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ORISSA HIGH COURT, CUTTACK

CHIEF JUSTICE

The Hon'ble Shri Justice **VINEET SARAN** ***,*** *B.A., LL.B.*

PUISNE JUDGES

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ADVOCATE GENERAL

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

NOMINAL INDEX

ACTS

Acts & No.

1950	Constitution of India, 1950
1973-2….	Code of Criminal Procedure, 1973
1961-59…	The Institute of Technology Act, 1961
2000-56….	Juvenile Justice (Care And Protection of Children) Act, 2000
1860-45….	Indian Penal Code, 1860
1894-1…..	Land Acquisition Act 1894
1988-59.....	Motor Vehicles Act, 1988
1985-61....	Narcotic Drugs & Psychotropic Substances Act, 1985
1950-23…	Orissa Municipal Act, 1950
1893- 4….	Partition Act, 1893
1988-49…	Prevention of Corruption Act, 1988

RULES:- 1. Orissa Judicial Services Rules, 2007
2. Orissa Minor Mineral Concession Rules, 2004

SUBJECT INDEX

CODE OF CRIMINAL PROCEDURE, 1973 – Section 362 – Provisions under – No Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error – Order taking cognizance – Whether an interlocutory or final order – Held, the order taking cognizance being an interlocutory order, the same can be reviewed – Provision of Section 362 of Cr. P.C would not apply.

Fani Bhusan Das & Ors. -V- State of Orissa & Ors.

2018 (I) I.L.R. Cut…….. 1162

CONSTITUTION OF INDIA, 1950 – Article 320 – Functions of Public service Commission – Discussed.

Teena Patra -V- State of Odisha & Anr.

2018 (I) I.L.R. Cut…….. 1055

CONSTITUTION OF INDIA,1950 – Article 227 – In a petition seeking issue of a Writ of certiorari under Article 227 of the Constitution of India, the Tribunal/Court whose order is impugned, whether be made a party and when? – Held, the following.

Lingaraj @ Linga Nayak & Anr. -V- Abhimanyu Bhoi.

2018 (I) I.L.R. Cut…….. 1069

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Delay and Latches – Writ petition by State challenging the judgment passed by the SAT in OA after six years – No explanation given – Condonation of delay – Held, even though the direction of learned Tribunal vitiates the entire proceeding and if the said order is allowed to stand, it would occasion failure of justice, but that by itself is not a reason to condone the inordinate delay of six years.

INDIAN PENAL CODE,1860 – Section 302 – Offence under – Conviction – Analysis of evidence – Although the Evidence of P.Ws.3, 6 and 7 are of no help to the prosecution, the evidence of the eye-witness, P.W.5 relating to assault on the head of the deceased by the appellant using an axe remains un-demolished – P.W. 5, the wife of deceased also stated about the previous dispute – No suggestion to her about relationship – Medical evidence corroborates the oral testimony of P.W. 5 – Held, the appellant is the author of the crime – Conviction and sentence upheld.

Karma Lakra -V- State of Orissa.

2018 (I) I.L.R. Cut…….. 1077

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 – Section 14 read with Rule 13(7) of Juvenile Justice (Care and Protection of Children) Rules, 2007 – Proceeding against the Child in conflict with law (CCL) not completed within the prescribed statutory time limit – Application was filed before the Juvenile Justice Board to terminate the proceeding – Rejected on the ground that the delay was due to a talk of compromise and that there is no such provision for termination of proceeding in the relevant Orissa Rules and it was submitted that Central Rule was not applicable – Petitioner C.C.L charged for the offences under Sections 498-A/506/34, of I.P.C. read with Section 4 of the D.P. Act – Facing trial for a petty offence and the trial has not been completed within the statutory period – No extension of time by the appropriate authority – Held, the C.C.L was entitled to seek termination of the proceeding since the proceeding was not completed within the mandatory period.

Arnapurna Panigrahi -V- State of Odisha.

2018 (I) I.L.R. Cut…….. 1159

Hospital, Rourkela demanded and accepted an amount of Rs.150/- as gratification for issuing fitness certificate – Ingredients of offence – Evidence thereof – Whether satisfied for maintaining the conviction & sentence – Held, no, the proof of demand of illegal gratification is the gravamen of the offences under sections 7 and 13(2) read with 13(1)(d)(i) and (ii) of 1988 Act and in absence thereof, unmistakably the charge would fail – Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would not be sufficient to bring home the charge under the aforesaid sections of the Act. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under sections 7 or 13 of the Act would not entail his conviction there under.

Dr. Sushil Kumar Pati -V- State of Odisha (VIG.)

2018 (I) I.L.R. Cut…….. 1118

RECURITMENT – Sikhya Sahayak – Advertisement has the specific condition that one will be entitled to 4 grace marks for each year and maximum for 5 years for previous experience – The language in the advertisement is very much clear and the only indication in this regard appears to be 4 grace marks will be awarded for each year and nothing beyond or behind – Petitioner has previous experience of 4 years 11 months 29 days – Claim of relaxation – Whether permissible – Held, No.

Sasmita Kar -V- State of Orissa & Ors.

2018 (I) I.L.R. Cut…….. 1094

SERVICE – Petitioner joined in the post of Asst. Archivist in Berhampur University – The Syndicate upgraded the post to that of Archivist in view of the need for taking the responsibility for the work of museum subject to approval of the State Government – Petitioner was allowed to work as Archivist with a higher scale of pay with an undertaking that in case the up

2018 (I) ILR - CUT-1010 (S.C.)

SUPREME COURT OF INDIA

J.CHELAMESWAR, J. & SANJAY KISHAN KAUL, J.

CIVIL APPEAL NO. 4782 OF 2018
[Arising out of SLP(C) No. 31167 of 2015]

WITH

Civil Appeal No.4784 of 2018 [Arising out of SLP(C) No.32438/2015]
Civil Appeal No.4783 of 2018 [Arising out of SLP(C) No.31857/2015]
Civil Appeal Nos.4786-4790 of 2018 [Arising out of SLP(C) Nos.34869-34873/2015]
Civil Appeal No.4785 of 2018 [Arising out of SLP(C) No.34695/2015]
Civil Appeal No.4791 of 2018 [Arising out of SLP(C) No.10555/2016]
Civil Appeal No.4792 of 2018 [Arising out of SLP(C) No.19639/2016]
Civil Appeal Nos.4794-4795 of 2018 [Arising out of SLP(C) Nos.23978-23979/2016]
Civil Appeal No.4793 of 2018 [Arising out of SLP(C) No.23977/2016]

MAHESH CHANDRA VERMA ……..Appellant

.Vrs.

THE STATE OF JHARKHAND
Through: **ITS CHIEF SECRETARY & ORS.** ……..Respondents

SERVICE – Period of service as Fast Track Judge – Counting towards length of service and pensionary benefits – Claim thereof – Held, keeping in mind the spirit of the directions made under Article 142 of the Constitution of India in *Brij Mohan Lal* and in *Mahesh Chandra Verma*, the necessary corollary must also follow, of giving benefit of the period of service in Fast Track courts for their pension and retiral benefits.

> *"The position in respect of the appellants is really no different on the principle enunciated, as there was need for a regular cadre strength keeping in mind the inflow and pendency of cases. The Fast Track Court Scheme was brought in to deal with the exigency and the appellants were appointed to the Fast Track courts and continued to work for almost a decade. They were part of the initial select list/merit list for recruitment to the regular cadre strength but were not high enough to be recruited in the existing strength. Even at the stage of absorption in the regular cadre strength, they had to go through a defined process in pursuance of the judgment of this court and have continued to work thereafter. We are, thus, unhesitatingly and unequivocally of the view that all the appellants and Judicial Officers identically situated are entitled to the benefit of the period of service rendered as Fast Track court Judges to be counted for their length of service in determination of their pension and retiral benefits."* *(Paras 15 to 18)*

Case Laws Relied on and Referred to :-

1. (2002) 5 SCC : Brij Mohan Lal v. Union of India & Ors.
2. 2 (2017) 11SCC 457 : Srikant Roy v. State of Jharkhand.
3. (2012) 11 SCC 656 : Mahesh Chandra Verma v. State of Jharkhand
4. (2012) 6SCC 502 : Brij Mohan Lal v. Union of India
5. Nihal Singh & Ors. v. State of Punjab & Ors.

For appellant : Mr. Balaji Srinivasn
For respondents :

JUDGMENT Date of Judgment : 11.05 2018

SANJAY KISHAN KAUL, J.

1. The sole question, which arises for consideration in these appeals is whether the services rendered by the appellants/Judicial Officers as Fast Track court Judges is liable to be counted for their pensionary and other benefits, the appellants having joined the regular judicial service thereafter.

2. The question of law arising as aforesaid, it is not necessary to delve into the facts of each case. Thus, only the facts which are relevant for the determination of this question are being set out. The Jharkhand State was carved out from the State of Bihar under the Bihar Reorganisation Act, 2000 on 25.11.2000. Soon thereafter the Jharkhand High Court, respondent No.2, issued an advertisement on 23.5.2001 to fill up the vacancies for the post of Additional District Judges in the Jharkhand Superior Judicial Service. The appellants also took part in the recruitment process and post conduct of examination and interview, a select list was prepared of 27 candidates, who were eligible for appointment to the Superior Judicial Service. None of the appellants, however, figured in the final select list. A parallel development was the allocation by the 11th Finance Commission of Rs.502.90 crores under Article 275 of the Constitution of India, for the establishment of courts described as the Fast Track courts.1,734 courts in various States were envisaged to deal with long-pending cases, specifically, Sessions cases. The funds allocated by the Finance Commission were to be utilized in a time bound schedule of five years, and the State Governments were required to take necessary steps to establish such courts.

