their services were regularized as V.L.W. on promotion from the post of Gram Panchayat Secretary, a few V.L.Ws. had not completed the qualifying period of service to get the minimum pension. Therefore, the Tribunal recorded the two fold submission of the applicants to the extent that:

(i) Entire service period of the applicants including G.P. Secretary period is to be counted for pension.

(ii) If entire service period cannot be considered for pension, then minimum pension is payable to the applicants.

According to him, the Tribunal, however considering all such rules and regulations and the fact that a considerable length of service the applicants have been rendered as Gram Panchayat Secretaries, directed the present petitioners to add so much of period of service from the G.P. Secretary service to that of the service of V.L.W. to make them eligible to get minimum pension. Hence the order of the Tribunal need not be interfered with.

7. The Tribunal, while passing the impugned order, has taken note of all the Rules and Regulations governing the field so far as Gram Panchayat Secretaries are concerned as well as the Rules and Regulations with regard to their promotion to the Village Level Workers are concerned. While dealing with the 2nd submission of the applicants regarding counting of service to get the minimum pension, the Tribunal relied on the decision of this Court rendered in OJC No. 2147 of 1991 dated 24.03.1992, i.e. in the case of ***Settlement Class-IV Job Contract Employees Union, Balasore- Mayurbhanj District v. State of Orissa and others***. At paragraph-10 of the judgment, this Court referred the decision rendered by the Constitution Bench of the Apex Court in the case of ***D.S. Nakara v. Union of India, reported in AIR 1983 SC 130*** and quoted relevant portion of the said judgment, to the following extent:-

"antiquated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer, not claimable as a right, and, therefore, no right to pension can be enforced through court, has been swept under the carpet……..".

In paragraph-26, the goals which a pension scheme seeks to subserve were noted. It was stated that a pension scheme consistent with the available resources must provide that the pensioner would be able to live (i) free from want, with decency, independence and self respect, and (ii) at a standard equivalent at the present retirement level. The Bench posed a question that the approach being adopted by it may merit the criticism that if a developing country like India cannot provide an employee while rendering service a living wage, how can one be assured of it in retirement. The question was answered by referring to the social philosophy adopted by us. In paragraph-31, this aspect of the matter was concluded by saying, inter alia, that pension is not an ex-gratia payment, but it is a payment for the past service rendered and it is a social welfare measure rendering socioeconomic justice to those who in the hey day of their life ceaselessly toiled for the employer or an assurance that in their old age, they would not be left in lurch."

8. The Tribunal also taken note of the Finance Department Resolution, wherein it was decided that for the purpose of pension and pensionary benefits to job contract employees, only their job contract service period shall be added to the period of qualifying service in regular establishment. It has also taken note of the circular issued by the Government in Revenue Department to the extent that in case any job contract employee going to retire in a particular year, his service may be regularized one month before his retirement and they were entitled to get minimum pension.

9. In view of the discussions made hereinabove paragraphs, this Court is of the opinion that the Tribunal has passed a reasoned order. There is no error apparent on the face of it which warrants interference by this Court in exercise of the jurisdiction conferred under Article 227 of the Constitution of India. The writ petition stands dismissed accordingly.

2018 (II) ILR - CUT- 225

CRA NO. 204 OF 1999

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

MUKHTAR HUSSAIN ……..Appellant

.Vs.

STATE OF ODISHA ……Respondent

INDIAN PENAL CODE,1860 – Section 302 and 201 – Offence under – Conviction only on the basis of last seen theory – No evidence available on record to show that the appellant was last seen with the deceased proximately before her death – The place of occurrence as well as the burial spot is accessible to all – There is no iota of evidence that the appellant knew or had reason to believe the commission of such offence and had an intention to cause disappearance of evidence – Held, it is unsafe to maintain the conviction.

"The spot map, which finds place in the crime detail form available in the lower Court record, does not disclose the location of the staircase and from which place the amputated left limb of the deceased was recovered. Thus, it would be unsafe to apply the rigors of last seen theory as well as provisions of Section 106 of the Evidence Act to the case at hand. In addition to the above, it is the categorical testimony of PWs-2 & 6 that the appellant was in police custody from 05.07.1998 onwards. In view of the circumstances discussed above, it is very difficult to come to a conclusion that the appellant is the perpetrator of the crime and convict him under Section 302 IPC. (Para 15)

Case Laws Relied on and Referred to :-

1. AIR (34) 1947 Privacy Council 67 : Pulukuri Kottaya and others .Vs. Emperor.
2. XXXV (1969) CLT 351 : Satrughana alias Satura Majhi .Vs. Sate.
3. AIR 1952 SC 354 : Palvinder Kaur .Vs. State of Punjab.
4. 2007 (7) SCC 502 : Sukhram .Vs. State of Maharashtra.

For Appellant : M/s Ashok Misra, K. Kanungo,G. N. Behera, Stayabrata Rath, G.B. Mohapatra, B.B. Mohanty and Miss D. R. Nanda

For Respondent : Mr. M. S. Sahoo, Addl. Govt. Adv.

JUDGMENT Date of Judgment: 08.08.2018

K.R. MOHAPATRA, J.

This appeal has been filed assailing the judgment of conviction and sentence dated 30.06.1999 passed by learned Additional Sessions Judge, Jharusuguda in S.T. Case No. 25/51 of 1999 convicting the appellant for committing offence under Sections 302 and 201 IPC and sentencing him to undergo imprisonment for life for commission of offence under Section 302 IPC and RI for five years for commission of offence under Section 201 IPC. The substantive sentences were directed to run concurrently.

2. The appellant was working as a 'Mouzam' in Khoja Sahi Insari Jamat of Jharsuguda (herein after referred to 'Mosque') and was staying in the Mosque premises with his daughter, namely, Kanirra Zainam (the deceased). On 05.07.1998, when the informant, namely, Naiyyar Reza (PW-6), who happened to be the President of the Mosque Committee was at the house of Janab Gulam Hussain to observe 40th day of death of the wife of Janab Gulam Hussain, the appellant arrived there and in presence of the informant and other committee members disclosed that his daughter (the deceased), while cooking food accidentally burnt to death on 04.07.1998. The appellant had burried the dead body of the deceased within the Mosque premises under a Neem tree. The informant suspected some foul play as instead of burying the dead body at Kabarsthan, the appellant had buried it in the Mosque premises. Accordingly, the committee members informed the matter at Jharsuguda Police Station. Upon receipt of the report (Ext.11), OIC, Jharsuguda P.S. registered U.D. Case No.26 of 1998 on 05.07.1998 at about 9.00 P.M. and took up the investigation. On 06.07.1998, on the instruction of the appellant, Police in presence of witnesses and Executive Magistrate, Jharsuguda, namely, Sri J.K. Behera, Additional Tahasildar, Jharsuguda (PW-5) disinterred the dead body of the deceased buried under the Neem tree within the Mosque campus. The appellant,

who was present at the spot identified the dead body to be of his daughter. On being disinterred, it was found that the left leg of the dead body below the knee joint was missing. Accordingly, inquest report (Ext.1) was prepared and the dead body was sent for postmortem examination. On the basis of the opinion in the postmortem report to the effect that the death might have been caused due to burn and amputation of the left leg causing shock and hemorrhage, the OIC, Jharsuguda PS (PW-7) drew up formal FIR (Ext.14) and registered Jharsuguda P.S. Case No.132 dated 08.07.1998 under Sections 302 and 201 IPC suspecting the appellant to have committed the crime.

In course of investigation, the appellant was arrested on 16.07.1998 and confessed his guilt. While in custody, the appellant led the IO (PW-7) and other witnesses to his bedroom situated within the Mosque premises and gave recovery of one axe (MO-I), by which he confessed to have amputated the left leg of his daughter. MO-I was seized vide Ext.4. Thereafter, the appellant led the team to the staircase of the Mosque under which he had burnt the amputated portion of the left leg. The remains of burnt pieces of bones and half burnt wood were seized from that place vide seizure list Ext.6. The appellant was forwarded to the Court on the next day, i.e., 17.07.1998. Thereafter, PW-7 handed over the investigation to the CI of Police, namely, K.C. Mohanty, who seized the bones and sent for chemical examination by FMT Department, VSS Medical College & Hospital, Burla. Seized axe was sent for examination and the report of the Scientific Officer, DFSL, Sambalpur (Ext.16), reveals no human blood on MO-I. On completion of the investigation, the CI of Police, Mr. Mohanty submitted charge-sheet under Sections 302/201 IPC on 11.11.1998 against the appellant. Accordingly, the appellant faced trial.

3. In order to prove their case, the prosecution examined as many as seven witnesses. PW-6 is the informant. PW-5 is the Executive Magistrate in whose presence the dead body of the deceased was disinterred. PW-3 is the Doctor, who conducted postmortem of the cadaver. PW-4 was the Lecturer of FMT, attached to VSS, Medical College & Hospital, Burla, who examined the burnt pieces of the bones. PWs-1 and 2 are independent witnesses before whom the appellant alleged to have made the confession. They are also witnesses to recovery of the dead body. PW-7 is the I.O. The prosecution also relied upon Ext.1, the inquest report; Ext.2, the statement of the appellant recorded by the Executive Magistrate (PW-5); Exts.4 and 6 are seizure lists; Ext.7 is the postmortem report; Ext.8, the report of FMT; Ext.9, the Scientific examination report; Ext.11, the FIR (in UD Case No. 26 of 1998); Ext.13, dead body challan; Ext.14, the formal FIR; Ext.16, the chemical examination report of MO-I by DFSL, Sambalpur. The axe, MO-I is the weapon of offence; MO-II, the sealed packet.

4. The plea of defence was complete denial of his involvement in the alleged crime and the appellant pleaded innocence.

5. Learned trial Court, basing upon oral and documentary evidence available on record as well as argument advanced by learned counsel for the parties, convicted and sentenced the appellant as stated above.

6. Mr. Mishra, learned counsel for the appellant, opened his argument with a submission that the occurrence was unfortunate and heinous, but he maintained that the appellant was not the author of the crime. He strenuously argued that the investigation was perfunctory and the materials available on record are not sufficient to come to a conclusion beyond any reasonable doubt that the appellant is the author of the crime. He contended that the extra judicial confession stated to have been made by the appellant before PWs- 1 and 2 are afterthought and are concocted to rope in an innocent person like the appellant. The information (Ext.11) basing upon which UD Case was registered as well as the formal FIR (Ext.14) disclose that the death was accidental and the same belie the alleged extra judicial confession made by the appellant before PWs-1 and 2. The motive of the appellant to commit the offence has not been proved at all. MO-I cannot be said to be the weapon of offence as it did not contain any human blood. Further, PW-3, the Doctor who conducted the postmortem, clearly opined that the left leg beneath the knee was severed with a single blow and it is very difficult to severe a leg in one blow with MO-I. There are also material discrepancies in the statements of the witnesses. There is no reason as to why a father would kill his daughter. Learned trial Court has not taken these material aspects into consideration while convicting the appellant under Section 302 read with Section 201 IPC. As such, the impugned judgment of conviction and sentence is liable to be set aside and the appellant should be set at liberty forthwith.

7. Mr. Sahoo, learned Additional Government Advocate refuting the submissions made by Mr. Mishra, learned counsel for the appellant, submitted that there are ample materials on record to come to a conclusion that the appellant is the author of the crime. Even if the extra judicial confession, stated to have been made by the appellant before PWs-1 and 2, is ignored, still the recovery of the dead body as well as the weapon of offence and remains of the burnt amputated left leg of the deceased at the instance of the appellant under Section 27 of the Evidence Act, clearly establish that he has committed murder of his daughter and made an attempt for disappearance of evidence. PW-4, the Head of the Department, FMT, VSS Medical College & Hospital, Burla, clearly opined that he found 15 pieces of bones. The fragments were joined and one Tibia and one Fibula were reconstructed and it was found that the bones belonged to left lower limb of an adult female. The deceased was residing with her father, namely, the appellant, at the time of her death. Thus, he had special means of knowledge of death of the deceased and the burden of proof lies on the appellant to disclose the nature and cause of death of the deceased. Learned trial Court carefully scrutinizing the materials on record and taking pains to discuss oral as well as documentary evidence, came to hold that the appellant has committed the murder of his daughter (the deceased) and in an attempt

for disappearance of evidence, buried the dead body, burnt the amputated left leg (below the knee portion) of the deceased and buried it. Thus, he has rightly convicted the appellant under Section 302 read with Section 201 IPC, which warrants no interference.

8. Taking into consideration the rival contentions of learned counsel for the parties, let us first examine as to whether the death was homicidal or accidental.

9. PW-3 is the Doctor, who conducted autopsy over the dead body. In his testimony, he categorically deposed as under:-

> *"2. On external examination I found the dead body to be decomposed and I could find earth and foreign body present over the dead body. The body was emitting foul smell. Maggots were present all over the body. The tongue of the deceased had protruded and bitten. Third degree burn injuries were present on both the lower and upper limbs abdomen chest, back and face up to 80 degrees. At some places skin was found to be intact and was of blackish colour. Eye balls were forced out of the sockets. Left leg was found to have been amputated above the knee. At the amputated site clotted blood were present. The amputated leg was missing. Hairs on the skull were burnt. Some small hairs were present. The external injuries were all ante mortem in nature.*
>
> 3. On dissection I found as follows:
> i) No conception was present.
> ii) Lungs were soft and black.
> iii) Heart was soft and both chambers were empty.
> iv) Stomach was soft and pale and contained half digested food materials.
> v) Small and large intestine distended.
> vi) Lever was soft and pale.
> vii) Spleen was soft and pale.
> viii) Kidney were soft and pale.
> ix) Uterus was normal in size.
>
> *In my opinion the probable cause of death was because of burn and amputation causing shock and heamorrhage and the injuries which I detected on the deceased might have been caused with-in three to five days of my examination. This is that Post-mortem Examination report prepared by me marked Ext.7."*

10. In his cross-examination, PW-3 opined that the severed part must have been cut by a single blow with a heavy sharp cutting weapon. MO-1 (the weapon of offence) was not so sharp and it was difficult for amputating bone and flesh with a single blow given by MO-1.

PW-4 was the Lecturer in FMT, VSS Medical College & Hospital, Burla, who examined the bones of severed left limb of the deceased. He categorically deposed as follows:

> *"2.On examination of the bones I found that there were 15 pieces bones. The fragments were joined and one Tibia and one Fibula were reconstructed and it was found that the bones belong to left side. The bones appears to be smooth and muscular markings were not prominent. The length of the reconstructed Tibia measures 35.5 C.M.*
>
> *3.From the examination I conducted, I could detect the bones sent to me for examination were that of a human being and belong to lower portion of left lower extrimity. The sex of the*

individual was a female and the stature of that individual is approximately 5 feet 3 inches. The bones belong to one adult female. This is that report prepared by me marked Ext.9 and this is my signature on Ext.9 marked Ext.9/1. There were no ante mortem injury on the bones sent to me for examination……..."

11. On a conjoint reading of testimony of PWs-3 and 4 and on examination of postmortem report (Ext.7) as well as report of PW-4 (Ext.9), it is apparent that the pieces of bones recovered from the spot by the Police was the lower portion of lower extremity of an adult female and the stature of the individual was approximately 5.3 feet. The injuries on the dead body were ante mortem in nature and the cause of death of the deceased was due to shock and hemorrhages because of burning and amputation.

12. The FIR in UD Case No.26 of 1998 (Ext.11) as well as the formal FIR (Ext.14) drawn by the IO suggest that the death was accidental. However, there is no evidence on record to show that the deceased was shifted to any hospital after the burn, which is the normal human conduct, in case of an accident. It is also not clear from the evidence available on record as to why and under what circumstance the left leg below the knee was amputated and whether such amputation was also accidental. On the other hand, the materials available on record clearly disclosed that the appellant while in police custody identified the spot where he had buried the dead body. The dead body was disinterred in presence of the Tahasildar-cum-Executive Magistrate, Jharsuguda on 06.07.1998. While conducting inquest, the IO (PW-7) could detect that the left limb below the knee was missing. After recording statements under Section 27 of the Evidence Act, the appellant led the IO and other witnesses to his bedroom situated within the campus and gave recovery of an axe. Thereafter, he led the team to the staircase of the Mosque under which the amputated portion of the missing left leg was burnt. From the said place, the IO seized the burnt pieces of bones and half brunt wood vide Ext.5. The identity of the deceased although disputed by the defence, but we accept the same to be of the deceased as the appellant had identified the spot where he had buried the dead body and identified the same to be of his daughter before the Magistrate (PW-5). His evidence remained unshaken in the cross-examination.

13. On a conspectus of the aforesaid materials, we are constrained to hold that the death of the deceased was not accidental but it is homicidal.

14. Obviously, the next question that arises for consideration is whether the appellant is the author of the crime. Admittedly, there is no eyewitness to the occurrence. The case of the prosecution is based on circumstantial evidence. From the evidence available on record, it appears that PW-1 and PW-2 were the members and PW-6 was the President of the Mosque Committee. On 05.07.1998, when they were at the house of Janab Gulam Hussain to attend the obsequies, i.e., 40th day of death, of the wife of Janab Gulam Hussain, the appellant reached there and disclosed before them to have committed murder of his daughter and to have buried the same

in the Mosque premises. But the contents of Ext.11 (FIR in UD case) and Ext.14, formal FIR belie such confession. Both Ext.11 and Ext.14 do not disclose the appellant to have confessed his guilt of committing murder of his daughter. The incriminating material available against the appellant is the statement (Ext.2) recorded under Section 27 of the Evidence Act. But, the alleged confession of the appellant allegedly made to have committed murder of his daughter is not admissible under Section 27 of the Evidence Act. The confession to the extent of recovery of the cadaver of the deceased is only admissible in evidence. In the path paving case of ***Pulukuri Kottaya and others –v- Emperor,*** reported in AIR (34) 1947 Privacy Council 67, in the context of admissibility of statement made under Section 27 of the Evidence Act, it is held as follows:

> *"It is fallacious to treat the "fact discovered" within the section as equivalent to the object produced. The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given, must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago.* ***It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant****."* (*emphasis supplied*)

The above decision in the case of ***Pulukuri Kottaya (supra)*** has been followed by this Court in the case of ***Satrughana alias Satura Majhi –v- Sate***, reported in XXXV (1969) CLT 351, wherein at paragraph 8 it has been held as follows:-

> *"8. Kottaya v. Emperor, is the leading decision on this point. A clear exposition of the evidentiary value of such a statement is given in para 11 of the judgment. Their Lordships observed thus:-*
>
> *"Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law."*
>
> *The effect of this passage has unfortunately been overlooked in most of the subsequent decisions.*
>
> *The implication of this concept may be explained by an illustration. If the statement made under Section 27 of the Evidence Act leads to discovery of opium, then a conviction can be founded solely on the basis of that statement, as possession of opium without license is by itself an offence under the Opium Act. Similarly discovery of arms without licence on the basis of a statement made under Section 27 of the Evidence Act can constitute the sole basis of conviction. But where the gist of the offence is not possession alone, then the statement leading to discovery in most cases cannot constitute the foundation of the prosecution case. As their Lordships put it, it is only one link in the chain of proof, and the other links must be established beyond reasonable doubt before the guilt is brought home to the accused."*

15. Learned Additional Government Advocate resorting to last seen theory as well as provisions under Section 106 of the Evidence Act to bring home the charge, vehemently argued that the appellant in his statement under Section 313 Cr.P.C., has admitted that his daughter was living with him at the time of occurrence. Further, the appellant has the special knowledge of the occurrence and the burden of proof is on him to prove such facts. He having not disclosed the same, adverse inference should be drawn against him. Further, from the circumstantial evidence, the only inescapable conclusion can be drawn that the appellant alone is the perpetrator of the crime. Learned counsel for the appellant, however, refutes the same contending that the rigors of Section 106 of the Evidence Act is not applicable to the case at hand as the Mosque is a public place and the place of occurrence is accessible to the members of the community. Further, there is no material available on record that the daughter was last seen with the father proximately before the occurrence. In order to ascertain the veracity of the submissions, we carefully scrutinized the record. The spot map available in the crime detail report disclosed that the room in which both the appellant and his deceased daughter were staying is situated in the precincts of the Mosque. There is also no evidence available on record to show that the appellant was last seen with the deceased proximately before her death. Further, the place of occurrence as well as the burial spot is accessible to all, who enters the Mosque.

The place of recovery of the half burnt bones is also doubtful. As discussed above, the appellant while in police custody, allegedly made a confessional statement. The testimony of I.O. (P.W.7) reveals that on recording the statement of the appellant under Section 27 of the Evidence Act, he (the appellant) led the I.O. as well other witnesses to his bedroom situated within the campus of the Mosque and gave recovery of an axe (M.O.I). Thereafter, he led the team to the staircase of the Mosque under which the amputated left leg was burnt. From the said place, I.O. seized the burnt pieces of bones as well as wood vide Ext.5. But PW-2, who was a witness to the discovery of burnt portion of amputated left leg, categorically testified that:-

> *"4.Police again called me on 16.07.1998 to the Police Station and asked me about the incident. On 16.07.1998 at about 6 P.M. police called me and one Iftehikar Immam to police station. In our presence the accused disclosed while in police custody to have cut the left leg of his daughter the deceased with an axe which he had concealed along with the severed portion of the left leg which the accused told to have burnt and further told to have concealed those things under the earth of the 'Neem' tree inside the 'Shia' mosque of Mangal Bazar and so saying led us and the police officer to the 'Shia' mosque campus of Mangal Bazar and also to the 'Neem' tree where he had allegedly concealed the axe and the burnt portion of the left leg under the earth. Police had recorded the statement of the accused before he led us to the spot for giving recovery of the weapon of offence and the severed left leg."*

The spot map, which finds place in the crime detail form available in the lower Court record, does not disclose the location of the staircase and from which place the amputated left limb of the deceased was recovered. Thus, it would be unsafe to apply the rigors of last seen theory as well as provisions of Section 106 of

the Evidence Act to the case at hand. In addition to the above, it is the categorical testimony of PWs-2 & 6 that the appellant was in police custody from 05.07.1998 onwards. In view of the circumstances discussed above, it is very difficult to come to a conclusion that the appellant is the perpetrator of the crime and convict him under Section 302 IPC.

16. A plain reading of Section 201 of IPC makes it clear that a conviction under the said Section can be sustained, firstly when the accused alleged of such offence knows or has reason to believe that an offence has been committed and with an intent to screen the offender from a legal punishment, cause the evidence to disappear or gives false information in respect of such offence knowing or having reason to believe the same to be false. In the case of ***Palvinder Kaur Vs. State of Punjab***, reported in AIR 1952 SC 354, it is held as under:-

> *"In order to establish the charge under section 201, Indian Penal Code, it is essential to prove that an offence has been committed-mere suspicion that it has been committed is not sufficient, that the accused knew or had reason to believe that such offence had been committed and with the requisite-knowledge and with the intent to screen the offender from legal punishment causes the evidence thereof to disappear or gives false information respecting such offences knowing or having reason to believe the same to be false. It was essential in these circumstances for the prosecution to establish affirmatively that the death of Jaspal was caused by the administration of potassium cyanide by some person (the appellant having been acquitted of this charge) and that she had reason to believe that it was so caused and with that knowledge she took part in the concealment and 'disposal of the dead body....."*

In the case of ***Sukhram Vs. State of Maharashtra***, reported in 2007 (7) SCC 502, it is held as under:

> *"15. The first paragraph of the Section contains the postulates for constituting the offence while the remaining three paragraphs prescribe three different tiers of punishments depending upon the degree of offence in each situation. To bring home an offence under Section 201 of IPC, the ingredients to be established are: (i) committal of an offence; (ii) person charged with the offence under Section 201 must have the knowledge or reason to believe that an offence has been committed; (iii) person charged with the said offence should have caused disappearance of evidence and (iv) the act should have been done with the intention of screening the offender from legal punishment or with that intention he should have given information respecting the offence, which he knew or believed to be false. It is plain that the intent to screen the offender committing an offence must be the primary and sole aim of the accused. It hardly needs any emphasis that in order to bring home an offence under Section 201 IPC, a mere suspicion is not sufficient. There must be on record cogent evidence to prove that the accused knew or had information sufficient to lead him to believe that the offence had been committed and that the accused has caused the evidence to disappear in order to screen the offender, known or unknown."*

In the case of ***Padmini Mahendrabhai Gadda Vs. State of Gujarat***, reported in JT 2017 (7) 225, Hon'ble Supreme Court at pargarph-18 following the case law decided in ***Sou. Vijaya alias Baby Vs. State of Maharashtra***, reported in JT 2003 (Suppl. 1) SC 270 also laid down the same principle.

In the instant case, there is no iota of evidence to come to a conclusion that the appellant knew or had reason to believe the commission of such offence as well as he had an intention to cause disappearance of evidence in order to screen the offender from legal punishment. Had it been so, he would not have disclosed about burial of the cadaver before PWs. 1, 2 and 6. As held in the aforesaid case laws, all the ingredients of Section 201 IPC must be satisfied to sustain a conviction under the said provision. As the aforesaid two ingredients are conspicuously absent in the case at hand, it is very difficult to maintain a conviction under Section 201 IPC against the appellant.

17. In view of the discussions made above, it is apparent that the learned trial Court although made his best endeavour to bring home the charge against the appellant under Sections 302 and 201 IPC, but he has failed to take into consideration the aforesaid legal position while adjudicating the matter.Accordingly, the appeal is allowed. The impugned judgment of conviction and sentence, being not sustainable, is set aside. The appellant be set at liberty forthwith, if his incarceration is not required in any other case. LCR be sent back forthwith.

2018 (II) ILR - CUT- 234

S.K. MISHRA, J.

W.P.(C) NO. 25344 OF 2017

M/S. KCS PRIVATE LTD. …….Petitioner

.Vs.

ROSY ENTERPRISES ……..Opp. Parties

ARBITRATION AND CONCILIATION ACT, 1996 – Section 29 A – Provisions under – Application for extension of time for passing of award – District Judge rejected the same holding that it had no jurisdiction to extend the time limit – Whether correct? – Held, No, the District Judge being the Principal Civil Judge of the District does have the jurisdiction to extend the time.

"The High Court of Orissa does not exercise the original civil jurisdiction. Sub-Section (2) of Section 2 of the Orissa Civil Courts Act, 1984 provides that the court of the District Judge shall be the principal court of original civil jurisdiction in the district and the explanation provides that for the purpose of this sub-section the expression 'District Judge' shall not include an Additional District Judge. Thus, for the State of Odisha, the District Judge is the 'Court' within the definition of the aforesaid Section. In that view of the matter, the learned District Judge, Sundargarh does have jurisdiction under Sub-Section (5) of Section 29A of the Act to extend the period of passing of the arbitral award. Instead of remanding the matter, as considerable time has been elapsed in the mean time, this Court think it proper to extend the time as prayed for by the petitioner and the opposite parties. It may be remembered that the petitioner and the opposite parties have filed a joint petition before the learned District Judge, Sundargarh and both the parties are agreed to extend the time frame as envisaged under Section 29A of the Act, I am inclined to extend the time for passing of the

arbitral award. Secondly, it is stated that the matter of dispute is complicated and involves voluminous evidence. Hence, in the interest of justice, it is appropriate to extend the period of passing of arbitral award by another six months, which would start from the date of production of certified copy of this order before the Arbitral Tribunal." *(Paras 10 & 11)*

Case Laws Relied on and Referred to :-

1. (2015) 1 SCC 32 : State of West Bengal and others .Vs. Associated Contractors.
2. (2007) 1 SCC 467 : M/s. Pandey and Co. Builders Pvt. Ltd. .Vs. State of Bihar.

For Petitioner : M/s. Damodar Pati, S.K. Mishra, D.R. Mohapatra, P.R. Mishra, G. Dash and S.K. Dash.

For Opp. Parties : M/s. U.C. Mishra, Ashutosh Mishra, P.K. Tripathy & J.K. Mohapatra

JUDGMENT Date of Judgment :06 .07.2018

S.K. MISHRA, J.

In this writ petition, the petitioner assails the order dated 16.11.2017 passed by the learned District Judge, Sundargarh in Arbitration Petition No.06 of 2017 rejecting the joint application filed by the petitioner and the opposite parties for extension of time for making the award on mutual consent under sub-section (4) of Section 29A of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act" for brevity).

02. Facts are not disputed. It is apparent from the records that an agreement was entered into between the parties at Rourkela and as per the work order issued on 14.01.2010, the consortium consisting the petitioner and opposite parties was given the order of execution of work inside the Rourkela Steel Plant by MECON LTD. The agreement was between the petitioner and the opposite parties, who are parties to the consortium. It has an arbitration clause. As dispute arose between the parties and could not be resolved amicably, this Court as per order dated 07.04.2016 passed in Arbitration Petition No.17 of 2013 appointed Sri Gayadhar Panda, retired District Judge, as the Sole Arbitrator to decide the dispute.

03. Pursuant to the notice dated 07.5.2016 issued by the learned Coordinator, High Court of Orissa Arbitration Centre, Cuttack, the matter of arbitration has been registered as Arbitration Proceeding No.18 of 2016. Pursuant to the above notice, the learned Arbitrator commenced the proceeding of arbitration and the same is continuing since 24.05.2016. It is the case of both the parties that the arbitration proceeding could not be concluded within a period of twelve months i.e. by 23.05.2017, for which with the consent of both the parties, the learned Arbitrator vide order dated 05.06.2017 extended the period of arbitration for a period of six months, i.e. up-to 23.11.2017 as envisaged under sub-section (3) of Section 29A of the Act.

04. It is the case of both the parties that they have produced voluminous documents which are very much required for just adjudication of the dispute.

Because of voluminous documents and lengthy cross-examination, it was practically impossible for the Arbitral Tribunal to complete the proceeding by 23.11.2017. Accordingly, the present petitioner filed an application before the learned District Judge, Sundargarh, which has been registered as Arbitration Petition No.6/2017, for extension of time under Section 29A of the Act. The opposite parties also did not contest the same and agreed for extension of time. However, the learned District Judge come to the conclusion that no other Court except the Hon'ble Apex Court and this Court have been conferred with the power to appoint Arbitrator as per the provisions of the Act. Hence, the learned District Judge was of the view that he does not have jurisdiction to appoint Arbitrator. So he lacks power to extend the period for passing of arbitral award.

05. Learned counsel appearing for both parties agreed that there is no covered judgment and it has to be decided on the facts of the case. For this purpose, it is appropriate to take note of Section 29A of the Act and quote the same for the purpose of proper appreciation. It reads as follows:-

> "29A**. Time limit for arbitral award**.-(1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.
>
> *Explanation*.- For the purpose of this sub-section, an arbitral tribunal shall be needed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, or their appointment.
>
> (2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.
>
> (3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.
>
> (4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:
>
> Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent for each month of such delay.
>
> (5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.
>
> (6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.
>
> (7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party."

06. Sub-section (1) of Section 29A of the Act provides that the award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference. Sub-section (2) of Section 29A of the Act provides that if the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree. Sub-section (3) of Section 29A of the Act provides that the parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months. As far as sub-section (4) of section 29A of the Act is concerned, the mandate of the arbitrator shall terminate unless the court has, either prior to or after the expiry of the period so specified, extended the period. There are also provisions regarding deduction of fees of the Arbitral Tribunal if the court finds that the delay has been caused because of the reasons attributed to the Arbitral Tribunal. So the most important provision is sub-section (4) of Section 29A of the Act. It is apparent from sub-section (4) of Section 29A of the Act that if the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period.

07. Similar question arose before a Single Judge Bench of Kerala High Court in OP(C) No.3256 of 2017 (O) (**M/s. URC Construction (Private) Ltd., No.119, Power House Road, Tamilnadu, Erode-638001, represented by Managing Director, C. Devarajan –vrs.- M/s. BEML Ltd., Palakkad Complex, Kinfra Wisepark, Menonpara Road, Kanjikode, Palakkad-678621, Rep. by its Chief General Manager, P. Sivakumar**) decided on 16th November, 2017, wherein an application was filed under Sub-Section (5) of Section 29A of the Act. The Single Judge Bench of the Kerala High Court having taken note of the judgments of the Hon'ble Supreme Court in the case of **M/s. Pandey and Co. Builders Pvt. Ltd. – vrs.- State of Bihar**: (2007) 1 SCC 467 and in the case of **State of West Bengal and others –vrs.- Associated Contractors** : (2015) 1 SCC 32, held that "*under the provisions of the Arbitration and Conciliation Act, 1996 the competent court is fixed as the Principal Civil Court exercising original jurisdiction or a High Court exercising original civil jurisdiction, and no other Court*". Therefore, the Single Bench of the Kerala High Court holding that the Kerala High Court does not have jurisdiction to extend the time under Sub-Section (5) of Section 29A of the Act, dismissed the original petition as not maintainable giving liberty to the petitioner therein to file appropriate application before the appropriate forum.

08. It is appropriate to quote the exact ratio laid down by the Hon'ble Supreme Court in the case of **M/s. Pandey and Co. Builders Pvt. Ltd.** (supra). It is quoted below:

> "16. Unlike the 1940 Act, the Arbitrator is entitled to determine his own jurisdiction. In the event, the Arbitrator opines that he has jurisdiction in the matter, he may proceed therewith, which order can be challenged along with the award in terms of Section 34 of the 1996 Act. If the Arbitrator opines that he has no jurisdiction to hear the matter, an appeal lies before the court. "Court" has been defined in Section 2(1)(e) of the 1996 Act in the following terms:
>
> "2(1)(e) 'court' means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;"
>
> 17. It is not disputed before us that the Patna High Court does not exercise any original civil jurisdiction. The definition of "court" as noticed hereinbefore means the Principal Civil Court of original jurisdiction in a district and includes the High Court which exercises the original civil jurisdiction. If a High Court does not exercise the original civil jurisdiction, it would not be a "court" within the meaning of the said provision. Constitution of the courts vis-a-vis the hierarchy thereof is governed by the 1887 Act, Section 3 whereof reads as under:
>
> "3. Classes of Courts.- There shall be the following classes of Civil Courts under this Act, namely: -
>
> (a) The Court of the District Judge;
> (b) The Court of the Additional Judge;
> (c) The Court of the Subordinate Judge; and
> (d) The Court of the Munsif."
>
> 18. Chapter III of the 1887 Act relates to ordinary jurisdiction of the civil courts. Section 18 provides for extent of original jurisdiction of District and Subordinate Judge in the following terms:
>
> "18. Extent of original jurisdiction of District or Subordinate Judge.-Save as otherwise provided by any enactment for the time being in force, the jurisdiction of a District Judge or Subordinate Judge extends, subject to the provisions of Section 15 of the Code of Civil Procedure, 1908 to all original suits for the time being cognizable by Civil Courts"."

09. A Three Judge Bench of the Hon'ble Supreme Court in the case of **State of West Bengal and others** (supra), wherein the question arose that which court has the jurisdiction to entertain and decide the application under Section 34 of the Act. Hon'ble Supreme Court in the case of **State of West Bengal and others** (supra) have held that "*section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in the district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Arbitration Act, 1996. The definition of "court" in Section 2(1)(e) in the 1996 Act fixes "court" to be the Principal Civil Court of Original Jurisdiction in the district or the High Court in exercise of its ordinary original civil jurisdiction. Section 2(1)(e) further goes on to say that a court would not include*

any civil court of a grade inferior to such Principal Civil Court, or a Small Cause Court. The definition is an exhaustive one as it uses the expression "means and includes". It is settled law that such definitions are meant to be exhaustive in nature". Hon'ble Supreme Court further held that "*where a High Court exercises ordinary original civil jurisdiction over a district, the High Court will have preference to the Principal Civil Court of Original Jurisdiction in that district. Firstly, the very inclusion of the High Court in the definition would be rendered nugatory if the above conclusion was not to be accepted, because the Principal Civil Court of Original Jurisdiction in a district is always a court lower in grade than the High Court, and such District Judge being lower in grade than the High Court would always exclude the High Court from adjudicating upon the matter. Secondly, the provisions of the Arbitration Act leave no room for any doubt that it is the superior most court exercising original jurisdiction which has been chosen to adjudicate disputes arising out of arbitration agreements*". It was a case of Calcutta High Court which exercised original civil jurisdiction. Hence, the Hon'ble Supreme Court have held that the High Court of Calcutta was held to be the Principal Civil Court of Original Jurisdiction. Thus, it is clear that while the High Courts of Patna and Kerala are not the 'Court', the Calcutta High Court is the 'Court' within the meaning of Section 2(1)(e) of the Act.

10. The High Court of Orissa does not exercise the original civil jurisdiction. Sub-Section (2) of Section 2 of the Orissa Civil Courts Act, 1984 provides that the court of the District Judge shal1 be the principal court of original civil jurisdiction in the district and the explanation provides that for the purpose of this sub-section the expression 'District Judge' shall not include an Additional District Judge. Thus, for the State of Odisha, the District Judge is the 'Court' within the definition of the aforesaid Section.

11. In that view of the matter, the learned District Judge, Sundargarh does have jurisdiction under Sub-Section (5) of Section 29A of the Act to extend the period of passing of the arbitral award. Instead of remanding the matter, as considerable time has been elapsed in the mean time, this Court think it proper to extend the time as prayed for by the petitioner and the opposite parties. It may be remembered that the petitioner and the opposite parties have filed a joint petition before the learned District Judge, Sundargarh and both the parties are agreed to extend the time frame as envisaged under Section 29A of the Act, I am inclined to extend the time for passing of the arbitral award. Secondly, it is stated that the matter of dispute is complicated and involves voluminous evidence. Hence, in the interest of justice, it is appropriate to extend the period of passing of arbitral award by another six months, which would start from the date of production of certified copy of this order before the Arbitral Tribunal.

12. With the aforesaid observations, this writ petition is allowed. The order impugned is hereby quashed. There shall be no order as to cost.

2018 (II) ILR - CUT- 240

DR. A.K.RATH, J.

W.P.(C) NO. 1907 OF 2003

PARSURAM MALIK .....Petitioner

.Vs.

STATE BANK OF INDIA & ORS. .....Opp. Parties

SERVICE – Disciplinary proceeding – Petitioner a Clerk-cum-Cashier in the State Bank of India appointed on compassionate ground – Misappropriation of funds by forging signature – Admission of guilt – Removed from service – Appeal dismissed – The question as to whether the court can interfere in the order of punishment – Held, No. – In cases involving corruption, there cannot be any other punishment than dismissal – Any sympathy shown in such cases is totally uncalled for and opposed to public interest – The amount misappropriated may be small or large; it is the act of misappropriation that is relevant, as held by the Apex Court in the case of Municipal Committee, Bahadurgarh v. Krishnan Behari and others, AIR 1996 SC 1249 followed.

Case Laws Relied on and Referred to :-

1. AIR 1996 SC 1249 : Municipal Committee, Bahadurgarh Vs. Krishnan Behari & Ors.
2. (2003) 4 SCC 364 : Chairman and Managing Director, United Commercial Bank & Ors. .Vs. P.C.Kakar,

AIR 1996 SC 484 : B.C.Chaturvedi .Vs. Union of India & Ors.

For Petitioner : Mr.Sachidananda Sahoo

For Opp. Parties : Mr.Dilip Kumar Mishra and Mr.Prabhab Behera

JUDGMENT Date of Hearing: 30.7.2018 Date of Judgment:06.8.2018

DR. A.K.RATH, J.

This petition challenges the order dated 13.7.2001 passed by the Deputy General Manager and Appellate Authority, State Bank of India vide Annexure-10. By the said order, the appellate authority dismissed the appeal filed by the petitioner and confirmed the order passed by the Assistant General Manager, Region-IV and Disciplinary Authority removing the petitioner from service vide Annexure-9.

2. Shorn of unnecessary details, the short facts of the case is that the petitioner was appointed as Clerk-cum-Cashier in the State Bank of India, Balichandrapur Branch on 7.6.1995 on compassionate ground.

He was placed under suspension pending disciplinary proceeding. Following charges were framed against him.

"01. SAVINGS BANK A/C NO. P/24/16133 OF
SHRI NATABAR JENA & SMT.SOSILA JENA (E or S)

(i) You have forged the signatures of the drawer Shri Natabar Jena on the following four cash withdrawals and misappropriated the amount aggregating to Rs.55,000=00.

a) On 14.04.98 Rs.10,000=00
b) On 16.04.98 Rs. 5,000=00
c) On 20.04.98 Rs.20,000=00
d) On 23.05.98 Rs.20,000=00

(ii) You have posted the above mentioned cash withdrawals in the ledger without presentation of the relative Pass Book.

(iii) Two numbers of fictitious credit entries for Rs.35,000=00 on 17.04.98 and Rs.20,000=00 on 25.05.98 were made by you in the ledger sheet of S/B a/c No.P/24/16133 without any bona fide transactions referred to in Bank's Books.

(iv) You have forged the checking Official's initial and wrongly authenticated the resultant balance (s) in the ledger sheet in respect of the fictitious credit entries in S/B a/c referred to item No.(ii) above.

(v) You have surreptiously altered the balance relating to S/B a/c No.P/24/16133 in S/B balance Books on 24.04.98 an 21.05.98 in order to avoid detection of the fraudulent entries during the course of balancing of books and to conceal the fraud. The figures thus adjusted/altered are as under:-

24.04.98	Rs.49,960=29 (Balance shown in the ledgersheet)	Rs.14,980=29 (Balance in the balance book)
21.05.98	Rs.35,160=29 (Balance shown In the ledgersheet)	Rs.160=29 (Balance in the balance book)

(vi) You have posted the S/B withdrawals in S/B ledger referred to in Clause (1)(i) although S.B. Counters were not assigned to you on the relative dates.

(vii) You have issued tokens in respect of the withdrawals referred to in Clause (1)(i) although you have were not working in the counter.

(viii) You have deposited Rs.200=00 on 18.06.1998 in the S/B a/c No.P24/16133 in order to avoid a debit balance.

02. SAVINGS BANK A/C NO.SIB/7/11805
(SHRI PRADEEP KUMAR SAMAL)

(i) You have made one credit entry of Rs.50,000=00 on 21.08.98 and one debit entry of Rs.165=00 on 21.08.98 in the ledger sheet of SB a/c No.SIB/7/11805 of Shri Pradeep Kumar Samal without any bonafide transactions. Also you have authenticated the resultant balance in the ledgersheet in respect of the above credit and debit entries by forging the checking official's initial.

(ii) you have forged the signature of Shri Pradeep Kumar Samal, the drawer, on the withdrawal for Rs.10,000=00 dated 28.08.98 and you have posted the said withdrawal in the ledger without presentation of the relative Pass Book, although you were not assigned to the counter.

03. DEMAND LOAN A/C NO.SL/9/1727 & 1737
(SHRI PRADIPTA KUMAR SATPATHY)

You closed the demand loan account No.0/1727 for Rs.2,000=00 of one Shri P.K.Satpathy and renewed the same for Rs.10,000=00 by forging his signature on all relevant documents.

04. DEPOSITS INTO VARIOUS ACCOUNTS IN WHICH FRAUD WAS ALLEGEDLY COMMITTED:

On various dates you have deposited sums aggregating to Rs.1,02,985=00 (which comes to Rs.1,03,000=00 along with Rs.15=00 towards interest for restoration of defrauded sums in the respective a/cs, in which you have allegedly committed fraud.

05. Your above acts are highly prejudicial to the interest of the Bank and if proved, will tantamount to gross misconduct on your part in terms of paragraph 521(i)(j) of Sastry Award)."

3. The petitioner was asked to show cause. The disciplinary authority appointed an enquiry officer. During enquiry, the petitioner admitted all the charges. The enquiry officer held that the charges were proved and submitted its report to the disciplinary authority. Thereafter, show cause was issued to him on 5.1.2001 vide Annexure-7. On taking a holistic view of the matter, the disciplinary authority removed the petitioner from service. He unsuccessfully challenged the said order before the appellate authority which was eventually dismissed.

4. A counter affidavit has been filed by the opposite parties stating therein that the petitioner was appointed as Clerk-cum-Cashier on compassionate ground after death of his father. The petitioner swindled away the money of the customers and acted in a manner prejudicial to the interest of the Bank. The Bank sustained loss. Charges were framed against the petitioner. He was asked to show cause. During enquiry, the petitioner admitted the charges. The enquiry officer held that charges were proved and submitted its report to the disciplinary authority. A copy of the report was sent to the petitioner to submit his representation. The disciplinary authority after examining the relevant records as well as enquiry report came to hold that the charges were proved. Show cause notice was issued to him. The petitioner submitted his reply admitting the mistake and prayed for relaxation of proposed punishment of removal from service. Considering the gravity of offence, the order of punishment was passed. A lenient view was taken by the Bank and he was removed from service.

5. Heard Mr.Schidananda Sahoo, learned Advocate for the petitioner and Mr.Dilip Kumar Mishra along with Mr.Prabhab Behera, learned Advocate for the opposite parties.

6. Mr.Sahoo, learned Advocate for the petitioner submitted that the petitioner committed a mistake. He admitted the charges. He had also deposited the amount in the Bank. The Bank had not sustained any financial loss. The disciplinary authority

as well as the appellate authority ought to have taken a lenient view in awarding lesser punishment. He further submitted that the court in order to shorten the litigation may award lesser punishment. The petitioner may be reinstated in service. To buttress the submission, he placed reliance on a decision of the apex Court in the case of Kailash Nath Gupta v. Enquiry Officer (R.K.Rai), Allahabad Bank and others, AIR 2003 SC 1377.

7. Per contra, Mr.Mishra, learned Advocate for the opposite parties submitted that charges levelled against the petitioner were serious. He admitted the guilty. The Bank was lenient enough in awarding punishment of removal from service. The same commensurate with the gravity of the offence.

8. The scope of interference with the quantum of punishment awarded by the disciplinary authority is well known. In B.C.Chaturvedi v. Union of India and others, AIR 1996 SC 484, the apex Court held :

> "13. The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has coextensive power to reappreciate the evidence or the nature of punishment. In a disciplinary inquiry the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal.
>
> xx xx xx
>
> 18. A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.
>
> xx xx xx
>
> 22. ……a High Court would be within its jurisdiction to modify the punishment/penalty by moulding the relief, which power in undoubtedly has, in view of long lines of decisions of this Court, to which reference is not deemed necessary, as the position is well settled in law……."
>
> The same view was reiterated in Kailash Nath Gupta (supra).

9. In Chairman and Managing Director, United Commercial Bank and others v. P.C.Kakar, (2003) 4 SCC 364, the apex Court held :

> "14. A bank officer is required to exercise higher standards of honesty and integrity. He deals with money of the depositors and the customers. Every officer/employee of the bank is required to take all possible steps to protect the interests of the bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a bank officer. Good conduct and discipline are inseparable from the functioning of every officer/employee of the bank. As was observed by this Court in *Disciplinary Authority-cum-Regional Manager v. Nikunja Bihari Patnaik*, (1996) 9 SCC 69,

it is no defence available to say that there was no loss or profit resulted in case, when the officer/employee acted without authority. The very discipline of an organization more particularly a bank is dependent upon of its officers and officers acting and operating within their allotted sphere. Acting beyond one's authority is by itself a breach of discipline and is a misconduct. The charges against the employee were not casual in nature and were serious. That being so, the plea about absence of loss is also sans substance."

10. In cases involving corruption, there cannot be any other punishment than dismissal. Any sympathy shown in such cases is totally uncalled for and opposed to public interest. The amount misappropriated may be small or large; it is the act of misappropriation that is relevant, as held by the Apex Court in the case of Municipal Committee, Bahadurgarh v. Krishnan Behari and others, AIR 1996 SC 1249. (Emphasis laid)

11. The logical sequitur of the analysis made above is that the writ petition, sans merit, deserves dismissal. Accordingly, the same is dismissed. No costs.

2018 (II) ILR - CUT- 244

DR. A.K.RATH, J.

W.P.(C) NO. 20090 OF 2016

BISWARANJAN BARIK ……..Petitioner

.Vs.

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

ORISSA CIVIL SERVICE (Rehabilitation Assistance) RULES, 1990 – Rule 2 – Provisions under – Father of the petitioner died while in service – Application for compassionate appointment by son – Rejected on the ground that he being the third legal heir not entitled for the job as the wife of the deceased was alive – Whether correct – Held, No. – The rejection illegal.

Case Laws Relied on and Referred to :-

1. AIR 1952 SC 16 : Commissioner of Police, Bombay .Vs. Gordhandas Bhanji.

For Petitioner : Mr.Sangram Jena

For Opp. Parties : Mr.Bikram Senapati, Addl.Govt.Advocate

JUDGMENT Date of Hearing & Judgment:09.8.2018

DR. A.K.RATH, J.

By this application under Article 226 of the Constitution of India, challenge is made to the order dated 6.10.2016 passed by the Joint Secretary to Government of Orissa, Department of Higher Education, Annexure-10, rejecting the claim of the petitioner for compassionate appointment under Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 ("Rules, 1990") on the ground that the petitioner is the third legal heir of the deceased employee in order of preference.

2. Bereft of unnecessary details, the case of the petitioner is that Bula Barik, father of the petitioner, was working as Peon in Kishore Nagar College. He died on 14.5.2006 leaving behind his widow, three daughters and one son, petitioner while in service. The petitioner made an application for appointment under the Rules, 1990. The same was sent to the Government of Orissa by the Principal of the Kishore Nagar College on 2.11.2006. By letter dated 6.10.2016, the Joint Secretary to Government of Orissa, Department of Higher Education intimated the Director, Higher Education, Orissa rejecting the claim of the petitioner on the ground that he is the third legal heir of the deceased employee in order of preference and the same is in contravention of Rule 2(b) of the Rules, 1990.

3. A counter affidavit has been filed by opposite party no.2 justifying the order. It is stated that of Rules, 1990 is meant to save the family from distress condition due to death of an employee. The first preference is given to wife/husband for the said benefit. In the instant case, the widow of the deceased employee is alive. She was 38 years old at the time of death of her husband. She should apply for the benefit under the Rules, 1990. But then, her son being the third legal heir applied for the job. Further, as per Rule 9(6) of the Rules, 1990 application should be submitted within one year from the death of the employee. The employee expired in the year 2006. The incomplete application was submitted in the year 2011 i.e., after lapse of five years, which is in contravention of Rule 9(6) of Rules, 1990. In view of the same, the case of the petitioner was rejected.

4. Heard Mr.Sangram Jena, learned Advocate for the petitioner and Mr.Bikram Senapati, learned Additional Government Advocate.

5. Before adverting to the contentions raised by the learned counsel for the parties, it will be necessary to set out some of the provisions of Rules, 1990. Deserving case has been defined under Rule 2(a) of the Rules, 1990, as follows:-

> "2. Definitions – xx xx xx
>
> (a) "Deserving Case" means a case where the appointing authority is satisfied, after making such enquiry as may be necessary:-
>
> (i) That the death of the employee has adversely affected his family financially because the family has no other alternative mode of livelihood;
>
> (ii) That there is existence of distress condition in the family after death of the employee;
>
> (iii) That none of the family members of the employee who had died while in service is already in the employment of Government/Public or Private Sector or engaged in independent business with an earning (capable to tide over the distress condition of the family arising out of the sudden death of the employee) and
>
> (iv) That the family does not have adequate income from the immovable properties to earn its livelihood".

"Family members" have been defined under Rule 2(b) of the Orissa Civil Service (Rehabilitation Assistance) Rules, 1990, as follows:

(b) "Family Members" shall mean and include the following members in order of preference-

(i) Wife/Husband;

(ii) Sons or step sons or sons legally adopted through a registered deed;

(ii) Unmarried daughters and unmarred step daughters;

(iv) (Widowed daughter or daughter-in-law residing permanently with the affected family)

(v) Unmarried or widowed sister permanently residing with the affected family.

(vi) Brother of unmarried Government servant who was wholly dependant on such Government servant at the time of death."

6. Admittedly, Bula Barik, father of the petitioner was working as a Peon in Kishore Nagar College. He died on 14.5.2006 leaving behind his widow, three daughters and one son, petitioner while in service. The petitioner made an application for appointment under the Rules, 1990 in the year 2006 as would be evident from the letter dated 2.11.2006 sent by the Principal of the Kishore Nagar College to the Deputy Secretary to Government, Department of Higher Education vide Annexure-3 series. The same was rejected in the year 2016. There was no justification on the part of opposite parties 1 and 2 to sit over the application for an indefinite period.

7. On a conspectus of the Rules, 1990, it is evident that six category persons have been enumerated in family members. If the family is in distressed condition, any member of the family can make an application, provided the conditions mentioned in Rule 2(a) are satisfied.

8. It is apt to state here that in course of hearing, learned Advocate for the petitioner files an affidavit in Court stating therein that the legal heirs have sworn an affidavit before the Execution Magistrate that they have no objection, if the petitioner is appointed under the Rules, 1990 and the other legal heirs have not been engaged in Govt. or non-Govt. organization.

9. The application was rejected solely on the ground that the petitioner is the third legal heir. It is too late in the day to contend that the application was not made within one year from the death of the employee as per 9(6) of the Rules, 1990. The order of rejection cannot be justified by taking another ground. In the case of Commissioner of Police, Bombay v. Gordhandas Bhanji, AIR 1952 SC 16, Justice Vivian Bose proclaimed that public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

10. For the lackadaisical attitude exhibited by the opposite parties, the petitioner has suffered. He is waiting since 2006. His application was rejected on jejune grounds.

11. A priori, the writ petition is allowed. The matter is remitted back to opposite party no.1 to consider the case of the petitioner for appointment under the Rules, 1990 within three months from the date or production of certified copy of the judgment.

2018 (II) ILR - CUT- 247

DR. A.K.RATH, J

WP(C) NO.12543 OF 2010

SATYANARAYAN MISHRA …….Petitioner

.Vs.

BOARD OF SECONDARY EDUCATION OF ORISSA & ORS. ……..Opp. Parties

(A) THE ODISHA CIVIL SERVICES (Classification, Control & Appeal) RULES, 1962 read with Sub-rule 2(a) of Rule 7 of the Odisha Civil Services (Pension) Rules, 1992 – Provisions under – Disciplinary proceeding initiated against the petitioner while in service – During pendency, the petitioner retired from service on attaining the age of superannuation – The question arose as to whether the same can continue after retirement – Held, Yes.

"Article of charges were supplied to the petitioner vide memo dated 11.3.2008. The petitioner retired from service on attaining the age of superannuation on 31.01.2012. By virtue of the legal fiction created in Sub-rule 2(a) of Rule 7 of the Odisha Civil Services (Pension) Rules, 1992, the petitioner would be deemed to be in service although he has reached the age of superannuation" *(Para 12)*

(B) SERVICE – Disciplinary Proceeding – Prayer for quashing of show cause notice and charge sheet – Whether permissible – Held, No.

"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 give 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 13)*

Case Laws Relied on and Referred to :-

1. 1985 (II) OLR 494 : Dr. (Smt.) Sushila Mishra v. Union of India & Ors.
2. (2007) 6 SCC 528 : Dilip S. Dahanukar .Vs. Kotak Mahindra Co. Ltd.
3. (2007) 6 SCC 694 : UCO Bank and another .Vs. Rajinder Lal Capoor.
4. (2007) 9 SCC 625 : Coal India Limited .Vs. Saroj Kumar Mishra.
5. (2007) 6 SCC 704 : Union of India .Vs. Sangram Keshari Nayak.
6. AIR 2007 SC 906 : Union of India .Vs. Kunisetty Satyanarayana.
7. AIR 2002 SC 2250 : Secretary, Min. of Defence and others .Vs. Prabash Chandra Mirdha.
8. AIR 1986 SC 2118 : Kashinath Dikshita .Vs. Union of India and others.

For Petitioners : Mr. Ashok Kumar Mohapatra,
Mr. Bibaswata Mohapatra.

JUDGMENT Date of Hearing: 07.08.2018 Date of Judgment: 20.08.2018

DR. A.K.RATH, J

This petition challenges the order dated 22.8.2007, vide Annexure-1, passed by the President, Board of Secondary Education of Orissa, (in short, "BSE") placing the petitioner under suspension as well as the charge-sheet, vide Annexure-2, issued by the Secretary, BSE to the petitioner.

2. Shorn of unnecessary details, the case of the petitioner was that he was working as Section Officer, Level-II in BSE. He was placed under suspension on 22.8.2007 by the President, BSE, opposite party no.2, pending disciplinary proceeding. On 11.3.2008, the Secretary, BSE, opposite party no.1, issued charge-sheet against him, inter alia, on the charges of grave misconduct for alleged commission of illegalities in tampering documents and increasing marks of a candidate Sri Bijaya Shankar Das; mishandling of examination relating documents especially of marks foils etc. leading to illegal increase of marks of the said candidate with mala fide intention to help the candidate in the annual High School Certificate Examination, 2007 and dereliction of duty. The disciplinary proceeding was initiated against him on the basis of the report submitted to the Chief Secretary to the Government of Orissa, but then the copy of the report had not been supplied to him. There was no whisper in the report about the involvement of the petitioner in the tampering of marks. He was directed to submit the written statement of defence. He requested opposite party no.1 on 26.3.2008 to supply relevant documents enabling him to submit the written statement of defence to the charge-sheet, but the same had not been supplied to him. While matter stood thus, an FIR was lodged. The matter was handed over to the Crime Branch of the State; whereafter G.R Case No.1057 of 2007 was registered. The Crime Branch after investigation submitted the charge-sheet on 31.12.2008 before the learned S.D.J.M., Cuttack against Dr. Minaketan Pani, ex-Secretary, Manamohan Swain, ex-Controller of Examination, Nityananda Sutar, ex-Section Officer, Certificate-II and Smt. Bharati Patra, ex-Senior Assistant, Certificate-II of the BSE and three outsiders. He was not an accused in the said case. He was cited as a witness. He made a representation to opposite party no.2 to reinstate him in service. But then, Dr. Minaketan Pani,

Manamohan Swain, Nityananda Sutar, Babaji Charan Beura and Akshya Kumar Behera had been reinstated in service. Opposite party no.1 sent a letter on 24.2.2009 to the Principal Secretary to Government, Department of School and Mass Education, Orissa pertaining to investigation made by the Crime Branch and departmental proceedings and requested the latter to reinstate the petitioner in service. Pursuant to the letter dated 5.6.2009, opposite party no.1 sent a letter on 28.7.2009 stating that the departmental proceedings could not proceed against the petitioner due to non-supply of documents. In the meantime he retired from service on 31.01.2012 on attaining the age of superannuation. With this factual scenario, the writ petition was filed seeking the reliefs mentioned supra.

3. A counter affidavit has been filed by opposite parties 1 and 2. According to the opposite parties, the petitioner was the Section Officer. He was the custodian of the relevant papers of the confidential section. The disciplinary proceeding was initiated against him for manipulation and tampering of marks of the student in the annual HSC Examination, 2007. Opposite parties initiated disciplinary proceeding on the basis of the report of the Chief Secretary, State of Orissa. Article of charges were supplied to the petitioner vide memo dated 11.3.2008. But then, the petitioner had not filed his written statement of defence. Some documents sought by the petitioner had been seized by the Crime Branch. One of the document was not available. The petitioner is well aware of the same. The appointing authority initiated departmental proceeding against the petitioner on the charge of misconduct and dereliction of duty. Criminal case and the departmental proceeding stand on different footing. Due to delay in disposal of the departmental proceeding, the petitioner was reinstated in service. Thereafter, he retired from service on attaining the age of superannuation.

4. Heard Mr. Ashok Kumar Mohapatra along with Mr. Bibaswata Mohapatra, learned counsel for the petitioner. None appeared for the opposite parties.

5. Mr. Mohapatra, learned counsel for the petitioner submitted that the charge-sheet was issued against the petitioner on 11.3.2008. The petitioner requested the opposite parties to supply documents basing upon which, charges were framed. The documents had not been supplied to the petitioner. No enquiry officer had been appointed to conduct the enquiry. The petitioner had retired from service in the year 2011. Thus departmental proceeding initiated against the petitioner could not continue. He further submitted that the petitioner was a witness in the criminal case. No departmental proceeding was initiated against the persons who were accused in the criminal case. Opposite parties could not pick and choose to initiate a departmental proceeding. To buttress the submission, he placed reliance on the decisions of this Court in the case of Dr. (Smt.) Sushila Mishra v. Union of India and others, 1985 (II) OLR 494, Sri Manoj Kumar Kar v. Board of Directors, Kalinga Gramya Bank (Earlier known as Cuttack Gramya Bank) and another, 2012 (I) OLR 180, and State Bank of India Officer's Association and another v. State Bank of

India represented through its Chief General Manager and another, 2013 (II) OLR 339.

6. The disciplinary proceeding was initiated while the petitioner was in service. The petitioner had retired from service on attaining the age of superannuation. The question does arise as to whether the same can continue after retirement of the petitioner ?

7. The Odisha Civil Services (Classification, Control & Appeal) Rules, 1962 as well as the Odisha Civil Services (Pension) Rules, 1992 have been adopted by the BSE. Sub-rule 2(a) of Rule 7 of the Odisha Civil Services (Pension) Rules, 1992 provides that -

> "7 (2)(a) Such departmental proceedings referred to in sub-rule (1), if instituted while the Government servant was in service, whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemed to be a proceeding under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service:
>
> Provided that when the departmental proceedings are instituted by an authority, subordinate to Government that authority shall submit a report recording its findings to the Government."

8. A cursory perusal of the said Rule, it is evident that a legal fiction has been created. The scope and ambit of a legal fiction should be confined to the object and purport for which the same has been created. In Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. (2007) 6 SCC 528, the apex Court held that legal fiction must be construed having regard to the purport of the statue.

9. An identical question came up for consideration before the apex Court in the case of UCO Bank and another v. Rajinder Lal Capoor, (2007) 6 SCC 694. On an interpretation of Regulation 20 of the UCO Bank Officer Employees' Services Regulations, 1979, the apex Court held that legal fiction has been created. When a valid departmental proceeding is initiated by reason of the legal fiction raised in terms of the said provision, the delinquent officer would be deemed to be in service although he has reached his age of superannuation. The departmental proceeding is not initiated merely by issuance of a show cause notice. It is initiated only when a charge sheet is issued.

10. In Coal India Limited v. Saroj Kumar Mishra, (2007) 9 SCC 625, the apex Court held that a departmental proceeding is ordinarily said to be initiated only when a charge sheet is issued. The same view was reiterated in Union of India v. Sangram Keshari Nayak, (2007) 6 SCC 704. The apex Court further held that an order of dismissal or removal from service can be passed only when an employee is in service. If a person is not in employment, the question of terminating his services ordinarily would not arise unless there exists a specific rule in that behalf.

11. The ratio in the decisions cited supra proprio vigore applies to the facts of this case as well.

12. Article of charges were supplied to the petitioner vide memo dated 11.3.2008. The petitioner retired from service on attaining the age of superannuation on 31.01.2012. By virtue of the legal fiction created in Sub-rule 2(a) of Rule 7 of the Odisha Civil Services (Pension) Rules, 1992, the petitioner would be deemed to be in service although he has reached the age of superannuation.

13. 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 give 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.

14. In Secretary, Min. of Defence and others v. Prabash Chandra Mirdha, AIR 2002 SC 2250, the apex Court held that charge-sheet cannot generally be a subject-matter of challenge as it does not adversely affect the rights of the delinquent unless it is established that the same has been issued by an authority not competent to initiate the disciplinarily proceedings. Neither the disciplinary proceedings nor the charge-sheet be quashed at an initial stage at it would be a premature stage to deal with the issues. Proceedings are not liable to be quashed on the grounds that proceedings had been initiated at a belated stage or could not be concluded in a reasonable period unless the delay creates prejudice to the delinquent employee. Gravity of alleged misconduct is a relevant factor to be taken into consideration while quashing the proceedings. In State Bank of India Officer's Association, this Court referred to the decision of the apex Court in the case of Prabash Chandra Mirdha (supra).

15. In Kashinath Dikshita v. Union of India and others, AIR 1986 SC 2118, the apex Court has succinctly stated the rationale for the rule requiring supply of copies of documents, basing on which charges levelled against a delinquent officer. In the said case, the appellant had requested for supply of documents. The request was turned down by the disciplinary authority. The enquiry proceedings had been challenged on the ground of non-supply of statements of witnesses and copies of documents. The apex Court held that when a Government servant is facing a

disciplinary proceeding, he is entitled to be afforded a reasonable opportunity to meet the charges against him in an effective manner. And no one facing a departmental enquiry can effectively meet the charges unless the copies of the relevant statements and documents to be used against him are made available to him. In the absence of such copies, how can the concerned employee prepare his defense, cross-examine the witnesses and point out the inconsistencies with a view to show that the allegations are incredible ? It is difficult to comprehend why the disciplinary authority assumed an intransigent posture and refused to furnish the copies notwithstanding the specific request made by the appellant in this behalf. Perhaps the disciplinary authority made it a prestige issue. If only the disciplinary authority had asked itself the question : "What is the harm in making available the material?" and weighed the pros and cons, the disciplinary authority could not reasonably have adopted such a rigid and adamant attitude. On the one hand there was the risk of the time and effort invested in the departmental enquiry being wasted if the Courts came to the conclusion that failure to supply these materials would be tantamount to denial of reasonable opportunity to the appellant to defend himself. On the other hand by making available the copies of the documents and statements are disciplinary authority was not running any risk. There was nothing confidential or privileged in it. The same view was taken in Dr. (Smt.) Sushila Mishra (supra).

16. The petitioner sent a letter to the disciplinary authority to supply documents basing upon which charges were framed. The disciplinary authority cannot shriek its responsibility in saying that the documents had been seized by the Crime Branch and one of the document was not available. Copies of documents formed the foundation of charge sheet. Unless documents are supplied, it will not be possible on the part of the petitioner to file the written statement of defence.

17. The order of suspension was revoked and the petitioner had been reinstated in service. Thus the first prayer has become redundant.

18. Initiation of criminal proceeding and departmental proceeding stands on a different footing. Merely because the petitioner was not an accused in the criminal case, the same does not preclude the opposite parties from initiating departmental proceeding. On this count charge-sheet cannot be quashed. Allegations are very serious. The matter was enquired into by the Crime Branch. The Crime Branch seized the documents. The accused persons faced trial. Thus delay in concluding departmental proceeding cannot be attributed solely to the opposite parties 1 and 2.

19. In view of the discussions made supra, the charge-sheet, vide Annexure-2, issued by the Secretary, Board of Secondary Education, Orissa, opposite party no.1, cannot be quashed.

20. The writ petition is disposed of with a direction to the Secretary, Board of Secondary Education of Orissa, opposite party no.1, to supply the documents to the petitioner basing upon which charges had been framed against him enabling him to

file written statement of defence within a period of three months from the date of production of the certified copy of the judgment. Opposite parties 1 and 2 shall conclude the disciplinary proceeding as expeditiously as possible, preferably within three months from the date of supply of the documents.

2018 (II) ILR - CUT- 253

DR. A.K.RATH, J

WP(C) NO.11014 OF 2018

MANAGING COMMITTEE OF HARIHARESWAR PANCHAYAT HIGH SCHOOL & ORS. ……..Petitioners

.Vs.

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

(A) CONSTITUTION OF INDIA, 1950 – Article 14 and 21 – Rights under – Held, access to justice is a facet of the right guaranteed under Article 14 of the Constitution, which guarantees equality before law and equal protection of law to not only citizens, but also non-citizens – Access to justice is a facet of right to life guaranteed under Article 21 of the Constitution as well – The right is so basic and inalienable that no system of governance can possibly ignore its significance, leave alone afford to deny the same to its citizens. (Paras 9 & 10)

(B) ODISHA EDUCATION (PAYMENT OF GRANT- IN - AID TO THE HIGH SCHOOLS, UPPER PRIMARY (ME) SCHOOLS, SANSKRIT TOLS AND MADRASAS) Order, 2017 – Clause 3 and 4 – Entitlement of the benefits thereof – Condition stipulated therein for swearing an affidavit requiring the employee to say on oath that he has no court case pending before any legal forum to avail Grant-in-Aid as per Grant-in-Aid Order, 1994 or under any special provisions of any Act and Rules made for the purpose or that he has withdrawn the case filed in respect of Grant-in-Aid claims – Question arose as to whether such a condition can be imposed – Held, no, by the impugned order, the Government have created a distinction between the employees who are willing to avail the benefits and others to pursue the litigation in the court of law – The Government is the ideal employer – As held by the apex Court access to justice is the fundamental right enshrined under Article 14 and 21 of the Constitution – The said right cannot be cabined, cribbed or confined by the impugned order.

Case Laws Relied on and Referred to :-

1. 1989 (II) OLR 394 : Narayan Sahoo & Ors. .Vs. State of Orissa & Ors.
2. 2014 (Supp.I) OLR (FB) 729 : Aruna Kumar Swain .Vs. State of Orissa.
3. 1996 (I) OLR (FB) 152 : Laxmidhar Pati and others .Vs. State of Orissa & Ors.
4. AIR 1968 SC 647 : State of Orissa .Vs. Sudhansu Sekhar Misra.
5. 1996 (1) OLR (FB) 152 : Laxmidhar Pati and Ors. .Vs. State of Orissa & Ors.
6. AIR 2012 SC 642 : Imtiyaz Ahmad .Vs. State of Uttar Pradesh & Ors.
7. AIR 2016 SC 3506 : Anita Kushwaha .Vs. Pushap Sudan.

For Petitioners : Mr. Jagannath Pattnaik, Sr. Adv.,
Mr. Ashok Mohanty, Sr. Adv., Mr. J. K. Rath, Sr. Adv.,
Mr. B. Routray, Sr. Adv., Dr. Dillip Kumar Mohapatra,
Mr. A. Sahoo, Mr. N. Nayak, Mr. G. Chaitanya.

For Opp. Parties : Mr. Sandeep Parida, Sr. Standing Counsel S & ME.,
Mr. Bansidhar Satapathy, Standing Counsel S & ME

JUDGMENT Date of Hearing: 21.08.2018 Date of Judgment: 21.08.2018

DR. A.K.RATH, J

Justice R.C. Patnaik (as he then was) in Narayan Sahoo and others v. State of Orissa and others, 1989 (II) OLR 394 while classifying the litigants proclaimed:

> "By and large, common man is not litigation-minded nor he is averse to litigation. Litigation is not his pursuit, his hobby. Sometimes, however, he inherits litigation and willy-nilly pursues it. Often, however, a litigation is thrust on him…"

2. The petitioners belong to the last category. The petitioners are the Managing Committee of Harihareswar Panchayat High School, Bhikaripalli in the district of Ganjam and its employees.

3. The brief facts of the case are that the Government of Odisha in its School & Mass Education Department, in exercise of the power conferred by sub-section (4) of Section 7-C of the Odisha Education Act, 1969, has issued the order dated 22nd October, 2017 to regulate the Private Educational Institutions (being High School, Upper Primary (ME) Schools, Sanskrit Tols & Madrasas), namely, the Odisha Education (Payment of Grant-in-Aid to the High Schools, Upper Primary (ME) Schools, Sanskrit Tols and Madrasas) Order, 2017 ('Grant-in-Aid Order, 2017'). Grant-in-Aid Order 2017 is applicable to the employees who are governed under the provisions of the Odisha Education (Payment of Grant-in-Aid to the High Schools, Upper Primary (M.E.) Schools, Sanskrit Tols & Madrasas) Order, 2013 subject to the provisions of the Order. Clause 3 thereof deals with entitlement of the employees. Clause 4 deals with payment of Grant-in-Aid for all categories of institutions subject to the stipulations contained therein. On the same day i.e. on 22.10.2017 another order was issued by the Government, vide Annexure-3, prescribing the following terms and conditions;

> "The employees of Non-Government Aided Educational Institutions who are governed under the provisions of sub-para (a) of Para-5 of the Odisha Education (Payment of Grant-in-Aid to the High Schools, Upper Primary (M.E) Schools, Sanskrit Tols and Madrasas) Order, 2013 as on 31.12.2017 and who are willing for the negotiated settlement may follow the Modalities in the Annexure-A."

Annexure-A of the Modalities provides that the employee willing to avail Grant-in-Aid as per the Grant-in-Order, 2017 has to submit an affidavit in non-judicial stamp paper of value Rs.10/- with due notarization to the effect that he/she has no Court case in respect of GIA claims pending in any legal forum/has withdrawn the said case (as in Annexure-B). The format for affidavit Annexure-B stipulates that the employee has to swear an affidavit stating that he is desirous of availing the benefit of negotiated settlement offered by the Government under Grant-in-Aid Order, 2017 with effect from 01.01.2018; he has no court cases pending before any legal forum to avail Grant-in-Aid as per Grant-in-Aid Order, 1994 or under any special provisions of any Act and Rules made for the purpose; that he has withdrawn the case filed in respect of Grant-in-Aid claim bearing GIA/WPC/SLP No…/…or any other (specified) before the High Court/Supreme Court. Added to it he has to make a declaration that if at any subsequent stage any of the statements made in affidavit are found to be false/incorrect, the benefit of Grant-in-Aid received by the employee as per Grant-in-Aid Order, 2017 with effect from 01.01.2018 shall be withdrawn. Subsequently the affidavit has been substituted by written intimation by order dated 20.03.2018, vide Annexure-4. The Government have issued another order on 04.06.2018 stipulating time limit. The willing employees have to submit their willingness by 31.07.2018.

4. The grievance of the petitioners is that the terms and conditions embodied in the order dated 22.10.2017 more particularly clause-2 of Modalities-A, format for affidavit requiring the employee that he has no court case pending before any legal forum to avail Grant-in-Aid as per Grant-in-Aid Order, 1994 or under any special provisions of any Act and Rules made for the purpose or that he has withdrawn the case filed in respect of Grant-in-Aid claim bearing GIA/W.P.C./SLP. No……/…… Or any other (specified) before the Hon'ble High Court/Hon'ble Supreme Court and the declaration that if at any subsequent stage any of the statements made in affidavit are found to be false/incorrect the benefit of Grant-in-Aid received by the employee as per Grant-in-Aid Order, 2017 with effect from 01.01.2018 shall be withdrawn, are anathema to the ethos and philosophy embodied in the Constitution. The same are violative of Articles 14 and 21 of the Constitution.

5. A counter affidavit has been filed by the opposite parties in connected writ petition being WP(C) No.9524 of 2018. The Government have adopted the same in the instant case. It is stated that the State Government, in exercise of the powers conferred by sub-section (4) of Section 7-C of the Orissa Education Act, 1969 (Odisha Act of 15 of 1969) introduced Grant-in-Aid Order, 2017 to regulate the payment of Grant-in-aid to the non Government educational institutions (non Government colleges, Junior Colleges and Higher Secondary Schools) making it effective from 1st January 2018. The Grant-in-Aid order was made applicable to the employees who are governed under the provisions of the Grant-in-Aid Order, 2008, Grant-in-Aid Order, 2009 and Grant-in-Aid Order, 2009 (for non Government

Upasastri and Sastri Colleges). The employees covered under the Grant-in-Aid Order, 2017 shall receive the salary components in the following manner;

> I. For the employees receiving Grant-in-Aid as per GIA Order, 2009 are to receive Grant-in-Aid in terms of GIA Order, 2017 = initial pay + grade pay as per ORSP Rule 2018 + 136% DA with 5 increments.
>
> II. For the employees receiving Grant-in-Aid as per GIA Order, 2008 are to receive Grant-in-Aid in terms of GIA Order, 2017 = initial pay + grade pay as per ORSP Rule, 2008 + 136% DA with 2 increments.
>
> III. For the employees receiving Grant-in-Aid as per GIA Order, 2009 (for Upasastri and Sastri courses) are to receive Grant-in-Aid in terms of GIA Order, 2017 = initial pay + grade pay as per ORSP Rule, 2008 + 136% DA with 2 increments.

Further to be governed under GIA Order, 2017, another Government order dated 22.10.2017 has been published in the extraordinary Gazette of the State Government vide SRO No.512/2017 which carries the modalities to be fulfilled by the employee concerned to be governed under Grant-in-Aid Order, 2017. The modalities have to be fulfilled by the employee concerned. The desirous employees to avail the benefit may follow the modalities and furnish information. It is further stated that the gazette notification bringing out Grant-in-Aid Order, 2017 is intended to benefit the employees as per Grant-in-Aid Order, 2009 and 2008 by covering them under direct payment pay fold scheme. The same is never intended to discriminate any person/employee. It is further stated that the apex Court has upheld the rights of the individual employees of the non-Govt. aided colleges who do not want to comply with the conditions mentioned in the Grant-in-Aid Order, 2017 and are desirous of pursuing their independent rights. Nobody will be forced or coerced to accept the conditions. The benefits of Grant-in-Aid Order, 2017 would be given to those employees who comply with the conditions as observed by the apex Court. The others, who choose to await the outcome of their cases in the appropriate court of law will continue to draw their normal emoluments as per the terms of the valid Grant-in-Aid Orders applicable. As and when appropriate court order is received in such individual cases, the Government will implement such orders or prefer appeal by exploring legal opportunities available.