3. A challenge was laid to this Scheme, known as the Fast Track Courts Scheme, in various High Courts primarily on the ground that there was no constitutional sanction for employment of retired Judges, nor were there effective guidelines in operation. These matters were transferred to the Supreme Court and all these matters were dealt with in the judgment in ***Brij Mohan Lal v. Union of India & Ors.*** [1] ***- [1]***. The Scheme was analysed by the Supreme Court and keeping in mind the laudable objects with which the Fast Track Courts Scheme was set up, the constitution of these courts was upheld but with certain directions. In terms of these directions, the first preference for appointment to these courts was to be given by ad hoc promotions 1 (2002) 5 SCC 1 from amongst eligible Judicial Officers, while the second preference was to be given to retired Judges who had good service records. The third preference envisaged was to the members of the Bar for direct appointment to these courts. The fourth direction in this behalf is as under:

> "4. The third preference shall be given to members of the Bar for direct appointment in these Courts. They should be preferably in the age group of 35-45 years, so that they could aspire to continue against the regular posts if the Fast Track Courts cease to function. The question of their continuance in service shall be reviewed periodically by the High Court based on

their performance. They may be absorbed in regular vacancies, if subsequent recruitment takes place and their performance in the Fast Track Courts is found satisfactory. For the initial selection, the High Court shall adopt such methods of selection as are normally followed for selection of members of the Bar as direct recruits to the Superior/Higher Judicial Services."

4. It is in furtherance of the aforesaid Fast Track Courts Scheme that the State of Jharkhand/respondent No.1 is stated to have constituted more than 80 such Fast Track courts at the level of Additional District Judges vide Notification dated 29.11.2001. In order to fill these posts expeditiously, the process of examination having been conducted immediately before this Notification, a decision was taken to accommodate the persons from the select list, who could not be accommodated in the regular cadre of Superior Judicial Service, to the Fast Track courts. The first 17 candidates out of the 27 candidates in the select list were appointed to the regular cadre on 15.12.2001, while the remaining 10 candidates were appointed to the Fast Track courts on 2.2.2002. Since the Fast Track court's vacancies could not be filed in by this process, 15 more candidates, under the category of direct recruitment from the Bar, were appointed from amongst the candidates who participated in the selection process pursuant to the advertisement dated 23.5.2001, but were not on the select list. This process was followed strictly in accordance with the merit of the candidates beyond the select list. These 15 candidates were appointed on 23.9.2002.

5. We may also notice that the existing system of pension and General Provident Fund ceased to exist for Government servants who joined in service on or after 1.12.2004 and in lieu of the same a new Contributory Pension Scheme was introduced for Government officials, who joined service on or after 1.12.2004. These Government officials joining on or after 1.12.2004 were mandatorily required to procure a new Permanent Retirement Account Number ('PRAN').

6. In the year 2008, the High Court issued a new selection process for 34 posts of Additional District Judges through a limited competitive examination to be held on 31.8.2008. Thereafter began a legal battle between the persons who were working in the Fast Track courts and those who would be beneficiaries under the limited competitive examination. The challenge laid before the Jharkhand High Court impugning the aforesaid selection process succeeded on 29.8.2008 but in the Special Leave Petition ('SLP') filed, the judgment of the Jharkhand High Court was set aside in ***Srikant Roy v. State of Jharkhand***[2]. The Judicial Officers assailed the appointment of persons to the post of Fast Track courts and suffice to say that the contest was carried right till this Court, decided in ***Mahesh Chandra Verma v. State of Jharkhand***[3].

7. Prior to the judgment in ***Mahesh Chandra Verma***[4] the issue of what is to be done with the Judges appointed to the Fast Track court after the funding was stopped by the Central Government, and when 2(2017) 1 SCC 457 3(2012) 11 SCC 656 4(supra) the State Government also had a problem of funding, formed subject matter

of directions in ***Brij Mohan Lal v. Union of India*[5] *- [II]***. The relevant paragraphs are as under:

> "207.9. All the persons who have been appointed by way of direct recruitment from the Bar as Judges to preside over FTCs under the FTC Scheme shall be entitled to be appointed to the regular cadre of the Higher Judicial Services of the respective States only in the following manner:
>
> (a) The direct recruits to FTCs who opt for regularisation shall take a written examination to be conducted by the High Courts of the respective States for determining their suitability for absorption in the regular cadre of Additional District Judges.
>
> (b) Thereafter, they shall be subjected to an interview by a Selection Committee consisting of the Chief Justice and four senior most Judges of that High Court.
>
> (c) There shall be 150 marks for the written examination and 100marks for the interview. The qualifying marks shall be 40% aggregate for general candidates and 35% for SC/ST/OBC candidates. The examination and interview shall be held in accordance with the relevant Rules enacted by the States for direct appointment to Higher Judicial Services.
>
> (d) Each of the appointees shall be entitled to one mark per year of service in the FTCs, which shall form part of the interview marks.
>
> (e) Needless to point out that this examination and interview should be conducted by the respective High Courts keeping in mind that all these applicants have put in a number of years as FTC Judges and have served the country by administering 5(2012) 6 SCC 502 justice in accordance with law. The written examination and interview module, should, thus, be framed keeping in mind the peculiar facts and circumstances of these cases.
>
> (f) The candidates who qualify the written examination and obtain consolidated percentage as afore indicated shall be appointed to the post of Additional District Judge in the regular cadre of the State.
>
> (g) If, for any reason, vacancies are not available in the regular cadre, we hereby direct the State Governments to create such additional vacancies as may be necessary keeping in view the number of candidates selected.
>
> (h) All sitting and/or former FTC Judges who were directly appointed from the Bar and are desirous of taking the examination and interview for regular appointment shall be given age relaxation. No application shall be rejected on the ground of age of the applicant being in excess of the prescribed age.
>
> 207.10. The members of the Bar who have directly been appointed but whose services were either dispensed with or terminated on the ground of doubtful integrity, unsatisfactory work or against whom, on any other ground, disciplinary action had been taken, shall not be eligible to the benefits stated in para 207.9 of the judgment."

8. The aforesaid judgment was taken note of in ***Mahesh Chandra Verma*[6]** and it was, thus, observed in para 63 as under:

> "63. The State of Jharkhand will now have to take steps to comply with directions issued in ***Brij Mohan Lal7-[II]***, if it has not complied with them so far. The State of Jharkhand and the High Court will have to work in sync to ensure that the directions to appoint the appellants in the regular cadre in Higher 6(supra) 7(supra) Judicial Service are complied with strictly in the manner laid down in ***Brij Mohan Lal8-[II]***."

9. The effect of the aforesaid judgment was that an examination for regularization and absorption was conducted and the appellants before this Court were successful and were thus, appointed to the Jharkhand Superior Judicial Service. However, they were treated as fresh recruits.

10. The appellants were aggrieved on account of them being treated as fresh recruits and requested for benefits of pay protection and other benefits of continuance of service. This request was, however, rejected by the State Government. This resulted in the writ petitions being filed in the High Court where some interim protection was granted but ultimately, the writ petitions have been dismissed by the common impugned order dated 14.10.2015.

11. A perusal of the impugned order shows that other than the reference to the judgments referred to aforesaid; the only aspect examined is that the initial appointment was temporary on the ex-cadre post, the appointment being so made for the temporary scheme for speedy disposal of cases. However, in view of the judgment in ***Brij*** 8(supra) ***Mohan Lal9-[II]*** and ***Mahesh Chandra Verma10*** they were appointed through a process to the regular post. The High Court reasoned that since these two judgments have not dealt with the post appointment situation of the appellants, the High Court would not be able to give anything which has not been granted by the Supreme Court under Article 142 of the Constitution of India. The Supreme Court had taken recourse to Article 142 of the Constitution of India to deal with the issue of the methodology for recruitment of the Fast Track court Judges to the regular posts.

12. In the course of arguments, learned counsel appearing for the State Government sought to emphasise that by its very nature, the Fast Track courts were constituted for a limited period of time and, thus, the persons so appointed were conscious of the fact that they would have a limited tenure. Since the funding from the Central Government stopped, the State Governments did continue these courts for some years, but that again would not give any right to the appellants to claim the benefit of the service rendered as Fast Track court Judges for the purposes of computation of pensionary and retiral benefits. He also 9(supra) 10(supra) sought to emphasise that this Court has taken recourse to Article 142 of the Constitution of India to issue directions and the High Court had rightly observed that what was not done by the Supreme Court under Article 142 of the Constitution of India could not be done by the High Court.

13. We put a specific query to the learned counsel as to whether this Court had, in the two judgments in question, prohibited any such grant? Learned counsel after some initial hesitation could not dispute the position that there was no such prohibition. We also put to the learned counsel whether the existing cadre strength was sufficient to sub-serve the justice delivery process, i.e., could it be said that there were enough courts in existence to try the relevant cases? The only answer,

which came forth was that the State had been carved out recently and had taken immediate steps to fill the vacancies. However, to our mind, the important aspect is that the State was no exception to the general position prevalent of inadequate judicial posts to deal with the existing inflow of cases. It is only through subsequent directions that a periodic increase in judicial strength has been envisaged. In ***Brij*** 11 ***Mohan Lal11-[II]***, it was observed as under:

> "207.11. Keeping in view the need of the hour and the constitutional mandate to provide fair and expeditious trial to all litigants and the citizens of the country, we direct the respective States and the Central Government to create 10% of the total regular cadre of the State as additional posts within three months from today and take up the process for filling such additional vacancies as per the Higher Judicial Service and Judicial Services Rules of that State, immediately thereafter."

14. The need to set up Fast Track courts arose on account of delays in the judicial process, targeting certain priority areas for quicker adjudication. In fact, had there been adequate cadre strength, there would have been no need to set up these Fast Track courts.

15. The appellants were not appointed to the Fast Track courts just at the whim and fancy of any person, but were the next in line on the merit list of a judicial recruitment process. They were either part of the select list, who could not find a place given the cadre strength, or those next in line in the select list. Had there been adequate cadre strength, the recruitment process would have resulted in their appointment. We do believe that these Judges have rendered services over a period of nine years and have performed their role as Judges to the satisfaction, otherwise there would have been no occasion for their appointment to 11(supra) the regular cadre strength. Not only that, they also went through a second process for such recruitment. We believe that it is a matter of great regret that these appellants who have performed the functions of a Judge to the satisfaction of the competent authorities should be deprived of their pension and retiral benefits for this period of service. The appellants were not pressing before us any case of seniority over any person who may have been recruited subsequently, nor for any other benefit. In fact, we had made it clear to the appellants that we are only examining the issue of giving the benefits of their service in the capacity of Fast Track court Judges to be counted towards their length of service for pensionary and retiral benefits. To deny the same would be unjust and unfair to the appellants. In any case, keeping in mind the spirit of the directions made under Article 142 of the Constitution of India in ***Brij Mohan Lal12-[II]*** and in ***Mahesh Chandra Verma13***, the necessary corollary must also follow, of giving benefit of the period of service in Fast Track courts for their pension and retiral benefits. The methodology of non-creation of adequate regular cadre posts and the consequent establishment of Fast Track courts manned by the appellants cannot be used as a ruse to deny the dues of the appellants. 12(supra) 13(supra) 13

16. In a different factual context but on the principle laid down, we take note of the judgment in ***Nihal Singh & Ors. v. State of Punjab & Ors.***[14] of a Bench of this court to which one of us was a member. The State of Punjab in the 1980s was faced with large scale disturbance and was not in a position to handle the prevailing law and order situation with the available police personnel and, hence, resorted to recruitment under Section 17 of the Police Act, 1861 (hereinafter referred to as the 'Act') for appointing Special Police Officers ('SPOs'). The SPOs were assigned the duty of providing security to banks, for which the financial burden was to be borne by the banks, with the clear understanding that, as per the provisions of the Act, such police officers were to be under the discipline and control of the Senior Superintendent of Police of the District concerned. Such SPOs provided yeoman service in difficult times but when their case was considered for regularization subsequently, it met with an unfavourable response by an order passed in the year 2002. This Court while recognizing that the creation of a cadre or sanctioning of posts was exclusively within the authority of the State, opined that if the State did 14(2013) 14 SCC 65 not choose to create a cadre but chose to make appointments of persons creating contractual relationship only, such action would be categorized as arbitrary nature of exercise of power. In this context, it was observed by the Bench, thus*:* "Sanctioned posts do not fall from heaven. The State has to create them by a conscious choice on the basis of some rational assessment of the need." Thus, the facts found showed that there was the existence of a need for creation of posts and the failure to create such posts or having a stop gap arrangement, which lasted for years cannot be used to deny in an arbitrary manner, the absorption benefit to people who had worked for long years. A direction was issued to regularise the services of such SPOs and they were held entitled to the benefits of service similar in nature to the existing cadre of police service of the State.

17. The position in respect of the appellants is really no different on the principle enunciated, as there was need for a regular cadre strength keeping in mind the inflow and pendency of cases. The Fast Track Court Scheme was brought in to deal with the exigency and the appellants were appointed to the Fast Track courts and continued to work for almost a decade. They were part of the initial select list/merit list for recruitment to the regular cadre strength but were not high enough to be recruited in the existing strength. Even at the stage of absorption in the regular cadre strength, they had to go through a defined process in pursuance of the judgment of this court and have continued to work thereafter.

18. We are, thus, unhesitatingly and unequivocally of the view that all the appellants and Judicial Officers identically situated are entitled to the benefit of the period of service rendered as Fast Track court Judges to be counted for their length of service in determination of their pension and retiral benefits.

19. The appeals are accordingly allowed leaving the parties to bear their own costs.

2018 (I) ILR - CUT- 1017

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

W.P.(C) NO. 1203 OF 2018

LOKANATH PRADHAN ……..Petitioner

.Vrs.

COLLECTOR, PURI & ORS. .....Opp. Parties

ORISSA MINOR MINERAL CONCESSION RULES, 2004 – Rule 2 (e) read with Schedule-IV – Tahasildar, granted permission for removal of sands subject to payment of cost of Rs.38,420/- towards royalty @ Rs.38.42 per C.M. for 1000 C.M. of sand within a period of two months – Cancellation of the permission before two months – No opportunity of hearing was given before cancellation – Held, the order of cancellation is in violation of the principles of natural justice and as such liable to be quashed and the petitioner is entitled to operate the sand source for balance period – Ordered accordingly. (Para 9)

Case Laws Relied on and Referred to :-

1. (2003) 1 SCC 726 : Beg Raj Singh v. State of U.P.,

For petitioner : M/s Maheswar Mohanty, S.C. Dash, A Mallik, R.K. Das & S.N. Jena.

For opp. parties : Mr. B.P. Pradhan, Addl. Govt. Adv.

JUDGMENT Decided on : 25.04.2018

DR. B.R.SARANGI, J.

Mahanta Goura Gobinda Das Goswami Guru Radhakrushna Dasa Goswami at Radhakanta Matha, Balisahi, Puri is the stitiban recorded tenant of Khata No.21 in Mouza-Siparurubali, District-Puri and the said Record of Right was published on 01.04.1977. Out of 25 plots of Khata No.21, Plot No.60 measuring Ac.2.46 decimals was recorded as kisam 'Patita' and filled with sands. For the development of the said Plot No.60, the recorded tenant of Khata No.21 had executed an agreement on 07.08.2017 in favour of the present petitioner in order to raise the income of Matha.

2. Pursuant to such agreement dated 07.08.2017, the petitioner applied to the competent authority, i.e., Tahasildar, Brahmagiri for grant of permission to lift 1000 C.M. of sand from Plot No.60, Kisam-Patita, Ac.2.46 decimals under Khata No.21 of Mouza-Sipasarubali for agricultural purposes. On receipt of such application, the Tahasildar forwarded the same to Revenue Inspector and Revenue Supervisor for joint report. On the basis of reports, on 23.11.2017, the Tahasildar, Brahmagiri granted permission in favour of the petitioner under Rule 2(e) read with Schedule-IV of Orissa Minor Mineral Concession Rules, 2004 for removal of sands from the said land subject to payment of cost of Rs.38,420/- towards royalty calculated E.D. Rs.38.42 per C.M. for the assessed 1000 C.M. of sand and, as such, permission was granted to lift the sand within a period of two months.

3. In view of the order dated 23.11.2017 of the Tahasildar, the petitioner deposited the royalty amount of Rs.38,420/- which was duly acknowledged by the authority by providing receipt thereof on the very same day. The petitioner, thereafter, started lifting the sand, pursuant to permission granted by the Tahasildar, but he was objected by the officials of the Tahasildar vide office order dated 06.01.2018, wherein it has been stated that the permission granted on 23.11.2017 for lifting the sand has been cancelled and, as such, when the petitioner wanted the copy of such cancellation order dated 06.01.2018, it was intimated to him that the same has been affixed in the office notice board. After collecting the said order of cancellation dated 06.01.2018, the petitioner has filed this application.

4. Mr. Maheswar Mohanty, learned counsel for the petitioner contended that once permission was granted to lift the sand for a period of two months, i.e., from 23.11.2017 to 22.01.2018, cancelling the same in the midst of such period, i.e., on 06.01.2018 in Annexure-6, without affording opportunity of hearing, amounts to arbitrary and unreasonable exercise of powers by the authority and, as such, no reasons have been assigned in the order of cancellation save and except the severe protest made by the members of Coastal Land and Forest Protection Committee on 05.01.2018. Therefore, such action of the authority concerned cannot sustain in the eye of law and is liable to be quashed. It is further contended that since the opposite parties have accepted the royalty amount and permitted the petitioner to lift the sand for a period of two months, the same should not have been cancelled in the midst of continuance of such period, i.e., on 06.01.2018, and, as such, the petitioner should have been permitted to lift the sand for the remaining period of 18 days by revoking the order of cancellation passed by the authority concerned.

5. Mr. B.P. Pradhan, learned Addl. Government Advocate, though admitted the facts of execution of the agreement with the petitioner by the original recorded tenant and also receipt of the royalty amount pursuant to the order passed by the Tahasildar on 23.11.2017 for lifting the sand, contended that due to road blockage picketing called by the members of the Coastal Land and Forest Protection Committee on 05.01.2018 and in view of the prevailing law and order situation, the order was passed on 06.01.2018 cancelliing the order dated 23.11.2017 and, as such, the order passed by the authority concerned does not warrant any interference by this Court at this stage.