6. Heard Mr. Jagannath Pattnaik, learned Senior Advocate, Mr. Ashok Mohanty, learned Senior Advocate, Mr. J. K. Rath, learned Senior Advocate, Mr. Budhadev Routray, Sr. Advocate for the petitioners, Mr. Sandeep Parida, learned Senior Standing Counsel for the School & Mass Education and Mr. Bansidhar Satapathi, Standing Counsel for the School & Mass Education.

7. Learned Senior Advocates for the petitioners submit that sub-section (4) of Section 7-C of the Odisha Education Act, 1969 contains a non-obstante clause. It provides that notwithstanding anything contained in any law, rule executive order or any judgment, decree or order of 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 Odisha Education (Amendment) Act, 1994, except in accordance with an order or rule made under the Odisha Education Act, 1969. 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. In exercise of power conferred by sub-section (4) of Section 7-C of the Odisha Education Act, 1969, the State Government promulgated the Odisha Education (Payment of Grant-in-aid to the High School and Upper Primary Schools) Order, 1994 for the teaching and non-teaching of the schools and colleges. Subsequently another Grant-in-Aid Order was issued in the year 2008 for the school and colleges. Some of the employees filed applications under Section 24-B of the Orissa Education Act before the learned State Education Tribunal for payment of Grant-in-Aid pursuant to Grant-in-aid Order, 1994. At this juncture, the impugned Grant-in-Aid Order, 2017 has been issued by the Government of Odisha. According to the learned Senior Advocates for the petitioners, access to justice is the fundamental right enshrined under Articles 14 and 21 of the Constitution of India. By the executive instruction, the fundamental rights of the petitioners cannot be curtailed to approach the portals of the court. Reliance is placed on the decisions of the apex Court in the case of Imtiyaz Ahmad v. State of Uttar Pradesh and others, AIR 2012 SC 642 and Anita Kushwaha v. Pushap Sudan, AIR 2016 SC 3506.

8. Per contra, learned Sr. Standing Counsel for the School & Mass Education submits that the Government of Odisha have not compelled the petitioners to withdraw the case pending before the learned Tribunal nor the impugned order has deprived the petitioners from claiming Grant-in-Aid. It is open to the petitioners to pursue the litigation. Nobody is forced or coerced to accept the conditions enumerated in Grant-in-Aid Order, 2017. The apex Court has upheld the rights of the individual employees who do not want to comply with the conditions mentioned in the Grant-in-Aid Order, 2017 and are desirous of pursuing their independent rights. The others, who choose to await the outcome of their cases in the appropriate court of law will continue to draw their normal emoluments as per the terms of the Grant-in-Aid Orders applicable. He further submits that the matter has been set at rest by the apex Court in the case of State of Odisha and others v. Managing Committee of Gadadhar Pradhan High School & another, (M.A No.64 of 2017 in C.A No(s).2466/2017). He further submits that the apex Court has observed that those, who want to benefit by this order have to comply with the conditions mentioned therein and those, who still want to question it and want to agitate their independent rights are free to do so in accordance with law, before the appropriate fourm. In view of the same, the apprehension of the petitioners is unjustified. The modalities have been prescribed after the direction of the apex Court. He further submits that an employee cannot claim Grant-in-Aid as a matter of right. To buttress the submission, he places reliance on the decision of this Court in the case of Laxmidhar Pati and others v. State of Orissa and others, 1996 (1) OLR (FB) 152.

9. Access to justice is a facet of the right guaranteed under Article 14 of the Constitution, which guarantees equality before law and equal protection of law to not only citizens, but also non-citizens. Access to justice is a facet of right to life guaranteed under Article 21 of the Constitution as well.

10. In Imtiyaz Ahmad (supra), the apex Court held that a person's access to justice is a guaranteed fundamental right under the Constitution and particularly Article 21. Denial of this right undermines public confidence in the justice delivery system and incentivises people to look for short-cuts and other fora where they feel that justice will be done quicker. In the long run, this also weakens the justice delivery system and poses a threat to Rule of Law. Access to justice must not be understood in a purely quantitative dimension. Access to justice in an egalitarian democracy must be understood to mean qualitative access to justice as well. Access to justice is, therefore, much more than improving an individual's access to courts, or guaranteeing representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and inequitable.

11. In Anita Kushwaha (supra), the apex Court held that access to justice is and has been recognised as a part and parcel of right to life in India and in all civilized societies around the globe. The right is so basic and inalienable that no system of governance can possibly ignore its significance, leave alone afford to deny the same to its citizens. The Magna Carta, the Universal Declaration of Rights, the International Covenant on Civil and Political Rights, 1966, the ancient Roman Jurisprudential maxim of 'Ubi Jus Ibi Remedium', the development of fundamental principles of common law by judicial pronouncements of the Courts over centuries past have all contributed to the acceptance of access to justice as a basic and inalienable human right which all civilized societies and systems recognize and enforce. Given the fact that pronouncements mentioned above have interpreted and understood the word "'life" appearing in Article 21 of the Constitution on a broad spectrum of rights considered incidental and/or integral to the right to life, there is no real reason why access to justice should be considered to be falling outside the class and category of the said rights, which already stands recognized as being a part and parcel of the Article 21 of the Constitution of India. If "life" implies not only life in the physical sense but a bundle of rights that makes life worth living, there is no juristic or other basis for holding that denial of "access to justice" will not affect the quality of human life so as to take access to justice out of the purview of right to life guaranteed under Article 21. Access to justice is a facet of right to life guaranteed under Article 21 of the Constitution. Access to justice may as well be the facet of the right guaranteed under Article 14 of the Constitution, which guarantees equality before law and equal protection of laws to not only citizens but non-citizens also. Equality before law and equal protection of laws is not limited in its application to the realm of executive action that enforces the law. It is as much available in relation to proceedings before Courts and tribunal and adjudicatory fora where law

is applied and justice administered. The Citizen's inability to access courts or any other adjudicatory mechanism provided for determination of rights and obligations is bound to result in denial of the guarantee contained in Article 14 both in relation to equality before law as well as equal protection of laws. Absence of any adjudicatory mechanism or the inadequacy of such mechanism, needless to say, is bound to prevent those looking for enforcement of their right to equality before laws and equal protection of the laws from seeking redress and thereby negate the guarantee of equality before laws or equal protection of laws and reduce it to a mere teasing illusion. Article 21 of the Constitution apart, access to justice can be said to be part of the guarantee contained in Article 14 as well.

12. The ratio in the decisions cited supra apply proprio vigore to the facts of the case.

13. By the impugned order, the Government have created a distinction between the employees who are willing to avail the benefits and others to pursue the litigation in the court of law. The Government is the ideal employer. As held by the apex Court access to justice is the fundamental right enshrined under Article 14 and 21 of the Constitution. The said right cannot be cabined, cribbed or confined by the impugned order.

14. The decision cited by the learned counsel for the State in the case of State of Odisha and others v. Managing Committee of Gadadhar Pradhan (M.A No.64 of 2017 in C.A No(s).2466/2017) is distinguishable. The order does not reveal that the issue in question was raised and decided by the apex Court. The same is not a binding precedent.

15. In the State of Orissa v. Sudhansu Sekhar Misra, AIR 1968 SC 647, the Constitution Bench of the apex Court held that a decision is only an authority for what it actually decides. The essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It is not a profitable task to extract a sentence here and there from a judgment and to build upon it.

16. In Laxmidhar Pati and others v. State of Orissa and others, 1996 (I) OLR (FB) 152, the Full Bench of this Court held that there is no absolute right to claim Grant-in-Aid and the financial capacity, the economic potentiality and other development works of Government have to be considered in interpreting Article 41 of the Constitution of India. The Court sounded a word of caution that the Government is a free-lancer in ordering release of grant-in-aid arbitrarily and denying fair-play and by encouraging favouritism. Its decision/order in the matter of grant/refusal of grant-in-aid must be based on sound principles and should not be whimsical or arbitrary. There is no quarrel over the proposition of law.

17. In Aruna Kumar Swain v. State of Orissa, 2014 (Supp.I) OLR (FB) 729, the Full Bench of this Court held as follows:

"Thus, if a case falls under the order covered by Section 7-C(4), it will create an enforceable right and the Court is bound to enforce the same under Article 226 of the Constitution. An enforceable right cannot be defeated on the ground of financial incapacity. There is no restriction on this Court under Article 226 to pass appropriate orders for enforcing fundamental or legal right."

18. The logical sequitur of the analysis made above is that the modalities prescribed in clause-2 under Annexure-A, affidavit Annexure-B as well as declaration Annexure-C so far as withdrawal of cases pending before different fora are arbitrary and violative of Articles 14 and 21 of the Constitution of India.

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

2018 (II) ILR - CUT- 260

B. MOHANTY, J & S.K. SAHOO, J.

JCRLA NO. 16 OF 2012

SARAT JENA …..…Appellant

.Vs.

STATE OF ORISSA ……..Respondent

(A) INDIAN EVIDENCE ACT, 1872 – Section 3 – Principles of appreciation of a case based on circumstantial evidence – Indicated.

"*Adverting to the contentions raised by the learned counsels for the respective parties, there is no dispute that there is no direct evidence as to who committed the murder of the deceased, when and how and the prosecution case hinges on circumstantial evidence. It is well established rule of criminal justice that fouler the crime, the higher should be the degree of proof. A moral opinion howsoever strong or genuine cannot be a substitute for legal proof. When a case is based on circumstantial evidence, a very careful, cautious and meticulous scrutinization of the evidence is necessary and it is the duty of the Court to see that the circumstances from which the conclusion of guilt is to be drawn should be fully proved and those circumstances must be conclusive in nature and all the links in the chain of events must be established clearly beyond reasonable doubt and established circumstances should be consistent only with the hypothesis of guilt of the accused and totally inconsistent with his innocence. Whether the chain of events is complete or not would depend on the facts of each case emanating from the evidence. The Court should not allow suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed away by emotional consideration."* *(Para 8)*

(B) INDIAN EVIDENCE ACT, 1872 – Section 8 – Motive behind the crime – Establishment of – Held, an important factor.

"In a case based on circumstantial evidence, motive assumes pertinent significance as existence of the motive is always an enlightening factor in a process of presumptive reasoning in such a case. No doubt it is only the perpetrator of the crime who knows as to what circumstances prompted him to take a certain course of action leading to the commission of crime, however, the absence of motive puts the Court on its guard to scrutinize the circumstances more carefully to ensure that suspicion and conjecture do not take place of legal proof." *(Para 10)*

Case Laws Relied on and Referred to :-

1. A.I.R. 1999 Supreme Court 1293 : State of Himachal Pradesh .Vs. Jeet Singh.
2. A.I.R. 1947 Privy Council 67 : Pulukuri Kottaya .Vs. King Emperor

For Appellant : Mr. Bibekananda Mohapatra
For Respondent : Mr. S.S. Mohapatra, Addl. Standing Counsel

JUDGMENT Date of Hearing: 04.06.2018 Date of Judgment: 25.06.2018

S.K. SAHOO, J.

The appellant Sarat Jena faced trial in the Court of learned Adhoc Additional Sessions Judge, Fast Track Court, Jajpur in C.T. (Sessions) Case No.117 of 2011 /31 of 2011 for offences punishable under sections 302/201 of the Indian Penal Code on the accusation that on 25.04.2010 he committed uxoricide by killing his wife Gunthi Mallik @ Jena (hereafter 'the deceased') at Mandapara cashew nut field under Korei police station in the district of Jajpur and caused disappearance of evidence with the intention of screening himself from legal punishment.

The appellant was found guilty of both charges and sentenced to undergo imprisonment for life and to pay a fine of Rs.1,000/- for the offence under section 302 of the Indian Penal Code and to undergo further rigorous imprisonment for one year and to pay a fine of Rs.1,000/-, in default, to undergo rigorous imprisonment for three months for the offence under section 201 of the Indian Penal Code.

2. On 25.04.2010 P.W.4 Sanatan Patra lodged the first information report before the officer in charge of Korei police station indicating therein that on that day at about 9.00 a.m., P.W.15 Jaiga Patra of village Mandapara informed him that his brother Pitambar Patra had seen the dead body of a lady lying in a bleeding condition inside the Mandapara cashew nut field. After getting such information, P.W.4 went to the spot and found an unidentified dead body of a female was lying there. He also found blood stains at a little distance from the dead body and there was mark of violence at the spot. The informant marked bleeding injuries on the neck of the dead body and he suspected that somebody after committing murder had thrown the dead body and fled away.

On the basis of such first information report, P.W.18 Subhendu Kumar Sinha, Inspector in charge of Korei police station registered Korei P.S. Case No.55 of 2010 under section 302 of the Indian Penal Code against unknown persons and took up investigation. During course of investigation, he visited the spot and in the presence of the witnesses and Executive Magistrate, he conducted inquest over the dead body and prepared inquest report (Ext.1). He seized the sample earth and blood stained earth, one red colour sword cover from the scene of crime and sent the dead body for post mortem examination. He also took the photographs of the dead body and sent messages to other police stations for identification of the dead body. P.W.17 Dr. Pritee Nayak conducted post mortem examination over the dead body and noticed incised wound over the neck of the dead body and the caus e of death

was opined to be neurogenic and hemorrhagic shock resulting from the homicidal injury on neck. She opined the injury on the neck to be sufficient in ordinary course of nature to cause death. The wearing apparel of the dead body was seized by the Investigating Officer who also received the post mortem report. The dead body was subsequently identified to be that of the deceased Gunthi Mallik. The house of the appellant was also searched and household articles were seized. The investigation of the case was subsequently taken over by Inspector Bichitrananda Samal (P.w.16), Inspector in charge of Korei police station after transfer of P.W.18 on 31.12.2010 who arrested the appellant on 13.01.2011. While in police custody, on the basis of the statement of the appellant recorded under section 27 of the Evidence Act, a sword was recovered and it was seized under seizure list (Ext.5) in presence of the witnesses. P.W.16 made a query to P.W.17 regarding possibility of the injuries sustained by the deceased with the sword which was answered in affirmative as per query report (Ext.8/1). The appellant was forwarded to Court and on the prayer of P.W.16, the material objects were sent to the S.F.S.L., Rasulgarh by learned J.M.F.C., Jajpur Road. On completion of investigation, charge sheet was submitted against the appellant under sections 302/201 of the Indian Penal Code on 28.11.2011.

3. After submission of charge sheet, the case was committed to the Court of Session for trial after observing due committal procedure where the learned trial Court charged the appellant under sections 302/201 of the Indian Penal Code on 29.06.2011 and since the appellant refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

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

P.W.1 Manas Ranjan Samal was the Tahasildar, Sukinda who remained present at the time of holding of inquest over the unidentified dead body of a female and he proved the inquest report Ext.1. He noticed number of external injuries including injury on her neck.

P.W.2 Chandra Bhuyan is also a witness to the inquest. He stated that the dead body of a female was found at Mandapara.

P.W.3 Benudhar Behera was the scribe of the first information report who was also present at the time of inquest of the dead body. He stated that as the ward member, he had gone to the spot and found the dead body of an unknown female.

P.W.4 Sanatan Patra is the informant in the case who was declared hostile by the prosecution. He stated that he proceeded to the spot and found the dead body of a female.

P.W.5 Padan Patra stated to have found the dead body of a female near the cashew nut jungle of Mandapara.

P.W.6 Sahadev Jena stated that the deceased was staying in her paternal house with the appellant who was her husband. He further stated about the seizure of vegetable cutter and other articles from the house of the appellant under seizure list Ext.3 and release of those articles in the zima of Gopi Mallik (P.W.7) under zimanama Ext.4.

P.W.7 Gopi Mallik was the paternal uncle of the deceased who stated that the deceased and the appellant were staying in the paternal village of the deceased and they were found absent from the village and subsequently he came to know about the death of the deceased at village Mandapara. He further stated to have taken of zima of some articles including utensils seized by police.

P.W.8 Banamali Mallik was the brother of the deceased and he stated that the deceased was the concubine of the appellant and was staying with him in his house and they were found absent from the house one day and after two days he came to know about the murder of the deceased at Mandapara.

P.W.9 Babuli Mallik stated that the deceased and the appellant were staying in his village and in his presence, the appellant identified the spot of murder to police and gave recovery of a sword as per his statement which was recorded by police. He is a witness to the seizure list of the sword.

P.W.10 Kalandi Rout did not support the prosecution case for which he was declared hostile.

P.W.11 Milu Perei stated to be present during the house search of the deceased and he further stated that the deceased was staying with her husband.

P.W.12 Sridhar Mallik stated that the deceased had married to one Ranjan prior to the appellant and was staying in village Upulei till her death. She was also declared hostile by the prosecution.

P.W.13 Garuda Jena stated that the deceased had married to one Niranjan who deserted her and then she married to the appellant. He further stated that the appellant showed the place of murder to the police and the statement of the appellant was recorded by the police and he gave recovery of a sword which was seized by police under seizure list (Ext.5).

P.W.14 Subash Das stated that the deceased married to one Ranjan earlier and after Ranjan left her, she again married to the appellant. He further stated that the appellant showed the place of murder to the police at Mandapara jungle and his statement was recorded by the police and he gave recovery of a sword which was seized under seizure list Ext.5. He further stated that the deceased was staying with the appellant till her death.

P.W.15 Jaiga Patra did not state anything about the prosecution case.

P.W.16 Bichitrananda Samal and P.W.18 Subhendu Kumar Sinha were the Inspectors in charge of Korei police station at different point of time who were the Investigating Officers of the case.

P.W.17 Dr. Pritee Nayak was the Medical Officer at Danagadi C.H.C. who on police requisition conducted post mortem examination over an unidentified female dead body on 26.04.2010 and proved her report Ext.9. She also proved the query report Ext.8.

The prosecution exhibited twelve documents. Ext.1 is the inquest report, Ext.2 is the F.I.R., Exts.3, 5, 11 and 12 are the seizure lists, Ext.4 is the zimanama, Ext.6 is the confessional statement of appellant, Ext.7 is the requisition of query, Ext.8 is the query repot, Ext.9 is the post mortem report and Ext.10 is the spot map.

5. The defence plea of the appellant was one of denial and it was pleaded that he was in the State of Karnataka for about nine months and got the message about the death of the deceased after eight months. He further pleaded that the earlier husband of the deceased namely Ranjan had told him to leave the deceased and he might have killed the deceased.

6. The learned trial Court after assessing the evidence on record has been pleased to hold that the appellant and the deceased were staying under one roof as husband and wife and the villagers of Upulei had seen them staying together and both of them were found absent and the dead body was found lying at Mandapara jungle. The learned trial Court further held that the prosecution has not proved the motive of the crime but from the defence evidence and statement of the appellant, it is most probable that to get rid of the deceased, the appellant committed the crime for some personal reason. It was further held that though there is no eye witness to the occurrence, the prosecution has successfully established the links in the chain of circumstances incompatible with the innocence of the appellant. The learned trial Court further held that the appellant failed to prove the plea of alibi at the time of occurrence but he had absconded after the occurrence. It was further held the prosecution has successfully proved the circumstances which link the chain pointing at the guilt of the appellant.

7. Mr. Bibekananda Mohapatra, learned counsel appearing for the appellant contended that in absence of any direct evidence and also clinching circumstantial evidence, it is very difficult to accept that the prosecution has established the charges against the appellant. He further contended that it has not been established beyond all reasonable doubt that the dead body which was found in the cashew nut field of village Mandapara was that of Gunthi Mallik @ Jena who was the wife of the appellant. He emphatically contended that when the prosecution has not proved any motive behind the commission of crime, as the case is based on circumstantial evidence, the prosecution case itself become suspicious. Learned counsel further contended that the statements of the witnesses that the appellant pointed out the

scene of crime as well as gave recovery of the sword which was the weapon of offence is highly suspicious. It is further contended that absconding of the appellant itself is not sufficient to hold him guilty of the offences charged. He further contended that since it was not established that the seized sword was the weapon of offence and the chemical examination report was also not proved, it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Sidhartha Sankar Mohapatra, learned Addl. Standing Counsel for the State on the other hand supported the impugned judgment and in reply, he argued that the circumstances relied upon by the prosecution are consistent only with the hypothesis of the guilt of the appellant and that each of the circumstance has been positively established by the prosecution and all the circumstances taken together unmistakably complete the chain and established that it was the appellant and appellant alone who had committed the crime. He further submitted that since prior to the occurrence in question, the appellant was staying with the deceased and the deceased was found missing and her dead body was recovered from the cashew nut field and she had met with a homicidal death, it was expected of the appellant to give some probable explanation as to under what circumstances the deceased was murdered. Having failed to discharge his burden satisfactorily and his conduct in remaining absent from his house for more than eight months and coming with a plea that he was absent at Karnataka and could not even receive any message from his family members about the death of the deceased is highly suspicious. He further contended that it is very difficult for the prosecution to come up with the exact motive on the part of the appellant to commit the crime which operates in the mind of a person. He emphatically contended that when there is no challenge by the defence that Gunthi Mallik @ Jena was murdered, such a contention at this stage should not be entertained. He asserted that since there is no infirmity or illegality in the impugned judgment, the appeal should be dismissed.

Principles of appreciation of a case based on circumstantial evidence

8. Adverting to the contentions raised by the learned counsels for the respective parties, there is no dispute that there is no direct evidence as to who committed the murder of the deceased, when and how and the prosecution case hinges on circumstantial evidence. It is well established rule of criminal justice that fouler the crime, the higher should be the degree of proof. A moral opinion howsoever strong or genuine cannot be a substitute for legal proof. When a case is based on circumstantial evidence, a very careful, cautious and meticulous scrutinization of the evidence is necessary and it is the duty of the Court to see that the circumstances from which the conclusion of guilt is to be drawn should be fully proved and those circumstances must be conclusive in nature and all the links in the chain of events must be established clearly beyond reasonable doubt and established circumstances should be consistent only with the hypothesis of guilt of the accused and totally inconsistent with his innocence. Whether the chain of events is complete

or not would depend on the facts of each case emanating from the evidence. The Court should not allow suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed away by emotional consideration.

Identity of corpse

9. As per the F.I.R. (Ext.2), one unidentified dead body of a female was lying in the cashew nut field of village Mandapara. The inquest witnesses P.Ws.1, 2 and 3 have stated that the dead body was that of an unidentified female. The inquest report (Ext.1) also did not indicate the name, parentage and residence of the deceased as per column no.2. The post mortem examination report (Ext.9) also indicates that the dead body was of an unknown female. The evidence on record particularly that of P.W.17 Dr. Pritee Mallik establishes the nature of death of the unidentified female to be homicidal which is not disputed by the learned counsel for the appellant. None of the witnesses including the relatives of the deceased like P.W.7 and P.W.8 and her co-villagers stated to have identified the dead body found in the cashew nut field of village Mandapara to be that of Gunthi Mallik @ Jena. Though P.W.18, the I.O. stated to have taken photographs of the dead body but those photographs with negatives were not exhibited during course of trial and even those were not shown to any of the witnesses for identification. P.W.18 has stated that the deceased lady was subsequently identified as Gunthi Mallik, wife of the appellant. His evidence is not clear as to who identified the dead body to be that of Gunthi Mallik @ Jena and how.

When the prosecution has charged the appellant to have committed the murder of his wife Gunthi Mallik @ Jena, it is the first and foremost requirement for the prosecution to establish that the dead body which was found inside the jungle was that of Gunthi Mallik @ Jena particularly when the case is based on circumstantial evidence. In view of the forgoing discussions, I am of the view that the prosecution has not adduced any clinching evidence to establish that the recovered female dead body from inside the cashew nut field in village Mandapara was that of Gunthi Mallik @ Jena. The learned trial Court has altogether ignored this vital aspect of the matter as discussed above, which compelled me to carefully analyse the evidence of the witnesses and the materials on record to come to such finding.

Motive

10. The prosecution has not established any motive on the part of the appellant to commit the murder of his wife. P.W.8, the brother of the deceased has stated that the deceased was the concubine of the appellant whereas P.W.7 has stated that the deceased had married the appellant. P.W.12 and P.W.13 have stated about the earlier marriage of the deceased prior to the marriage with the appellant. There is nothing on record that there was any kind of dissention between the appellant and his wife over any issue.

In a case based on circumstantial evidence, motive assumes pertinent significance as existence of the motive is always an enlightening factor in a process of presumptive reasoning in such a case. No doubt it is only the perpetrator of the crime who knows as to what circumstances prompted him to take a certain course of action leading to the commission of crime, however, the absence of motive puts the Court on its guard to scrutinize the circumstances more carefully to ensure that suspicion and conjecture do not take place of legal proof.

In view of the materials available on record, it can be said that the prosecution has miserably failed to establish any kind of motive on the part of the appellant to commit the crime. The absence of an apparent motive is certainly a relevant factor to be considered in favour of the appellant particularly when the case is based on circumstantial evidence.

Last seen

11. The witnesses have stated that the deceased was staying with the appellant. P.W.8 has stated that about a year back on a Saturday, the appellant and the deceased were found absent from the house and after two days, he came to know about her murder at Mandapara. Though P.W.8 stated that in his house, the deceased was staying with the appellant but in the cross-examination, he has stated that his house is at a short distance from the house where the appellant and the deceased were staying. Similarly, P.W.7 has stated that the deceased was with the appellant in her parental village and they were found absent and then he came to know that Gunthi died at Mandapara. However, in the cross-examination, he has stated that his house is a kilometer away from the house of the appellant and the deceased and he could not say when the appellant was staying with Gunthi in the parental house.

Therefore, there is lack of evidence as to when both the appellant and the deceased were last seen together. In absence of any clinching material relating to close proximity between the last seen and recovery of dead body, it is very difficult to accept such evidence to convict the appellant with the charge of murder of the deceased.

The 'last seen theory' comes into play where the time gap between the point of time when the accused and the deceased were last seen together and the deceased was found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible and 'last seen together' in a criminal case of murder is a circumstance which is only a link in the chain but that evidence alone would not be sufficient to convict the accused.

Conduct of the appellant showing the place of occurrence and leading to discovery of sword

12. P.W.16, the I.O. has stated that he arrested the appellant on 13.01.2011 and while in police custody, the appellant voluntarily confessed his guilt and gave his statement which was recorded under section 27 of the Evidence Act. The appellant

then led the police and the witnesses to Mandapara cashew nut field and showed the place of occurrence where he had committed the murder of the deceased and then led the police party to village Kankadajhara and showed the place of concealment of the weapon of offence i.e. sword which was recovered and seized in presence of the witnesses as per seizure list (Ext.5).

The other witnesses who have stated about such aspect are P.W.9, P.W.13 and P.W.14. None of these witnesses have stated that first the appellant gave his statement which was recorded by police and in pursuance of such statement, the place of occurrence was shown by the appellant so also the sword was recovered. P.W.9 has stated that police took him to the spot and the appellant was with him and the appellant identified the spot of murder and gave recovery of the sword and the police recorded the statement of the appellant wherein he put his thumb impression. P.W.13 has stated that he was taken to the police station after four months of the death of the deceased and then he was taken to Mandapara jungle and the appellant was with police at that time. The appellant showed the place of murder and the statement of the appellant was recorded and then the appellant gave recovery of the sword at a short distance from the place of murder. P.W.14 has stated that police came with the appellant and he was taken along with P.W.9 and P.W.13 to Mandapara jungle where the appellant showed the place of murder and his statement was recorded and then the appellant gave recovery of the sword.

The evidence of P.W.9 and P.W.14 is completely silent regarding the actual place of recovery of sword. P.W.13 has stated that the sword was recovered at a short distance from the place of murder (Mandapara jungle). P.W.16, the I.O. has stated in his chief examination that the place of recovery of sword is at village Kankadajhara whereas in the cross-examination, he has stated that the village Kankadajhara is about one and half kilometer away from the place where the weapon of offence was recovered. P.W.18, the first I.O. on the other hand stated that when he visited the spot on 25.04.2010 and conducted inquest over the dead body, he recovered one red colour sword with cover from the scene of crime. This statement is contrary to the seizure list dated 25.04.2010 prepared by P.W.18 marked as Ext.11 which does not indicate any seizure of sword but a sword cover. If the statement of P.W.18 relating to recovery of one red colour sword with cover from the scene of crime on 25.04.2010 is accepted then the seizure of sword on 13.01.2011 as per seizure list Ext.5 at the instance of the appellant cannot be accepted. Therefore, not only the place of recovery of sword as per the statement of witnesses is discrepant but also such recovery is shrouded in mystery.

It is pertinent to note that the seized sword was not produced during trial and even though the sword was sent for chemical examination on the prayer of the Investigating Officer to S.F.S.L., Rasulgarh through learned J.M.F.C., Jajpur Road but the chemical examination report has also not been proved during trial. It has also not been proved by the prosecution that the seized sword was the weapon of offence.

In view of section 27 of the Evidence Act, only so much of the information as distinctly relates to the facts really thereby discovered is admissible. The extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Information as to past user or past history of the object produced is not related to its discovery in the setting in which it is discovered. The leading decision of the Privy Council on section 27 of the Evidence Act i.e. **Pulukuri Kottaya -Vrs.- King Emperor reported in A.I.R. 1947 Privy Council 67** which has become locus classicus wherein it was held that section 27 of the Evidence Act seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. For example, if the information supplied by a person in custody leads to the discovery of the fact that knife was concealed in the house of the informer to his knowledge and if the knife is proved to have been used in the commission of the offence, the fact discovered becomes very relevant.

In case of **State of Himachal Pradesh -Vrs.- Jeet Singh reported in A.I.R. 1999 Supreme Court 1293**, the Hon'ble Court relying upon the case of **Pulukuri Kottaya** (supra) held that discovery of fact referred to in section 27 of the Evidence Act is not the object recovered but the fact embraces the place from which the object is recovered and the knowledge of the accused as to it.

A discovery of fact includes the object found, the place from which it is produced and the knowledge of the accused as to its existence. As already indicated, the three independent witnesses are completely silent as to what the appellant stated prior to showing the place of occurrence as well as giving recovery of the sword. From their statements, it is also not clear when such a statement was made by the appellant. Even the Investigating Officer has not stated that the appellant made any statement that he would show the place of commission of crime or place of concealment of the sword and so saying, he led the police party and showed the place of occurrence as well as gave recovery of the sword. Even though the statement of the appellant recorded under section 27 of the Evidence Act has been marked as Ext.6 but most part of the statement relates to how the crime was committed by the appellant which is not admissible in view of the bar under section 25 of the Evidence Act as it was not the distinct and proximate cause of the discovery of the sword.

The statement of the appellant recorded under section 27 of the Evidence Act indicates that he kept the sword inside the bushes. The seizure list of the sword vide Ext.5 indicates that the place of seizure of sword was near village Kankadajhara from inside the bushes. None of the witnesses to the seizure of sword including the I.O. (P.W.16) has stated that the sword was recovered from inside the bushes.

According to the prosecution case, the place of occurrence had already been discovered. Once the fact has been discovered, section 27 of the Evidence Act cannot again be made use to *rediscover* the discovered fact or a fact already disclosed and capable of discovery. It would be a total misuse even abuse of the provisions of section 27 of the Evidence Act. (**J.T. 1994 (4) S.C. 1, Sukhvinder Singh -Vrs.- State of Punjab**).

In view of the foregoing discussions, it is very difficult to place any reliance on the prosecution case relating to conduct of the appellant showing the place of occurrence and leading to discovery of sword.

Absconding

13. The occurrence in question stated to have taken place on 25.04.2000. The appellant was arrested by P.W.16 on 13.01.2011. The appellant has taken a specific plea that he was at Karnataka for nine months and he got the news about the death of the deceased eight months after.

There is no material on record that the appellant was aware about the death of his wife and in spite of that he did not turn up to the village. Neither P.W.7 nor P.W.8 who were related to the deceased stated to have intimated the appellant about the death of his wife. None of the Investigating Officers has stated to have made any search of the appellant. The appellant even was not specifically questioned regarding the allegation of absconding in his statement under section 313 of Cr.P.C. In spite of that, in the last question which was of a general in nature as to what he wanted to say about the case, the appellant has taken a plea that he was in the State of Karnataka for about nine months as well as getting message about the death of his wife after eight months. Therefore, neither there is any material that the appellant had full knowledge of the commission of the crime nor there is any material that he voluntarily absconded in order to evade police arrest.

The act of absconding may be a relevant piece of evidence to be considered along with other evidence but it is as such not a determining link in completing the chain of circumstantial evidence and mere absconding should not form the basis of a conviction as it is a weak link in the chain. Absconding by itself is not conclusive either of guilt or of a guilty conscience. Even if it is assumed for the sake of argument, though I am not holding to be so, that the plea of alibi of the appellant is not established, that would not necessarily lead to the success of the prosecution case automatically which is to be independently proved beyond reasonable doubt. Such failure may be an additional circumstance against the appellant but before such additional circumstance is taken into consideration, the prosecution must prove all other circumstances against the appellant to prove his guilt.

Conclusion

14. Analysing the evidence on record meticulously, it is found that the circumstances brought on record by the prosecution have not been fully established

and there is no cogent and reliable evidence against the appellant to have committed the crime. The reasoning assigned by the learned trial Court in convicting the appellant seems to be based on conjecture and suspicion which have no place in the matter of legal proof of guilt of the appellant in a criminal trial and therefore, I am of the humble view that the impugned verdict is nothing but a sheer moral conviction. Emotions have no role to play in a criminal trial in adjudicating the guilt or otherwise of the accused which is to be established by credible evidence. The crime committed may be cruel or ruthless but the evidence has to be evaluated dispassionately and objectively to see whether the accused is responsible for the said crime or he is innocent.

15. In view of the foregoing discussions, I hold that the prosecution has miserably failed to establish the charges against the appellant beyond all reasonable doubt.

In the result, the Jail Criminal Appeal is allowed. The impugned judgment and order of conviction of the appellant and the sentence passed thereunder is set aside. The appellant is acquitted of the charges under sections 302/201 of the Indian Penal Code. The appellant who is in jail custody shall be released forthwith unless his detention is required in any other case. Accordingly, the JCRLA is allowed.

2018 (II) ILR - CUT- 271

DR. B.R.SARANGI, J.

CRLMP NO. 1455 OF 2016

SANTOSH KUMAR TARAI .....Petitioner

.Vs.

JAYASHREE SAHOO .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 125 – Application for maintenance by wife – Consideration thereof – Principles – Held, merely because the wife is earning something, it would not be a ground to reject her claim for maintenance – In a proceeding under Section 125 Cr. P.C., it is not necessary for the Court to ascertain as to who was in wrong and minute details of matrimonial dispute between the husband and wife need not be gone into. (Para 10)

Case Laws Relied on and Referred to :-

1. 2001 (I) OLR 411 : Rasmita Rout @ Baral .Vs. Maheswar Baral.
2. (2015) 61 OCR (SC) 695 : Sunita Kachwaha & Ors .Vs. Anil Kachwaha.
3. 2015 (II) OLR 1037 : Digambar Samal .Vs. Narmada Mohanty and another.
4. 74 (1992) CLT 221 : Sraban Kumar Pradhan .Vs. Smt. Menaka Kumari Rout @ Pradhan & anr.

For petitioner : M/s. S.K. Parida, P.K. Sahoo,
For opp. parties : M/s G. Rath, Sr. Advocate,
Sri S. Rath & B.K. Nayak,

JUDGMENT Decided On: 13.07.2018

DR. B.R.SARANGI, J.

The petitioner-husband has filed this application challenging the order dated 26.09.2016 passed by the Judge, Family Court, Bhubaneswar in CRP No.226 of 2015 granting interim maintenance of Rs.8000/- per month to the opposite party-wife with effect from filing of the petition dated 25.02.2016 and further litigation expenses of Rs.5000/- with the direction that the petitioner-husband shall make payment of interim monthly maintenance before 9th day of every English calendar month.

2. The factual matrix of the case, in hand, is that the petitioner married to the opposite party, which was solemnized on 10.07.2011, as per Hindu rites and customs at the residence of father of the opposite party. After marriage, both the parties lived together for few days as husband and wife in the house of the petitioner. Thereafter, it is alleged that opposite party started showing unbecoming behavior not only to the petitioner but also to his family members and refused to keep marital relationship with the petitioner. As the petitioner was frequently going outside Bhubaneswar for his official work, he could not make any effort to know such attitude of the opposite party. Subsequently, the petitioner informed the facts to the parents of the opposite party, but no result came out. Finally, the opposite party on 07.06.2015 deserted the house of the petitioner. Thereafter, the petitioner sent notice to the opposite party through his lawyer on 07.09.2015 as he wants to live with her as husband and wife for the interest of the family or for making a mutual divorce, but the same was returned unserved. Consequentially, the petitioner filed C.P. No.703 of 2015 before the Judge, Family Court, Bhubaneswar for restitution of conjugal rights, which is pending.

3. The opposite party filed an application under Section 125 Cr. P.C. before the Judge, Family Court, Bhubaneswar, which was registered as CRP No.226 of 2015, with a prayer to pay Rs.20,000/- per month for her maintenance. On 25.02.2015, the opposite party also filed a petition seeking direction to the petitioner to pay Rs.20,000/- for interim maintenance and Rs.10,000/- towards litigation expenses till finalization of CRP No.226 of 2015. The learned Judge, Family Court, Bhubaneswar issued notice to show cause and posted the matter to 07.04.2016. On receipt of notice, the petitioner appeared through his lawyer and filed show cause on 06.05.2016 denying the averments made therein and also filed objection to the petition for interim maintenance stating inter alia that the opposite party, without any reasonable and justifiable ground, deserted the matrimonial house. Thereby, she is guilty of marital disturbances inflicting mental agony and physical torture to him and his old and ailing mother. Therefore, she is not entitled to get any maintenance

and, as such, prayed for rejection of the petition filed for interim maintenance and litigation expenses.

4. The learned Judge, Family Court, Bhubaneswar passed the order impugned order dated 26.09.2016 considering the application dated 25.02.2016 directing the petitioner to pay a sum of Rs.8000/- per month as interim maintenance w.e.f. 25.02.2016 and litigation expenses of Rs.5000/- to the opposite party and also directed that the petitioner shall pay the interim monthly maintenance before 9th day of every English calendar month, hence this application.