6. We have heard Mr. Maheswar Mohanty, learned counsel for the petitioner, as well as Mr. B.P. Pradhan, learned Addl. Government Advocate and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

7. There is no dispute with regard to factual matrix of the case as mentioned above, but the only question to be considered whether while issuing the office order dated 06.01.2018, any opportunity of hearing was given to the petitioner or not. In

the counter affidavit the opposite parties have taken a specific stand in paragraph-8 thereof, which is reproduced below:

> *"8. That in reply to the averments made in paragraphs 9 and 10 of the writ application, it is humbly submitted that it is a fact that due to road blockage picketing, called by the "members of the Coastal Land and Forest Protection Committee" on 05.01.2018 and in view of prevailing law and order situation, an order is passed vide this office letter No.159, dated 06.01.2018 for cancellation of the order, dated 23.11.2017, which is just and proper and made keeping in view of ground reality."*

The reason, which has been assigned in paragraph-8 of the counter affidavit, as mentioned above, for cancellation of the order dated 23.11.2017 is not spelt out in the order impugned dated 06.01.2018 (Annexure-6). Even otherwise, the minimum requirement of law, that the petitioner has to be given an opportunity of hearing in compliance of the principles of natural justice, has not been followed, as nothing has been placed on record to indicate that before passing of the order dated 06.01.2018, any opportunity of hearing was given to the petitioner. Rather, the order dated 06.01.2018 (Annexure-6) vis-à-vis the pleadings in paragraph-8 of the counter affidavit clearly indicate that pursuant to the protest made by the Members of the Coastal Land and Forest Protection Committee on 05.01.2018, the petitioner has been prevented to lift the sand and, as such, the office order issued by the Tahasildar on 23.11.2017 permitting the petitioner to lift the sand from the land in question has been cancelled vide order dated 06.01.2018. Pursuant to the order dated 23.11.2017, the petitioner had been permitted to lift the sand within a period of two months, which was valid from 23.11.2017 to 22.01.2018, and, in view of the order of cancellation dated 06.01.2018 made vide Annexure-6, only 18 days left to lift the sand. Therefore, before cancellation order, no opportunity of hearing having been given to the petitioner, the order impugned in Annexure-6 dated 06.01.2018 cannot sustain in the eye of law.

8. In ***Beg Raj Singh v. State of U.P.***, (2003) 1 SCC 726, the apex Court in paragraph-6 of the said judgment held as follows:-

> *"xxx xxx xxx*
>
> *The ordinary rule of litigation is that the rights of the parties stand crystallized on the date of commencement of litigation and the right to relief should be decided by reference to the date on which the petitioner entered the portals of the court. A petitioner, though entitled to relief in law, may yet be denied relief in equity because of subsequent or intervening events i.e. the events between the commencement of litigation and the date of decision. The relief to which the petitioner is held entitled may have been rendered redundant by lapse of time or may have been rendered incapable of being granted by change in law. There may be other circumstances which render it inequitable to grant the petitioner any relief over the respondents because of the balance tilting against the petitioner on weighing inequities pitted against equities on the date of judgment.*
>
> *xxx xxx xxx*
>
> *The operation had to be stopped because of the order of the State Government intervening which order has been found unsustainable in accordance with stipulations contained in the mining lease consistently with GO issued by the State of Uttar Pradesh. Merely because a little*

higher revenue can be earned by the State Government that cannot be a ground for not enforcing the obligation of the State Government which it has incurred in accordance with its own policy decision."

9. Considering the law laid down by the apex Court, as discussed above, and applying the same to the present context, in our view, the case of the petitioner stands on a better footing as permission, which was granted to the petitioner for the period of two months, i.e., from 23.11.2017 to 22.01.2018, was cancelled on 06.01.2018 without affording any opportunity of hearing, without complying the principles of natural justice and without assigning any cogent reason. Therefore, interest of justice would be best served if the petitioner is permitted to lift the sand for the remaining period of 18 days.

10. For the foregoing reasons, the office order dated 06.01.2018 in Annexure-6 passed by the Tahasildar, Brahmagiri, cancelling the office order dated 23.11.2017, without complying with the principles of natural justice, is liable to be quashed and accordingly the same is hereby quashed. Accordingly, it is directed that the Tahasildar, Brahmagiri shall grant necessary permission to the petitioner to lift the sand to the extend of the quantity of sand permitted to be removed for the full period of two months, subject to adjustment of the period for which he has already operated.

11. The writ petition stands allowed. No order as to costs.

2018 (I) ILR - CUT- 1020

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

W.P.(C) NO. 3714 OF 2015

KARTIK CHANDRA BARIK & ANR. .....Petitioners

.Vrs.

PRINCIPAL SECRETARY, (R & D.M) GOVERNMENT OF ODISHA & ORS. .....Opp. Parties

ORISSA RELIEF CODE, Rule – 81 – House Building Grant – Writ petition claiming house building assistance – Plea of damage of house by flood – Joint enquiry by revenue authority – Report suggest house not damaged – Nothing has been stated in rebuttal with regard to the inquiry report – Held, in absence of any pleadings in the writ petition to establish the claim of the petitioners, and in view of the disputed questions of fact which cannot be decided in the writ jurisdiction, this Court is not inclined to grant the relief sought for – Accordingly, the writ petition stands dismissed. (Paras 7 to 10)

Case Laws Relied on and Referred to :-

1. (1994) 4 SCC 460 : Narendra Kumar v. State of Haryana.
2. AIR 2011 SC 1127 : Kalyan Singh Chouhan v. C.P. Joshi.
3. AIR 1953 SC 235 : Trojan & Co. v. RM. N.N. Nagappa Chettiar.
4. AIR 2002 SC 665 : Om Prakash Gupta v. Ranbir B. Goyal.
5. AIR 2005 SC 3165 : Ishwar Dutt v. Land Acquisition Collector.
6. AIR 2010 SC 1299 : State of Maharastra v. Hindustan Construction Company Ltd..

For Petitioner : Mr. Srinath Mishra, Adv.
For Opp. parties : Mr. P.K. Muduli, Addl. Govt. Adv.

JUDGMENT Decided on : 02.05.2018

DR. B.R.SARANGI, J.

The petitioners, claiming to be poor villagers of Patunia and Hamjapur under Patunia Gram Panchayat, have filed this application seeking direction to the opposite parties to sanction house building assistance, as declared by the State Government for the flood affected victims of 2014, in their favour.

2. The factual matrix of the case is that due to high flood in the year 2014, the houses of the petitioners were damaged by the tide of river Sanagenguti, the branch river of Mahanadi. The Government declared house building assistance to the victims of the flood affected areas. Consequently, the Revenue Inspector, Salipur conducted inquiry in the villages of the petitioners by taking photo snaps of retched houses. Though such assistance was given to some of their co-villagers, the petitioners were deprived of. As the petitioners were seriously affected and were victims of such high tide of the river, on 07.11.2014 they approached the Tahasildar, Dharmasala, but he, even though assured, did not consider their grievance. Thereafter, the petitioners approached the Collector, Jajpur on 08.12.2014 ventilating their grievance. Since no action was taken on the same, the petitioners have approached this Court by filing the present application.

3. Mr. Srinath Mishra, learned counsel for the petitioners strenuously urged that though the petitioners were seriously affected due to high tide of the flood of the year 2014 and they are entitled to get the house building assistance, as per the provisions contained in Orissa Relief Code, the same has not been granted to them, although similarly situated persons have already been granted the benefit, for which the petitioners have been grossly prejudiced.

4. Mr. P.K. Muduli, learned Addl. Government Advocate contended that as per the guidelines of Government of Orissa, house enumeration work had been conducted by the local Revenue Inspector and enumeration register was also prepared and duly checked up by the supervising authority with regard to the damages caused due to flood water of river Sanagenguti during the last flood in the year 2014. Accordingly, the house building assistance was sanctioned and disbursed to the flood victims. Since the petitioners name did not find place in the enumeration register, they could not get house building assistance under the provisions of the

Orissa Relief Code. As such, the petitioners cannot get such benefit by means of this writ petition, since it involves disputed questions of fact.

5. We have heard Mr. Srinath Mishra, learned counsel for the petitioner, as well as Mr. P.K. Muduli, learned Addl. Government Advocate and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. It is no doubt true that due to high flood caused in the year 2014 by the tide of river Sanagenguti, certain damages had been caused to Patunia, Radhadeipur, Hamjapur villages under Patunia Gram Panchayat. The Revenue Inspector of Salipur, as per the guidelines of Government of Orissa, conducted the house enumerated work and prepared enumeration register, which was duly checked by the supervising authority. Accordingly, the house building assistance was sanctioned and disbursed to the flood victims. As names of the petitioners did not find place in the said enumerated register prepared by the Revenue Inspector, who caused inquiry, they were not eligible to get the house building assistance as provided under the Orissa Relief Code.

7. Rule-81 of Orissa Relief Code, which provides for house building grant, reads thus:-

"***81. House Building Grant.***

(1) On receipt of the preliminary flood damage report from the Collector, the Board of Revenue/Special Relief Commissioner shall take steps for allotment of funds for payment of house building grant to the eligible persons. The scale of house building grant to be sanctioned in respect of houses of people damaged due to flood, cyclone or heavy rainfall for repair or reconstruction of their houses is as follows :-

(i)	*For completely washed away houses Per family (maximum aid)*	*Rs. 3500*
(ii)	*For completely collapsed houses per family (maximum aid)*	*Rs.2000*
(iii)	*For partially collapsed houses per family (maximum aid)*	*Rs. 1000*

Explanation

(i) Houses which have been completely washed away from their original sites leaving behind no building materials shall be treated as "completely washed away".

(ii) A house may be treated as fully collapsed if all the four walls and the roof have collapsed.

(iii) A partially collapsed house is one in which one or more walls might have collapsed but the roof may still be standing on pillars or some of, the walls with or without damage to the roof. During cyclone it is possible that only the roof is completely blown off leaving all or some of the pillars intact, in such a case the house will be treated as partially collapsed.