5. Mr. S.K. Parida, learned counsel for the petitioner argued with vehemence and contended that on the basis of false allegations made by the opposite party, FIR was registered before the IIC, Mahila Police Station and consequentially, the petitioner was arrested and thereafter released on bail by the court below. Due to such arrest, the petitioner was put under suspension and has not yet received the subsistence allowance. Therefore, the direction given for payment of interim maintenance @Rs.8000/- per month from the date of filing of the application dated 25.02.2016, cannot sustain in the eye of law. It is further contended that after suspension, the petitioner is receiving subsistence allowance to the tune of Rs.24,000/- per month and, therefore the direction for payment of Rs.8000/- as interim maintenance is not justified. At best, the learned Judge, Family Court, Bhubaneswar could have awarded 1/5th of amount received by the petitioner as salary. Therefore, the award of interim maintenance of Rs.8000/- per month is too excessive and cannot and should not have been granted by the court below and accordingly, seeks for quashing of the order so passed. To substantiate his contention, he has relied upon the judgment of this Court rendered in the case of ***Rasmita Rout @ Baral v. Maheswar Baral,*** 2001 (I) OLR 411.

6. Mr. Ganeswar Rath, learned Senior Counsel appearing along with Mr. S. Rath, learned counsel for the opposite party contended that the order passed by learned Judge, Family Court, Bhubaneswar is well discussed and the award of interim maintenance of Rs.8000/- is just and proper taking into consideration the salary of the petitioner as Rs.53,180/-. As suggested by learned counsel for the petitioner, if 1/5th of the salary is to be paid as interim compensation, then the order passed by the learned Judge, Family Court, Bhubaneswar to pay Rs.8000/- towards interim maintenance is less than 1/5th of the total salary of Rs.53,180/- received by the petitioner. Therefore, no illegality or irregularity has been committed by the learned court below by awarding a sum of Rs.8000/- as interim maintenance. It is further contended that by virtue of the interim order dated 11.01.2017 passed in Misc. Case No.325 of 2016, this Court directed for payment of interim maintenance of Rs.6000/- per month, but the same has not yet been paid regularly and, as such, there is outstanding of Rs.70,000/- to be paid by the petitioner. So far as the quantum of interim maintenance is concerned, it is within the complete domain of the court below, especially when the application under Section 125 Cr.P.C. is still

pending for consideration. It is stated that the divorce suit is still pending between the parties. To substantiate his contention, he has relied upon the judgment of this Court rendered in the case of ***Sraban Kumar Pradhan v. Smt. Menaka Kumari Rout @ Pradhan and another,*** 74 (1992) CLT 221, wherein this Court held that when the gross salary is of Rs.2320/- and after deduction, the petitioner therein was getting Rs.1460/-, 1/3rd of the salary, i.e., Rs.500/- was fixed as interim maintenance.

7. Having heard learned counsel for the parties and after going through the records, with the consent of learned counsel for the parties, this application stands disposed of finally at the stage of admission.

8. The undisputed fact being that the petitioner and the opposite party married together and remained as husband and wife for some time and thereafter the opposite party left the matrimonial house. The petitioner filed C.P. No.703 of 2015 before the learned Judge, Family Court, Bhubaneswar for restitution of conjugal rights which is still pending. Apart from the same, the opposite party also filed suit for divorce bearing C.P. No.642 of 2017 which is pending for consideration. During pendency of the litigation between the parties, an application under Section 125 Cr.P.C. was filed by the opposite party registered as CRP No.226 of 2015 for payment of maintenance and subsequently a petition was filed on 25.02.2016 in the said 125 Cr.P.C. proceeding claiming for grant of interim maintenance and litigation expenses and on consideration of such application, the learned Judge, Family Court, Bhubaneswar granted interim maintenance of Rs.8000/- per month with effect from the date of filing of such application i.e., 25.02.2016 and litigation expenses.

9. The simple question which arise for consideration in this case is whether the learned Judge, Family Court, Bhubaneswar is justified in granting interim maintenance in favour of the opposite party on the application filed in a proceeding under Section125 Cr.P.C. or not.

10. There is no dispute that the petitioner and opposite party are husband and wife. In ***Digambar Samal v. Narmada Mohanty and another***, 2015 (II) OLR 1037, wherein it has been held that if the Magistrate is prima facie satisfied with regard to the performance of marriage in proceedings under the section which are of a summary nature, strict proof of performance of essential rights is not required.

11. In ***Sunita Kachwaha & ors v. Anil Kachwaha***, (2015) 61 OCR (SC) 695, the apex Court held that merely because the wife is earning something, it would not be a ground to reject her claim for maintenance. In a proceeding under Section 125 Cr. P.C., it is not necessary for the Court to ascertain as to who was in wrong and minute details of matrimonial dispute between the husband and wife need not be gone into.

12. Applying the above principle to the present context, since the marriage between the parties is admitted, the learned Judge, Family Court, Bhubaneswar is well justified in granting interim maintenance to the opposite party, while

considering the application filed under Section 125 Cr.P.C. Even if the opposite party has got Post Graduate qualification in Political Science and is attending coaching classes for earning her livelihood, that itself cannot absolve the petitioner from payment of maintenance to the opposite party in view of the law discussed above.

13. Mr. S.K. Parida, learned counsel for the petitioner vehemently contended that the petitioner is now getting Rs.24,000/- as monthly salary, as he has been placed under suspension, and therefore the direction given for grant of interim maintenance of Rs.8000/- will be too harsh for him, for which this Court, while issuing notice, passed an interim order for payment of interim maintenance of Rs.6000/-. It is not disputed that this Court, vide order dated 11.01.2017 in Misc. Case No.325 of 2016, granted interim order to pay Rs.6000/-, but that itself cannot be construed that the petitioner should pay that much of amount as interim maintenance to the opposite party, since this Court was to examine the correctness of the order passed by the learned Judge, Family Court, Bhubaneswar in awarding the interim maintenance while considering the application filed by the opposite party in a proceeding under Section 125 Cr.P.C. Nothing has been placed before this Court to indicate that the learned Judge, Family Court, Bhubaneswar is not justified in passing such order, rather it is contended that the award of interim maintenance of Rs.8000/- is excessive and therefore, interference of this Court is imminent. In course of hearing, learned counsel for the opposite party brought to the notice of this Court by producing the salary slip of the petitioner for the month of November, 2017 and stated that in the meantime the order of suspension has been revoked and the petitioner is getting regular salary @ Rs.49,040,/- per month. In such view of the matter, the award of interim maintenance of Rs.8000/- by the learned Judge, Family Court, Bhubaneswar cannot be said to be excessive.

14. In the above view of the mater, this Court is not inclined to interfere with the order dated 26.09.2016 passed by the learned Judge, Family Court, Bhubaneswar in CRP No.226 of 2015 on consideration of the application dated 25.02.2016 for payment of interim maintenance of Rs.8000/- and litigation expenses of Rs.5000/-, which is hereby upheld. However, it is left open to the parties to approach the appropriate forum for reduction or enhancement of the amount of interim maintenance in accordance with law, if they are so advised.

15. With the aforesaid observation, the CRLMP stands disposed of.

2018 (II) ILR - CUT- 276

D.DASH, J.

R.S.A. NO. 441,442 & 443 OF 2015

RAMANATH @ RAMAKANTA MOHANTY ……..Appellant.

.Vs.

UMESH CHANDRA BEHERA & ORS. ……..Respondents.

CODE OF CIVIL PROCEDURE, 1908 – Order-7 Rule 7 – Power of the court to mould the relief – Suit for declaration of right, title and interest on the basis of adverse possession – Material available suggests permissive possession – Prayer for grant of a decree for specific performance of contract by way of amendment – Declined and the order attained finality – Whether at this stage the court can grant the relief of a decree for specific performance of contract – Held, no, it is not permissible to pass a decree for specific performance of contract by moulding the relief in exercise of power under order-7 rule -7 of the Code causing total surprise to the defendants to their utter prejudice.

(Para 20)

For Appellant : M/s. Ajodhya Ranjan Dash, S.K. Nanda-1, B. Mohapatra, K.S. Sahu, L.D. Achari, G.Chaitanya, H.B.Mangaraj,S.K.Routray.

For Respondents : M/s. P.K. Routray, A. Routray, B.G. Mishra, A. Routray, P.K. Jena & J. Bhuyan.

JUDGMENT Date of Hearing : 17.07.2018 Date of Judgment: 13.08.2018

D.DASH, J.

These three appeals under section 100 of the Code of Civil Procedure (herein after for short called 'the Code') arise out of the common judgment dated 30.07.2015 passed by the learned 3rd Additional District Judge, Cuttack in R.F.A. No. 53 of 2011 (37 of 2014) and R.F.A. No. 54 of 2011 (20 of 2014) followed by the decrees.

In both the first appeals i.e. R.F.A. No. 35 of 2011 (37 of 2014) and R.F.A. No. 54 of 2011 (20 of 2014), the challenge was to the common judgment dated 24.02.2011 passed by learned 2nd Civil Judge (Sr. Division), Cuttack in the suits i.e. T.S. No. 67 of 1992 and T.S. No. 562 of 1996, followed by the decrees.

2. This appellant as plaintiff has filed suit i.e. C.S. No. 67 of 1992 against the respondent-defendants praying for a decree of declaration of his right, title, and interest over the suit land and premises as to have been so acquired by way of adverse possession and for permanent injunction, restraining them or their agents etc from entering upon the suit land and premises.

3. The respondents as the plaintiffs have filed the suit i.e. T.S. No. 562 of 1996 with the prayers to pass a decree for eviction of the appellant (defendant therein) and damage @ Rs. 100/- per day with effect from 01.11.1996 till eviction.

4. The order which governs both the suits is as follows:-

> "The plaintiff of T.S. 67-92 is entitled to get the suit property registered in his name by the defendants after payment of present market value of the suit property and house, to be assessed by the Sub-Registrar, Cuttack, to the defendants within two months from the date of this order, failing which the plaintiff is entitled to get the same executed through the court. The defendants are injuncted from entering into the suit land and causing any disturbance in the peaceful possession of the plaintiff of T.S. 67-92."

5. Being aggrieved by the judgment and decrees passed in the suit, the unsuccessful defendants of T.S. No. 67 of 1996 preferred two first appeals under section 96 of the Code which came to be numbered as RFA No. 53 of 2011 (37 of 2014) in connection with T.S. No. 67 of 1992 and R.F.A No. 54 of 2011 (28 of 2014) in connection with T.S. No. 562 of 1996 (37 of 2014).

6. At this stage, it may be stated that this appellant (plaintiff of T.S. No. 67 of 1992 and defendant of T.S. No. 562 of 1996) had filed a cross-objection under order 41 rule 22 of the Code in the first appeal i.e. RFA No. 52 of 2011 (37 of 2014) arising from T.S. No. 67 of 1992 questioning the finding of the trial court recorded against him that he has not acquired the right title and interest over the suit property by adverse possession.

7. The lower appellate court has disposed of the two first appeals along with the cross-objection connected with one such appeal by passing the order which is the following:-

> "Both the appeals are allowed on contest with cost. The impugned judgment and decree passed by the learned 2nd Addl. Civil Judge (Sr. Divn.), Cuttack is hereby set aside. The suit bearing T.S. No. 67 of 1992 is dismissed and T.S. No. 562 of 1996 is decreed. The cross objection of the Respondent is accordingly dismissed. The respondent-plaintiff in T.S. No. 67 of 1992 is directed to give vacant possession of the suit properties to the appellants-plaintiffs in T.S. No. 562 of 1996 within three months hence failing which they are at liberty to take recourse to law and the respondent is further directed to pay the damages of Rs. 100 per day from October, 1996 till the date of eviction."

8. To be precise, the scenario of the lis which presently stands is that this appellant is under the sufferance of a decree for eviction and damage. Therefore, these three second appeals have been filed; one against the dismissal of the suit of declaration of appellant's right, title and interest; the other against the decree for eviction and damage passed against him and the third one against the rejection of cross-objection in the first appeal which had arisen from the suit filed by this appellant i.e. C.S. No. 67 of 1992.

Pertinent, it is to mention at this juncture that the original appellant i.e. the sole plaintiff of T.S. No. 562 of 1996 having died after filing of these appeals, his legal representatives have come on record and are pursuing all these appeals.

9. In the above state of affairs as regards the factual settings giving rise to these appeals; those had been taken up together for hearing on admission as agreed upon by the learned counsel for the appellants as also the respondents who have

entered appearance by filing caveat being in complete agreement with the view that these three appeals have to be disposed of together and a common judgment governing all, stands as the legal need.

10. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as per their position in the original suit i.e. T.S. No. 67 of 1992 which is anterior in point of time.

11. Case of the plaintiff is that Janaki Sundari, mother of these defendants was one of the owners of the property. She during her life time for legal necessary having decided and declared to sale the suit property, the plaintiff offered to pay the maximum consideration of Rs. 30,000/- which was accordingly settled. Pursuant to the same, Janaki Sundari executed an agreement for sale of the suit land to the plaintiff. It is said that the agreement was executed by Janaki for self and on behalf of her minor children i.e. two sons, one of whom is defendant no. 1 and the other one namely, Prakash, not a party and two daughters who are defendant no. 2 and 3. At the time of execution of said agreement on 09.02.1972, there was payment of advance consideration in part amounting to Rs. 15,000/- which Janaki Sundari had accepted and since then the plaintiff was allowed to possess the suit land and building as its owner. The agreement was that the sale deed would be executed within two years i.e. by 09.02.1974 on payment of the balance consideration.

The subject matter of the agreement and the suit is the land measuring Ac.0.47 decimals in Cuttack city under Unit No. 25, Jobra within the jurisdiction of Malgodown Police Station and the building standing over there, assigned with the municipal holding number. Next, it is stated that because of the coming into force of the Urban Land (Ceiling & Regulation) Act, 1976 (for short, called as 'the ULC Act') and for the legal rider contained therein, the sale-deed could not come into being. When that state of affair was prevailing, the elder son of Janaki Sundari namely Prakash attained majority and he having taken up the management of the joint family properties and the connected affairs, demanded the payment of balance consideration of Rs. 15,000/- from the plaintiff. So, on 27.11.1978, Prakash was paid with the balance consideration and at that time, he promised to comply all such legal formalities for permission for the said sale from the competent authority under the ULC Act. However, Prakash did not apply for permission nor the other son and the daughter of Janaki made any such application before the competent authority. So the time period agreed upon for the purpose of execution of sale-deed elapsed, as also said period being reckoned from the time of receipt of balance consideration of Rs. 15,000/- by Prakash subsequently stood elapsed.

It is stated by the plaintiff that he has been continuing to possess the suit land and premises on his own since the time of execution of the agreement for sale by Janaki Sundari and after the expiry of the subsequent time period as agreed upon by the children of Janaki Sundari at the time of receipt of balance consideration of

Rs. 15,000/- with effect from 27.11.1978. He further asserts to be in open, peaceful and uninterrupted possession as the owner of the property and claiming as such with hostile animus to the knowledge of the defendants. Thus, it is stated that the plaintiff has acquired right, title and interest over the suit properties by way of adverse possession. It is, further stated that the plaintiff has met all the expenses every month for the repair and maintenance of the building and had paid other necessary charges with respect to the said properties. As on 04.01.1992 and 13.01.1992, the defendants with ulterior motive created disturbance in the possession of the suit land and premises by the plaintiff, first of all a proceeding under section 144 Cr.P.C. was initiated; and subsequently the suit has been filed.

12. The defendants in their written statement while traversing the plaint averments have specifically denied about the execution of any such deed of agreement for sale by Janaki Sundari in favour of the plaintiff. The document, if any, is said to be forged, fabricated and created one for the purpose. They assert that Janaki Sundari had never executed any such un-registered deed of agreement in favour of the plaintiff nor she or her son Prakash had ever received any amount towards the consideration for sale of the suit properties as alleged and that occasion had never arisen. The document is said to be a created one. Further the facts in support of the same as pleaded are said to be for the purpose, and therefore some close relations of the plaintiff have been made to sign as witnesses to such fabricated agreement, being scribed by plaintiff's own man chosen for the purpose who is used to dance according to his tune. It is stated that the plaintiff was a tenant all along, in so far as the suit properties are concerned and thus there stood all through the relationship of landlord and tenant between Janaki Sundari and plaintiff and thereafter between the defendants and the plaintiff.

13. It is the case of the defendants as narrated in the plaint of the suit i.e. T.S. No. 562 of 1996 filed by them that the plaintiff is a monthly tenant in respect of the said house since the year 1964 and at the time of induction as tenant he was paying rent of Rs. 80/- per month which has subsequently been enhanced from time to time and has stood at Rs. 500/- per month. It is stated that the tenancy has been terminated on 07.10.1996 by serving notice under section 106 of the T.P. Act giving 15 clear days for vacation of the suit premises but the response in denial of the title of the defendant has come, though law frowns upon such denial of title of the landlord by a tenant and the tenant is estopped in saying so.

The plaintiff in the written statement filed in the suit i.e. T.S. No. 562 of 1996 has taken the stands which have been described in the plaint presented by him giving rise to T.S. No. 67 of 1992.

14. Learned counsel for the appellants submitted that the finding of the lower appellate court that the agreement for sale in the instant case is not enforceable runs contrary to the evidence on record, and the outcome of non-application for settled

principle of law holding the field without appreciation of evidence on record in a just and proper manner and had it been so done side by side placing the settled principle of law on the table while shuffling all the cards for examination, the result would have been completely different and in favour of the plaintiff . He, therefore, submits that all the three second appeals be admitted upon formulation of the substantial questions of law in the light of aforesaid for being answered at the end.

He further submitted that the lower appellate court has completely erred in law by setting aside the trial court's decree for specific performance of contract by which the defendants had been directed to execute the registered sale-deed in favour of the plaintiff on receipt of the present market value of the suit properties in rightly exercising the power as contained order-7 rule -7 of the Code which have been meant to be pressed into service by the court in appropriate cases like the given one in the interest of justice.

15. Learned counsel for the respondents who has entered appearance by filing caveat in assisting the Court submitted that if one reads the judgment passed in the suit by the trial court, the error committed by the trial court at every step is quite apparent. According to him, the suit being one for declaration of right, title and interest in respect of the land in suit filed by the plaintiff, the only scope is there to examine the matter from the angle as to if the plaintiff has proved the agreement for sale purported to have been executed by the Janaki Sundari, for self and on behalf of her minor children and then giving all the relaxations and good bye to the technicalities and even in the absence of prayer in that light, whether the plaintiff's possession is on the basis of that agreement for sale; and if so, as to whether he has fulfilled all the legal requirements of law by remaining in possession having performed all stated particulars as obligated under the contract being always ready and willing to perform all those all along, only leaving the performance of such parts by the defendants for which the final transaction has not seen the light of the day i.e. solely for the default of the proposed vendees. He further submitted that in case of finding all the above in favour of the plaintiff the trial court ought to have accordingly gone to finally rule as to whether said possession is to receive the protection as provided under section 53(A) of the T.P. Act.

He vehemently submitted that the trial court under no circumstance in the present case could have passed a decree for specific performance of contract, directing the defendants to execute the registered sale-deed in respect of the suit properties on receipt of the present market value of such properties, leaving it to be so determined by the registering authority which is again impermissible rendering the decree as indefinite.

He further submitted that the lower appellate court by passing the impugned judgment has rectified the grave errors committed by the trial court both on facts and law. And, therefore even though, it is a case of reversal of the findings of the trial court by the first appellate court and reversal of the ultimate result of the

two suits coming out just the contrary; there arises no substantial question of law so as to be formulated for being answered in this case meriting the admission of these appeals. The lower appellate court when having properly put the undisputed facts to tests in the touchstone of the settled principles of law has given the verdict, in upsetting the results of the suit, the same should not weigh in the mind of this court in searching out the existence of substantial question of law.

16. Before going to address the submissions undertaking the task of simultaneous examination of the facts and circumstances of the case together with other material connected thereto, let us keep in view the admitted factual settings.

Successors of one Gajendra Behera partitioned their properties by a registered deed of partition dated 17.12.1971. The suit properties came to the hands of Dibakar Behera, the husband of Janaki Sundari and the father of these defendants. The properties allotted to the Dibakar were inherited by them and that includes the suit properties which is the land inside the Cuttack City under Unit No. 25 near Jobra under the jurisdiction of Malgodown Police Station of the extent of Ac.0.47 decimals over which there stands a building.

17. The trial court besides formulating some issues on the technical objections raised from both sides, has framed the issues as regards the main claim of the plaintiff for the declaration of his right, title and interest in respect of the suit properties as said to have been acquired by adverse possession and similarly in so far as prayer made in the other suit filed by the defendants is concerned; as to their entitlement to an order of eviction as also the consequential claim of damage.

18. Coming to answer the issue relating to acquisition of title by way of adverse possession, the trial court first of all has found the plaintiff to be an erstwhile tenant. Accordingly, the nature of the possession has been held to be permissive. To this extent its faultless. But then in answering the other two issues as to the entitlement of the defendants for an order of eviction and damage, the trial court in view of the purported agreement for sale as pressed into service by going through the evidence has found that there was payment of consideration of Rs. 15,000/- by the plaintiff to the defendants and thus, the plaintiff was the intended owner (which has no legal foundation) and after the part performance of the contract at his end, his possession no more remained as the tenant with effect from 09.02.1997. In that view of the matter, the plaintiff having not been found to be a trespasser, the prayer for passing a decree for eviction from the properties and damage have been refused. With this finding, the trial court is seen to have provided the protection to the possession of the plaintiff in so far as the suit property is concerned without even going to decide the survival of said agreement for sale and all other legal aspects connected thereto for the purpose of giving such finding in extending the protection under section 53-A of the T.P. Act. In clearly appears that the trial court has not been able to correctly prepare the road map in proceeding to decide the suit so as to travel across and arrive at the right destination. The court below first of all ought to have considered

the matter relating to specific performance of contract, if it is so permissible in the suit and on failure to record the finding as to the enforceability of contract, the matter of protection of possession aspect ought to have been gone into.

Be that as it may, next it is seen that going to decide the issue as to the entitlement of the plaintiff to an order of injunction and the issue under the heading of "Any other relief or reliefs to the which the parties are entitled to"; the trial court has granted the relief to the plaintiff by directing the defendants to execute sale-deed in respect of the suit properties in the name of the plaintiff by the defendants on receipt of market price of the property as would be so determined by the concerned sub-registrar that too even without any stipulation as to the time period for its registration. A decree for permanent injunction restraining the defendants from causing any disturbance in possession of the plaintiff in respect of the suit property has also been passed.

19. The lower appellate court having agreed upon the finding of the trial court that the plaintiff has failed to establish a case of acquisition of right, title and interest over the suit property by adverse possession, has negated all other findings which has ultimately resulted the dismissal of the suit filed by the plaintiff and thus has led for passing of a decree in favour of the defendants in the suit filed by them as the plaintiffs who are the appellants of R.F.A. No. 53 of 2011/37 of 2014 for eviction and damage.

20. The plaintiff's suit is for declaration of the right, title and interest over the suit properties said to have been acquired by adverse possession. The prayers are the followings:-

(a) Let it be declared that the plaintiff has acquired right, title and interest over the suit properties through adverse possession since 05.12.1978 a decree declaring the right, title, interest and possession of the plaintiff in respect of the suit property exclusively be passed.

(b) Let the defendants themselves or their agents and servants be permanently restrained from entering into the suit land and building and from doing any loss and damage to the same.

(c) Let the cost of the suit be decreed in favour of the plaintiff and against the defendants.

(d) Let the plaintiff get any other relief which he entitled to under the law.

During pendency of the suit, the plaintiff had filed an application under order-6 rule -17 of the Code so as to introduce certain averments there in the plaint as regards the readiness and willingness to perform his part of the contract and for a decree for specific performance of contract. The trial court rejected the petition and the order has attained its finality. The plaintiff still has opted to pursue the suit as laid for its conclusion.

Induction of the plaintiff as the tenant in respect of the suit properties stands admitted. An unregistered deed of agreement for sale is said to have been executed by Janaki Sundari for self and on behalf of her minor children Ext.1 expressing therein the desire and decision to sale the properties to the plaintiff for a

consideration of Rs. 30,000/- on receipt of advance consideration of Rs. 15,000/- as finds mention with the stipulation as to the period of the execution of the sale-deed to be within two years upon further receipt of balance consideration of Rs. 15,000/-. This agreement is attacked by the defendant no. 1 as forged and fabricated one. The lower appellate court has found the evidence let in by the plaintiff so as to prove the agreement-Ext.1 by leading oral evidence in support of the same to be wholly inconsistent with the pleadings, as also contrary on the material aspects finding mention in its body of the said agreement. The discussion has been made in paragraph -19 at page -13 of the judgment. The trial court perhaps had forgotten this aspect that the first duty is to ascertain that if all such factual settings for the agreement were then in existence and next the execution of the agreement when that has been denied. Moreover, the agreement is stated to have been executed by Janaki Sundari for self and on behalf of her minor children, let's say expressing therein her unequivocal intention to sale the properties to the plaintiff on receipt of consideration of Rs. 30,000/-. No doubt Janaki Sundari is the mother-guardian of these defendants, but the agreement for sale in order to sustain as one in so far as the interest of her minor children are concerned with eighty percent interest in the property, first of all there is absolutely no evidence with regard to the fact as to if it is for the benefit of those minors and for legal necessity on the part of the mother guardian compelling her to enter into such agreement creating an encumbrance over the property so as to finally part with said property forever. That apart, it is neither pleaded nor proved that by said receipt of advance consideration, the minor children have in any way been benefited so as to say that said agreement on receipt of part agreed consideration and delivery of possession in pursuance of the same was for the benefit of the minor children of Janaki Sundari. The required permission in such a case whether is necessary or not has then of course having not been examined by the courts below, as this stage this court refrains from proceeding with said exercise.

Moreover, there is no evidence with regard to the then prevailing market value of the property in question. When it is said that Prakash was paid with a sum of Rs. 15,000/- towards the balance consideration as agreed upon by the Janaki Sundari and that to in the year 1978 as against the agreement said to have been executed in the year, 1972, the defendant's explanation is that the same has been paid towards the house rent. The document exhibited in that connection i.e. Ext. 2 has been examined and found by the lower appellate court to be simply a money receipt having no nexus with the so called agreement, Ext.1. This aspect is not refuted by the plaintiff leading evidence to counter. The stray statements of the witness with regard to legal necessity have also been discussed by the lower appellate court and has been found to be unacceptable. It has taken the pain of examining the oral and documentary evidence in great detail, in ultimately coming to the conclusion that agreement even if was there, has lost its enforceability in the eye of law. The lower appellate court by discussing the evidence has also found, this Ext. 1 to be an invalid document and as such, not enforceable.

In this suit, which is for declaration of right, title and interest as to have been so acquired by adverse possession, wherein the prayer for grant of a decree for specific performance of contract has been declined to be introduced by amendment which has attained finality by now; in my considered view, it is not permissible to pass a decree for specific performance of contract by moulding the relief in exercise of power under order-7 rule7 of the Code which is not meant to be pressed into service in such eventuality, causing total surprise to the defendants to their utter prejudice. The trial court since had committed grave error in passing the decree, the lower appellate court had rightly set it aside so as to put the matter in order.

Then it has also been discussed that the plaintiff in order to get the relief of protection of his possession in consonance with the provision of section 53(A) of the T.P. Act, has failed to establish the legal requirements by pleading and proving all such required facts. The categorical finding is that the suit suffers from the infirmity so as to overcome the personal bars provided in section 16 of the Specific Relief Act.

21. Section 53-A of the T.P. Act and Section 16 of the Specific Relief Act, 1964, being of significant relevance, for proper appreciation, are extracted hereunder:-

> "**53-A.** ***Part-Performance***.- Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,
>
> and the transferee has, in part-performance of the contract, taken possession o the property or any part thereof, or the transferee, being already in possession, continues in possession in part-performance of the contract and has done some act in furtherance of the contract,
>
> *and the transferee has performed or is willing to perform his part of the contract*,
>
> then, notwithstanding that, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under his any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:
>
> *Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part-performance thereof.*"
>
> "***16. Personal bars to relief***.- Specific performance of a contract cannot be enforced in favour of a person-
>
> (a) who would not be entitled to recover compensation for its breach; or
> (b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud or the contract, or willfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or
>
> (c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.
> *Explanation*.- For the purposes of clause(c)"-

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the *plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."*

22. As would be patent from the above quotes, the protection of a prospective purchaser/transferee of his possession of the property involved is available subject to the following prerequisites:

(a) there is a contract in writing by the transferor for transfer for consideration of any immovable property signed by him or on his behalf, from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;

(b) the transferee has, in part-performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part-performance of the contract;

(c) the transferee has done some act in furtherance of *the contract and has performed or is willing to perform his part of the contract*.

23. In terms of this provision, if the above preconditions stand complied with, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons(s) claiming under him, any right in respect of the property of which the transferee has been or continue in possession, other than a right expressly provided by the terms of the contract, notwithstanding the fact, that the transfer, as contemplated, had not been completed in the manner prescribed therefor by the law for the time being in force."

On a bare perusal of the evidence adduced and the same being cumulatively viewed with the surrounding circumstances and conduct of the plaintiff leads this Court to wholly agree with the view taken by the lower appellate court that in the case on hand the plaintiff has failed to show that he has, in part performance of the contract done some act and has performed and was ready and willing to perform his part of the contract all along. The very conduct of silence for a long time and filing the suit with the reliefs claimed rather go to stand as the circumstance standing against the case of plaintiff in exposing malafides. For all these aforesaid, the question of the plaintiff's receiving the protection to his possession with the aid of section 53-A of the T.P. Act does not arise at all.

24. Now coming to the question of acquisition of title by adverse possession on the basis of an agreement for sale, the law is no more res-integra that the nature of possession being permissive all through said claim is unsustainable. In this case, accepting the plaintiff's case, the nature of possession clearly remains permissive.

25. In the wake of aforesaid, the submission of the learned counsel for the appellants that there arises the substantial question of law in the case so as to be formulated for their answer, meriting admission of these appeals fails. Accordingly, the three appeals stand dismissed and in the facts and circumstances without cost.

2018 (II) ILR - CUT- 286

GUAP NO. 02 OF 2018

D.DASH, J.

BATAKRUSHNA SAHOO …….Appellant

. Vs.

MAMATA SAHOO ……..Respondent

(A) HINDU MINORITY AND GUARDIANSHIP ACT, 1956 – Sections 8 and 25 read with section 7 of the Family Courts Act 1984 – Application for custody of two year old minor son by mother – Plea of husband that the petition being technically defective not maintainable – Question of jurisdiction of the Family court was also raised – Held, although nomenclaturing as to the application does not appear to be in order, however, the application being for custody of the minor male child, keeping in view the settled position of law that the wrong nomenclature, is not a ground to reject the application in limini, the submission of the learned counsel for the appellant stands repelled as the technicality cannot be allowed to prevail over the substantial justice so as to prevent its flow. (Para 7)

(B) FAMILY COURTS ACT 1984 – Section 7 read with section 21(1) of the Code of Civil Procedure, 1908 – Application for custody of two year old minor son by mother – Objection with regard to the jurisdiction of the family court not raised by the husband before the family court but raised before the High court – Whether acceptable – Held, No.

"Nowhere, the appellant-opposite party has raised such objection as to the lack of territorial jurisdiction on the part of the Family Court at Bhubaneswar to entertain the application and adjudicate upon the same. The appellant-opposite party in his evidence has also not whispered a word raising such objection in his evidence. Such issue relating to the territorial jurisdiction of the Court as per the provision of section 21(1) of the Code of Civil Procedure ought to have been raised by the appellant-opposite party at the earliest point of time of his appearance before the said court pursuant to the notice and as provided in law. However, that having not been done any point of time even till conclusion of the proceeding, the objection now raised for the first time before this appellate court has to be whittled down. Moreover, no such failure of justice appears to have occasioned by such entertainment of the application by the Family Court, Bhubaneswar." *(Para 8)*

(C) Guardians and Wards Act, 1890 – Section 17– Determination of the question of 'welfare' of the minor – Discussed. (Para 10)

Case Laws Relied on and Referred to :-

1. AIR 2009 SC 557 : Gaurav Nagpal Vs. Sumedha Nagpal.
2. 1988 (II) OLR-391 : Konduparthi Venkateswarlu & Ors. vrs. Ramavarapu Viroja Nandan & Ors.
3. (2005) 7 SCC 791 : Harshad Chiman Lal Modi vrs. DLF Universal Ltd.

For Appellant : Mr. Devashis Panda, S.Panda, G.Mohanty, A.Ratho,
For Respondent : M/s. Bijay Ku. Mohanty, H.K.Bajpayee, J.Pradhan,

JUDGMENT Date of hearing: 31.07.2018 Date of judgment: 21.08.2018

D.DASH,J .

The judgment dated 11.05.2018 passed by the learned Judge, Family Court, Bhubaneswar in C.P. No. 734 of 2017 has been assailed in this appeal.

2. The petitioner-respondent filed an application nomenclature as one under sections 8 and 25 of the Hindu Minority and Guardianship Act read with section 7 of the Family Courts Act for custody of her minor son, namely, Aditya Sahoo. It is stated that the petitioner-respondent had married the appellant-opposite party on 13.07.2016 at Bhubaneswar and thereafter they led their conjugal life. On 12.06.2017 they were blessed with a son namely, Aditya Sahoo. It is alleged that a few months after their marriage, the appellant-opposite party and his family members meted out torture at the respondent-petitioner. It is further alleged that they used filthy languages against her and also physically assaulted her for coercing her to fulfill their further demand of dowry. It is also the case that her father had given cash of Rs.90,000/- with house hold articles and ornaments worth of Rs.10,00,000/- at the time of marriage. It is stated that when the respondent-opposite party denied to tell more to her parents who were not in a position to meet further demand of dowry, she was tortured. After birth of the son, the appellant-petitioner and his mother kept the newly born child away from the respondent- petitioner when the child was in absolute need of breast feeding from his mother and the respondent-petitioner was never allowed to keep her son with her.

When the matter stood thus, on 19.10.2017 the appellant-opposite party and the member of his family drove out the respondent-petitioner from their house keeping away the minor son with them. Immediately thereafter, the petitioner being the guardian of her minor son namely Aditya Sahoo, both of person and property, filed an application before the Family Court, Bhubaneswar for return of the custody of her son and accordingly prayed to direct the appellant-opposite party to hand over the custody of the male child, Aditya to her.

3. The appellant-opposite party (husband), denies the allegation made by the respondent-petitioner (wife) against him and his family members. It is his case that the respondent-petitioner herself on her own will and volition has purposely deserted the appellant-opposite party and their minor son on 19.07.2017. It is further stated that since the time of birth, she has been neglecting the minor son. She took no care for the breast feeding and in respect of the matter relating to health, well being of said minor male child. It is stated that the mother, elder sister, elder sister-in-law and the appellant-opposite party have been taking all the required care for the male child, Aditya, who is now living happily with them and therefore, there is no need to hand over the custody of the child to the respondent-petitioner.

4. On the above rival pleadings, the court below appears to have rightly formulated two points for determination. Upon examination of the evidence on record, on the first point it has held that it would be ideal to give custody of the male child namely, Aditya to the respondent-petitioner and in so far as the next point with regard to the maintainability of the proceeding, finding has been returned in favour of the respondent-petitioner.

5. Learned counsel for the appellant submits that here the Family Court, Bhubaneswar had no jurisdiction to entertain the application for custody of the minor male child as has been sought for by the respondent-petitioner in view of the label of the petition. Taking this Court through the provisions of Guardians and Wards Act and section 7 of the Family Courts Act, it is his submission that the Family Court, Bhubaneswar lacks the jurisdiction in the matter since the very application for custody of the minor has to be filed and entertainable by the court having the jurisdiction over the area where the minor ordinarily resides. He has relied upon the case of ***Konduparthi Venkateswarlu & others vrs. Ramavarapu Viroja Nandan and others,*** 1988 (II) OLR-391. He has also relied upon the ratio decided in the case of ***Harshad Chiman Lal Modi vrs. DLF Universal Ltd***; (2005) 7 SCC 791 to say that the order is nonest since it has been passed by the court without having the jurisdiction.

His submission on merit is that the learned court below has not properly appreciated the evidence on record so as to arrive at a conclusion as to under whose custody, the welfare of the minor would be best guarded and served. It is his submission that the learned court below has simply been swayed away in looking at the age of the minor and the fact that the respondent-petitioner is the mother, without bestowing due attention to the evidence on record and other circumstances emanating there from aiming at the welfare of the minor. For all these above grounds, he urges that the impugned order relating to the custody of the minor son of the parties, directing the appellant-opposite party to hand over the custody of the minor male child i.e. Aditya to the respondent-petitioner, is liable to be set aside.

6. Learned counsel for the respondent-petitioner submits in support of the impugned judgment relating to the custody of the minor male child i.e. Aditya in favour of this respondent-petitioner (mother). It is his submission that the court below has taken the welfare of the minor child as the paramount consideration in giving the ruling in favour of the appellant-opposite party (mother) to be the custodian and very rightly has allowed the visitation right to the appellant-opposite party (father). He further submits that the learned court below has analyzed the evidence and keeping in view the age of the minor male child and all other surrounding circumstances at those stand at present, has arrived at a right decision. He thus submits that the appeal does not bear any merit.

7. Let me first address the submission as regards the maintainability of the application and the jurisdiction. The jurisdiction of the Family Court as regards the

suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor has been provided under section 7(1)(g) of the Family Courts Act. The petition filed by the respondent-petitioner has been nomenclatured as to be one under sections 8 and 25 of the Hindu Minority and Guardianship Act read with section 7 of the Family Courts Act. Section 8 of the Hindu Minority and Guardianship Act states about the powers of natural guardian and the said act contains in total thirteen sections. Under section 25 of the Guardians and Wards Act, it is seen that said section deals with title of guardian to custody of ward and that if a ward leaves or is removed from the custody of a guardian of his person and the Court is of the opinion that it is for the welfare of the ward to return to the custody of his guardian, it may make an order for his return as also such other orders so as to enforce the said order of return for being delivered to the custody of the guardian.

Chapter-III of the Family Courts Act concerns with the jurisdiction of the Family Court. As provided under section 7(1)(g), a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor, is to be entertained by the Family Court exercising all the jurisdiction as was exercisable by any District Court or any Subordinate Court under any law for the time being in force to the exclusion of the jurisdiction of said courts. Although nomenclaturing as to the application does not appear to be in order, however, the application being for custody of the minor male child, keeping in view the settled position of law that the wrong nomenclature, is not a ground to reject the application in limini, the submission of the learned counsel for the appellant stands repelled as the technicality cannot be allowed to prevail over the substantial justice so as to prevent its flow.

8. Next coming to the objection relating to the lack of jurisdiction of the Family Court at Bhubaneswar to entertain the application, it be stated here that the same primarily concerns with the territorial jurisdiction of the Court. It is not a case that the Family Court at Bhubaneswar is having no jurisdiction in the matter of adjudication relating to the custody of the minor. As provided under sub section (1) of section 21 of the Code of Civil Procedure, no such objection is allowable in appeal or revision unless such objection had been taken in the court of the first instance at the earliest possible opportunity, and in all cases where the issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

For the purpose, I have carefully gone through the lower courts record which also contains the written submission filed by the parties. No where, the appellant-opposite party has raised such objection as to the lack of territorial jurisdiction on the part of the Family Court at Bhubaneswar to entertain the application and adjudicate upon the same. The appellant-opposite party in his evidence has also not whispered a word raising such objection in his evidence.

9. Learned counsel for the appellant-opposite party submits that it is only the court under whose jurisdiction minor ordinarily resides can entertain the application so as to decide the dispute and therefore the learned court below ought to have looked into that aspect as to whether the minor in the case ordinarily resides within its jurisdiction or not. If the submission of the learned counsel for the appellant-opposite party is accepted, then this application would have been entertainable by the Family Court at Puri, taking into account the fact that the minor has been ordinarily residing at village Jaipur in the district of Puri since his birth. In the instant case, the application has been entertained and decided by the Family Court at Bhubaneswar. Such issue relating to the territorial jurisdiction of the Court as per the provision of section 21(1) of the Code of Civil Procedure ought to have been raised by the appellant-opposite party at the earliest point of time of his appearance before the said court pursuant to the notice and as provided in law. However, that having not been done any point of time even till conclusion of the proceeding, the objection now raised for the first time before this appellate court has to be whittled down. Moreover, no such failure of justice appears to have occasioned by such entertainment of the application by the Family Court, Bhubaneswar. For the aforesaid, the decision in the case of *Harshad Chiman Lal Modi* (supra) does not come to the aid of the submission of the learned counsel for the appellant and the other cited case of *Konduparthi Venkateswarlu* (supra) also needs no further discussion.

10. Coming to the merit, it is profitable to adopt the language of Section 17 of the Guardians and Wards Act, 1890 for determination of the question of 'welfare' of the minor, which reads as follows:

> "17. **Matter to be considered by the Court in appointing guardian.-**(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.
>
> (2) In considering what will be for the welfare of the minor, the Courts shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.
>
> (3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.
>
> xx xx xx
>
> (5) The Court shall not appoint or declare any person to be a guardian against his will."

Sub-section (2) of Section 17 provides that Court while considering the question of 'welfare' of the child shall have regard to the age, sex and religion of the minor, so also the character and capacity of the proposed guardian and his nearness of kin to the minor etc. The same is also the consideration while determining the question of 'welfare' for custody of the child. Thus, broadly the following questions shall be considered along with others for determining 'welfare' of the child. Those are:

a) Who would have the better care and better consideration for the welfare of the minor;

b) Where he or she is likely to be happier;

> c) By whom mental and physical development and comfort of the child can be better looked after;
>
> d) Who has not only the desire but a determination, not only in concept but also capacity to provide for a better education and medical facility as well as uninterrupted nourishment of the child; And
>
> e) Who would be available by the side of the child at the time of his/her need for mental as well as physical support and can provide proper care, counseling and give love and affection as well as protection and patting up.

The Apex Court in the case of ***Gaurav Nagpal Vs***. ***Sumedha Nagpal***, reported in AIR 2009 SC 557 held as follows:-

> "42. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousami Moitra Ganguli's case (supra), the Court has to due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.
>
> 43. The word 'welfare' used in Section 13 of the Act to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parents patriae jurisdiction arising in such cases."

11. Perusal of the impugned order reveals that the court below has taken into consideration the provision of section 6(a) of the Hindu Minority and Guardianship Act that the custody of the minor who has not completed the age of five years, shall ordinarily be with the mother and keeping the same in view, in the facts and circumstances of the case as have come out in evidence, the court below has passed the impugned order holding that the custody of the minor child should be with the respondent-petitioner (mother).

The minor has just crossed two years of age. It is said by the appellant-opposite party that the appellant-petitioner since beginning could not adjust in the village. Having gone from the City of Bhubaneswar, when she did not find that city atmosphere in the rural area, she could not have the mental make up and further adjust with the living conditions in their joint family at village Jaipur under Sakhigopal Police Station in the District of Puri. It has been alleged that the respondent-petitioner after birth of the male child neglected in taking his care and thereafter on her own will and desire left the matrimonial home deserting everyone including her minor son presently under the care and custody of the elder brother's wife of the appellant-opposite party and his mother. So the minor child when had been neglected by the respondent-petitioner and she was not taking any care as regards feeding and his well being, which was being looked after by the other female

members of the family, she is unfit to be the custodian of the minor son. It is the evidence of respondent-petitioner on oath that the appellant-opposite party is running a whole sale shop and remains busy there. It has been further deposed that despite torture meted out at her stretching over the period, she was continuing to stay and lastly, has been driven out. She has denied the allegation that she is guilty of desertion of her husband and son. The appellant-opposite party has denied the allegation leveled against him and against his family members in torturing the respondent-petitioner. It is his evidence that the minor child is under his custody and his mother and bhauja (elder brother's wife) are assisting him in the matter of taking care of the minor male child aged about two years. The mother of the respondent-opposite party aged about sixty years has deposed that she is now taking care of feeding of the minor male child and his well being and her elder daughter-in-law is also taking care of the minor male child. The elder sister-in-law has also deposed in the same vein. The neighbour and the Asha Worker of the village have also been examined.

Keeping in view the welfare of the minor as paramount consideration and upon appreciation of the evidence on record, cumulatively viewing the circumstances including those concerning the parties, I do not find that a case has been made out to deprive the respondent-petitioner of the custody of her two year old minor son and to prefer the appellant-opposite party for the same.

Thus I find no justifiable reason to set aside the order impugned in this appeal in handing over the custody of the minor male child to the respondent-petitioner providing the visitation right to the appellant-opposite party and his family members. In the result, the appeal stands dismissed. No order as to cost.

2018 (II) ILR - CUT- 292

B. RATH, J.

O.J.C. NO. 7620 OF 2000

NILAMANI DASH & ORS. ..... Petitioners

.Vs.

GOURISHANKAR DASH & ORS. ……...Opp. Parties

COURT PROCEEDINGS – Concessions made before the court by both parties – Recorded in the judgment – Subsequent retracting from the concession in the higher forum – Whether permissible – Held, No.

"We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no

*one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. So the Judges' record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge himself, but nowhere else."(**State of Maharashtra vrs. Ramdas Shrinivas Nayak,** reported in AIR 1982 S.C. 1249 followed.)" (Para 7)*

Case Laws Relied on and Referred to :-

1. AIR 1982 S.C. 1249 : State of Maharashtra .Vs. Ramdas Shrinivas Nayak.

For petitioners : M/s. Dipali Mohapatra, B.K. Sahoo, S. Parida

For Opp.party : M/s. P.K. Routray, P.R. Sutar, M.R. Dash, B.G. Mishra, R.K.Rout, Mr. K.K. Mishra, A.G.A.

JUDGMEMT Date of Hearing : 06.07.2018 Date of Judgment :17/07/2018

B. RATH, J.

This writ petition involves a challenge to the quashment of orders at Annexures-1, 3 and 4 involving the writ petition.

2. Short background involving the case is that on 25.04.1983 there is final publication of ROR under Section 22(2) of the Consolidation of Holdings and Prevention of Fragmentation of Land Act (for short "the Consolidation Act"). As a consequence, Chaka No.81, L.R. Plot No.299(P), an area of Ac.0.10 decimals was allotted in favour of the petitioners. No objection was being raised by opposite party no.2 at the relevant point of time. Finding there is discrepancy in the field position of the plots involved as well as the map position, petitioners preferred a revision under Section 37 of the Consolidation Act on the file of the Joint Commissioner, Consolidation, Sambalpur bearing Revision No.8 of 1998. Opposite parties also simultaneously filed Revision No.175 of 1997 for allotment of an area of Ac.0.10 decimals being wrongly recorded in the name of the petitioners. Consequent upon filing of objection by the respective parties, both the revisions being taken up together were concluded with a direction for remand of the revisions to the Consolidation Officer with specific direction for conducting field enquiry and also taking fresh decision after providing opportunity to the respective parties. Upon remand of the matter, the Consolidation Officer observing that there is discrepancy in the area between the map and field and as it was within the permissible limit further looking to the claim of opposite party no.2, directed for restoration of Ac.0.10 decimals of land in favour of opposite party no.2. Consolidation Appeal No.45 of 1998 preferred by the petitioners on 30.01.1998 the appellate authority on disposal of the Appeal directed to allot Ac.0.10 decimals of Government land in favour of the petitioners and thereby confirmed the order for restoration of Ac.0.10 decimals in favour of opposite party no.2. Consolidation Revision No.161 of 1999 being preferred, the Revisional Authority confirmed the orders of the Authorities below.

3. Assailing the impugned order, Miss Dipali Mohapatra, learned counsel appearing for the petitioners submitted that though the appellate authority directed to allot Ac.0.10 decimals of land in favour of the petitioner from the Government land to Chaka No.81, in fact there is no land adjoining in the Chaka holding for the intervention of a Canal therein. However, there was some Government land adjacent to Chaka No.82. Further, the revision at the instance of opposite party no.2 having been initiated after fourteen years delay, Miss Mohapatra, learned counsel appearing for the petitioner also resisted the entertainment of the revision under Section 37(1) of the Consolidation Act after such long delay.

4. Shri Routray, learned counsel appearing for the private opposite party no.2 taking this Court to the observations of the Authorities below, submitted that there is no infirmity involving the impugned order requiring interference in the same.

5. Shri K.K. Mishra, learned Addl. Government Advocate appearing for the State toed the submission of the learned counsel appearing for opposite party no.2.

6. Considering the rival contentions of the parties and looking to the impugned order at Annexure-1, this Court finds, the Authority considering the dispute involving Annexure-1 and taking into account the rival contentions of the parties observed as follows :-

> "However on the day of field enquiry on 01.11.1998 it was conceded by the Advocate of both the parties in the later presence that out of chaka No.83, chaka plot No.141 of the petitioner in RRC No.8/98, the O.P. is possessing Ac.0.04 which was agreed upon to be restored to the petitioner in this case, upon restoration of Ac.0.10 original land of petitioner in R.R.C. No.175/97 in his chaka No.82 upon modification for chaka No.81 of O.P. in that case."

It be stated here that the word 'petitioner' hereinabove indicates that the petitioner in RRC 8/1998, i.e., the present petitioner and the petitioner in RRC No.175 of 1997 is the opposite party no.2.

7. It is in the above background of the case, this Court finds, the order passed by the original authority was on the concession made by both the parties. Looking to a decision of the Apex Court in the case of ***State of Maharashtra vrs. Ramdas Shrinivas Nayak,*** reported in AIR 1982 S.C. 1249, wherein the Apex Court considering whether in view of the concession recorded by a particular Court, if it is open to a party to agitate the matter further in higher forum ? In paragraphs-4 and 7 therein the Apex Court have held as follows :-

> "4.When we drew the attention of the learned Attorney General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submission made by him in the High Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation". (Per Lord Atkinson

in Somasundaran v. Subramanian, AIR 1926 PC 136). We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error (Per Lord Buckmaster in Madhusudan v. Chandrabati, AIR 1917 PC 30). That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

7. So the Judges' record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge himself, but nowhere else."

8. Taking into consideration the admission of the petitioners before the original authority in the remand proceeding and the decision of the Apex Court, this Court is of the opinion that there is admittedly a concession by both the parties and further for no involvement of a concession contrary to legal position, this Court is bound to accept the statements / concession of the parties so recorded by the original authority. Following the Hon'ble Apex Court's directions, in the worse, the parties were at liberty to call the attention of the very Judge / the authority while the matter was still fresh in the mind of the Judge / authority. For the settled position of law and the observation of this Court, this Court finds, there is no scope for interfering in the impugned order at Annexure-1, so also the subsequent orders involved therein vide Annexures-3 and 4. For the specific concession and for the petitioner not taking timely steps on the objection to recording of such concession in the same Court, this Court otherwise has no scope for entertaining such plea at this point of time.

9. This writ petition thus stands dismissed for having no merit. No cost.

2018 (II) ILR - CUT- 295

B. RATH, J.

W.P.(C). NO. 7039 OF 2011

NARAN @ NARAYAN BEHERA & ORS. .....…Petitioners

.Vs.

HAREKRUSHNA BEHERA & ORS. …….Opp. parties

CODE OF CIVIL PROCEDURE, 1908 – Order 6 Rule 17 read with Order 8 Rule 6 A – Amendment of Written Statement and filing of Counter Claim – Plea of the plaintiff that there is no cause of action and a new case being brought out – Suit for Partition – Records show otherwise – Held, in view of an effective adjudication of dispute both petitions have been rightly allowed.

"Reading of the written statement, inter-alia, the counter claim, this Court finds, there is disclosure of certain facts which as per this Court, rather not only facilitate an effective partition of the joint family property but will also avoid multiplicity of litigations amongst the family members. This Court further observes, for the acceptance of the counter claim the plaintiffs involving the suit also get the scope for the written statement to the counter claim and the consequential evidence accordingly. It is at this stage, looking to the claims made in the counter claim, this Court finds, the defendants brought the counterclaim on 08.02.2011 and for the pleadings brought therein the defendants were even entitled to file a fresh suit within three years from the date of above cause of action. It is in this view of the matter, this Court observes, since the counterclaim was brought to the Court within one year and four months, allowing such counterclaim will be otherwise restricting the multiplicity of litigations. This Court further observes, on allowing such counterclaim there may be also avoidance of unnecessary repetition of evidence in a fresh suit. In the interest of justice and further considering that the suit is a partition suit, for the betterment of the parties involved all issues involving all the properties between the parties to the suit should be tried together in this particular suit." *(Paras 4 & 5)*

Case Laws Relied on and Referred to :-

1. 2018 (I) OLR (SC) 278 : Raj Kumar Bhatia .Vs. Subhash Chander Bhatia.
2. (2016) 11 S.C.C. 800 : Vijay Prakash Jarath .Vs. Tej Prakash Jarath.

For Petitioners : M/s. R.K. Prusty, B.C. Majhee, D. Das, M.L. Jena

For Opp. Party : M/s. S.K. Mishra, J. Pradhan, P. Prusty, D.K. Pradhan, D. Samal

JUDGMENT Date of Hearing & Judgment : 31.07.2018

B. RATH, J.

This writ petition involves a challenge to the impugned order dated 14.03.2011 passed in Civil Suit No.1138 of 2009-I involving allowing an application for amendment of written statement as well as introduction of a counter claim at the instance of the defendants.

2. Factual scenario as available from the records appended thereto and the pleadings of the parties, it appears, the petitioner-plaintiffs filed Civil Suit No.1138 of 2009-I, a suit for partition along with related decrees on 23.11.2009. Consequent upon notice, the defendants filed written statement on 13.05.2010. During pendency of the suit, an application under Order-6, Rule-17 of C.P.C. along with introduction of counter claim was filed by the defendants on 08.02.2011. The plaintiffs as opposite parties in their objection in resisting the Order-6, Rule-17 of C.P.C. application along with the counter claim, contended that on introducing such application the defendants have not only attempted to bring new facts which were

already within their knowledge, but in the process the defendants are also attempting to bring completely new issues with clear intention to delay the trial involving the suit and accepting such application may result in depriving the plaintiffs from their relief. It is also contended that the counterclaim also involves new cause of action which may be irrelevant for the purpose of decision in the suit. On hearing the submission of both the sides, the trial Court by the impugned order allowed the written statement as well as the counter claim at the instance of the defendants resultantly giving rise the present writ petition. Shri Prusty, learned counsel appearing for the petitioners on reiteration of all the above further referring to the provision at Order-8, Rule-6-A of C.P.C., submitted that there is no judicious application of mind on considering such issue by the trial Court and unless the impugned order is interfered and set-aside, it will get a bad precedent.

3. Shri Mishra, learned counsel appearing for the contesting opposite party nos.1 and 2 while supporting the impugned order, referring to a decision of the Hon'ble Apex Court in the case of ***Raj Kumar Bhatia vrs. Subhash Chander Bhatia,*** reported in 2018 (I) OLR (SC) 278, contended that for the judgment of the Hon'ble Apex Court, the only question remains to be decided is to compensate the parties likely to be affected by way of cost.

4. As narrated hereinabove, the suit was filed on 23.11.2009, the written statement was filed on 13.05.2010 and the application under Order-6, Rule-17 of C.P.C. involving a counterclaim was filed on 08.02.2011. There is no dispute that the suit involves a partition suit between the family members. Reading of the written statement, inter-alia, the counter claim, this Court finds, there is disclosure of certain facts which as per this Court, rather not only facilitate an effective partition of the joint family property but will also avoid multiplicity of litigations amongst the family members. This Court further observes, for the acceptance of the counter claim the plaintiffs involving the suit also get the scope for the written statement to the counter claim and the consequential evidence accordingly. It is at this stage, taking into consideration the provisions contained in Order-8, Rule-6A of C.P.C. this Court finds the provision reads as follows :-

> "**6-A. Counter claim by defendant –** (1) A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counterclaim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counterclaim is in the nature of a claim for damages or not:
>
> Provided that such counterclaim shall not exceed the pecuniary limits of the jurisdiction of the court.
>
> (2) Such counterclaim shall have the same effect as a cross-suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counterclaim.

> (3) The plaintiff shall be at liberty to file a written statement in answer to the counterclaim of the defendant within such period as may be fixed by the court.
>
> (4) The counterclaim shall be treated as a plaint and governed by the rules applicable to plaints."

On perusal of sub-rule (1) leaves no room for any doubt that the cause of action, in respect of which a counterclaim can be filed, stage accrues before the defendant has delivered his defence. In the instant case, from the application under Order-6, Rule-17 of C.P.C., it appears, there is prima-facie disclosure by the defendants of the cause of action after the suit is filed on 23.11.2009. It is at this stage, looking to the claims made in the counter claim, this Court finds, the defendants brought the counterclaim on 08.02.2011 and for the pleadings brought therein the defendants were even entitled to file a fresh suit within three years from the date of above cause of action. It is in this view of the matter, this Court observes, since the counterclaim was brought to the Court within one year and four months, allowing such counterclaim will be otherwise restricting the multiplicity of litigations. This Court further observes, on allowing such counterclaim there may be also avoidance of unnecessary repetition of evidence in a fresh suit. In the interest of justice and further considering that the suit is a partition suit, for the betterment of the parties involved all issues involving all the properties between the parties to the suit should be tried together in this particular suit. Further, looking to the provision at sub-rules (3) and (4) of Order-8, Rule-6-A of C.P.C., this Court further finds, the plaintiffs involved herein have also opportunity of filing the written statement in response to the allowing of counterclaim involved herein. It is here, this Court taking a cue from a decision of the Hon'ble Apex Court in the case of ***Vijay Prakash Jarath vrs. Tej Prakash Jarath,*** reported in (2016) 11 S.C.C. 800, this Court finds, the Hon'ble Apex Court in paragraph-10 have the following view:-

> "10. It is quite apparent from the factual position noticed hereinabove, that after the issues were framed on 18-10-1993, the counterclaim was filed by the appellants before this Court (i.e. by Defendants 3 and 4 before the trial court) almost two-and-a-half years after the framing of the issues. Having given our thoughtful consideration to the provisions relating to the filing of counterclaim, we are satisfied, that there was no justification whatsoever for the High Court to have declined, the appellant before this Court, from filing his counterclaim on 17-6-1996, specially because, it is not a matter of dispute that the cause of action, on the basis of which the counterclaim was filed by Defendants 3 and 4, accrued before their written statement was filed on 11-11-1992. In the present case, the respondent-plaintiff's evidence was still being recorded by the trial court, when the counterclaim was filed. It has also not been shown to us, that any prejudice would be caused to the respondent-plaintiff before the trial court, if the counterclaim was to be adjudicated upon, along with the main suit. We are of the view, that no serious injustice or irreparable loss (as expressed in para 15 of *Bollepanda P. Poonacha case),* would be suffered by the respondent-plaintiff in this case."

Similarly, taking into account another decision of the Hon'ble Apex Court in the case of ***Raj Kumar Bhatia (supra)*** though involving allowing an application under Order-6, Rule-17 of C.P.C., from paragraphs-11 to 13 the Hon'ble Apex Court observe as follows :-

> "11. This being the position, the case which was sought to be set up in the proposed amendment was an elaboration of what was stated in the written statement. The High Court has in the exercise of its jurisdiction under Article 227 of the Constitution entered upon the merits of the case which was sought to be set up by the appellant in the amendment. This is impermissible. Whether an amendment should be allowed is not dependent on whether the case which is proposed to be set up will eventually succeed at the trial. In the enquiring into merits, the High Court transgressed the limitations on its jurisdiction under Article 227. In *Sadhna Lodh v. National Insurance Company* (2003) 3 SCC 524, this Court has held that the supervisory jurisdiction conferred on the High Court under Article 227 is confined only to see whether an inferior court or tribunal has proceeded within the parameters of its jurisdiction. In the exercise of its jurisdiction under Article 227, the High Court does not act as an appellate court or tribunal and it is not open to it to review or reassess the evidence upon which the inferior court or tribunal has passed an order. The Trial Court had in the considered exercise of its jurisdiction allowed the amendment of the written statement under Order 6 Rule 17 of the CPC. There was no reason for the High Court to interfere under Article 227. Allowing the amendment would not amount to the withdrawal of an admission contained in the written statement (as submitted by the respondent) since the amendment sought to elaborate upon an existing defence. It would also be necessary to note that it was on 21 September 2013 that an amendment of the plaint was allowed by the Trial Court, following which the appellant had filed a written statement to the amended plaint incorporating its defence. The amendment would cause no prejudice to the Plaintiff.
>
> 12. In the view which we have taken, it has not become necessary to consider the alternative submission of the appellant namely, that recourse taken to the jurisdiction under Article 227 by the respondent after filing an application for review before the Trial Court was misconceived. Since the matter has been argued on merits, we have dealt with the rival submissions.
>
> 13. Hence, on a conspectus of the facts and having due regard to the nature of the jurisdiction under Article 227 which the High Court purported to exercise, we have come to the conclusion that the impugned judgment and order is unsustainable. We accordingly allow the appeal and set aside the judgment of the High Court. The order passed by the Trial Court allowing the amendment of the written statement is accordingly affirmed."

5. For the observations of this Court and the view of the Hon'ble Apex Court as reflected hereinabove, this Court finds, the trial Court has the justified approach in allowing the written statement / counterclaim. For no infirmity in the impugned order, this Court declining to grant relief claimed in the writ petition dismisses the writ petition. In the circumstance, no order as to costs.

2018 (II) ILR - CUT- 299

B. RATH, J.

C.M.P. NO.336 OF 2018

M/S.UTKAL AUTO ……..Petitioner

.Vs.

RADHESHYAM GOENKA & ORS. ……Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order 26 Rule 9 – Provisions under – Application by plaintiff for deputing a Commissioner – There is absolutely no question framed to be investigated through the appointed Commissioner – Some indication on the identification of the property – Intention of the plaintiff is to depute a Commission to visit the site to ascertain the construction aspect and to submit a report – Evidence not yet started in the suit – The case of the plaintiff-petitioner heavily rests on its satisfaction of such claim considering the extent of permission in the Clause-4 of the agreement – Unless the parties enter into evidence, it becomes difficult to realize the identification aspect at this stage of the suit – Held, looking to the claim and the rival-claim of both the parties and for the restrictions contained in Order 26 Rule 9 of C.P.C. for deputing a Commission at particular stage, this Court is of the opinion that sending a Commission at this stage of the matter will be amounting to collection of evidence, which is not permissible in the eye of law. (Paras 6 & 7)

Case Laws Relied on and Referred to :-

1. AIR 1988 Orissa 30 : K. Raghunath Rao .Vs. Smt. Tumula Jailaxmi
2. AIR 1988 Orissa 248 : Mahendranath Parida .Vs. Purnananda Parida & others.

For Petitioner : M/s. G.Mukherji, A.C.Panda & S.D.Ray
For Opp. Party : M/s. S.Nanda & A.Mahanta

JUDGMENT Date of Hearing : 18.07.2018 : Date of Judgment :01.08.2018

B.RATH, J.

This is a Civil Miscellaneous Petition involving a challenge to the impugned order dated 8.2.2018 passed by the 4th Additional Civil Judge (Sr.Divn.), Cuttack in C.S. No.271 of 2017(I) on rejection of an application under Order 26 Rule 9 of C.P.C. by the trial court at the instance of the plaintiff, a partnership firm.

2. Plaintiff-petitioner filed a suit bearing C.S. No.271 of 2017(I) for declaration of the plaintiff as irrevocable licensee to occupy the suit schedule property and also for permanent injunction against the opposite party (defendants in the trial court). Plaintiff put forth a case that in 1993 the plaintiff was in search of space/godown for its business purpose. Late Shyamal Prasad Goenka on coming to know about the requirement of the plaintiff offered the suit land. Accordingly, a deed of agreement was executed between both the parties and thereafter the plaintiff taking possession of the suit land on rent at Rs.5000/- per month. It was averred therein that the suit property consisted of some dilapidated tin shed and some vacant space. Under the agreement, looking to its business requirement, the plaintiff was also allowed to develop the same. Rent agreement entered between the parties was renewed from time to time and the last such agreement was executed on 3rd day of January, 2012. In the meantime Sahyamal Goenka died and the defendants

succeeded in his place as Goenka's legal representative. Looking to the increase in the business of the plaintiff, the defendants granted licence to the plaintiff for making additional construction at its own fund and to use such construction for business purpose. The plaintiff took the stand that it has developed the vacant land and constructed the sheds of permanent nature incurring huge expenses and it has neither breached nor violated any terms and conditions of the deed. The period of last agreement was till 31st December, 2017. It is when the plaintiff was running with its business peacefully, all of sudden evil design crept in the mind of the defendants, who accordingly issued a notice under Section 106 of the Transfer of Property Act intimating therein that the plaintiff's tenancy to come to an end from the date of expiry of the agreement dated 31.12.2016. Finding no resolution of the dispute, the plaintiff was forced to undertake the suit proceeding with the prayers as indicated already. Referring to Clause-8 in the agreement, the plaintiff contended that the lesser would allow 10 feet wide space on eastern side of the workshop and 6 feet wide space in front of the workshop as common space. But since on the eastern side of the plot no.26 no vacant space was available, the defendants agreed to allow the plaintiff to utilize the northern portion of the plot no.26 for the purpose of parking of the vehicles. It is further alleged that unfortunately, the defendants with ulterior motive tried to restrain the petitioner, the plaintiff from utilizing the vacant space at the northern portion of plot no.26.

Upon receipt of notice in the suit, the defendant- O.Ps. filed written statement along with counter-claim denying the claim with regard to open space by the plaintiff with a flat denial. It is finding the flat denial of the defendants on the request of the claim of the plaintiff filed an application under Order 26 Rule 9 of C.P.C. seeking appointment of Civil Court Commissioner for identification of certain dispute claiming to be relevant for the purpose of effective adjudication of the suit. The application being opposed was decided on contest with a dismissal order by the trial court finding place at Annexure-6.

3. Sri G.Mukherji, learned counsel for the plaintiffpetitioner assailing the impugned order submitted that the impugned order is against sound judicial principle and also against the purpose involving the provision. Sri Mukherji, learned counsel for the petitioner taking help of the provision under Order 26 Rule 9 of C.P.C. and the decisions of this Court in ***K. Raghunath Rao vrs. Smt. Tumula Jailaxmi*** reported in AIR 1988 Orissa 30 and ***Mahendranath Parida vrs. Purnananda Parida & others*** reported in AIR 1988 Orissa 248 submitted that the trial court not only failed in appreciating the provision requiring appointment of Commission but also failed in taking into account the decisions of this Court as referred to herein above. On the premises of the decisions referred to herein above, Sri Mukhurji, learned counsel for the petitioner claimed for interference by this Court in the impugned order and thereby setting aside the same.

4. Sri S.Nanda, learned counsel for the defendant- O.Ps. on the other hand while taking this Court to the denial of the defendants in the written statement contended that for the admission of the petitioner involving the disputed land, there remains nothing to be identified involving the suit property. Sri Nanda also submitted that the purpose behind the Order 26 Rule 9 of C.P.C. is required to be utilized only in the case of controversy between the parties with regard to any identification. Sri Nanda thus contended that therefore, there is no application of Order 26 Rule 9 of C.P.C. to the case at hand. For the petitioner's heavily relying on the pleadings at paragraphs-3, 4 & 5 of the plaint and for the petitioner's heavily relying on certain terms and conditions in the agreement referred to, identification dispute, if any, that can be resolved through oral evidence. Taking this Court specifically to Clause-4 of the agreement dated 3.1.2012, Sri Nanda, learned counsel for the O.Ps. submitted that for the Clause only giving permission for temporary sheds remains contrary to the pleadings of the plaintiff-petitioner in paragraphs-3 & 5 of the application under Order 26 Rule 9 of C.P.C. Sri Nanda, therefore, urged that for the denial of the defendants in the matter of grant of any permission for additional construction, unless the plaintiff is in a position to establish that there is a Clause contained permitting the petitioner to go for additional construction in terms of Clause-4 of the agreement deputing a Commission at this stage would be amounting to collection of evidence. It is on the premises of application under Order 26 Rule 9 of C.P.C. having no substance, Sri Nanda, learned counsel taking this Court to the observations of the trial court in the rejection of the application under Order 26 Rule 9 of C.P.C. submitted that there has been right appreciation of the issue involved therein leaving no scope for this Court interfering in the same. Sri Nanda, learned counsel for the O.Ps. further to substantiate his contentions for the support of law placed before this Court the decisions in ***Rajendra Sa vrs. Nadeem Ahmed & another*** (C.M.P. No.369/2018 disposed of on 20.4.2018), ***Dhondiram Niivrutti Pawar & others vrs. Laxman Khashaba Pawar & others*** (W.P.(C) No.1196/2017 disposed of on 23.1.2018) and ***Mohammed Ashraf & others vrs. Harish Gujaran & others*** (W.P.(C) No.31886/2016 disposed of on 9.2.2018). It is on the premises of the petitioner having no substance of law opposing the move of the opposite parties.

5. Considering the rival contentions of the parties, this Court looking to the pleading of the plaintiff-petitioner in paragraphs-4, 5, 8 & 15, this Court finds, the plaintiff has the following pleadings involving the construction/additional construction and also on his claim on defendants allowing the plaintiff to utilise the northern portion of the plot no.26 for the purpose of parking of vehicles.

> "4. That, the plaintiff constructed a factory shed at considerable cost as per design approved by the appropriate authority.
>
> 5. That, since the plaintiff's business has gradually grown up for which the constructed area was insufficient/inadequate for the plaintiff's business. Considering the long length of relationship, the defendants granted licence to the plaintiff for making additional

constructions with his own fund and use it for his business purpose. The relevant clauses i.e. Clause Nos.4, 5, 8, 9 & 10 of the agreement dtd. 3.1.2012 related to such permission.

8. That, although the agreement was executed from time to time but the tenancy/lease hold rights/ license is of a permanent nature as acting upon the document of conveyance the plaintiff has raised permanent structures on the suit property with the consent of the land lords. Further support to this the construction made by this plaintiff on the license given by the defendants make the license irrevocable in view of Section-60(b) of the Indian Easements Act.

11. That, after receiving the aforesaid notice the plaintiff immediately sent a reply to the said notice on 29.11.2016 wherein the plaintiff clearly stated that the suit schedule property was initially leased out by Sri Shyamal Prasad Goenka, defendants predecessor in interest, who inducted the plaintiff as tenant/licensee, in respect of the suit schedule property. The property demised consisted of a few constructed rooms and vacant land. With the permission of the licensor/lessor plaintiff have spent more than Rs.31,60,000/- (rupees thirty one lakhs sixty thousand only) in raising permanent constructions on the vacant land and in the process the value of such development of the property has considerably enhanced with the rise in price index. The next constructions were necessary for housing the work shop for which lessee/licensee was taken."

Similarly, looking to the written statement/counter-claim at the instance of the defendant-opposite parties herein, this Court in response to the pleading in the aforesaid paragraphs in the plaint, in paragraphs-10, 11, 14 & 21 objected the claim of the plaintiff as follows :-

"10. That the averments made in para 4 of the plaint are false and denied by these defendants. It is absolutely false to say that the plaintiff constructed a factory shed at considerable cost as per design approved by the appropriate authority.

In reply it is stated that the plaintiff has taken the suit premises for storing scooters motor cycles and for work shop for the said two wheelers as per clause No.3 of the agreement not for any factory nor he has constructed any factory shed on the suit land of these defendants. The plaintiff has erected a temporary shed by using old rusted iron pillar, rusted G.C. Sheet and A.C. sheets which were brought from their old work shop at Jobra Road, Cuttack after eviction then that premises.

11. That the averments made in para 5 of plaint are absolutely false and purely imaginary. It is totally false to say that since the plaintiff's business has gradually grown up for which the constructed area was insufficient/inadequate for plaintiff's business and it is also false to say that considering the long length of relationship, the defendants granted license to the plaintiff for making additional constructions with his own fund and use it for business purpose. It is also absolutely false and misleading to say that clause Nos.4, 5, 8, 9 and 10 of the agreement dt.3.1.2012 related to such permission.

In reply it is stated that the plaintiff is not a licensee rather a lessee under the defendants i.e. a monthly tenant at will, which tenancy begins from the first day of each month and ends on the last day of the said month which was continued for five years. There is a written lease Agreement which clearly speaks that the plaintiff is lessee and the defendants are lessor and the plaintiff has admitted in the said written agreement that he is a lessee i.e. a monthly tenant at will. There is not a single word granting license of the suit land and godown to the plaintiff. There is also no ingredient of license to be claimed by plaintiff in the said agreement. That the purpose of the agreement dt.3.1.2012 is to grant monthly lease to the tenant which is a lease deed admitted by both the parties. In the said agreement license was not granted to the plaintiff for running his shop. Hence the plaintiff is stopped by law of

stopped to claim itself stopped as a licensee. Instead of vacating the suit premises he is taking such false plea to linger the matter, for it's illegal occupation.

14. That the averment made in para 8 of the plaint are false, misleading and denied. It is false to say that the lease agreement/license is of a permanent nature and it is false to say that as acting upon the document of conveyance the plaintiff has raised permanent structures on the suit property with consent of the landlords. It is totally false to submit that further support to this the constructions made for this plaintiff on the license given by the defendants make the license irrevocable in view of section 60(b) of the Indian Easement Act.

In reply it is submitted that the true intention of the lease agreement dt.3.1.2012 between the parties is to let out the suit property to the plaintiff as a monthly tenant and in the said agreement it was clearly mentioned that the lessee may put temporary tin shed for keeping two wheelers. There is no permission to plaintiff tenant by the landlords to construct any permanent construction. So also the tenant has not constructed any permanent construction with any masonry work over the suit property. The plaintiff's clever drafting cannot camouflage the real intention of the parties, which has been stated in the above said agreement. Hence no license was granted to the plaintiff and the lease granted in favour of plaintiff is not a permanent in nature, it was only for 5 (five) years. There is no relationship of licensor and licensee in between the plaintiff and defendants. Hence there is no question of claiming permanent license over the suit property. The section 60(b) of the Indian Easement Act, 1882 is not applicable in this case and section 52 of the said Act does not define the agreement at dt.3.1.2012 is a deed of license.

The terms and conditions of the lease deed dt.3.1.2012 does not define it as a license deed and does not come under the purview of the section 52 of the Easement Act. Rather this matter will be governed by Transfer of Property Act. Mere pleadings are not evidences, the plaintiff is put to strict proof of the same.

21. That the facts stated in para 15 of the plaint are false and denied. The facts stated relating to measurement of wide space are to be proved by the plaintiff. But it is absolutely false to say that the defendants agreed to allow the plaintiff to utilise the Northern portion of plot No.26 for the purpose of parking vehicles.

In reply it is stated that there was no agreement to let out the Northern Portion of the plot No.26 for the purpose of parking space."

6. It is at this stage, taking into consideration the application under Order 26 Rule 9 of C.P.C. at the instance of the plaintiff, this Court finds, the plaintiff while seeking identification through the Commission in exercise of power under Order 26 Rule 9 of C.P.C. in paragraphs-3, 4 & 5 submitted as follows :-

"3. That, the plaintiff constructed a factory shed at considerable cost as per design approved by the appropriate authority.

4. That, since the plaintiff's business has gradually grown up for which the constructed area was insufficient/inadequate for the plaintiff's business for which he required more space. Considering the long length of relationship, the defendants granted license to the plaintiff for making additional constructions with his own fund and use it for his business purpose.

5. That, the aforesaid averment is denied by the Defendants stating that there is no such construction, where as in clause nos.4, 5, 8, 9 & 10 of the agreement dated 3.1.2012 it has been clearly mentioned that the plaintiff may erect additional constructions with his own fund and use it for his business purpose."

It is also irrelevant to take note of the fact that even though the plaintiff filed an application under Order 26 Rule 9 of C.P.C., there is absolutely no question framed to be investigated through the appointed Commissioner. Looking to the schedule of the property, it appears, the pleadings in the application and the schedule of property, it appears in paragraph-6 there has been some indication on the identification aspect. From reading of paragraph-6, this Court observes, the intention of the plaintiff is to depute a Commission to visit the site to ascertain the onstruction aspect and to submit a report. Looking to the background involving the claim of identification of the particular aspect, this Court finds, when the plaintiff, vide the plaint claimed regarding its undertaking additional construction on the basis of Clause-4 of the agreement and also use of certain portion to the northern side of the disputed plot as parking space. For the provision in the agreement and for the flat denial of the defendants on the issue of additional construction as well as permission of the defendants to the plaintiff on the aspect of use of vacant area to the northern side of the dispute plot no.26, this Court here finds, the case of the plaintiff-petitioner heavily rests on its satisfaction of such claim considering the extent of permission in the Clause-4 of the agreement. It is at this stage, this Court finds, the provision at Order 26 Rule 9 of C.P.C. reads as follows :-

> "Order 26 Rule 9 of C.P.C.-Commissions to make local investigations- In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any *mesne profits* or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court :
>
> Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules."