(I) *Amended vide Gov/Revenue & Excise Deptt. Resolution No. 52854/R dated 24.11.1995.*

(2) Substituted vide Govt. in R/E Deptt. L No. 74816/R dated 12.11.1980

(2) The Collector shall ensure a careful assessment of the completely washed away 'completely collapsed' and 'partially collapsed' houses and ensure preparation of such lists in respect of every village. The list shall be approved by the Collector.

(3) House building grant may be sanctioned by the Collector and the Sub-Collector. Any other gazette officers serving under the Revenue administration may sanction and distribute such grants if he is specially authorized by the Collector in this behalf. At the time of necessity, the Revenue Divisional Commissioner as well as the Board of Revenue/Special Relief Commissioner shall be competent to authorize any gazetted officer to sanction and disburse house building grants.

(4) In the matter of payment of house building grant priority should be given to scheduled castes and scheduled tribes, landless labourers, marginal farmers and small farmers in this order.

(5) House building grant shall not be denied to encroacher on Government land whose houses have sustained damage in accordance with the scale of assistance prescribed in Subparagraph(1) but as far as possible they may be asked to shift to unobjectionable sites, if such sites are available."

In terms of the provisions of Rule-81, as enumerated above, and in obedience to order dated 18.03.2015 of the Tahasildar, Dharmasala, on 19.03.2014, a joint inquiry was conducted by the Revenue Inspector, Salipur, Revenue Supervisor, Salipur and Addl. Tahasildar, Salipur on the petition filed by Kartik Chandra Barik (petitioner no.1) and others with regard to house damage caused due to last flood in the year 2014. Radhadeipur, Patunia and Hamjapur villages were enumerated by the then Revenue Inspector, Salipur, soon after the flood in the year 2014. The names of petitioners were not included in the enumerated list, as their residential houses were found to be not affected during the said flood. So far as petitioner no.1-Kartik Chandra Barik is concerned, the observation in the joint inquiry report was as follows:-

Sl. No.	***Name of the Petitioner***	***Village***	***Observation of Inquiry***
1.	*Kartik Ch. Barik, S/o.- Dhusasan*	*Patunia*	*It is ascertained from the local inquiry that the petitioner Kartik Ch. Barik of village Patunia is claiming the HBA over the plot no. 1131/1330 of Khata No. 216 Mouza Patunia which stands recorded in the name of Batakrushna Rout, Krushna Ch. Rout, S/o.- Baidyanath Rout of village Patunia. During inquiry Sri Rout has stated that Sri Kartik Ch. Barik had taken shelter at the time of flood 2014. He has no right over the said plot.* *Further it is also ascertained that Sri Barik having pucca RCC house constructed over the plot 1118 Khata No. 325 of Mouza Patunia stands recorded in the name of Kartik Ch. Barik & his brother Kalandi Barik residing over this plot.* *The copy of ROR & an affidavit produced by Sri Rout is enclosed for kind consideration.*

So far as petitioner no.2 is concerned, whose name also finds place at serial no.18 of the report, the observation was as follows:-

Sl. No.	*Name of the Petitioner*	*Village*	*Observation of Inquiry*
18.	*Basantilata Malik, W/o.- Babaji*	*Hamjapur*	*It is found that the residence house of the petitioner is pucca (IAY) and it was not affected during the flood. Petitioner is claiming house damage showing kitchen houses having no wall. They are using the shed for cooking purpose. Not affected by flood.*

The above inquiry report has also been annexed as Annexure-A/3 to the counter affidavit dated 26.03.2015 filed by opposite parties no.2 and 3. Though rejoinder affidavit has been filed to the said counter affidavit, nothing has been stated in rebuttal with regard to the inquiry report submitted by the authority concerned indicating the ineligibility of the petitioners to get the benefit of house building assistance.

8. On perusal of the writ petition, it appears that the petitioners have not made out a case in their favour with regard to entitlement under Rule-81 of Orissa Relief Code, which provides for house building grant. Though reference has been made to the judgment of the apex Court in the case of ***Narendra Kumar v. State of Haryana***, (1994) 4 SCC 460, after going through the same, this Court finds that the said case has been decided on its own facts and circumstances, which has no application to the present case, particularly when the petitioners' name do not find place in the enumerated list prepared by the authority. As such, the findings in the inquiry report, as have been extracted above, clearly indicate that petitioner no.1 is having a pucca RCC house constructed over plot no.1118, Khata no.325 of Mouza-Patunia and he, as well as his brother, is residing therein. No pleadings whatsoever are available in the writ petition with regard to damage of the houses of the petitioners and their corresponding plot and khata numbers.

9. In ***Kalyan Singh Chouhan v. C.P. Joshi***, AIR 2011 SC 1127, after placing reliance on various judgments including ***Trojan & Co. v. RM. N.N. Nagappa Chettiar,*** AIR 1953 SC 235; ***Om Prakash Gupta v. Ranbir B. Goyal,*** AIR 2002 SC 665; ***Ishwar Dutt v. Land Acquisition Collector***, AIR 2005 SC 3165; and ***State of Maharastra v. Hindustan Construction Company Ltd***., AIR 2010 SC 1299, the apex Court held that relief not founded on the pleadings cannot be granted.

10. For the foregoing reasons, in absence of any pleadings in the writ petition to establish the claim of the petitioners, and in view of the disputed questions of fact which cannot be decided in the writ jurisdiction, this Court is not inclined to grant the relief sought for. Accordingly, the writ petition stands dismissed. However, there shall be no order as to cost.

2018 (I) ILR - CUT- 1025

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

A.H.O. NO. 90 OF 1999

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

.Vrs.

ANANDA CHANDRA ROUT & ANR. .....Respondents

LETTERS PATENT APPEAL – Order of learned single judge was on the basis of agreement of parties in the spirit of Lok Adalat – Held, cannot be interfered with in writ appeal. (Para 8)

For Appellant : M/s S. S. Rao & B.K. Mohanty.
For Respondents : M/s J.K. Mohanty, B. Singh, K.C. Dehury & P.B. Singh.

JUDGMENT Date of Hearing: 16.05.2018 Date of Judgment : 18.05.2018

DR. B.R. SARANGI, J.

This appeal is directed against the order dated 07.05.1999 passed in M.A. No. 717 of 1996, by which the learned Single Judge has modified the award dated 26.09.1996 passed by the IIIrd Motor Accident Claims Tribunal, Balasore in M.A.C.T. Case No. 135/184(c) of 1992-89 by reducing the awarded amount from Rs.35,000/- to Rs.30,000/- and directed that the sum of Rs.17,500/-, which was kept in fixed deposit in this Court, along with the entire accrued interest may be paid to the claimant respondent no.1 by way of account payee cheque, and the balance amount of Rs.12,500/- be paid by the insurance company along with interest at the rate of 10% from the date of claim application within a period of two months from the date of passing of the order, failing which the said amount shall carry interest at the rate of 12% thereafter.

2. The factual matrix of the case, in hand, is that respondent no.1, while travelling as a driver in the bus bearing registration number OAU 2969 belonging to OSRTC (Orissa State Road Transport Corporation), it showed some mechanical trouble, for which he was checking the same. Just then, a truck bearing registration number ORU 7118 came from the opposite direction on N.H. (National Highway) No.5 and dashed against the said bus, as a result of which it was rolled down and respondent no.1 received severe injuries. Due to the injuries sustained, respondent no.1 was admitted as an indoor patient in Bhadrak Sub-Divisional Hospital and treated under Dr. Parsuram Sahu, the Orthopedic Specialist. His right hand shoulder joint was broken into 2-3 pieces and left leg middle finger and ring finger were completely damaged.

3. The respondent no.1 then filed an application under Section 166 of the Motor Vehicles Act, 1988 claiming compensation before the IIIrd Motor Accident Claims Tribunal, Balasore, which was registered as M.A.C.T. Case No. 135/184(c)

of 1992-89. Pursuant to the notice issued, the appellant insurance company appeared before the tribunal and filed its written statement denying and disputing the claim. However, respondent no.2, the owner of the truck did not contest. During trial respondent no.1 examined himself, besides another witness. He proved copies of the FIR, charge-sheet, seizure list and injury report, which were marked as Exts.1 to 4. On behalf of the appellant insurance company, the insurance policy was exhibited as Ext.A. After due adjudication, the tribunal came to a definite finding that the accident took place due to rash and negligent driving of the truck in question and held that the offending vehicle was insured with the appellant, although the number of the vehicle in the policy Ext.A differs from that mentioned in the police papers. But the tribunal, by judgment dated 26.09.1996, awarded a sum of Rs.35,000/- as compensation towards the injuries sustained by respondent no.1.

4. Being aggrieved by the aforesaid award dated 26.09.1996, the appellant filed M.A. No. 717 of 1996 before this Court. The learned Single Judge, vide order dated 07.05.1999, accepting the suggestion of respondent no.1, disposed of the appeal in the spirit of Lok Adalat and modified the award, as already stated hereinbefore. Against the said order, the present appeal has been filed by the insurance company.

5. It appears that the present appeal was filed with delay of 75 days. Notice was issued to the respondents, vide order dated 04.01.2005, in the matter of limitation in Misc. Case No. 122 of 1999. Pursuant to the said notice, respondent no.1 appeared through its counsel. So far as respondent no.2 is concerned, notice was returned unserved due to want of present correct address. Therefore, direction was issued, vide orders dated 19.05.2006 and 05.03.2009, to take fresh steps for issuance of notice to respondent no.2 with correct address. But no steps have been taken by the appellant till date. In any case, respondent no.2, the owner of the truck, having not contested before the tribunal and also before this Court in misc. appeal, and in the meantime more than a decade having been passed, it being an old case of the year 1999, this Court, instead of directing the appellant to take fresh steps, disposed of the matter with the consent of the parties at this stage.