7. For the heavy burden lying on the plaintiff to establish its claim on the issue of additional construction as well as parking space to the northern side of the disputed plot based on the condition in Clause-4, unless the parties entering into evidence, it becomes difficult on the part of the trial court to realize the identification aspect at this stage of the suit. Further looking to the claim and the rival-claim of both the parties and for the restrictions contained in Order 26 Rule 9 of C.P.C. for deputing a Commission at particular stage, this Court is of the opinion that sending a Commission at this stage of the matter will be amounting to collection of evidence, which is not permissible in the eye of law.

8. Perused the impugned order. Keeping in view the contentions and the rival contentions of the respective parties, this Court for the observations made therein finds, there is no infirmity in the impugned order. Therefore, this Court is not inclined to interfere in the impugned order but however observes that in the event after conclusion of evidence from both the sides and on entering into the argument if the court feels that the identification issue still unresolved, it may permit the plaintiff-petitioner to file an application under Order 26 Rule 9 of C.P.C. for consideration of the request of the petitioner therein.

For the observations as well as the findings made by this Court, there is no requirement for this Court to go to the decisions cited by the learned counsel for the petitioner being based on different situations. The Civil Miscellaneous Petition stands dismissed without interference in the impugned order. No cost.

2018 (II) ILR - CUT- 306

S. K. SAHOO, J.

ABLAPL No. 20739 OF 2017

KARNA PRADHAN .....petitioner

.Vs.

STATE (VIGILANCE) .....Opp. party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 438 – Anticipatory bail application – Filed for second time – Whether maintainable and under what circumstances – Held, yes and the circumstance is, in an exceptional case, a successive anticipatory bail application can be entertained where the party is able to show that on erroneous submission of the Public Prosecutor either on factual aspect or on law, the earlier application was rejected or there is a substantial change in the fact situation after the rejection of earlier one for which non-consideration of his application would result in miscarriage of justice.

Case Laws Relied on and Referred to :-

1. (2001)7 SCC 673 : Madhya Pradesh .Vs. Kajad :
2. (2001) 1 SCC 169 : Hari Singh Mann .Vs. Harbhajan Singh Bajwa.
3. (2016) 1 SCC 152 : Bhadresh Bipinbhai Sheth .Vs. State of Gujarat.

For petitioner : Mr. V. Narasingh
For State(Vig.) : Mr. Niranjan Moharana

ORDER Date of Order : 18.07.2018

S. K. SAHOO, J.

Heard Mr. V. Narasingh, learned counsel for the petitioner and Mr. Niranjan Moharana, learned Addl. Standing Counsel for the Vigilance Department.

This is an application under section 438 Cr.P.C. for grant of anticipatory bail to the petitioner in connection with Bhubaneswar Vigilance P.S. Case No.60 of 2016 corresponding to V.G.R. Case No.114 of 2016(V) pending in the Court of learned Special Judge, Vigilance, Bhubaneswar for alleged commission of offences under section 13(2) read with section 13(1)(e) of the Prevention of Corruption Act, 1988 read with section 109 of the Indian Penal Code.

Earlier the anticipatory bail application of the petitioner in ABLAPL No.19168 of 2016 was refused on 29.11.2017 basing on the submission made by the

learned Addl. Standing Counsel for the Vigilance Department that the custodial interrogation of petitioner is very much necessary and the petitioner has not cooperated fully with the investigation. Challenging such submission, this anticipatory bail application has been filed wherein it is urged that the petitioner was never called upon to join investigation and therefore, the question of non-cooperation does not arise. It is further submitted that the petitioner has retired from the Government Service. Learned counsel for the petitioner relied upon the decision of the Hon'ble Supreme Court in case of State of **Madhya Pradesh –Vrs.- Kajad reported in (2001)7 Supreme Court Cases 673**, wherein it is held that successive bail applications are permissible under the changed circumstances but without the change in the circumstances, the second application would be deemed to be seeking review of the earlier judgment which is not permissible under criminal law as has been held by this Court in **Hari Singh Mann -Vrs.- Harbhajan Singh Bajwa reported in (2001) 1 Supreme Court Cases 169**.

Learned counsel for the petitioner drew the attention of this Court in case of **Bhadresh Bipinbhai Sheth –Vrs.- State of Gujarat reported in (2016) 1 Supreme Court Cases 152**, it is held as follows:-

> "25.3. It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion to grant bail must be exercised on the basis of the available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined the investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided. A great ignominy, humiliation and disgrace is attached to arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage.
>
> 25.4. There is no justification for reading into Section 438 Cr.P.C. the limitations mentioned in Section 437 Cr.P.C. The plentitude of Section 438 must be given its full play. There is no requirement that the accused must make out a "special case" for the exercise of the power to grant anticipatory bail. This virtually, reduces the salutary power conferred by Section 438 Cr.P.C. to a dead letter. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his freedom, by the acceptance of conditions which the court may deem fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail."

It is the settled principle in law that no party can claim as of right to move a fresh application for anticipatory bail after dismissal of his previous application whether on merits or on dismissal as withdrawn. However, in an exceptional case, a successive anticipatory bail application can be entertained where the party is able to show that on erroneous submission of the Public Prosecutor either on factual aspect or on law, the earlier application was rejected or there is a substantial change in the fact situation after the rejection of earlier one for which non-consideration of his application would result in miscarriage of justice.

Mr. Manoranjan Paikaray, Inspector Vigilance, Khurda Squad is present today in Court and he has produced his letter dated 18.07.2018 wherein it is mentioned that the petitioner has been appearing and co-operating in the investigation as and when required and that the petitioner has also submitted all the documents in support of his case and he does not have any other documents to produce in favour of his case and that his custodial interrogation is not necessary and in the meantime the investigation has been substantially progressed.

Learned Addl. Standing Counsel for the Vigilance Department submitted that in view of the present conduct of the petitioner, he has no serious objection to the grant of anticipatory bail to the petitioner.

Considering the submissions made by the respective parties, the conduct of the petitioner in co-operating with the investigation and producing relevant documents before the Investigating Officer and taking into account the progress of investigation and the fact that the custodial interrogation is not necessary and keeping in view the nature of accusation and the ratio laid down in case of Bhadresh Bipinbhai Sheth (supra), I am of the humble view that the petitioner has been able to make out an exceptional case for re-consideration and therefore, I am inclined to release the petitioner on anticipatory bail and accordingly, this Court directs that in the event of arrest of the petitioner in connection with the aforesaid case, he shall be released on bail on furnishing bail bond of Rs.1,00,000/- (Rupees one lakh) with two solvent sureties each for the like amount to the satisfaction of the arresting officer with further conditions that he shall make himself available for interrogation by the I.O. as and when required and he shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing any facts to the Courts or to the Investigating Officer.Violation of any of the above conditions shall entail cancellation of bail.The ABLAPL is accordingly disposed of.

2018 (II) ILR - CUT- 308

S. K. SAHOO, J.

CRLA NO. 231 OF 2017

GAJANAN PROPERTY DEALER & CONSTRUCTION PVT. LTD & ORS. .....Appellants

.Vs.

STATE OF ORISSA & ANR. .....Respondents

ODISHA PROTECTION OF INTERESTS OF DEPOSITORS (in Financial Establishments) Act, 2011 – Section 13 – Appeal under – Challenging the order rejecting an application filed under section 239 of Cr.P.C. for

discharge and consequently framing charges under sections 420, 406, 467, 468 read with section 120-B of the Indian Penal Code and under section 6 of the OPID Act – It seems, the Investigating Officer has not correctly assessed the nature of dispute between the parties and in a mechanical manner filed the charge sheet – The truth has been kept behind the curtain deliberately and therefore, there is malafideness and arbitrariness in the action of the investigating agency to harass the appellants – Held, the duty of the Investigating Officers is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth – Jamuna Chaudhary -Vrs.- State of Bihar reported in 1974 Criminal Law Journal 890 followed."

"In view of the foregoing discussions, I am of the considered opinion that the Investigating Officer has failed to collect any clinching materials to proceed against the appellants and acted in a most casual and superficial manner. On the available materials on record, I find no prima facie case for commission of the offences alleged against the appellants. There is no ground for presuming that the appellants have committed the offences alleged. There is no strong suspicion against the appellants. The dispute between the parties is primarily civil in nature which has been given the colour of a criminal case resulting abuse of process. Submission of charge sheet is based totally on unfounded assumptions and it has resulted in causing miscarriage of justice. Therefore, I am of the humble view that the learned trial Court has committed palpable error in dismissing the petition for discharge and in framing charges against the appellants and as such, in the interest of justice, the impugned order cannot be sustained in the eye of law." *(Paras 15 &16)*

Case Laws Relied on and Referred to :-

1. (2007) 37 OCR (SC) 358 : Thelapalli Raghavaiah .Vs. Station House Officer.
2. (2008) 40 OCR (SC) 578 : Suneet Gupta .Vs. Anil Triloknath Sharma.
3. (2008) 39 OCR (SC) 188 : Inder Mohan Goswami .Vs. State of Uttaranchal.
4. (2011) 49 OCR (SC) 924 : Joseph Salvaraj A..Vs. State of Gujarat.
5. (2009) 43 OCR (SC) 680 : Devendra .Vs. State of U.P.
6. A.I.R. 2001 S.C. 1226 : Alpic Finance Ltd. .Vs. P. Sadasivan.
7. A.I.R. 2000 S.C. 2341 : Hridaya Ranjan Pd. Verma .Vs. State of Bihar.
8. (2009) 8 SCC 751 : Md. Ibrahim -Vs.- State of Bihar.
9. (2006) 34 OCR (SC) 749 : Popular Muthiah .Vs. State of Tamil Nadu.
10. (2005) 30 OCR (SC) 177 : State of Orissa .Vs. Devendra Nath Padhi.
11. (2012) 9 SCC 460 : Amit Kapoor .Vs. Ramesh Chander
12. A.I.R. 2000 S.C. 2583 : State of Madhya Pradesh .Vs. Mohanlal Soni.
13. 2003 Criminal Law Journal 1140 A.R. Saravanan .Vs. State.
14. (2005) 30 OCR (SC) 177 : State of Orissa .Vs. Debendra Nath Padhi.
15. 1999 SCC (Crl.) 373 : State Anti-Corruption Bureau, Hyderabad and Anr. .Vs. P. Suryaprakasam :
16. (2008) 40 OCR (SC) 272 : Hem Chand .Vs. State of Jharkhand.
17. (2008) 41 OCR (SC) 853 : Rukmini Narvekar .Vs. Vijaya Satarkekar and others.
18. (2007) 37 OCR (SC) 358 : Thelapalli Raghavaiah .Vs. Station House Officer.
19. (2008) 40 OCR (SC) 578 : Suneet Gupta .Vs. Anil Triloknath Sharma.
20. (2008) 39 OCR (SC) 188 : Inder Mohan Goswami .Vs. State of Uttaranchal.
21. (2011) 49 OCR (SC) 924Joseph Salvaraj A. Vs. State of Gujarat.
22. (2009) 43 OCR (SC) 680 : Devendra .Vs. State of U.P.

23. A.I.R. 2001 S.C. 1226 : Alpic Finance Ltd. .Vs. P. Sadasivan.
24. A.I.R. 2000 S.C. 2341 : Hridaya Ranjan Pd. Verma .Vs. State of Bihar.
25. (2002) 5 SCC 234 : Devender Pal Singh .Vs. State National Capital Territory of Delhi.
26. (2006) 34 OCR (SC) 749 : Popular Muthiah .Vs. State of Tamil Nadu.
27. A.I.R. 1991 S.C. 1260 : State of Bihar and Anr. .Vs. P.P. Sharma.
28. 1974 Criminal Law Journal 890 : Jamuna Chaudhary .Vs. State of Bihar.

For Appellants : Mr. Susanta Kumar Dash
For State of Orissa : Mr. Bibekananda Bhuyan Add. Govt. Advocate

JUDGMENT Date of Judgment: 27.08.2018

S. K. SAHOO, J.

Why everybody wants a house of his own? It is not just a basic need of a human being, a primal urge or just a place made of four walls and a roof thereon but a place where he lives with his family safely, secured and healthy. It gives him comfort, peace and stability, to imagine things in a better manner and to act for the goodness of the society and the nation. Charles Dickens quotes, "Charity begins at home and justice begins next door".

This case depicts the attempts made by Hindustan Aeronautics Limited Housing Committee, Koraput Division, Sunabeda (hereafter 'HAL Housing Committee') to bring a housing project at Bhubaneswar for the employees of HAL and the alleged misappropriation, cheating, forgery committed by the appellants in not fulfilling the terms and conditions of the agreement executed between the parties for such purpose.

The appellants have filed this appeal under section 13 of the Odisha Protection of Interests (in Financial Establishments) Act, 2011 (hereafter 'OPID Act') challenging the impugned order dated 23.11.2015 passed by the learned Presiding Officer, Designated Court, OPID Act, Cuttack in C.T. Case No. 07 of 2014 in rejecting the petition dated 17.10.2015 filed by the appellants under section 239 of Cr.P.C. for discharge and consequently framing charges under sections 420, 406, 467, 468 read with section 120-B of the Indian Penal Code and section 6 of the OPID Act.

2. On 27.04.2014 the respondent no.2 Rajaram Mohanty, Additional General Manager (Overhaul), Sukhoi Engine Division, Sunabeda-2 for HAL Housing Committee lodged the first information report before the Superintendent of Police, Economic Offences Wing, Bhubaneswar stating therein that HAL Housing Committee is a sub-committee of Hindustan Aeronautics Employee Welfare Fund (in short 'HAEWF') constituted for providing houses to its 540 committee members. HAEWF was registered under the Societies Registration Act and it was decided and resolved by the General Body of sub-committee to have a housing project at Bhubaneswar for its members who are employees of HAL and accordingly funds were collected from its members. The appellant no.2 Niranjan Parida, Managing Director of M/s. Gajanan Property Dealer & Construction Pvt.

Ltd. (hereafter 'the Company') representing and managing the company, approached HAL Housing Committee with a proposal to provide the required land of fifty acres in Mouza- Jagannath Prasad, Bhubaneswar and accordingly an agreement was executed on 04.02.2009 with a condition that the appellant no.2 would provide land @19.35 lakhs per acre including the cost of land, cost of registration, conversion, mutation and payment of revenue tax upto date of registration within the stipulated period of 31.03.2009 to the individual committee members. The appellant no.2 was given Rs.50,00,000/- (rupees fifty lakhs) as advance for the said purpose but he could not arrange the land during the period of agreement.

It is further stated in the first information report that since the appellant no.2 could not provide the required land at Mouza- Jagannath Prasad, he persuaded the committee members promising to provide the required fifty acres of land in Mouza- Dhauli Kausalyapur and accordingly, the second agreement was entered into on 31.07.2009 with a condition to provide land @Rs.20.50 lakhs per acre including the cost of land, cost of registration, conversion, mutation and payment of revenue tax upto the date of registration within the stipulated period of 30.09.2009 to the individual committee members. The appellant no.2 managed to register around ten acres of land in Mouza- Dhauli Kausalyapur in the name of the committee members after receiving an amount of Rs.2.15 crores. The amount was transferred from the committee account to the company account of ICICI Bank, Nayapalli Branch, Bhubaneswar but the appellant no.2 failed to arrange the balance land of forty acres during the agreement period.

It is further stated in the first information report that the appellant no.2 again came to the committee with a proposal for providing compact land of fifty acres in Mouza- Giringaput and Bhagabatipur, Bhubaneswar and accordingly, the third agreement was executed on 01.01.2010 with a condition to provide fifty acres of land @Rs.22.30 lakhs per acre including the cost of land, cost of registration, conversion, mutation and payment of revenue tax upto date of registration in Mouza- Giringaput and Bhagabatipur within stipulated period of 31.10.2010 to the individual committee members. The ten acres of land in Mouza- Dauli Kausalyapur which was registered the name of the committee was returned to the appellant no.2.

It is further stated in the first information report that the appellant no.2 managed to acquire 48.510 acres of land in Mouza- Giringaput and Bhagabatipur and registered around 42.151 acres of land in the name of the committee, however he with an illegal intention and ulterior motive, registered the balance land measuring 6.359 acres in his own name without registering the same in the name of the committee. The appellant no.2 cunningly kept the said land as those were connecting road to the house sites. He had received an amount of Rs.8.62 crores in addition to the amount of Rs.2.65 crores which he had already received earlier. The cost of the land registered in the name of the committee came to Rs.9.40 crores, whereas the

appellant no.2 had received an amount of Rs.11.27 crores and thus the balance amount of Rs.1.87 cores remained with the appellant no.2. It is stated that the amount was transferred from the committee account to the company account no.028405003638 of ICICI Bank, Nayapalli Branch, Bhubaneswar through RTGS. The committee ascertained later on that out of the land registered in the name of the committee, an area of Ac.14.00 fell under the category of "Chhota Jungle". The appellant no.2 did not register the land in the name of the individual committee members as per the conditions of the agreement for which an amount of Rs.42.28 lakhs was marked as expenses on this head.

It is further stated in the first information report that as per the third agreement, it was agreed upon between the parties to develop the acquired land before 31st January 2011 but no development took place during the period for which the period was extended upto 31st March 2012 by the minutes of the meeting dated 25th July 2011 agreed and signed by both the parties & again it was extended upto 10th June 2012 by the minutes of the meeting dated 22-24/01/2012 agreeing upon the rates annexed to the said minutes of meeting.

It is further stated in the first information report that on the request of the appellant no.2, an amount of rupees fifty five lakhs was paid to him as advance through RTGS to his company account no.028405003638 of ICICI Bank, Nayapalli Branch, Bhubaneswar for development of the land out of the contract amount of Rs.5.06 crores. After receiving the advance amount, the appellant no.2 did not do any developmental work and on repeated approaches, he demanded more money to start the development work. After repeated reminders, the appellant no.2 did not turn up to settle his account and he cunningly took away the excess amount from the committee and created compelling circumstances to fall in his trap. In spite of several requests and reminders, the appellant no.2 did not hand over the original sale deeds of the land arranged and sold by him. He did not hand over the relevant connected documents and also did not do anything regarding conversion and mutation of the property. He deliberately did not return the land purchased in his name by utilizing the money of the committee and registered the connecting roads in his name with an ulterior motive.

It is further stated in the first information report that the appellant no.2 had misappropriated an amount of Rs.2.84 crores (an amount of Rs.1.87 crores for the land, Rs.55 lakhs as advance for development of site and Rs.42 lakhs for registration and conversion charges) for which proper legal action is necessary to be initiated against him for recovery of the land measuring area Ac.6.359 purchased in his name by utilizing the committee money and the excess amount Rs.2.84 crores taken by him and that the appellant no.2 had kept all the original documents with him with an ulterior motive.

It is further stated in the first information report that at the time of taking possession of the land, it was noticed that during land procurement, the land broker

engaged by the appellant no.2 and the land owners were not paid their dues as per the promises and assurances made to them, which is against the spirit and interest of the agreement and therefore, the appellant no.2 had committed breach of trust by not utilizing the money for which he had received the amount. The informant remained unaware as to how much land was free from dispute as the appellant no.2 illegally held all the original documents and the entire linked documents with him with an intention to put the committee in deep trouble.

3. On the basis of the first information report lodged by the opposite party no.2 Rajaram Mohanty, E.O.W., P.S., Bhubaneswar Case No.11 dated 27.04.2014 was registered under sections 420, 406, 467, 468 read with section 120-B of the Indian Penal Code and section 6 of the OPID Act.

During investigation of the case, it was ascertained that HAEWF is a registered society whose objective is to provide housing plots to its committee members. After obtaining a good response from HAL employees to develop a plotted scheme at Bhubaneswar, advance amount of Rs.51,000/- for category-I, Rs.46,000/- for category-II and Rs.41,000/- for category-III along with non-refundable deposit of Rs.1000/- towards membership was deposited by the interested members.

E.O.W., P.S., Bhubaneswar Case No. 33 of 2013 was instituted on 28.12.2013 under sections 406/420/34 of the Indian Penal Code on the written report of Sumanta Kumar Behera, employee of HAL against the respondent no.2 Rajaram Mohanty and other members of HAL Housing Committee on the allegation of inviting applications from HAL employees to provide land for housing purpose, collecting money and though obtaining their signatures in the sale deeds at factory premises for registration of lands at Giringaput and Bhagabatipur but neither the accused persons in that case handed over the plots nor refunded the amount paid by the informant of that case in spite of repeated request rather demanded more money in the pretext of development charges and stated that if he failed to comply the demand, they would not be responsible for the possession of the land.

During course of investigation of E.O.W., P.S., Bhubaneswar Case No. 33 of 2013, it was found that HAL Housing Committee has not cheated the individual members rather the company cheated the members of the HAL. During physical verification of the project, it was ascertained that some of lands purchased by HAL Housing Committee were in their possession and the rest lands were not in their possession. A letter was sent by the Investigating Officer to the respondent no.2 Rajaram Mohanty to intimate the actual area of land in possession of HAL Housing Committee and the value of the land. The HAL Housing Committee in its letter dated 28.04.2015 intimated that the revenue land of Ac.4.572 with a clear title had been arranged by the company in the name of individual members and the rest of the lands are litigated without clear transferable title and not in their possession. It

was further found that the total loss incurred by HAL Housing Committee is Rs.10,80,04,440/- It was ascertained that the appellant no.2 as Managing Director of the Company and the appellant no.3 Lilumanjari Parida, Director of the Company made conspiracy with each other and they fabricated false documents with a dishonest intention to cheat HAL Housing Committee with whom agreements have been entered into. They collected crores of rupees from the HAL Housing Committee with dishonest intention and diverted the same for their personal gain. The appellants defaulted and failed to provide the rest land and thus the investigating officer was of the opinion that the appellants nos. 2 and 3 have cheated the HAL Housing Committee and members of HAL and thereby they misappropriated the hard-earned money of the employees to the tune of Rs.10,80,04,440/-excluding interests beyond 10.06.2012. Accordingly, while submitting final report in E.O.W., P.S., Bhubaneswar Case No. 33 of 2013, charge sheet was placed in E.O.W., P.S., Bhubaneswar Case No.11 of 2014 against the appellants under sections 420, 406, 467, 468 read with section 120-B of the Indian Penal Code and section 6 of the OPID Act on 12.05.2015.

4. Mr. Susanta Kumar Dash, learned counsel for the appellants contended that as per the agreement between the appellant-company and HAL Housing Committee for a housing project over the land having an extent of Ac.50.00 at Bhubaneswar, the appellant-company arranged almost the required land but the HAL Housing Committee started negotiating with others for entrusting the construction of houses over the lands acquired through the appellant-company in violation of the terms of agreement which stipulated the appellant-company to be entrusted with the construction of houses. Being aggrieved by the conduct of the HAL Housing Committee, the appellant-company instituted a civil suit bearing C.S. No.502 of 2012 on 18.04.2012 against HAL Housing Committee relating to the issues involved in the criminal case which is subjudiced in the Court of learned Civil Judge, Senior Division, Bhubaneswar wherein the plaintiff prayed for passing a decree of permanent injunction restraining the defendant from entering into any agreement with any third party with regard to the construction work over the suit property, with a further prayer for a direction to the defendant to co-operate with the plaintiff for supplying necessary finance for construction work over the suit property and to execute fresh agreements to that effect by supplying drawing, specification etc. of the work to be done. An application for ad-interim injunction vide I.A. No.351 of 2012 under Order XXXIX Rules 1 & 2 read with section 151 of Code of Civil Procedure was also filed by the appellant-company with a prayer to restrain the HAL Housing Committee from engaging any other person/firm/company for executing the development and construction of the housing project over the suit land and though HAL Housing Committee has not filed the written statement in the Civil Suit but show cause/objection has been filed to I.A. No.351 of 2012. It is further contended that since the appellant-company instituted the aforesaid suit, the HAL Housing Committee, in order to harass and

pressurize the appellants to abandon their claim with regard to the construction of houses, initiated the criminal prosecution and during pendency of the criminal proceeding, the HAL Housing Committee entered into agreement with the third parties for construction of the houses. It is further contended that the allegation leveled in the F.I.R. that to the utter surprise of the informant, an area of Ac.14.00 dec. from out of the land registered in the name of the committee was found under the category of 'Chhota Jungle', is a motivated one inasmuch as HAL Housing Committee presented a writ petition before this Court on 11.01.2011 vide W.P.(C) No.834 of 2011 which is more than three years prior to the lodging of the first information report and in that writ petition, the HAL Housing Committee claimed change of Kissam of the Stitiban land from 'Chhota Jungle' to 'Gharabadi' on the basis of field position as well as report of the Revenue Inspector dated 12.10.2010 obtained on the strength of the application of the committee. It is further submitted that the facts narrated in the charge sheet that the HAL Housing Committee is in possession of only four acres of land is completely false inasmuch as an agreement has been signed between the HAL Housing Committee and one Pravakar Swain for the development work for thirty acres of land and after Pravakar Swain left the work, it was given to another organization namely AD Dwellers Pvt. Ltd. and the said company has made construction work of the boundary wall of more than thirty acres of land but thereafter he also left the work. It is vehemently contended that the dispute between the parties is essentially civil in nature and it has been given the colour of a criminal case. It is argued that there is no reasonable basis for the foundation of the accusation and the ingredients of the offences are totally lacking and the investigation has been done in a perfunctory manner and the learned Designated Court mechanically rejected the petition under section 239 of Cr.P.C. and framed charges against the appellants and therefore, the impugned order should be set aside. During course of hearing, the learned counsel for the appellants filed affidavits dated 11.01.2018 and 22.03.2018 annexing various documents which were taken on record. Learned counsel for the appellants relied upon the decisions of the Hon'ble Supreme Court in the cases of **Thelapalli Raghavaiah -Vrs.- Station House Officer reported in (2007) 37 Orissa Criminal Reports (SC) 358**, **Suneet Gupta -Vrs.- Anil Triloknath Sharma reported in (2008) 40 Orissa Criminal Reports (SC) 578** , **Inder Mohan Goswami -Vrs.- State of Uttaranchal reported in (2008) 39 Orissa Criminal Reports (SC) 188**, **Joseph Salvaraj A. -Vrs.- State of Gujarat reported (2011) 49 Orissa Criminal Reports (SC) 924**, **Devendra -Vrs.- State of U.P. reported in (2009) 43 Orissa Criminal Reports (SC) 680**, **Alpic Finance Ltd. -Vrs.- P. Sadasivan reported in A.I.R. 2001 S.C. 1226**, **Hridaya Ranjan Pd. Verma -Vrs.- State of Bihar reported in A.I.R. 2000 S.C. 2341**, **Md. Ibrahim -Vrs.- State of Bihar reported in (2009) 8 Supreme Court Cases 751**, **Popular Muthiah -Vrs.- State of Tamil Nadu reported in (2006) 34 Orissa Criminal Reports (SC) 749** and **State of Orissa -Vrs.- Devendra Nath Padhi reported in (2005) 30 Orissa Criminal Reports (SC) 177**.

Mr. Bibekananda Bhuyan, learned Addl. Govt. Advocate on the other hand contended that the first information report indicates that despite an agreement between the parties and receipt of a sizable amount belonging to the members of HAL Housing Committee, the appellants acquired Ac.41.219 dec. of land and managed to record Ac.7.073 dec. of land in their names and out of the lands registered in the name of the Committee by the appellants, 14 acres fell under the category of 'Chhota Jungle'. It is contended that the appellants were fully aware that the 14 acres of lands were inalienable in view of the provisions of the Forest (Conservation) Act, 1980 and the decision of the Hon'ble Supreme Court in the case of T.N. Godavaraman. No permission as required under the Orissa Communal Forest and Private Lands (Prohibition of Alienation) Act, 1948 (Act 1 of 1948) (hereafter '1948 Act') was obtained from the Collector and thus fraud has been perpetuated and the so-called alienation are mere eye wash being contrary to law. The appellants having taken the consideration money have defrauded the informant's society by alienating 'Jungle kissam' of land in spite of statutory prohibition. It is further contended that though the appellants by way of affidavits have filed several documents to indicate that the informant was aware about the Kissam of land and as such they cannot be held liable for fraud because of statutory prohibition, but those documents were neither produced before the learned trial Court during consideration of the application for discharge nor taken as grounds at the time of filing of the appeal and therefore, those documents and contentions cannot be taken into account in the present appeal. Learned counsel relied upon the decisions in cases of **Chandradhoja Sahoo -Vrs.- State of Orissa reported in (2012) 13 Supreme Court Cases 419**, **Smt. Basanti Kumari Sahu -Vrs.- State of Orissa reported in 81 (1996) Cuttack Law Times 571**, **State of Orissa -Vrs.- Dillip Kumar Sahoo reported in 2017 (I) Orissa Law Reviews 214**, **Birendra Nath Das -Vrs.- State of Orissa reported in 123 (2017) Cuttack Law Times 752** and **Chandradhoja Sahoo -Vrs.- Member, Board of Revenue, Orissa reported in 2009 (II) Orissa Law Reviews 8.**

Scope of discharging an accused under section 239 of Cr.P.C.

5. Section 239 of Cr.P.C., inter alia, provides that if upon considering the police report and the documents sent with it under section 173 of Cr.P.C. and making such examination, if any, of the accused and after giving prosecution and accused an opportunity being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused and record his reasons for so doing. The object of discharge under section 239 of Cr.P.C. is to save the accused from unnecessary and prolonged harassment. When the allegations are baseless or without foundation and no prima facie case are made out, it is just and proper to discharge the accused to prevent abuse of process of the Court. If there is no ground for presuming that accused has committed an offence, the charges must be considered to be groundless. The ground may be any valid ground including the insufficiency of evidence to prove the charge. When the materials at the time of

consideration for framing the charge are of such a nature that if unrebutted, it would make out no case whatsoever, the accused should be discharged. Appreciation of evidence is an exercise that this Court is not to undertake at the stage of consideration of the application for discharge. The truth, veracity and effect of the materials proposed to be adduced by the prosecution during trial are not to be meticulously adjudged. The likelihood of the accused in succeeding to establish his probable defence cannot be a ground for his discharge.

In case of **Amit Kapoor -Vrs.- Ramesh Chander reported in (2012) 9 Supreme Court Cases 460**, it is held as follows:-

> "19. At the initial stage of framing of a charge, the Court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the Court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage."

In case of **State of Madhya Pradesh -Vrs.- Mohanlal Soni reported in A.I.R. 2000 S.C. 2583**, it is held that at the stage of framing charge, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence to conclude whether the materials produced are sufficient or not for convicting the accused. If the evidence which the prosecution proposes to produce to prove the guilt of the accused, even if fully accepted before it is challenged by the cross-examination or rebutted by the defence evidence, if any, cannot show that accused committed the particular offence then the charge can be quashed.

In case of **A.R. Saravanan -Vrs.- State reported in 2003 Criminal Law Journal 1140**, it is held as follows:-

> "7. Under section 239 of Cr.P.C., it is the duty of the trial Court to look into whether there is ground for presuming commission of offence or whether the charge is groundless. The trial court is required to see whether a prima facie case pertaining to the commission of offence is made out or not. At the stage of 239 of Cr.P.C., the trial court has to examine the evidence only to satisfy that prima facie case is made out or not. The Magistrate has to consider the report of the prosecution, documents of both sides, hear the arguments of the accused and prosecution and arrive at a conclusion that the materials placed, on their face value would furnish a reasonable basis or foundation for accusation.
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> 8. The words "groundless" employed in Section 239 means there is no ground for presuming that the accused is guilty. When there is no ground for presuming that the accused has committed an offence, the charge must be considered as groundless."

Scope of producing materials by accused at the stage of section 239 of Cr.P.C.

6. At the stage of framing of charge, in rare and exceptional cases, if the accused produces materials before the High Court which is based on sound, reasonable and indubitable facts and cannot be justifiably refuted by the prosecution and which are of sterling and impeccable quality or on the basis of admitted documents which would rule out and displace the assertions contained in the charges

leveled against him, in order to prevent abuse of process of the Court and to secure the ends of justice, the High Court even at the stage of section 239 of Cr.P.C. can take into account such materials. However, the High Court at that stage should not enter into appreciation of evidence to verify if the defence plea can be established by the accused or not.

In case of **State of Orissa -Vrs.- Debendra Nath Padhi reported in (2005) 30 Orissa Criminal Reports (SC) 177**, it is held as follows:-

> "7. Similarly, in respect of warrant cases triable by Magistrates, instituted on a police report, Sections 239 and 240 of the Code are the relevant statutory provisions. Section 239 requires the Magistrate, to consider 'the police report and the documents sent with it under Section 173 and, if necessary, examine the accused and after giving accused an opportunity of being heard, if the Magistrate considers the charge against the accused to be groundless, the accused is liable to be discharged by recording reasons thereof.
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> 8. What is to the meaning of the expression 'the record of the case' as used in Section 227 of the Code. Though the word 'case' is not defined in the Code but Section 209 throws light on the interpretation to be placed on the said word. Section 209 which deals with the commitment of case to Court of Session when offence is triable exclusively by it, inter alia, provides that when it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall commit 'the case' to the Court of Session and send to that Court 'the record of the case' and the document and articles, if any, which are to be produced in evidence and notify the Public Prosecutor of the commitment of the case to the Court of Session. It is evident that the record of the case and documents submitted therewith as postulated in Section 227 relate to the case and the documents referred in Section 209. That is the plain meaning of Section 227 read with Section 209 of the Code. No provision in the Code grants to the accused any right to file any material or document at the stage of framing of charge. That right is granted only at the stage of the trial.
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> 16. All the decisions, when they hold that there can only be limited evaluation of materials and documents on record and sifting of evidence to prima facie find out whether sufficient ground exists or not for the purpose of proceeding further with the trial, have so held with reference to materials and documents produced by the prosecution and not the accused. The decisions proceed on the basis of settled legal position that the material as produced by the prosecution alone is to be considered and not the one produced by the accused. The latter aspect relating to the accused though has not been specifically stated, yet it is implicit in the decisions. It seems to have not been specifically so stated as it was taken to be well settled proposition. This aspect, however, has been adverted to in **State Anti-Corruption Bureau, Hyderabad and Anr. -Vrs.- P. Suryaprakasam : 1999 SCC (Crl.) 373** where considering the scope of Sections 239 and 240 of the Code it was held that at the time of framing of charge, what the trial Court is required to, and can consider are only the police report referred to under Section 173 of the Code and the documents sent with it. The only right the accused has at that stage is of being heard and nothing beyond that (emphasis supplied). The judgment of the High Court quashing the proceedings by looking into the documents filed by the accused in support of his claim that no case was made out against him even before the trial had commenced was reversed by this Court. It may be noticed here that learned counsel for the parties addressed the arguments on the basis that the principles applicable would be same - whether the case be under Sections 227 and 228 or under Sections 239 and 240 of the Code.
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> 18.....The scheme of the Code and object with which Section 227 was incorporated and Sections 207 and 207(A) omitted have already been noticed. Further, at the stage of framing of charge, roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police.
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> 23. As a result of aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. Satish Mehra's case holding that the Trial Court has powers to consider even materials which accused may produce at the stage of section 227 of the Code has not been correctly decided."

In the case of **Hem Chand -Vrs.- State of Jharkhand reported in (2008) 40 Orissa Criminal Reports (SC) 272**, it is held as follows:-

> "8. It is beyond any doubt or dispute that at the stage of framing of charge, the Court will not weigh the evidence. The stage for appreciating the evidence for the purpose of arriving at a conclusion as to whether the prosecution was able to bring home the charge against the accused or not would arise only after all the evidences are brought on records at the trial.
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> 9. It is one thing to say that on the basis of the admitted documents, the appellant was in a position to show that the charges could not have been framed against him, but it is another thing to say that for the said purpose he could rely upon some documents whereupon the prosecution would not rely upon.
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> 12. The learned counsel for the CBI is, thus correct in his submission that what has been refused to be looked into by the learned Special Judge related the documents filed by the appellant along with his application for discharge.
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> The Court at the stage of framing charge exercises a limited jurisdiction. It would only have to see as to whether a prima facie case has been made out. Whether a case of probable conviction for commission of an offence has been made out on the basis of the materials found during investigation should be the concern of the Court. It, at that stage, would not delve deep into the matter for the purpose of appreciation of evidence. It would ordinarily not consider as to whether the accused would be able to establish his defence, if any."

In the case of **Rukmini Narvekar -Vrs.- Vijaya Satarkekar and others reported in (2008) 41 Orissa Criminal Reports (SC) 853**, it is held as follows:-

"9. In my view, therefore, there is no scope for the accused to produce any evidence in support of the submissions made on his behalf at the stage of framing of charge and only such materials as are indicated in Section 227 Cr.P.C. can be taken into consideration by the learned Magistrate at that stage. However, in a proceeding taken therefrom under Section 482 Cr.P.C., the Court is free to consider material that may be produced on behalf of the accused to arrive at a decision whether the charge as framed could be maintained. This, in my view, appears to be the intention of the legislature in wording Sections 227 and 228 the way in which they have been worded and as explained in Debendra Nath Padhi case by the larger Bench therein to which the very same question had been referred.

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28(17).....Thus in our opinion, while it is true that ordinarily defence material cannot be looked into by the Court while framing of the charge in view of D.N. Padhi's case, there may be some very rare and exceptional cases where some defence material when shown to the trial Court would convincingly demonstrate that the prosecution version is totally absurd or preposterous, and in such very rare cases, the defence material can be looked into by the Court at the time of framing of the charges or taking cognizance.

xx xx xx xx xx xx xx

29(18). In our opinion, therefore, it cannot be said as an absolute proposition that under no circumstances can the Court look into the material produced by the defence at the time of framing of the charges, though this should be done in very rare cases i.e. where the defence produces some material which convincingly demonstrates that the whole prosecution case is totally absurd or totally concocted. We agree with Sri Lalit that in some very rare cases the Court is justified in looking into the material produced by the defence at the time of framing of the charges, if such material convincingly establishes that the whole prosecution version is totally absurd, preposterous and concocted."

Execution of three agreements: Conduct of appellant no.2

7. The *first agreement* was executed on 04.02.2009 for providing fifty acres of required land in Mouza-Jagannath Prasad, Bhubaneswar. The condition was that the appellant no.2 would provide land @19.35 lakhs per acre including the cost of land, cost of registration, conversion, mutation and payment of revenue tax upto date of registration within the stipulated period of 31.03.2009 to the individual committee members. The appellant no.2 was given Rs.50,00,000/- (rupees fifty lakhs) as advance for the said purpose but he failed to arrange the land during the period of agreement.

The *second agreement* was executed on 31.07.2009 for providing fifty acres of required land in Mouza-Dhauli Kausalyapur. The condition was that the appellant no.2 would provide land @Rs.20.50 lakhs per acre including the cost of land, cost of registration, conversion, mutation and payment of revenue tax upto the date of registration within the stipulated period of 30.09.2009 to the individual committee members. The appellant no.2 managed to register around ten acres of land in Mouza-Dhauli Kausalyapur in the name of the committee members after receiving an amount of Rs.2.15 crores. The appellant no.2 failed to arrange the balance land of forty acres during the agreement period.

The *third agreement* was executed on 01.01.2010 for providing fifty acres of required compact land in Mouza-Giringaput and Bhagabatipur in Bhubaneswar.

The condition was that the appellant no.2 would provide land @ Rs.22.30 lakhs per acre including the cost of land, cost of registration, conversion, mutation and payment of revenue tax upto date of registration within the stipulated period of 31.10.2010 to the individual committee members. The ten acres of land in Mouza-Dauli Kausalyapur which was registered the name of the committee was returned to the appellant no.2.

It is the prosecution case that after execution of third agreement, the appellant no.2 managed to acquire Ac.48.510 dec. of land in Mouza- Giringaput and Bhagabatipur in Bhubaneswar but registered around 42.151 acres of land in the name of the committee. He registered the balance land measuring 6.359 acres in his own name with an illegal intention and ulterior motive. The lands kept by the appellant no.2 were connecting road to the house sites.

It is the further prosecution case that the appellant no.2 received an amount of Rs.8.62 crores in addition to the amount of Rs.2.65 crores which he had already received earlier and thus the total amount received was Rs.11.27 crores. The cost of the land registered in the name of the committee was Rs.9.40 crores and thus the balance amount of Rs.1.87 cores remained with the appellant no.2.

Filing of Civil Suit by appellant-company: Case of company

8. The first information report was lodged on 27.04.2014. It is not in dispute that two years prior to the lodging of the first information report, the appellant-company instituted a civil suit bearing C.S. No.502 of 2012 on 18.04.2012 against HAL Housing Committee in the Court of learned Civil Judge, Senior Division, Bhubaneswar wherein the plaintiff prayed for passing a decree of permanent injunction restraining the defendant from entering into any agreement with any third party with regard to the construction work over the suit property, with a further prayer for a direction to the defendant to co-operate with the plaintiff for supplying necessary finance for construction work over the suit property and to execute fresh agreements to that effect by supplying drawing, specification etc. of the work to be done.

An application for ad-interim injunction vide I.A. No.351 of 2012 under Order XXXIX Rules 1 & 2 read with section 151 of Code of Civil Procedure was also filed in the said Civil Suit by the appellant-company with a prayer to restrain the HAL Housing Committee from engaging any other person/firm/company for executing the development and construction of the housing project over the suit land and though HAL Housing Committee has not filed the written statement in the Civil Suit but show cause/objection has been filed to I.A. No.351 of 2012.

In order to appreciate the nature of dispute between the parties, the recitals of the *third agreement* which was executed on 01.01.2010 are very relevant. This agreement executed between the appellant-company and HAL Housing Committee indicates that in order to have a housing complex at Bhubaneswar, the HAL Housing

Committee was searching for a prospective builder and estate developer and constructor, who can arrange and develop the land so also for construction of the housing project and the appellant-company who was dealing with sale/purchase of landed property and construction thereof agreed for such arrangement, development of land and also agreed to undertake the housing project over the site. The HAL Housing Committee agreed upon the proposal made by the appellant-company for establishing the house project at Mouza- Giringaput and Bhagabatipur after visiting the proposal site and being satisfied over the location of the area. As per the agreement, it was the responsibility of the appellant-company for arranging around fifty acres of land for the proposed housing project. The appellant-company shall give the copy of legal opinion obtained from a legal practitioner about the title/ownership of each plot to the HAL Housing Committee before the execution of sale deeds of the properties. The appellant-company shall make the development of the proposed housing site after registration of the properties in the name of the HAL Housing Committee or its nominated persons which includes leveling of the land, construction of metal and morum road, construction of retraining walls of adequate size and shape in the periphery of the proposed site, small demarcation stones to be fixed all around the project site and two numbers of gates with security cabins to be constructed at two entry places. In case the HAL Housing Committee or its member desire to provide the construction of individual compound walls to individual units, the construction of those individual compound walls must be given to the appellant-company. In case all the members having individual sub-plots inside the projects provide the individual walls of their respective units, the appellant-company has to complete the common compound wall all around the project by its own costs.

In the Civil Suit, specific averments have been taken that the HAL Housing Committee fixed the deadline to 31.03.2012 for completion of all the allied works agreed to be done by the appellant-company in respect of acquiring the land but keeping itself away from doing the part of its contract i.e. entrustment of development work of land, by executing agreement for issuing work order and construction of houses over the housing project site and on the day before presentation of the suit, the defendant flatly denied to entrust the development and construction work by executing a fresh agreement and work order. It is further stated in the plaint that the plaintiff had sustained huge loss in arranging the lands and the appellant-company was expecting to get the allotment of development and construction work as agreed upon and the defendant had no right to stop construction work of the plaintiff or to entrust the work of construction to any other person by entering into any agreement with him.

Even though the defendant entered appearance in the Civil Suit but no written statement was filed till the lodging of the first information report. However, objection/show cause has been filed by the HAL Housing Committee in the interim application wherein it is stated that the shifting of project from one place to another by executing three agreements from time to time was only because of non-

acquisition of land by the plaintiff and violation of the terms of the contract and at no point of time the plaintiff completed the acquisition of land as per the terms of the agreement. It is further stated in the show cause that by taking the entire amount towards costs of fifty acres of land from the defendant, the plaintiff failed in executing the sale deed within the agreement period and that the land acquired in the name of the committee members is around 41.219 acres whose cost @ 22.30 lakhs per acre is around Rs.9,19,183,70/- and the plaintiff received Rs.11,32,000,00/- which is calculated to be excess amount of Rs.2,12,816,36/- and therefore, the plaintiff had illegally retained the money with him without handing over the land area around 7.073 acre purchased in its name by utilizing the excess amount received from the HAL Housing Committee. It is further stated that the plaintiff has no prima facie case in his favour and the balance of convenience never leans in favour of the plaintiff, rather in favour of the defendant.

Whether a civil dispute has been given a colour of criminal offence

9. In case of **Thelapalli Raghavaiah -Vrs.- Station House Officer reported in (2007) 37 Orissa Criminal Reports (SC) 358**, it is held as follows:-

> "17. Mr. Singhvi referred to and relied on a decision of this Court in **Madhavrao Jiwajirao Scindia and Ors. -Vrs.- Sambhajirao Chandrojirao Angre and Ors. reported in 1988 (1) SCC Page 692** , where this Court had occasion to observe that though a case of breach of trust may be both a civil wrong and a criminal offence but there would be certain situations where it would pre-dominantly be a civil wrong and may or may not amount to a criminal offence. It was also observed that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations as made prima facie established the offence.
>
> 18. We have carefully gone through the complaint made by the petitioner, and are convinced that the same primarily makes out a civil dispute relating to measurement, though an attempt has been made to give the same a criminal flavour. The High Court rightly held that the entire reading of the complaint does not disclose any offence except a civil dispute between the parties."

In case of **Suneet Gupta -Vrs.- Anil Triloknath Sharma reported in (2008) 40 Orissa Criminal Reports (SC) 578**, it is held as follows:-

> "22. In the case on hand, the High Court was right in coming to the conclusion that a civil dispute - pure and simple - between the parties was sought to be converted into a criminal offence only by resorting to pressure tactics and by taking police help which was indeed abuse of process of law and has been rightly prevented by the High Court."

It prima facie appears that the dispute between the parties arose when HAL Housing Committee tried to enter into an agreement with a third party with regard to the construction work over the lands acquired by the appellant-company and accordingly, the Civil Suit was filed on 18.04.2012 before the learned Civil Judge (Senior Division), Bhubaneswar with a prayer for a decree permanent injunction against the defendant so also a decree for mandatory injunction. An interim application was also filed in the Civil Suit for ad-interim injunction against the defendant to restrain him from engaging any other person/firm/company for

executing the development and construction of housing project over the suit land. Documents were filed by the appellants by way of additional affidavit like the agreement dated 01.01.2010, the plaint copy of the Civil Suit, the copy of the interim application, copy of the objection/show cause filed by the defendant and the order sheets of C.S. No.502 of 2012 which were taken on record without any objection from the side of the respondents. These documents having not been refuted by the prosecution can be looked into even at this stage to ascertain the nature of dispute between the parties. Merely because vital documents were not filed before the trial Court at the time of hearing of the petition under section 239 of Cr.P.C. and those were produced before the High Court by the accused while challenging the rejection of the discharge petition, it would be travesty of justice not to consider such documents only on the ground of non-filing of the same before the trial Court. The contention in that respect made by the learned Addl. Govt. Advocate is not acceptable. In rare and exceptional cases, this Court can entertain the materials produced by the accused in such contingency provided that such materials are based on sound, reasonable and indubitable facts and cannot be justifiably refuted by the prosecution and those are of sterling and impeccable quality. The said principle is also applicable for the admitted documents. In order to prevent abuse of process of the Court and to secure the ends of justice, this Court can take into account such materials even at the stage of section 239 of Cr.P.C.

After carefully going through the case records and the undisputed documents filed by the appellants, I am convinced that the dispute between the parties is primarily civil in nature relating to delay in acquiring the lands, violation of certain terms and conditions of agreement, attempt made by the HAL Housing Committee to entrust the development and construction of housing project over the suit land to the third party.

Offence under section 420 of the Indian Penal Code

10. The essential ingredients of the offence of "cheating" are as follows: (i) deception of a person either by making a false or misleading representation or by dishonest concealment or by any other act or omission; (ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived; and (iii) such act or omission causing or is likely to cause damage or harm to that person in body, mind, reputation or property. To constitute an offence under section 420 of the Indian Penal Code, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived (i) to deliver any property to any person, or (ii) to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security). (Ref:- **Md. Ibrahim –Vrs.- State of Bihar reported in (2009) 8 Supreme Court Cases 751**)

In case of **Inder Mohan Goswami -Vrs.- State of Uttaranchal reported in (2008) 39 Orissa Criminal Reports (SC) 188**, it is held that to hold a person guilty of 'cheating', it is necessary to show that he had a fraudulent or dishonest intention at the time of making the promise. From his mere failure to subsequently keep a promise, one cannot presume that he all along had a culpable intention to break the promise from the beginning.

In case of **Joseph Salvaraj A. -Vrs.- State of Gujarat reported in (2011) 49 Orissa Criminal Reports (SC) 924**, it is held that under section 420 of the Indian Penal Code, it is inbuilt that there has to be a dishonest intention from the very beginning, which is sine qua non to hold the accused guilty for commission of the said offence.

In case of **Devendra -Vrs.- State of U.P. reported in (2009) 43 Orissa Criminal Reports (SC) 680**, it is held that a misrepresentation from the very beginning is a sine qua non for constitution of an offence of cheating, although in some cases, an intention to cheat may develop at a later stage of formation of the contract.

In case of **Alpic Finance Ltd. -Vrs.- P. Sadasivan reported in A.I.R. 2001 S.C. 1226**, it is held as follows:-

> "10. The facts in the present case have to be appreciated in the light of the various decisions of this Court. When somebody suffers injury to his person, property or reputation, he may have remedies both under civil and criminal law.
>
> The injury alleged may form basis of civil claim and may also constitute the ingredients of some crime punishable under criminal law. When there is dispute between the parties arising out of a transaction involving passing of valuable properties between them, the aggrieved person may have right to sue for damages or compensation and at the same time, law permits the victim to proceed against the wrongdoer for having committed an offence of criminal breach of trust or cheating. Here the main offence alleged by the appellant is that respondents committed the offence under Section 420 I.P.C. and the case of the appellant is that respondents have cheated him and thereby dishonestly induced him to deliver property. To deceive is to induce a man to believe that a thing is true which is false and which the person practicing the deceit knows or believes to be false. It must also be shown that there existed a fraudulent and dishonest intention at the time of commission of the offence. There is no allegation that the respondents made any willful misrepresentation. Even according to the appellant, parties entered into a valid lease agreement and the grievance of the appellant is that the respondents failed to discharge their contractual obligations. In the complaint, there is no allegation that there was fraud or dishonest inducement on the part of the respondents and thereby the respondents parted with the property. It is trite law and common sense that an honest man entering into a contract is deemed to represent that he has the present intention of carrying it out but if, having accepted the pecuniary advantage involved in the transaction, he fails to pay his debt, he does not necessarily evade the debt by deception.
>
> 11. Moreover, the appellant has no case that the respondents obtained the article by any fraudulent inducement or by willful misrepresentation. We are told that respondents, though committed default in paying some installments, have paid substantial amount towards the consideration.

12. Having regard to the facts and circumstances, it is difficult to discern an element of deception in the whole transaction, whereas it is palpably evident that the appellant had an oblique motive of causing harassment to the respondents by seizing the entire articles through magisterial proceedings. We are of the view that the learned judge was perfectly justified in quashing the proceedings and we are disinclined to interfere in such matters."

In case of **Hridaya Ranjan Pd. Verma -Vrs.- State of Bihar reported in A.I.R. 2000 S.C. 2341**, it is held as follows:-

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

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

The section requires - (1) Deception of any person.

(2) (a) Fraudulently or dishonestly inducing that person

(i) to deliver any property to any person; or

(ii) to consent that any person shall retain any property; or

(b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body mind, reputation or property.

14. On a reading of the section, it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

15. In determining the question, it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time to inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating, it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise.

16. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

It is the prosecution case that after the execution of the third agreement on 01.01.2010 for providing fifty acres of required compact land in Mouza-Giringaput and Bhagabatipur in Bhubaneswar, the appellant no.2 managed to acquire Ac.48.510 dec. of land in Mouza-Giringaput and Bhagabatipur but registered around Ac.42.151 dec. of land in the name of the committee and he registered the balance land

measuring Ac.6.359 dec. in his own name and the lands kept by the appellant no.2 were connecting road to the house sites. Even when the second agreement was executed on 31.07.2009 for providing fifty acres of required land in Mouza-Dhauli Kausalyapur, the appellant no.2 managed to register around ten acres of land in Mouza-Dhauli Kausalyapur in the name of the committee members which were returned to the appellant no.2 after execution of third agreement. Thus after executing agreement and taking money for providing land, the appellant no.2 has not sat idle rather made sincere attempt to locate the lands at the assured places at Bhubaneswar and was successful to a large extent and also got it registered in the name of the HAL Housing Committee. What was the genuine grievance of the appellants for which the appellant no.2 retained and registered Ac.6.359 dec. in the name of the company and did not register the same in the name of the committee is a factor which is the subject matter of the Civil Suit.

In view of the foregoing discussions, I am of the humble view that there is absence of any prima facie material to show that representation which was made to the committee by the appellant no.2 was false to his knowledge and it was made in order to deceive the committee. There is also nothing on record to show that the intention of the appellant no.2 was dishonest at the very time when he made the promise and entered into a transaction with the committee to part with money. Therefore, on the basis of the available materials, it cannot be said that there existed any fraudulent and dishonest intention at the time of execution of agreement or the appellant no.2 made any willful misrepresentation. Even if it is the prosecution case that the appellant no.2 failed to discharge the contractual obligations to some extent but mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction. Without fraudulent inducement or willful misrepresentation, mere failure to keep up the promise subsequently cannot be a ground to attract the ingredients of the offence of cheating.

Therefore, I am of the humble view that in the factual scenario, the ingredients of offence under section 420 of the Indian Penal Code are not attracted.

Offence under section 406 of the Indian Penal Code

11. Section 406 of the Indian Penal Code prescribes punishment for criminal breach of trust which is defined under section 405 of the Indian Penal Code. A careful reading of the section 405 Indian Penal Code shows that a criminal breach of trust involves the following ingredients:

> (a) a person should have been entrusted with property, or entrusted with dominion over property;
>
> (b) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly use or dispose of that property or wilfully suffer any other person to do so;

(c) that such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust.

The gist of the offence under section 405 of the Indian Penal Code is misappropriation done in a dishonest manner. There are two distinct parts of the said offence. The first involves the fact of entrustment, wherein an obligation arises in relation to the property over which dominion or control is acquired. The second part deals with misappropriation which should be contrary to the terms of the obligation which is created. To make out a case of criminal breach of trust, it is not sufficient to show that money has been retained by the appellants. It must also be shown that the appellants dishonestly disposed of the same in some way or dishonestly retained the same. The mere fact that the appellants did not pay the money to the informant does not amount to criminal breach of trust.

It is the case of the informant as per the first information report that an excess amount of Rs.2.84 crores (an amount of Rs.1.87 crores for the land, Rs.55 lakhs as advance for development of site and Rs.42 lakhs for registration and conversion charges) has been retained by the appellant no.2 and therefore, he has misappropriated such amount. Much prior to the lodging of the F.I.R., the appellant has approached the learned Civil Judge, Senior Division, Bhubaneswar in C.S. No.502 of 2012 and also filed an interim application against HAL Housing Committee praying for certain reliefs as already stated. Whether the terms and conditions of the agreement between the parties have been flouted, whether the appellants would be entitled to the reliefs sought for in the Civil Suit and interim application and whether there is any excess payment of money to the appellant no.2 can be better adjudicated by the Civil Court by giving due opportunity of hearing to the respective sides. In the background of civil dispute between the parties, mere fact that the appellant no.2 did not refund the excess money which he allegedly received from the informant, does not amount to criminal breach of trust.

Therefore, I am of the humble view that in the factual scenario, the ingredients of offence under section 406 of the Indian Penal Code are not attracted.

Offences under sections 467 and 468 of the Indian Penal Code

12. The basic ingredients of the offence under section 467 of the Indian Penal Code are that (i) the document in question is forged; (ii) the accused forged it and (iii) the document is one of the kinds enumerated in the said section. Section 468 of the Indian Penal Code applies to those cases where forgery has been committed for the purpose of cheating. If it is proved that the purpose of the offender in committing the 'forgery' is to obtain property dishonestly or if the guilty purpose comes within the definition of 'cheating' as defined under section 415 of the Indian Penal Code then his act would be punishable under section 468 of the Indian Penal Code. For both these offences, the very first thing which is required to be proved is that a

'forgery' as defined under sections 463 and 464 of the Indian Penal Code have been committed.

It is contended that by the learned counsel for the State that since out of the lands registered in the name of the Committee by the appellants, 14 acres fell under the category of 'Chhota Jungle' which are inalienable and no permission was obtained from the Collector as required under 1948 Act, therefore, fraud has been perpetuated and so-called alienation is a mere eye wash being contrary to law. The decisions placed by the learned counsel for the State indicate that section 3 of 1948 Act contains a non-obstante clause, which prohibits alienation of communal forest and private lands and further prohibits a landlord from selling, mortgaging, leasing or otherwise assigning or alienating or converting into raiyati land any communal forest or private land or creating any occupancy rights therein, without the previous sanction of the Collector which of course would not be applicable in prohibiting a landlord from leasing out his private land for a period not exceeding two years and section 4 provides transaction of the nature specified in section 3 to be void.

In the case in hand, more than three years prior to the lodging of the first information report, HAL Housing Committee approached this Court on 11.01.2011 in W.P.(C) No. 834 of 2011 with a prayer to direct the Tahasildar, Bhubaneswar to change the Kissam of Plot No.5 under Khata No.176 of Mouza-Giringaput which was mentioned as 'Chhota Jungle' in the 1962 settlement R.O.R. and this Court as per order dated 13.12.2011 while disposing of the writ petition, directed the petitioner to approach the appropriate authority under section 58 of the Odisha Land Reforms Act, 1960. The averments made in the writ petition filed by the HAL Housing Committee clearly indicate that being aware of the fact in the R.O.R., the Kissam of the land was mentioned as 'Chhota Jungle', they purchased the land and approached different authorities since 2010 including this Court twice i.e. W.P.(C) No.16482 of 2010 and W.P.(C) No. 834 of 2011 for conversion of the status of the land, as the same Kissam as per 1962 settlement ROR was not in existence in the field and since the Government had decided to give the facility to the land owner for changing the Kissam and thereby raising the land revenue. Therefore, the transfer of land recorded under the Kissam 'Chhota jungle' was within the knowledge of both the parties and the requisite mens rea of forgery is hopelessly found to be absent and it cannot be said any fraud has been perpetuated in the alienation or that the execution of the sale deed comes within 'making a false document' as defined under section 464 of the Indian Penal Code.

Therefore, I am of the humble view that in the factual scenario, the ingredients of offence under sections 467 and 468 of the Indian Penal Code are not attracted.

Offence under section 120-B of the Indian Penal Code

13. Section 120-B of the Indian Penal Code prescribes punishment for criminal conspiracy which is defined under section 120-A of the Indian Penal Code.

In case of **Devender Pal Singh -Vrs.- State National Capital Territory of Delhi reported in (2002) 5 Supreme Court Cases 234**, it is held that the element of a criminal conspiracy consists of (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprise possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. For an offence punishable under section 120-B of the Indian Penal Code, the prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means.

There is no iota of material in the chargesheet to indicate that there was any criminal conspiracy between the appellants for doing an unlawful act by unlawful means rather the appellant no.2 on behalf of the company lawfully entered into a contract with the HAL Housing Committee and did his best in acquiring the lands and registering the lands in the name of the company in a lawful manner and as such the ingredients of offence under section 120-B of the Indian Penal Code are not attracted.

Offence under section 6 of the OPID Act

14. Section 6 of the OPID Act deals with punishment for default in repayment of deposits and interests honouring the commitment. In order to attract the ingredients of the offence, the following aspects are to be proved:-

(i) Default in returning the deposit by any Financial Establishment; or

(ii) Default in payment of interest on the deposit or failure to return in any kind by any Financial Establishment; or

(iii) Failure to render service by any Financial Establishment for which the deposits have been made.

In the event any of the aforesaid aspects is proved, every person responsible for the management of the affairs of the Financial Establishment shall be held guilty. 'Financial Establishment' has been defined under section 2(d) of the OPID Act and 'deposit' has been defined under section 2(b) of the OPID Act. The word 'default' in section 6 of the OPID Act has been used in conjunction with honouring the commitment and therefore, it depends upon the reciprocal promises. The material available on record indicate that after several round of discussions and execution of successive agreements, the job of arranging a sizable extent of land at Bhubaneswar was entrusted to the company by the HAL Housing Committee. It was a herculean task and in spite of that, it appears that the company did his best in arranging a major extent of land. Dispute arose when the hope of the company to proceed with the housing project on the acquired land as a part of composite agreement was shattered by the conduct of the committee in making attempt to hand over the housing project to a 3rd party. Therefore, it is difficult to fathom that any commitment made by the company was flouted deliberately or that the company committed any default or failed to render any service for which the deposit was accepted.

Therefore, the ingredients of the offence under section 6 of the OPID Act are grossly lacking.

Scope of interference in exercise of Appellate Jurisdiction

15. There is no dispute that this appeal has been filed under section 13 of the OPID Act as the appellants are aggrieved by the order of the Designated Court in rejecting the petition under section 239 of Cr.P.C. for discharge and consequently framing charges.

In case of **Popular Muthiah -Vrs.- State of Tamil Nadu reported in (2006) 34 Orissa Criminal Reports (SC) 749**, it is held that the High Court while exercising its revisional or appellate power, may exercise its inherent powers, both in relation to substantive as also procedural matters. In respect of the incidental or supplemental power, evidently the High Court can exercise its inherent jurisdiction irrespective of the nature of the proceedings. It is not trammeled by procedural restrictions and the power can be exercised suo motu in the interest of justice. If such a power is not conceded, it may even lead to injustice to an accused.

It seems that the Investigating Officer has not correctly assessed the nature of dispute between the parties and in a mechanical manner filed the charge sheet. The truth has been kept behind the curtain deliberately and therefore, there is malafideness and arbitrariness in the action of the investigating agency to harass the appellants.

In case of **State of Bihar and Anr. -Vrs.- P.P. Sharma reported in A.I.R. 1991 S.C. 1260**, it is held as follows:-

> "47. The investigating officer is the arm of the law and plays pivotal role in the dispensation of criminal justice and maintenance of law and order. The police investigation is, therefore,

> the foundation stone on which the whole edifice of criminal trial rests an error in its chain of investigation may result in miscarriage of justice and the prosecution entails with acquittal. The duty of the investigating officer, therefore, is to ascertain facts, to extract truth from half-truth or garbled version, connecting the chain of events. Investigation is a tardy and tedious process. Enough power, therefore, has been given to the police officer in the area of investigatory process, granting him or her great latitude to exercise his discretionary power to make a successful investigation. It is by his action that law becomes an actual positive force. Often crimes are committed in secrecy with dexterity and at high places. The investigating officer may have to obtain information from sources disclosed or undisclosed and there is no set procedure to conduct investigation to connect every step in the chain of prosecution case by collecting the evidence except to the extent expressly prohibited by the Code or the Evidence Act or the Constitution. In view of the arduous task involved in the investigation he has been given free liberty to collect the necessary evidence in any manner he feels expedient, on the facts and in given circumstances. His/her primary focus is on the solution of the crime by intensive investigation. It is his duty to ferret out the truth. Laborious hardwork and attention to the details, ability to sort out through mountainous information, recognized behavioural patterns and above all, to coordinate the efforts of different people associated with various elements of the crime and the case are essential. Diverse methods are, therefore, involved in making a successful completion of the investigation."

In case of **Jamuna Chaudhary -Vrs.- State of Bihar reported in 1974 Criminal Law Journal 890**, it is held by the Hon'ble Supreme Court as follows:

> "11. The duty of the Investigating Officers is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth."

16. In view of the foregoing discussions, I am of the considered opinion that the Investigating Officer has failed to collect any clinching materials to proceed against the appellants and acted in a most casual and superficial manner. On the available materials on record, I find no prima facie case for commission of the offences alleged against the appellants. There is no ground for presuming that the appellants have committed the offences alleged. There is no strong suspicion against the appellants. The dispute between the parties is primarily civil in nature which has been given the colour of a criminal case resulting abuse of process. Submission of charge sheet is based totally on unfounded assumptions and it has resulted in causing miscarriage of justice. Therefore, I am of the humble view that the learned trial Court has committed palpable error in dismissing the petition for discharge and in framing charges against the appellants and as such, in the interest of justice, the impugned order cannot be sustained in the eye of law.

17. Accordingly, the CRLA is allowed. The impugned order dated 23.11.2015 passed by the learned Presiding Officer, Designated Court in rejecting the petition under section 239 of Cr.P.C. for discharge and consequently framing charges under sections 420, 406, 467, 468 read with section 120-B of the Indian Penal Code and section 6 of the OPID Act, are hereby set aside. The criminal proceeding against the appellants in C.T. Case No. 07 of 2014 pending before the learned Presiding Officer, Designated Court stands quashed.

2018 (II) ILR - CUT- 333

S. N. PRASAD, J.

F.A.O. NO.483 OF 2017 & F.A.O. NO.493 OF 2017

GAUTAM BEHERA .....Appellants

.Vs.

STATE OF ORISSA & ORS. .....Respondents

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition challenging the order passed by the Education Tribunal – Grant of grant-in-aid refused – Power of writ court to interfere in certiorari proceeding – Indicated.

"Certiorari jurisdiction can be exercised only for correcting errors of jurisdiction committed by inferior courts or tribunals. A writ of certiorari can be issued only in the exercise of supervisory jurisdiction which is different from Appellate jurisdiction. The writ jurisdiction can extends only to cases where orders are passed by inferior courts or tribunals in excess of their jurisdiction or as a result of their refusal to exercise jurisdiction vested in them or they act illegally or improperly in the exercise of their jurisdiction causing grave miscarriage of justice. In regard to finding of fact recorded by an inferior tribunal, a writ of certiorari can be issued only if in recording such a finding, the tribunal has acted on evident which is legally inadmissible or has refused to admit admissible evidence or if the finding is not supported by any evidence at all, because in such cases the error amounts to an error of law, a pure error of fact, however grave, cannot be corrected by a writ. In view of such settled position of law, according to my considered view and after going through the factual aspect as discussed hereinabove, the appellants have failed to make out case for issuance of writ of certiorari by not pointing out any perversity in the finding rather the finding is based upon the legal position vis-à-vis the factual aspect as discussed in detail hereinabove, hence the same needs no interference. ***Swaran Singh and another vrs. State of Punjab and others*** *reported in (1976) 2 SCC 868, and* ***Heinz India Private Limited and another vrs. State of Uttar Pradesh and others*** *reported in (2012) 5 SCC 443 followed."*

Case Laws Relied on and Referred to :-

1. (2012) 5 SCC 443 : Heinz India Private Limited and another Vs. State of Uttar Pradesh and others
2. (1976) 2 SCC 868 : Swaran Singh and another Vs. State of Punjab & Ors.
3. AIR 1964 SC 477 : Syed Yakoob Vs. K. S. Radhakrishnan & Ors.

For Appellants : M/s. K.K. Swain. B. Jena, R.P. Das, K. Swain & J.R. Khuntia.

For Opposite Parties : Standing Counsel (School and Mass Education Department)

JUDGMENT Date of Hearing and Judgment : 23.07.2018

S. N. PRASAD, J.

Both the FAOs have taken up together since common issue is under challenge and are being disposed of with this common order.

2. Case of the appellants in both the appeals are that the college in question was established in the year 1983 but received concurrence and affiliation in +2 Arts

stream from the academic session 1986-87, subsequently in the year 1992-93, the College had received the concurrence and affiliation to impart education in +2 Science stream. At the time of establishment of the College, the yardstick of the year 1977 about the admissibility of the ministerial posts was in force. As per the said yardstick, both appellants were appointed as Junior Clerks against the 2nd and 3rd post on 25.06.1984 and 15.02.1986, respectively and joined in service on 1.7.1984 and 15.02.1986 respectively.

The College in question are getting Block Grant in terms of the Grant-in-Aid Order, 1994, the appellants being appointed as per the yardstick of the year 1977, after completion of their qualifying period of service of three years became eligible to receive Grant-in-Aid in terms of the Grant-in-Aid order, 1994. But the Opposite parties have released Block Grant in their favour in terms of Grant-in-Order 2009, hence an application was filed before the Orissa Education Tribunal on the ground that the appellants become eligible as per the yardstick, 1977 and also eligible to get grant in aid in terms of the Grant in Order 1994 since they are fulfilling the eligibility criteria as per the Grant in Order 1994 and yardstick of the year 1977 which was applicable but the same has not been extended in their favour.

Further case of the appellants is that at the time of appointment of the appellants, the yardstick of the year 1977 meant for the ministerial posts was in force. As per the said yardstick each of the posts of the appellants were admissible to the College, even though the College has been notified as an aided educational institution and treated as Category-II type of College, still then their posts were not only admissible but also they are eligible to receive grant-in-aid in terms of the Grant-in-Aid Order 1994 at par with their counterparts, but the opposite parties by misinterpreting the relevant provisions of the Grant-in-Order 1994 vis-à-vis Grant-in-Aid Order 2009 did not consider the case of the appellants under the provision of Grant-in-Aid order 1994 and has released Block Grant in terms of the Grant-in-Aid Order 2009, being aggrieved with this they have come to this Court.

3. Case of the opposite parties is that the College in question being notified as an aided educational institution in terms of the Grant-in-Order 1994 and treated as category-II type of College in terms of the Grant in order 1994 as per the roll strength and yardstick provided in the said order, by which none of the post of the appellants is eligible to college either from the date of appointment or at a later stage, hence the opposite parties after taking into consideration their appointment in respective years when the yard stick of 1977 was in force, has rightly taken decision to release Block Grant in terms of Order 2009.

Further stand of the opposite parties is that the College in question has been notified as an Aided Educational Institution in terms of the Grant-in-Aid Order 1994 and thereby treated as Category-II type of College. The yardstick of the year 1977 was applicable only for the College those who were in receipt of Grant-in-Aid prior to the Orissa Education (Amendment) Act, 1994 came into operation w.e.f.

6.2.1995, as such since the College in question is not being treated as a Category-I type of College and the appellants had not completed qualifying period of service of three years prior to the commencement of Amendment Act, 1994, they have not been granted the benefit under the Grant-in-Aid Order, 1994. Further the college in question since is a Category-II type of College, as per the workload and yardstick of Grant in Aid Order, 1994, none of the posts of the appellants are admissible for receiving grant-in-aid. However, appointment of the appellants being made during the currency of the yardstick of the year 1977, as per the terms and conditions enumerated under Para-3 in Grant in Aid Order 2009, Block Grant has rightly been released in favour of the appellants.

In view thereof, it has been submitted that the Tribunal after taking into consideration all these aspects of the matter has rightly not extended the benefit of Grant-in-Aid in terms of the Grant-in-Order 1994, hence the same may not be interfered with.

4. Heard the learned counsel for the parties, appreciated their rival submissions and also gone through the record appended to the memo of appeal, factual aspect which is not in dispute in these appeals are that the College in question is to impart education in +2 Arts for the academic session 1986-87 and imparting education in +2 Science Stream from the Academic session 1992-93. At the time of establishment of the College, the yardstick of the year 1977 was prevalent. The appellants are claiming to be approved against 2nd and 3rd post as Junior Clerks since they have been appointed in the year 25.06.1984 and 15.02.1986, respectively and joined the aforesaid post on 1.7.1984 and 15.02.1986 respectively. The petitioners are claiming that they are entitled to get the benefit of Grant-in-Aid in terms of the Grant-in-Aid Order 1994 while the opposite parties have extended it in terms of the Grant-in-Order 2009, as such illegality has been committed, hence these appeals.

5. This Court, before appreciating the findings has thought it proper to go through the legal provision, which is necessary for coming to the rightful conclusion.

Orissa Education Act, 1969 has been promulgated to provide educational institution confirmed to certain basic infrastructural and academic standards and for meeting the essential educational institution which would be required to fulfill in order to be eligible for recommendation. Under the aforesaid provision, the provision to extend the benefit of Grant-in-Aid has been provided under the provision of Section 7-C, by which the State Government has decided to set apart a sum of money annually for being given as grant-in-aid to Private Educational Institution in the State.

In terms of the provision as contained under Sub-section 4 of Section 7-C, the State Government has come out with an order known as Orissa (Non-Government Colleges, Junior Colleges and Higher Secondary Schools) Grant-in-Aid Order, 1994 (hereinafter called as Grant-in-Order 1994) for the sake of

convenience 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 College or Higher Secondary School as specified under the aforesaid order, the order stipulates the conditions to get the benefit of grant in aid by bifurcating non-government educational institutions category wise.

It has been stipulated under para-3(5) of the Order 1994 that no order according permission or approval or recognition either temporary or otherwise under the relevant provisions of the Act, or under any Rule applicable to it, and no order of any University or the Council according affiliation, whether such permission, approval, recognition or affiliation was accorded prior to the commencement of the Amendment Act, or thereafter shall ipso facto entitle any Non-Government Educational Institution to be notified as an Aided Educational Institution or to receive grant-in-aid for any post.

Three categories have been made. Category-I relates to 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 the Government prior to the commencement of the Amendment Act.

Category-2 covers such 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 has been functioning regularly for five years or more by the 1st June, 1994 after obtaining Government concurrence recognition and affiliation of any University, of 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 Annexure-III of the aforesaid order, the yardstick for approval of posts in Aided Educational Institutions for the purpose of Grant-in-Aid has been provided, wherein the type of institutions, stream, actual enrolment and maximum number of subjects other than compulsory subject permissible is being referred. Under Annexure-III, at para-10 stipulates regarding maximum number of posts other than the post of Teachers, Demonstrators, P.E.T. Laboratory Attendants. The Table is being reproduced herein below for ready reference:-

Number of post admissible students strength	**Non-teaching posts admissible for purpose of grant-in-aid**
Up to 350	One Junior Clerk-cum-Typist One Asst. Librarian Two Peons
More than 350 and up to 750	One Senior Clerk One Junior Clerk-cum-Typist One Assistant Librarian One Library Attendant Three Peons

More than 750 and up to 1500	One Senior Clerk Two Junior Clerks-cum-Typist One Assistant Librarian One Library Attendant Four Peons
More than 1500 and up to 2500	One Head Clerk One Senior Clerk One Junior Clerks-cum-Typist One Librarian(if number of books exceeds 10,000) One Asst. Librarian One Library Attendant Four Peons
More than 2500	One Head Clerk Two Senior Clerks Three Junior Clerks-cum-Typist One Librarian (if number of books exceeds 10,000) Two Assistant Librarians Two Library Attendants Five Peons

It is evident from para-10 of Annexure-III, that if the roll strength as per the yardstick referred in Annexure-III of the Order 1994 would be up to 350, there would be one Junior Clerk-cum-Typist, One Asst. Librarian and two peons, but when it exceeds to 350 up to 750, there would be one Senior Clerk, one Junior Clerk-cum-Typist, one Asst. Librarian, one Library Attendant and three Peons.

6. Admittedly from the date of appointment of the appellants, the yardstick of the year 1977 was in force and it is also admitted factual aspect that the College in question has not been extended the benefit of Grant in Aid Order 1994, as such it is not under Category-I type of College in terms of Grant in Aid Order 1994, as such yardstick of the year 1977 would be applicable but along with if the appellants are to be eligible to receive grant-in-aid in terms of Para-9(2)(B)(i) Orissa Education Act, 1969 by virtue of it 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, and if;

(a) the post was admissible as per the workload and yardstick prevalent prior to commencement of the Amendment Act;

(b) has been filled up prior to that date;

(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.