6. Mr. S.S. Rao, learned counsel appearing for appellant submitted that without examining a doctor to establish the extent of injuries and disability sustained by the claimant respondent no.1, the award of compensation of Rs.35,000/- made by the tribunal, which has been modified by the learned Single Judge to Rs.30,000/- in the spirit of Lok Adalat, cannot be sustained in the eye of law, as the materials available on record have not been considered in their proper perspective.

7. Learned counsel for respondent no.1 contended that since the matter has been decided by the learned Single Judge in the Lok Adalat spirit and the compensation amount has been reduced from Rs.35,000/- to Rs.30,000/-, the

impugned award, as well as the order passed by the learned Single Judge, does not warrant any interference by this Court in the present appeal.

8. Having heard learned counsel for the parties and after going through the records, it appears that there is no dispute with regard to factual matrix of the case in hand. The only question raised by the learned counsel for the appellant is that the tribunal, without examining a doctor to establish the extent of injuries and disability sustained by respondent no.1, could not have awarded compensation of Rs.35,000/-, which has been modified by the learned Single Judge to Rs.30,000/- in the Lok Adalat spirit. But fact remains, once the misc. appeal has been disposed of by the learned Single Judge in the Lok Adalat spirit and award of the tribunal has been modified with the consent of the parties, the same cannot be interfered with in this letter's patent appeal. In other words, since on the agreement of the parties the amount of compensation has been reduced from Rs.35,000/- to Rs.30,000/- by the learned Single Judge in the spirit of Lok Adalat, at subsequent stage the parties are precluded to challenge the same in a letter's patent appeal. Even otherwise, the fact that respondent no.1 had sustained injuries has been proved on the basis of the injury report submitted and marked as exhibit in course of hearing and the same has neither been disputed nor objected to by the appellant. Once the injury report has been marked as exhibit, without any objection, and the same forms part of the record itself, the question of examination of a doctor to establish the extent of injuries does not arise. Thus, the award of the tribunal granting compensation of Rs.35,000/-, having been modified by the learned Single Judge in misc. appeal to Rs.30,000/- in Lok Adalat spirit, cannot be said to be exorbitant or irrational so as to warrant interference by this Court in the present appeal. Therefore, we are not inclined to interfere with the order dated 07.05.1999 passed by the learned Single Judge in Misc. Appeal No. 717 of 1996, after lapse of more than two decades from the date of accident.

9. There is thus no merit in this letter's patent appeal, which is hereby dismissed. No order to costs.

2018 (I) ILR - CUT- 1027

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

AHO. NO. 58 OF 1999

D. M, ORIENTAL INSURANCE COMPANY LTD., SAMBALPUR ……..Appellant

.Vrs.

SMT. DRAUPADI BEHERA & ORS. ……..Respondents

MOTOR VEHICLES ACT, 1988 – Section 170 – Claim case – Award – The main question raised with regard to liability of the Insurance Company – Plea that the Insurance Company has no right to contest the claim on questions relating to negligence and quantum unless an order is passed permitting the Insurance Company to contest the claim – Contention of the claimants that the Insurance Company having not proved that there was no valid driving licence, cannot be permitted to agitate the said question in appeal – Held, even though there is no valid driving licence, keeping in view the provision contained in Section 149(4) of the Motor Vehicle Act, the amount is to be paid by the Insurance Company, which in its turn can get reimbursement from the owner – Letters patent Appeal – Order of the single judge is well justified and supported by reasons – No interference called for – *National Insurance Co. Ltd. v. Swaran Singh,* AIR 2004 SC 1531 followed. (Paras 3 & 4)

Case Laws Relied on and Referred to :-

1. 1998 (2) T.A.C. 379 (SC) : (Shankarayya & Anr v. United India Insurance Company Ltd & anr)
2. AIR 2004 SC 1531 : National Insurance Co. Ltd. v. Swaran Singh,.

For Appellant : M/s S.S. Basu, G.P. Dutta, & S. Ray.
For Respondents : M/s A. Mohanty, J. Sahu ,M.K Rout N.C. Sahoo, P.R. Das, T.Rath & S.Natia,M/s. D.K. Sahu & K.N. Mishra, Mr. B.P. Routray.

JUDGMENT Decided on : 19.06.2018

DR. B.R. SARANGI, J.

This intra-Court appeal has been filed by the Insurance Company challenging the judgment dated 28.06.1999 passed by the learned Single Judge in Misc. Appeal No. 160 of 1995, whereby the findings relating to the negligence of the driver and the quantum payable to the claimants have been confirmed and it has been directed that the sum of Rs.25,000/- deposited in this Court along with accrued interest shall be disbursed to the claimant-respondents by the Registry by an account payee cheque/ pay order and the balance sum of Rs.59,000/-, along with the interest, as directed by the Claims Tribunal, shall be deposited by the Insurance Company before the Claims Tribunal by end of August, 1999. Interest should be calculated on sum of Rs.85,000/- from the date of claim application till September, 1995 and on Rs.59,000/- thereafter till the date of deposit before the Claims Tribunal. Such amount shall be disbursed by the Claims Tribunal to the claimants in accordance with the direction contained in the award. If the amount as directed is paid by the end of August, 1999, the Claims Tribunal shall frame

appropriate issue relating to liability of the Insurance Company and regarding the existence of driving licence and proceed to dispose of such issue in accordance with law after permitting the Insurance Company and the owner to adduce relevant evidence. If, however, the amount is not paid by end of August, 1999, the direction contained in the original award relating to liability of the Insurance Company shall be deemed to have been confirmed. Since the owner had not appeared, it was directed that appropriate notice shall be issued to the owner by the Claims Tribunal at the cost of Insurance Company and all steps should be taken by the Insurance Company for issuance of such notice and accordingly directed the appellant to appear before the Claims Tribunal on 3rd August, 1999 to receive further instruction. The documents filed as additional evidence were directed to be returned to the appellant for production and proof before the Claims Tribunal.

2. The factual matrix of the case, in hand, is that the claimant-respondents no. 1 to 5 are widow and four minor children of deceased Baidhar Behera. On 22.06.1999, while the deceased was standing on the road, a truck bearing no. OSS-5343 dashed against him causing death after some time. Therefore, the claimants filed application claiming Rs.1,50,000/- as compensation. The owner of the truck did not contest the case. However, the Insurance Company filed written statement denying the allegation made in the claim application and contended that the driver of the truck did not have valid driving licencce and the vehicle had no permit and fitness certificate. The Claims Tribunal, on consideration of the materials available on record, held that the accident occurred due to rash and negligent driving of the driver of the truck and it was further found that the vehicle had been insured with the appellant-Insurance Company and as such the insurer was liable to pay compensation of Rs. 84,000/-. Against the said award of the Claims Tribunal, Misc. Appeal No. 160 of 1995 was filed before this Court and the learned Single Judge considering the arguments advanced by the appellant, found that though the appellant challenged the legality of the findings regarding negligence and quantum ultimately did not seriously press the said questions keeping in view the decision of the Supreme Court reported in 1998 (2) T.A.C. 379 (SC) (**Shankarayya and another v. United India Insurance Company Ltd and another)** to the effect that the Insurance Company has no right to contest the claim on questions relating to negligence and quantum unless an order is passed permitting the Insurance Company to contest the claim case in accordance with section 170 of the Motor Vehicles Act, 1988. But considering the main question raised with regard to liability of the Insurance Company, the learned Single Judge held that the contention raised

by the appellant that though a plea was taken that there was no valid driving licence of the driver, no specific issue was framed by the Claims Tribunal regarding liability of the Insurance Company, as well as existence or non-existence of valid driving licence, and as such, the appellant has been prejudiced thereby. It was further held that if it is found that there is no valid driving licence, the Insurance Company may not be held liable. However, considering the contention of the claimants that the Insurance Company having not proved that there was no valid driving licence, cannot be permitted to agitate the said question in appeal, the learned Single Judge further held that even though there is no valid driving licence, keeping in view the provision contained in Section 149(4) of the Act, the amount is to be paid by the Insurance Company, which in its turn can get reimbursement from the owner.

3. Mr. G.P. Dutta, learned counsel for the appellant argued with vehemence and stated that since there was no valid driving livence, the Insurance Company is not liable to pay the awarded amount and thereby the learned Single Judge has committed an error by directing for payment of awarded amount leaving upon to the claimants to agitate before the Claims Tribunal afresh with regard to liability of Insurance Company due to non-possession of the valid driving licence by the driver.

4. Having heard learned counsel for the appellant and going through the judgment of the learned Single Judge, this Court finds that the direction given by the learned Single Judge is well justified and supported by reasons. More particularly, the extant issue has already been considered by the apex Court in ***National Insurance Co. Ltd. v. Swaran Singh***, AIR 2004 SC 1531 and in paragraph-99 thereof it has been held as follows:

> *"99. It is, therefore, evident from the discussions made hereinbefore that the liability of the insurance company to satisfy the decree at the first instance and to recover the awarded amount from the owner or driver thereof has been holding the field for a long time."*

In view of summary of findings in paragraph-105 of the aforesaid judgment vis-à-vis the findings arrived at by learned Single Judge in the present case, we do not find any illegality or irregularity so as to warrant our interference in the same.

5. Accordingly, the appeal has no merit and is thus dismissed. No order to costs.

2018 (I) ILR - CUT- 1031

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

W.P.(C) NO.23317 OF 2015

PANCHANAN HEMBRAM ……..Petitioner

.Vrs.

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

SERVICE – DISMISSAL – Petitioner while working as a Constable opened fire from his Service 303 Rifle under the influence of alcohol – Disciplinary proceeding – Plea that he was not supplied with the documents and no opportunity was given before the award of punishment – Record shows, petitioner has participated in the proceeding and put his signature in each page of the record of departmental proceeding and at no point of time he has raised any objection regarding non-supply of any document or copy of the enquiry report etc – Held, there being no irregularity, no interference warranted.

Case Laws Relied on and Referred to :-

1. ILR 1975 Cuttack 1298 : Mahadeb Dash Vrs. Life Insurance Corporation of India.
2. 70(1990) CLT 116 : Prafulla Chandra Behera Vrs. Chairman, Board of Directors Managing Director of Dena Bank & Ors.
3. AIR 1989 SC 149 : Scooter India Limited Lucknow Vrs. Labour Court Lucknow & Ors.
4. AIR 1994 S.C. 1074 : Managing Director, ECIL, Hyderabad Etc. Vrs. B.Karunakar Etc.

For Petitioner : M/s. B.S.Mishra & A.R.Mishra
For Opp. Party : Addl. Government Advocate

JUDGMENT Date of Judgment: 27.06.2018

S.PANDA, J.

Petitioner in this writ petition assails the order dated 13.2.2014 passed by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 1506(C) of 2004 wherein the Tribunal rejected the prayer of the applicant without interfering with the order of dismissal.

2. Mr.Mishra, learned counsel for the petitioner submits that as per Paragraph-10 of Appendix-49 of the Police Manual the disciplinary authority is required to consider the records of the proceedings and record its findings on each charge which has not been done in the present case. The applicant was directed to perform duty in the jungle to restrain the dacoits and the dacoits attacked him for which his companion constable forced the applicant to open fire. The documents basing on which the charges were framed and more particularly the report of the IIC, Karanjia P.S. was not provided to the applicant even though he had requested for the same. The report of preliminary enquiry made by the I.I.C. Karanjia P.S. should have been provided as per the Appendix-49 wherein proceeding for departmental punishment under Rule, 828 of the Police Manual is stipulated and the delinquent should have been allowed to cross-examine the person who has conducted such enquiry at the

very inception of the proceeding. He has also submitted that petitioner was not refused to cross-examine the I.I.C., Karanjia P.S. however he was kept outside the room where so called enquiry was conducted. He merely put his signature on the papers wherever the Enquiring Officer directed, on simple faith. Those contention of the applicant has not been considered by the Tribunal while passing the impugned order. It is also submitted that he had declined to cross-examine one witness and not all. The Disciplinary Authority should have given finding to each charge while accepting the enquiry report and issuing show cause notice why punishment proposed should not be awarded to him, which has not been complied with in the present case. He further submits that without supplying the documents as well as without giving opportunity of hearing to the applicant, the Disciplinary Authority passed the order of dismissal which was also confirmed by the Appellate Authority. The Tribunal without considering the aforesaid facts on its proper perspective passed the impugned order. He further submits that the order of dismissal passed by the Disciplinary Authority dismissing him from service being a major penalty need to be interfered with while setting aside the impugned order passed by the Tribunal. In support of his contention he has cited the decisions reported in ***ILR 1975 Cuttack 1298, Mahadeb Dash Vrs. Life Insurance Corporation of India, 70(1990) CLT 116, Prafulla Chandra Behera Vrs. Chairman, Board of Directors and Managing Director of Dena Bank & others, AIR 1989 SC 149, Scooter India Limited Lucknow Vrs. Labour Court Lucknow and others***.

3. The learned Addl. Government Advocate submits that the applicant was relieved from Balasore district on 8.8.1993 and joined in Mayurbhanj district on 14.8.1993. While working in the district of Mayurbhanj the applicant on 7.9.2000 around 4.30 PM opened fire from his Service 303 Rifle issued to him, under the influence of alcohol, in order to terrorise the other constables, who were on duty with him. Accordingly a disciplinary proceeding was initiated against him. On receipt of the memorandum of charge the applicant submitted his explanation. The applicant was given full opportunity to defend himself in the departmental proceeding. All the documents as per the memo of evidence including the report submitted by the IIC, Karanjia P.S. were supplied to him on 17.9.2000 along with the charge memo. Neither the applicant produced any defence evidence nor did he file any written defence till 30.7.2001. The Enquiring Officer submitted his enquiry report on 30.7.2001. The disciplinary authority found the report of the Enquiring Officer to be just and proper asked the applicant to submit his reply suggesting the punishment of dismissal. The reply given by the applicant was found to be unsatisfactory and therefore the order of dismissal was passed which was also confirmed by the appellate authority. He further submits that the police department is supposed to be a disciplined department and a police constable is expected to act with utmost restraint while using the service rifle issued to him. The applicant under the influence of liquor, opened fire to terrorise his fellow constables who were on

duty along with him. The learned Addl. Government however produced all the relevant documents and submits that the delinquent has put his signature and he being the constable the plea taken by him that he has put his signature wherever the Enquiring Officer directed to put, on simple faith was not accepted by the Tribunal rightly. The Tribunal considering the aforesaid facts on its proper perspective rightly passed the impugned order.

4. The brief fact of the case is that the applicant was appointed as a Police Constable in the district of Balasore on 26.11.1986. After serving for several years under S.P. Balasore, he was deputed to work in the district of Mayurbhanj under Superintendent of Police, Mayurbhanj-opposite party No.3. While continuing as such a disciplinary proceeding was initiated against him and memorandum of charge was served on him. On receipt of the memorandum of charge the applicant made an application dated 19.9.2000 to opposite party No.3 with a prayer to supply the relevant documents including the report of the IIC, Karanjia dated 8.9.2000 basing on which the proceeding was drawn. However petitioner contended that none of the documents was supplied to him. As such the applicant submitted his written statement of defence on 24.9.2000 denying all the allegations against him. Thereafter the enquiry was conducted without affording any opportunity to the applicant to cross-examine the witnesses examined on behalf of the department. The Enquiring Officer submitted his report which was accepted by opposite party No.3. Thereafter the applicant was served with a second show cause notice dated 13.9.2001 suggesting the punishment of dismissal from service. The applicant on 19.9.2001 submitted his reply to such show cause notice. The opposite party No.3 considering the Enquiring Officer report passed the order of dismissal from service by order dated 7.10.2001.

5. Challenging the dismissal order passed by the Disciplinary Authority the applicant approached the appellate authority i.e. opposite party No.2 by filing appeal petition dated 30.1.2002. The appellate authority considering the Enquiring Officer report as well as the order passed by the Disciplinary Authority rejected the appeal by order dated 5.4.2003 confirming the order of the Disciplinary Authority. Finding no other way the applicant approached the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.1506(C) of 2004 with a prayer to quash the order of punishment dated 7.10.2001 passed by the Disciplinary Authority dismissing him from service as well as the order dated 5.4.2003 passed by the Appellate Authority confirming the order of the Disciplinary Authority.

6. The Tribunal taking into consideration the aforesaid facts passed the impugned order with an observation that the police department is supposed to be a disciplined department and a police constable is expected to act with utmost restraint while using the service rifle issued to him. The applicant under the influence of liquor, opened fire to terrorise his fellow constables who were on duty along with him. With such finding the Tribunal was not inclined to interfere with the punishment of dismissal awarded on the applicant.

7. The decision referred by the learned counsel for the petitioner (supra) wherein the propositions settled by the Court are correct however those propositions are not applicable to the present case at hand.

8. The Apex Court in the Case of ***Managing Director, ECIL, Hyderabad etc. Vrs. B.Karunakar etc.*** reported in ***AIR 1994 S.C. 1074*** held that:-

> " When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice.
>
> Hence, in all cases where the Inquiry Officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the Courts and Tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court/Tribunal, and give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the Court/Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment. The Court/Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished. The Courts should avoid resorting to short-cuts. Since it is the Courts/Tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisionsl authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the Court/Tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment. Where after following the above procedure, the Court/Tribunal sets aside the order of punishment, the proper relief that should be granted is to direct reinstatement of the employee with liberty to the authority/management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the stage of furnishing him with the report. The question whether the employee would be entitled to the back-wages and other benefits from the date of his dismissal to the date of his reinstatement if ultimately ordered should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome. If the employee succeeds in the fresh inquiry and is directed to be reinstated, the authority should be at liberty to decide according to law how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any and the extent of the benefits, he will be entitled. The reinstatement made as a result of the setting aside of the inquiry for failure to furnish the report should be treated as a reinstatement for the purpose of holding the fresh inquiry from the stage of furnishing the report and no more, where such fresh inquiry is held. That will also be the correct position of law."

9. The learned Addl. Government Advocate produced the entire records of the Departmental Proceeding and it reveals that the petitioner has participated in the proceeding and put his signature in each page of the record of departmental proceeding. At no point of time he has raised any objection regarding non-supply of any document or copy of the enquiry report etc. He has not shown any reason that non-supply of material document in Departmental Proceeding caused prejudice to him before the Tribunal.

10. In view of the above settled principle of law since no prejudice is caused to him, we are not inclined to interfere with the matter. The Tribunal has taken into consideration all the above aspects and passed a reasoned order. There is no error apparent on the face of record to interfere with the same in exercising the jurisdiction under Article 227 of the Constitution of India. Accordingly the writ petition is dismissed. The record so produced by the learned Addl. Government Advocate be returned back forthwith.