7. After going into the factual aspect of the instant case and also the admitted position, that the appointment of the appellants have been made as per the prevalent yardstick of the year 1977 but not eligible as per the provision made under 9(2)(B)(i) of the Grant-in-Aid Order, 1994, it is for the reason that the post was not admissible as per the workload and yardstick prevalent prior to commencement of the Amendment Act.

Learned counsel for the appellants has not disputed the factual aspect regarding roll strength of the College which is in between 350 to 750 and as per Annexure-III appended to the Grant in Aid Order, 1994 up to 350, there would be one Junior Clerk-cum-Typist, One Asst. Librarian and two peons, but when it

exceeds to 350 up to 750, there would be one Senior Clerk, one Junior Clerk-cum-Typist, one Asst. Librarian, one Library Attendant and three Peons.

8. We are, here, concern with the post of Junior Clerk. Admittedly there is only one post of Junior Clerk up to the roll strength of 750, however there is difference that if it exceeds 350 to 750 there would be one post of Senior Clerk but here in the instant case is with respect to the post of Junior Clerk and admittedly there is admissibility of only one post as per the roll strength, which is not exceeding 750 and the aforesaid post is occupied and hence the appellants cannot be held entitled to get the benefit of grant-in-aid in pursuance of the Grant-in-Aid order, 1994 due to non-availability of the admissible post.

9. The Tribunal after taking into consideration these factual aspects and also taking into consideration the fact that the appellants are not fulfilling the criteria laid down under the provision of para-9(2)(B)(i) of the Grant-in-Aid Order, 1994 has rightly not extended the aforesaid benefit of grant in aid, in pursuance of the Grant-in-Aid Order 1994.

In view thereof, according to my considered view, the Tribunal has not committed any error.

10. This Court is exercising the power conferred under Article 226 and 227 of the Constitution of India for issuance of writ of certiorari and it is settled that power to issue writ of certiorari is very limited as has been held by the Hon'ble Supreme Court by its Full Bench in the case of **Syed Yakoob Vrs. K. S. Radhakrishnan and others** reported in *AIR 1964 SC 477* wherein at paragraph-7 their Lordships have been pleased to hold as follows:-

> "**7.**The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Art. 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. 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 in excess of it, or as a result of failure to exercise jurisdictions. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts 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. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of tact, 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. In dealing with this category of cases, however, we must

> always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was' insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Art. 226 to issue a writ of certiorari can be legitimately exercised."

I have also perused the judgment rendered by the Hon'ble Apex Court in the case of **Swaran Singh and another vrs. State of Punjab and others** reported in *(1976) 2 SCC 868*, their Lordships discussing the power of writ court under Article 226 for issuance of writ of Certiorari has been pleased to hold at para-12 and 13, that certiorari jurisdiction can be exercised only for correcting errors of jurisdiction committed by inferior courts or tribunals. A writ of certiorari can be issued only in the exercise of supervisory jurisdiction which is different from Appellate jurisdiction. The writ jurisdiction can extends only to cases where orders are passed by inferior courts or tribunals in excess of their jurisdiction or as a result of their refusal to exercise jurisdiction vested in them or they act illegally or improperly in the exercise of their jurisdiction causing grave miscarriage of justice. In regard to finding of fact recorded by an inferior tribunal, a writ of certiorari can be issued only if in recording such a finding, the tribunal has acted on evident which is legally inadmissible or has refused to admit admissible evidence or if the finding is not supported by any evidence at all, because in such cases the error amounts to an error of law, a pure error of fact, however grave, cannot be corrected by a writ.

In another judgment rendered by the Hon'ble Apex Court in the case of **Heinz India Private Limited and another vrs. State of Uttar Pradesh and others** reported in *(2012) 5 SCC 443*, their Lordships has been pleased to hold at para-66 and 67, which is being quoted herein below:-

> "**66**. That the Court dealing with the exercise of power of judicial review does not substitute its judgment for that of the legislature or executive or their agents as to matters within the province of either, and that the court does not supplant "the feel of the expert" by its own review, is also fairly well settled by the decisions of this Court. In all such cases judicial examination is confined to finding out whether the findings of fact have a reasonable on evidence and whether such findings are consistent with the laws of the land.
>
> **67**. In Dharangadhra Chemical Works Ltd. vrs. State of Saurashtra reported in AIR 1957 SC 264, this Court held that decision of a tribunal on a question of fact which it has jurisdiction to determine is not liable to be questioned in proceedings under Article 226 of the Constitution unless it is shown to be totally unsupported by any evidence.

11. In view of such settled position of law, according to my considered view and after going through the factual aspect as discussed hereinabove, the appellants have failed to make out case for issuance of writ of certiorari by not pointing out any perversity in the finding rather the finding is based upon the legal position vis-à-vis the factual aspect as discussed in detail hereinabove, hence the same needs no interference. In view thereof both appeals fail and are dismissed.

2018 (II) ILR - CUT- 340

S. N. PRASAD, J.

W.P. (C) NO. 7693 OF 2017

ENZEN GLOBAL SOLUTION PVT. LTD. ……..Petitioner

.Vs.

PRESIDENT, DIST. CONSUMER DISPUTES REDRESSAL FORUM & ORS. ……..Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 read with Section 126 and 127 of the Electricity Act, 2003 – A proceeding under Section 126 Electricity Act, 2003 culminated in the final assessment order – Appeal provided under Section 127 of the Electricity Act, 2003 – Instead of filing appeal under the Electricity Act, 2003, a complaint case was filed before the District Consumer Forum – Plea of jurisdiction and maintainability was raised – Not taken into consideration by the District Consumer Forum – The question arose as to whether the proceeding before the District Consumer Forum was maintainable when there is a specific provision for appeal available in the Act – Held, the District Consumer Forum has no jurisdiction to pass order – Proceeding and order quashed.

Case Laws Relied on and Referred to :-

1. (1998) 8 SCC 1 : Whirlpool Corporation ,Vs. Registrar of Trademarks, Mumbai & Ors.
2. AIR 2013 SC 2766 : U.P. Power Corporation Ltd. & Ors. .Vs. Anis Ahmed.

For Petitioner : Mr. Suresh Chandra Dash.
For Opp. Parties : M/s. Panchanan Panigrahi, H.K. Dash.

JUDGMENT Date of Hearing and Judgment : 10.08.2018

S. N. PRASAD, J.

The petitioner has challenged the order dated 16.12.2016 passed by the District Consumer Disputes Redressal Forum, Dhenkanal in C.C. Case No. 91 of 2015 under the provision of Section 12 of the Consumer Protection Act, 1986 which has been allowed by the Forum vide order passed therein on 16.12.2016. The aforesaid order has been challenged merely on the ground of jurisdiction as has been decided by the Hon'ble Supreme Court in the case of **U.P. Power Corporation Ltd. & Ors. vrs. Anis Ahmed** reported in *AIR 2013 SC 2766*.

Learned counsel for the opposite party no.2 has submitted that the order passed by the District Consumer Forum has been challenged directly before this Court in exercise of power conferred under Article 226 of the Constitution of India, even though there is provision of appeal under the Consumer Protection Act, 1986 as such the writ petition may not be entertained. However, he has not disputed the ratio decided in the case of **U.P. Power Corporation (supra)**.

This Court has heard the learned counsel for the parties and gone through the material available on record, from which this Court has found that the petitioner, who is the franchisee of the licensee unauthorisedly exercising the power of the

licensee has initiated proceeding under Section 126 of the Electricity Act, 2003 on detection of unauthorized use of electricity and theft. The proceeding under Section 126 of the Electricity Act, 2003 has been culminated in the final assessment order.

It is evident from the provision of Electricity Act, 2003 (in short 'Act 2003') that there is provision of appeal under the provision of Section 127 of the Act, 2003, but the opposite party no.2 instead of invoking the appellate jurisdiction conferred under Section 127 of the Act, 2003 has invoked the jurisdiction of District Consumer Disputes Redressal Forum as per the Consumer Protection Act, 1986 which has been registered as C.C. Case No. 91 of 2015 and the point related to maintainability of the dispute before the Forum has also been raised therein but the Forum has not taken into consideration that when the final assessment has been done in pursuance of the provision of Section 126 of the Act, 2003 against which provision of appeal is there entertaining the dispute raised by the opposite party under the provision of Consumer Protection Act, 1986, is not sustainable.

It is not in dispute that the Electricity Act, 2003 is the self-content Act having its own provision. One of the provisions is for making provisional assessment vis-à-vis final assessment in case of unauthorized use of electricity to be done under the provision of Section 126 of the Electricity Act, 2003. The order passed under Section 126 stipulates the provision for providing an opportunity of hearing against the order of provisional assessment and after hearing the consumer, final assessment order is to be made under the provision of Section 126(5) of the Electricity Act, 2003.

In the instant case, final assessment order has been passed under the provision of Section 126(5) of the Act, 2003.

It is further evident that the order passed in pursuance to the provision of Section 126(5) of the Act, 2003, wherein provision of statutory appeal is there under the provision of Section 127 of the Electricity Act, 2003, meaning thereby, if any proceeding initiated under Section 126 of the Act, 2003, appeal will lie before the competent authority in terms of the provision of Section 127 of the Act, 2003.

The opposite party no.2 instead of availing the statutory remedy as provided under Section 127 of the Act, 2003 has invoked the jurisdiction of District Consumer Disputes Redressal Forum as conferred under the provision of Consumer Protection Act, 1986.

The dispute has been raised by the petitioner herein before the Forum regarding the maintainability of the complaint on the ground that against the order passed in terms of the Section 126 of the Electricity Act, 2003, appeal will lie and the Forum is having no jurisdiction but the Forum without appreciating that aspect of the matter has proceeded and passed the final order which is under challenge in this writ petition.

The issue with respect to the jurisdiction of the Forum or Commission under the Consumer Protection Act, 1986 fell for consideration before the Hon'ble Supreme Court in the case of **U.P. Power Corporation (supra)** and this issue has been decided holding therein that the Electricity Act, 2003 is a self-content Act, while the Consumer Protection Act, 1986 is meant for altogether for different issue i.e. related to deficiency in service, if found, Consumer Disputes Redressal Forum is to adjudicate the aforesaid issue. But the provision of 126 of the Electricity Act, 2003 related to

unauthorized use of electricity, wherein power has been conferred under the provision of Section 126(1) of the Act, 2003 to make out search and seizure of the premises, where the electricity connection has been provided and thereby to assess provisionally the quantum of the electricity consumed in money terms. The provision of Section 126 (2) of the Electricity Act, 2003 provides for giving notice to the consumer to make an objection against the provisional assessment as has been done under Section 126(1) of the Act, 2003. Section 126(3) of the Act, 2003 stipulates to provide opportunity of hearing to the consumer before taking final decision regarding provisional assessment to assess it finally which is to be done under the provision of Section 126(5) of the Act, 2003.

Thus, it is evident that the provision of Section 126 of the Act, 2003 is against unauthorized use of electricity and when it is against the unauthorized use of electricity, it cannot be said to be deficiency in service as has been stipulated in the Consumer Protection Act, 1986.

The Hon'ble Supreme Court in the case of **U.P. Power Corporation (supra)** while dealing with the issue has laid down the ratio holding therein that the Consumer Protection Act is having no jurisdiction, so far as the issue related to Section 126 of the Act, 2003.

In view of the aforesaid ratio laid down in the case of **U.P. Power Corporation (supra)**, which is squarely applicable on the facts and circumstances involved in this case, according to my considered view, the jurisdiction exercised by the District Consumer Disputes Redressal Forum, Dhenkanal is having no jurisdiction.

Learned counsel for the opposite party no.2 has raised the question regarding maintainability of the writ petition on the ground that provision of be filed before the State Commission under the provision of Consumer Protection Act, 1986. But according to my considered view, when the question of jurisdiction has been raised and admittedly the District Consumer Forum is having no jurisdiction on the basis of ratio laid down in the case of **U.P. Power Corporation (supra)**.

This Court, applying the ratio laid down in the case of **Whirlpool Corporation vrs. Registrar of Trademarks, Mumbai & ors.** reported in *(1998) 8 SCC 1*, is of the view that wherein the ratio has been laid down that if an order is without jurisdiction or contrary to the statutory rule or if there is infringement of any fundamental right, availability of alternative remedy will not be a bar to entertain writ petition in exercise of power under Article 226 of the Constitution of India.

In view of the aforesaid settled position of law, the issue raised regarding maintainability of the writ petition on the ground that availability of alternative remedy is having no substance.

In the entirety of facts and circumstances, the impugned order dated 16.12.2016 passed in the C.C. Case No. 91 of 2015 is held to be without jurisdiction. Accordingly, the order dated 16.12.2016 passed by the District Consumer Disputes Redressal Forum, Dhenkanal in C.C. Case No. 91 of 2015 is quashed. In the result, the writ petition is allowed. However, it is up to the opposite party no.2 to avail the statutory remedy as provided under Section 127 of the Electricity Act, 2003.

2018 (II) ILR - CUT- 343

W.P.(C) NO.18092 OF 2010

S. N. PRASAD, J.

DAYASHANKAR RAM ……..Petitioner

.Vs.

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

SERVICE LAW – Complaint by a CISF Constable alleging use of language relating to his caste which is prohibited under the provisions of SC & ST (Prevention of Atrocities) Act against his higher officer – Authority to test the veracity of the allegation conducted three fact finding enquiries – Circumstances requiring three enquiries explained – Petitioner raised the grievance of not granting him opportunity and not providing him the enquiry report – Whether the opportunity to petitioner or to provide the enquiry report of fact finding enquiry was required to be provided – Held, No.

"It is settled position of law that if a preliminary enquiry is being conducted, it is not required to be communicated to the complainant or even before initiation of departmental proceeding, if a preliminary enquiry by way of fact finding is being constituted, the person concerned is not required to be noticed rather summoning of the person concerned will come only after submission of the report to be given by the fact finding authority and in consequence thereof, if any, departmental proceeding is decided to be initiated and at the stage of enquiry, only appearance of concerned employee is required to be provided."

(Para7)

For Petitioner : M/s. B.M. Bhuyan
For Opp. Parties : M/s. A.K. Bose (ASGI)
Mr. P.K. Padhi (CGC).

JUDGMENT Date of hearing and judgment : 24.08.2018

S. N. PRASAD, J.

The instant writ petition has been filed under Article 226 and 227 of the Constitution of India, wherein the enquiry report as contained under Annexuer-4 and 5 has been sought to be quashed with a further direction upon the opposite party no.5 to take appropriate action under the provision of Section 8/18 of the CISF Act in terms of the enquiry report vide Annexure-3.

2. Brief facts of the case as has been pleaded in the writ petition that while the petitioner was working as Constable, scuffle has been entered in between him and V.S. Pathak. It has been alleged by the petitioner that since he belongs to SC and ST community, as such he has been called upon by taking his caste name which is prohibited under the provision of SC and ST Prevention of Atrocities Act. He, therefore has made complaint before the competent authority, the competent authority initiated against the said complaint by constituting a Committee to submit preliminary enquiry report.

The Enquiry Committee after examining the witnesses has given its report stating therein that the case of caste abuse exists against V.S. Pathak as contained

under Annexure-3. Thereafter, other two preliminary enquiryreports have been submitted as contained under Annexure-4 and 5, under which the said V.S. Pathak has been exonerated from the allegations leveled by the petitioner against him. The petitioner, being aggrieved with the subsequent enquiry reports, is before this Court by way of instant writ petition inter alia on the ground that when the first enquiry committee has given the fact finding proving the charge, there was no occasion to constitute two other enquiry officer who have given report in supersession to the enquiry report as contained under Annexure-3.

It has been submitted that when in the enquiry report given under Annexure-3, allegation leveled against the petitioner has been found to be true, the authority should have proceeded against the said V.S. Pathak, instead of doing so, other Enquiry Officer have been appointed that too without any communication to him.

3. Opposite parties have appeared and filed counter affidavit inter alia stating therein that Annexure-3 has been issued saying therein that caste abuse against V.S. Pathak is exist but the aforesaid report has been given only on the basis of the statement given by one Constable Sabhajeet who has said *"Tum jhoot bol raha hai pata nahi kahan se fauj main* ***chure phure*** *aa jate hain. Sipahi ho sipahi ke awqat main raho."*

It has been contended that the said enquiry report is wholly on the basis of the statement of Constable Sabhajeet, while the other 12 witnesses have not supported the aforesaid allegations against Shri V.S. Pathak. Further it has been contended that even if the statement of Constable Sabhajeet as has been recorded disclosing therein that the word "chure phure" has been used against the petitioner that does not mean that any word taking the name of the caste since "chure phure" there is no caste like that.

It is in this pretext, further Enquiry Officer has been directed to be constituted who has given its report vide Annexure-4 disproving the allegation. The authorities, thereafter, have constituted another enquiry officer in order to ascertain the finding given by the Enquiry Officer as contained under Annexure-4, but there is no difference in the subsequent enquiry report dated 10.06.2009 as contained under Annexure-5, hence no illegality has been committed.

Learned counsel for the opposite parties has submitted that it is a fact finding enquiry and there is no requirement to give notice to the petitioner.

4. Learned counsel for the petitioner in response submits that if there was a enquiry and if the authority wants to differ with the same, process is there to give difference of opinion along with reason by providing an opportunity of hearing to the concerned person, to substantiate his argument, he has relied upon the judgment rendered in the case of **Punjab National Bank and others vrs. Shri Kunj Behari Misra and others** reported in *(1998) 7 SCC 84* and in that view of the matter, it has been submitted that contention and plea taken by the opposite parties is not worth to be considered.

5. Heard the learned counsel for the parties and gone through the materials available on record.

On appreciation of rival submissions of the learned counsel for the parties, it is evident that the petitioner has challenged Annexure-4 and 5. Annexure-4 and 5 is the preliminary enquiry report given by the Enquiry Officer to test the veracity of the allegation leveled by the petitioner against the Inspector, Shri V.S. Pathak. Prior to the aforesaid enquiry reports, the competent authority has appointed one Enquiry Officer to give fact finding wherein altogether 13 witnesses have been examined. One of the witnesses namely Constable Sabhajeet has deposed that *"Tum jhoot bol raha hai pata nahi kahan se fauj main* ***chure phure*** *aa jate hain. Sipahi ho sipahi ke awqat main raho"*. The other witnesses have not substantiated the allegations leveled by the petitioner against said V.S. Pathak.

6. The Enquiry Officer has found the allegation of using derogatory language against the petitioner as proved. The aforesaid enquiry report has been submitted by the aforesaid Enquiry Officer before the disciplinary authority, who being not satisfied with the same, has constituted another Enquiry Committee. It is evident from the enquiry report as contained under Annexure-3, that out of 13 witnesses, only one witness has supported the allegations by deposing therein that *"Tum jhoot bol raha hai pata nahi kahan se fauj main chure phure aa jate hain. Sipahi ho sipahi ke awqat main raho."* However, the other witnesses have not supported the allegations. The competent authority after taking into consideration of the fact that 12 witnesses have not supported the allegations, as such has taken decision to go for further enquiry. In view thereof, another Enquiry Officer was appointed holding the post of Asst. Commandant, who has recorded the depositions of 13 witnesses. On the basis of statement made by one witness namely Constable Sabhajeet, enquiry report has submitted his report under Annexure-3, who has reiterated the statement as he had stated before the Enquiry Officer who has submitted the report as contained under Annexure-3 but the Assistant Commandant holding the subsequent enquiry has submitted report on 12.03.2004, who on analysis of the depositions of the witnesses, has given finding that the allegations alleged against V.S. Pathak by Constable Sabhajeet is not right and concocted.

Another Enquiry Officer was appointed vide order dated 8.4.2009 before whom, eight witnesses have been examined and after appreciating their depositions, the conclusion has been arrived at that allegations of caste abuse against Shri V.S. Pathak has been leveled by the petitioner to save himself from disciplinary action. The petitioner has questioned the subsequent enquiry reports as contained under Annexure-4 and 5 on the ground that he has not given an opportunity of hearing and the fact regarding appointment of Enquiry Officer has not communicated to him.

7. It is settled position of law that if a preliminary enquiry is being conducted, it is not required to be communicated to the complaint or even before initiation of departmental proceeding, if a preliminary enquiry by way of fact finding is being

constituted, the person concerned is not required to be noticed rather summoning of the person concerned will come only after submission of the report to be given by the fact finding authority and in consequence thereof, if any, departmental proceeding is decided to be initiated and at the stage of enquiry, only appearance of concerned employee is required to be provided.

8. Here, it is not a case of initiation of departmental proceeding rather it is a case of initiation of proceeding against a person against whom allegation of taking the caste name, which is prohibitory under the provision of SC and ST Prevention of Atrocities Act, is involved.

The petitioner has made complaint against one V.S. Pathak making therein allegation of caste abuse, as such once the complaint has been made, it is the accountability and the responsibility of the employer to get the fact verified by constituting or appointing Enquiry Committee/Officer.

9. This Court thought it proper to deal with the judgment relied upon by the learned counsel for the petitioner in the case of **Punjab National Bank vrs. Shri Kunj Behari Misra (supra)** that the aforesaid judgment has been rendered by the Hon"ble Supreme Court in the different context altogether. The factual aspect revolves round in the said case was that in course of departmental proceeding if any finding is given by the Enquiry Officer as charge not proved, there is no requirement to go for the further enquiry rather the disciplinary authority after receipt of the enquiry report may differ with the finding but subject to the condition that representation to that effect would be supplied to the delinquent employee stating therein the reason of difference asking him to give reply and thereafter to impose punishment.

10. But here in the instant case, it is not a case of departmental proceeding rather it is a case before initiation of department proceeding that too against a person against whom allegation has been leveled by the complaint of taking caste name, hence the aforesaid judgment is not at all applicable to the present case.

Here, in the instant case, the Enquiry Officer was appointed and when the competent authority has found that first enquiry report is not satisfactory rather it is based upon the statement of one witness that too there is no word taking the name of the caste as provided under the provision of under Section 3(r) of the SC and ST Prevention of Atrocities Act which stipulates that calling by taking the name of the caste of the members of the SC and ST community will be said to be punishable offence under the provision of Section (3) of the aforesaid Act.

11. But according to my considered view, there is no caste in the name of *"chure phure"*. However, learned counsel for the petitioner has justified that it is the synonyms of the caste „Chamar" but he has not been able to substantiate the submission.

The competent authority when not satisfied with the aforesaid enquiry report, has constituted another Enquiry Committee who has submitted the report finding the allegations not true and further to substantiate the second enquiry report the third Enquiry Officer was appointed, who has also corroborated the second enquiry report.

Since it is the fact finding as per the direction of the competent authority to look into the veracity of the allegations on the complaint made by the petitioner, as such there is no requirement to communicate it to the petitioner in case of constituting other Enquiry Committee/Officer.

12. In view thereof and on the ground of which enquiry report as contained under Annexure-4 and 5 has been challenged i.e. due to non-communication to the petitioner, the aforesaid enquiry report as contained under Annexure-4 and 5 cannot be quashed by this Court.

Moreover, the Enquiry Officer who has submitted the report under Anneuxre-3, 4 and 5 has taken into consideration the deposition of various witnesses and also the statutory provision as contained under the SC and ST Prevention of Atrocities Act, as has been reflected herein above that the word which has been used by the said V.S. Pathak against the petitioner *"chure phure"* but *"chure phure"* is not a caste coming under the category of SC and ST.

13. In that view of the matter, this Court is not inclined to interfere with the subsequent enquiry report as contained under Annexure-4 and 5. In view thereof, the writ petition lacks merit, as such the same is dismissed.

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J.P. DAS, J.

CRLMC NO. 1986 OF 2018

WITH

CRLMC NO(S). 1990,1993,2013 & 2062 OF 2018

PURNA CHANDRA DAS ……..Petitioner.

.Vs.

STATE OF ODISHA,VIGILANCE ……..Opp-Party.

(A) CRIMINAL TRIAL – Judgment pronounced – Before awarding the sentence the Presiding Officer was transferred – Question as to whether the successor can award sentence – Held, Yes. – Principles – Discussed.

"As per the settled position of law, a judgment written and signed by the predecessor, cannot be pronounced by his successor but once the judgment has already been pronounced according to law, the awarding of sentence can only be made after hearing the accused-convict and that can very well be performed by the successors in office."

(Para 11)

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Application under – Challenge is made to the judgment of conviction pronounced by the Trial court – The Presiding Officer before awarding the sentence transferred – Plea that no appeal could be filed without the sentence being awarded – Held, such a plea cannot be accepted as the sentence can be awarded by the successor and appeal can be preferred thereafter – Petition invoking the inherent power of the court not maintainable – Principles – Discussed. (Para 12)

Case Laws Relied on and Referred to :-

1. (1999) 6 SCC 146 : Arun Shukla .Vs. State of U.P. and Ors.
2. AIR 1977 S.C. 1489 : State of Karnataka .Vs. L Muniswamy and Ors.
3. AIR 1987 Rajasthan 83: (Full Bench) Habu .Vs. State of Rajasthan.
4. (2011) 14 SCC 813 : Vishnu Agarwal .Vs. State of Uttar Pradesh & Anr.
5. AIR 1993 S.C. 892 : The Janata Dal .Vs. H.S. Chawdhary.

For Petitioner : M/s. D.Panda, G.Mohanty, S.Panda, A Ratho, D.Das. M/s. D. Sarangi, J.K.Mohanty, S.Senapati, M.Dash, M/s. A.K.Acharya, S.Mishra, M/s. P.Acharya, Sudipto Panda, A Sathpathy, D.Panigrahy, G.Patra, N.Jena, S.P.Behera, S.S.Tripathy, V.Kumar, S.Mohanty,

For Opp. Party : M/s. Additional Standing Counsel, (Vigilance)

JUDGMENT Hearing : 19.07.2018 Date of Judgment : 26.07.2018

J.P.DAS, J

This common order shall dispose of the aforesaid five applications filed under Section 482 of the Cr.P.C seeking exercise of inherent jurisdiction of this Court assailing the judgment dated 03.07.2018 and the order of the said date passed by learned First Additional Sessions Judge-cum-Special Judge,Vigilance, Bhubaneswar in T.R.Case No.62 of 2012.

2. Al the five petitioners along with another co-accused faced trial in the aforesaid case for the offences punishable under Section 13(2) read with Section 13(i)(d) of the Prevention of Corruption Act, 1988 and under Sections 420/120-B of the Indian Penal Code.

3. The allegation made by the prosecution in brief, was that the present applicants, excepting Sri Ashis Kumar Nayak, were officials of Orissa Rural Housing Development Corporation (in short, "ORHDC"). During the year 2000-2001 a financial assistance of Rs.2.5 crore was made available to HUDCO for establishing twenty building centres in coastal area of the State and the matter was entrusted to ORHDC to prepare a plan of action. One of such building was proposed to be constructed at Balipatna. One N.G.O in the name of GRAMYA BIKAS MANCHA, of which the petitioner Ashis Kumar Nayak was the Secretary, was recommended by the Collector, Cuttack to the Managing Director, ORHDC for being entrusted to construct the building centre. It was alleged that without completion of formalities and allotment of land in favour of the N.G.O., the work was executed and all the accused persons allegedly conspired to release the funds in favour of the said N.G.O. ignoring rules, regulations, circulars and guidelines applicable for disbursement and use of such financial assistance. The matter was taken up by the Vigilance and it was found out that the amount of Rs.22,32,510/- was released in favour of the N.G.O on the basis of fabricated documents thereby causing severe loss to the State Exchequer.

4. The learned trial court on completion of trial found all the accused persons excepting Ashis Kumar Nayak guilty of the offences punishable under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 and sections 420/120-B of the Indian Penal Code and accused Ashis Kumar Nayak was found guilty

of the offences punishable under Sections 420/120-B of the Indian Penal Code. All the accused persons were convicted accordingly. The judgment was pronounced on 03.07.2018. At the time of pronouncement of the judgment, hazira was filed only by two accused persons namely, Sanjay Mohanty and Ashis Kumar Nayak but on call only accused Sanjay Mohanty was found present. Other accused persons were absent and learned counsel on behalf of the accused Pradeep Kumar Rout and Chitta Ranjan Mallik had filed petition under Section 317,Cr.P.C.. Learned counsel for the accused Vinod Kumar filed a petition for time and learned counsel for the accused Pradeep Kumar Rout filed another petition seeking time for argument. Learned trial court mentioned in the order-sheet that the case was posted for judgment directing all the accused persons to remain present physically. Hence, rejecting the petition for time, the learned trial court pronounced the judgment since one of the co-accused was present. Thereafter, he heard the accused Sanjay Mohanty on the question of sentence and awarded sentences for different offences. Simultaneously, he directed issuance of N.B.W(A) against the absent accused persons, namely, the present petitioners.

5. In the present application, the petitioner challenged the aforesaid pronouncement of judgment and subsequent issuance of N.B.W.(A) against the petitioners with the submissions that the learned trial court committed gross illegality in conducting the trial so also, in rejecting the petitions filed on behalf of the accused persons. It was submitted by learned counsel appearing for the petitioners that the statements of the accused persons recorded under Section 313, Cr.P.C. was not properly done. The prayer of some accused persons to examine defence witnesses was not properly considered and the learned trial court closed the hearing abruptly. Applications to recall the Investigating Officer and to examine one of the petitioners as a defence witnesses were rejected on flimsy grounds. Further, no arguments were heard from either side but it was wrongly recorded by the learned trial court that arguments were heard. Lastly, it was submitted that since the learned Presiding Officer of the trial court was to be relieved on the same date i.e. 03.07.2018, he hurriedly pronounced the judgment ignoring the mandates of law and without affording reasonable opportunities to the accused persons to place their case. On the aforesaid submissions, it has been prayed to quash the judgment pronounced by the learned trial court so also to set aside the order directing issuance of N.B.W(A) against the petitioners in exercise of inherent power under Section 482, of the Cr.P.C.

6. In course of hearing, without entering into the merits of the submissions as to the illegalities and irregularities allegedly committed by the learned trial court, a question was raised as to whether the present applications filed by the petitioners under Section 482 of the Cr.P.C. are legally maintainable or not. The question was raised that after a judgment has been finally pronounced by a trial court, the only remedy available to the convicts is to prefer an appeal and hence, instead of availing the appellate forum, whether an application under section 482 of the Cr.P.C. can be entertained by this Court.

7. It was contended by the learned counsel for the petitioners separately that gross irregularities and illegalities have been committed by the learned trial court and the judgment has been hurriedly pronounced. It was further submitted that since the

sentences have not been awarded against the present petitioners, the pronouncement of judgment was not complete apart from the fact that in absence of any sentence being awarded, the petitioners cannot approach the appellate forum. It was also submitted that since the concerned Presiding Officer has been transferred after pronouncement of judgment, his successor-in-office cannot award the sentences on the said judgment after hearing the accused-convicts on question of sentence.

8. Section 353 of the Cr.P.C provides that the judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced in open Court by the Presiding Officer immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders. According to the proviso to Section 353(6) of the Cr.P.C. where there are more accused than one, and one or more of them do not attend the Court on the date on which the judgment is to be pronounced, the presiding officer may, in order to avoid undue delay in the disposal of the case, pronounce the judgment notwithstanding their absence. Further Section 353(7) of the Cr.P.C provides that no judgment delivered by any Criminal Court shall be deemed to be invalid by reason only of the absence of any party or his pleader on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their pleaders, or any of them, the notice of such day and place.

9. On the backdrop of aforesaid mandates of procedural law, there was no deviation in the acts of the learned trial court in pronouncing the judgment. The copies of the order-sheets are placed also on behalf of the petitioners. It is seen that in order dated 02.07.2018 the learned trial court considered the applications filed on behalf of the petitioners under Section 311, Cr.P.C and Section 315, Cr.P.C. and rejected the same. Thereafter, it was mentioned that one witness was re-examined as per direction of this Court and was discharged. Then the learned trial court posted the matter for judgment to 03.07.2018 directing the accused persons to remain physically present on the date fixed. It was also mentioned in the said order that the accused persons may file written notes, if they so like, in course of the day. Stressing on this, it was submitted on behalf of the petitioners that no reasonable opportunity was given to the defence to place their case and the pronounce of judgment was posted to the next day and it was pronounced during the first hour of the day without waiting for the attendance of the accused persons.

10. The contentions as above do not appear reasonable since it is found out that the date was fixed for judgment and the accused persons were directed to remain present. The judgment was pronounced hurriedly during the first hour of the day without waiting for the attendance of the accused persons is absolutely unacceptable since it is not expected that court shall wait till the accused persons arrive.

11. Even conceding for the sake of argument that there were certain irregularities committed by the leaned trial court in concluding the trial, still the fact remains that rightly or wrongly judgment was pronounced. The absent accused persons namely, the present petitioners instead of appearing before the learned trial court for hearing on question of sentence have approached this Court under Section

482, Cr.P.C.. It is obvious that unless the accused persons appeared before the learned trial court, no sentence could have been awarded. Hence, the plea that in absence of the sentence being awarded, the accused persons cannot prefer appeal, has no ground to stand. The submissions made on behalf of the petitioners that the successor-in-office cannot award the sentence on the judgment pronounced by his predecessor is not sustainable in law. As per the settled position of law, a judgment written and signed by the predecessor, cannot be pronounced by his successor but once the judgment has already been pronounced according to law, the awarding of sentence can only be made after hearing the accused-convict and that can very well be performed by the successors in office.

12. In the facts and circumstances as narrated above, while the petitioners have an alternative efficacious remedy to prefer appeal against the judgment of the trial court wherein the grievances can well be taken care of, the present application under Section 482,Cr.P.C. is not maintainable in law. This view of mine is fortified by a judgment of the Hon'ble Apex Court reported in ***(1999) 6 SCC 146*** **(Arun Shukla versus State of U.P. and others)** as submitted and relied upon by the learned counsel for the State, Vigilance. The facts and the circumstances of the case before the Hon'ble Apex court were absolutely similar to the present circumstances, wherein setting aside an order of the High court passed under Section 482 of the Cr.P.C., it was observed by Their Lordships of the Hon'ble Apex Court in the aforesaid judgment as follows:

> "It appears that unfortunately the high Court by exercising its inherent jurisdiction under Section 482 of the Criminal Procedure Code(for short "the Code") has prevented the flow of justice on the alleged contention of the convicted accused that it was polluted by the so-called misconduct of the judicial officer. It is true that under Section 482 of the code, the High Court has inherent powers to make such orders as may be necessary to give effect to any order under the Code or to prevent the abuse of process of any court or otherwise to secure the ends of justice. But the expressions " abuse of the process to law" or " to secure the ends of justice" do not confer unlimited jurisdiction on the High Court and the alleged abuse of the process of law or the ends of justice could only be secured in accordance with law including procedural law and not otherwise. Further, inherent powers are in the nature of extraordinary powers to be used sparingly for achieving the object mentioned in Section 482 of the Code in cases where there is no express provision empowering the High court to achieve the said object. It is well neigh settled that inherent power is not to be invoked in respect of any matter covered by specific provisions of the Code or if its exercise would infringe any specific provision of the Code. In the present case, the High Court overlooked the procedural law which empowered the convicted accused to prefer statutory appeal against conviction of the offence. The High Court has intervened at an uncalled for stage and soft-pedalled the course of justice at a very crucial stage of the trial.

13. Learned counsel for the petitioners citing some case laws, submitted that a finally delivered judgment can be set aside in exercise of power under Section 482, Cr.P.C. in order to secure the ends of justice and to prevent the abuse of process of court. Leaned counsel for the different petitioners relied upon the decisions reported in ***AIR 1977 S.C. 1489*** (**State of Karnataka vrs. L Muniswamy and Ors**), ***AIR 1987 Rajasthan 83 (Full Bench)*** (**Habu vrs. State of Rajasthan**), ***(2011) 14 SCC 813***

(**Vishnu Agarwal vrs. State of Uttar Pradesh and another**), in judgment of the Hon'ble Apex Court obtained from SCC online in the matter of **State of Punjab vrs. Davinder Pal Singh Bhullar and Ors**, in ***Criminal Appeal Nos.753-755 of 2009***. I have carefully gone through the citations as relied upon. With due respect, it may be mentioned that the facts and the circumstances apart from the positions of law as decided in the cited cases are absolutely different from those in the case at hand. The first case of State of Karnataka related to a quashing of a charge. The Full Bench decision of Rajasthan High Court related to the interpretation of Section 362 of the Cr.P.C. with the observation that the High Court can recall its judgment in exercise of powers under Section 482 of the Cr.P.C. in case the opportunity of hearing is not given to the accused and the bars under Section 362, Cr.P.C. would not be applicable. This related to disposal of one revision application by the High Court in absence of the accused-petitioner which was held can be recalled in exercise of power under Section 482 of the Cr.P.C. Similar was the situation in the case of **Vishnu Agarwal** as has been relied upon, so also in the case of **State of Punjab vrs. Bhullar**. To put in brief, in all the cases as relied upon the Hon'ble Apex Court as well as the Hon'ble High Court of Rajasthan held that when an order or judgment has been pronounced by the High Court in violation of the principles natural justice, it can be recalled in exercise of the powers under Section 482, Cr.P.C. and the bars provided under Section 362 of the Cr.P.C. would not be applicable. In all these case, there was no alternative statutory forum available to the aggrieved persons for redressal of their grievances. But as stated earlier, in the case at hand there is an alternate forum by way of appeal available for the accused persons to raise their grievances. As quoted earlier in the case of **Arun Sankar Sukla (supra)**, it has been categorically held that the inherent power of the High Court is not to be invoked in respect of any matter covered by specific provisions of the Code or if its exercise would infringe any specific provision of the Code. It was also held by the Hon'ble Apex Court in another decision reported in ***AIR 1993 S.C. 892*** (**The Janata Dal vrs. H.S. Chawdhary**)that

> "the provision under Section 482, Cr.P.C. closely resembles Section 151 of the Code of Civil Procedure, 1908, (hereinafter called the C.P.C.), and, therefore, the restrictions which are there to use inherent powers under Section 151, Cr.P.C. are applicable in exercise of powers under Section 482, Cr.P.C. and one such restriction is that there exists no other provision of law by which the party aggrieved would have sought relief.

14. In view of the aforesaid positions of law, I am of the opinion that the applications of the petitioners in the present forum are not maintainable. Accordingly, all the aforesaid applications stand rejected being not maintainable in law.

15. However, the petitioners are given liberty to appear before the learned trial court on or before 4th August,2018 so as to be heard on the question of sentence. On their such appearance by the stipulated period, the learned trial court shall proceed according to law. Till that date, the N.B.W.(A) issued against the petitioners shall not be executed.