2018 (I) ILR - CUT- 1035

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

W.P.(C) NO.22504 & 6550 OF 2017

STATE OF ORISSA & ORS. .....Petitioners

.Vrs.

JAGANNATH DAS & ANR. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Delay and Latches – Writ petition by State challenging the judgment passed by the SAT in OA after six years – No explanation given – Condonation of delay – Held, even though the direction of learned Tribunal vitiates the entire proceeding and if the said order is allowed to stand, it would occasion failure of justice, but that by itself is not a reason to condone the inordinate delay of six years. (Para 8)

For Petitioners : Mr. M.S.Sahu, Additional Govt. Adv.
For Opp. Parties : M/s. Manoja Kumar Khuntia,G.R. Sethi, J.K. Digal & Miss B. Pattnaik

JUDGMENT Date of Judgment: 19.06.2018

K.R. MOHAPATRA, J.

W.P.(C) No.22504 of 2017 has been filed by the State of Odisha assailing the order dated 17.11.2011 passed by learned Orissa Administrative Tribunal, Cuttack Bench, Cuttack (for short, 'the Tribunal') in O.A. No.1017(C) of 2001 and

W.P.(C) No.6550 of 2017 has been filed assailing the order dated 08.03.2017 passed by learned Tribunal in C.P. No.257 (C) of 2012, which was filed alleging non-compliance of order dated 17.11.2011 in O.A. No.1017 (C) of 2001. Since both the writ petitions involve same set of facts and parties to the aforesaid writ petitions are the same, those are taken up for analogous hearing and disposed of by this common judgment.

2. Shorn of unnecessary details, the facts giving rise to filing of the aforesaid writ petitions are as follows.

One Sri Jagannath Das (hereinafter referred to as 'the petitioner') had appeared in a common recruitment test held in the year 1984 for appointment to the post of A.S.I.-M/Junior Clerk under Superintendent of Police, Cuttack Sadar. However, he was placed in the waiting list. Subsequently, 19 posts of Record Keeper were created vide Letter No.37414/P dated 31.07.1985 of the Home Department. As the petitioner was placed in the waiting list, he was asked for an option to join the post of Record Keeper. The petitioner, in reply, consented to the same in writing. Accordingly, he was appointed as a Record Keeper in the office of Superintendent of Police, Cuttack, Sadar, vide letter dated 02.11.1985. While continuing as such, Methods of Recruitment and Conditions of Service of the Ministerial Officers under the Director General of Police office and its Subordinate Offices Rules, 1988 was framed and subsequently another set of Rules were framed in the year 1995, but the post of Record Keeper was not included as a part of the Ministerial Officers cadre in the said Rules. Being deprived of promotional prospects, the petitioner made several representations, but of no avail. Accordingly, he filed O.A. No.1017 (C) of 2001 for a direction to include him in the cadre of the A.S.I-M/Junior Clerk in the ministerial cadre of the office of the Director General of Police and its subordinate offices, so that he could not be deprived of promotional prospect. He further prayed to consider his case for promotion to the rank of Senior Clerk and Head Clerk in the cadre of aforesaid two offices.

3. Counter affidavit was filed by the opposite parties (Director General and Inspector General of Police as well as Superintended of Police, Kendrapara), contending *inter alia* that the petitioner was in the waiting list of recruitment test held in the year 1984. However, upon creation of the post of Record Keeper in the office of the Superintendent of Police, Cuttack, Sadar, he was given an opportunity to give option to join the said post. The said post of Record Keeper is an ex-cadre post and has no promotional avenue. Being aware of the situation, the petitioner had consented in writing to join the said post and accordingly, he was issued with the order of appointment dated 02.11.1985 by Superintend of Police, Cuttack, Sadar. The petitioner had represented on 19.04.1997 for being included in the common cadre of (A.S.I.-M) relying upon the decision dated 28.11.1995 of the Hon'ble Apex Court in Civil Appeal No. 2091 of 1990 (Sisir Kumar Mohanty -v- State of Orissa), but pursuant to subsequent order dated 16.04.1998 of Hon'ble Apex Court passed in

R.P.(C) No. 279 of 1998 (Ashok Kumar Pattnaik and others –v- State of Orissa and another), the aforesaid order dated 28.11.1995 was recalled. Thus, the representation filed by the petitioner could not be considered favourably. Accordingly, opposite parties prayed for dismissal of the Original Application.

4. Taking into consideration the rival contentions of the parties, learned Tribunal passed the impugned order dated 17.11.2011 holding as under:-

> "*In view of such observations of the Hon'ble Apex Court, the Government, i.e., Respondent no.1, shall be at liberty to create adequate avenues for promotion for the applicant and the similarly placed persons considering the exigency of service and finances available as these will be motivators for personnel such as the applicant who are otherwise likely to retire without promotion, or else consider allowing higher scale of pay of Record Keepers as prevalent in other departments to such personnel who are discharging the same duties and bear the same designation.*"

5. Alleging non-compliance of the order passed in O.A. No. 1017 (C) of 2001, the petitioner filed C.P. No.257 (C) of 2012. The contempt proceeding was disposed of on 08.03.2017 with the following observation:-

> "*Since the applicant has already been allowed financial upgradation i.e. higher scale by way of sanction of RACP benefit, we are of the considered view that that order of the Tribunal dated 07.11.2011 has since been complied by the respondents. Hence, no contempt lies against the contemnors.*
>
> *Accordingly, the contempt proceeding is dropped. The applicant is however at liberty to approach this Tribunal if he is still aggrieved.*
>
> *Send copies.*"

Assailing the order passed in a contempt proceeding, the petitioner filed W.P.(C) No.6550 of 2017. Likewise, after disposal of the contempt proceeding, the State of Odisha filed W.P.(C) No. 22504 of 2017 assailing order passed in the Original Application.

6. Mr.Khuntia, learned counsel for the petitioner defending the order passed in O.A. No.1017(C) of 2001, contended that there was a clear direction to the Government for creation of adequate promotional avenue for the petitioner and similarly situated persons considering the exigency of service. It was also alternatively directed that the Government should consider allowing higher scale of pay to Record Keeper as prevalent in other Departments. Mr.Khuntia relying upon the document reflecting scale of pay of Record Keeper under Revenue and Excise Department of the year, 1985, which was filed by him as an enclosure to O.A. No.1017 (C) of 2001 submitted that the petitioner and similarly situated persons are entitled to higher scale of pay. Further, due to non-compliance of direction in the Original Application the petitioner had filed C.P. No. 257 (C) of 2012. During pendency of the contempt proceeding, the Government filed a compliance report dated 19.05.2014, wherein, it was reflected that the petitioner was allowed higher scale of pay and grade pay of Record Keeper, i.e., Rs.10,840 + G.P. Rs.2400/- in the pay band of Rs.5200-20,200 + grade pay of Rs.2400/-. That apart, when the matter

was taken up on 22.09.2016, learned Standing Counsel for the State produced the letter of the Superintendent of Police, Kendrapara dated 05.04.2016 enclosing the order sanctioning RACP benefit, i.e., financial up-gradation fixing the higher grade pay of Rs.2,800/- with effect from 07.11.2015 in favour of the petitioner on completion of 30 years of service. Learned Tribunal misconstruing the same to be the compliance of orders passed in the Original Application, dropped the contempt proceeding, which is *per se* illegal. In fact, neither any promotional avenue was created in respect of the post of Record Keeper, nor was the petitioner given higher scale of pay, as directed. The pay scale of the petitioner as reflected in the compliance report was hiked in due course along with other employees in the office of the Superintendent of Police. The petitioner was in the same scale of pay as that of A.S.I.-M/Junior Clerk and the pay scale of both the posts were enhanced at the same time. Learned Tribunal miserably failed to consider that the State Government did not at all take into consideration the scale of pay of Record Keepers in other departments of the State Government, which was much higher than the petitioner has been allowed to draw in the garb of compliance of the order of learned Tribunal. As such, the same cannot be treated to be compliance of the direction made in the Original Application. Hence, he prayed for a direction to opposite parties to comply with the order passed in the Original Application in its letter and spirit.

7. Objecting to the prayer of the State of Odisha in assailing the order passed in the Original Application, Mr. Khuntia, learned counsel for the petitioner submitted that the writ petition suffers from an inordinate delay and latches. As such, the same needs no consideration. Further, the order passed in the Original Application being a well reasoned one, the same needs no interference.

8. Mr. Sahoo, learned Additional Government Advocate for the State, *per contra*, submitted that the petitioner was in the waiting list in the recruitment test held for the post of A.S.I.-M/ Junior Clerk in different district offices. In order to provide an opportunity of employment, when the post of Record Keeper was created, the petitioner was asked to give option to be appointed to the post of Record Keeper. In response to the same, the petitioner gave his written consent to be appointed as Record Keeper. At the time of recruitment, he was well aware of the position that the post of Record Keeper is an ex-cadre post and there was no promotional avenue. Being aware of the same, the petitioner joined his post. However, subsequently the pay scale was enhanced and as there was stagnation, he was given ACP/RACP from time to time. Although materials were placed before learned Tribunal denying the claim of the petitioner, learned Tribunal, without considering the same, issued a direction for creation of promotional avenue for the post of Record Keeper and in the alternative to consider allowing higher scale of pay to the petitioner, which is without jurisdiction. Creation of a post and/or grant of higher scale of pay is the discretion and domain of the Executive and no Court/Tribunal has any jurisdiction to issue direction in that respect. Accordingly, he prays for setting aside the order passed in the Original Application.

Objecting to the contention of Mr. Khuntia, learned counsel for the petitioner, he submitted that after compliance of the order passed in a Original Application, the petitioner and similarly situated employees went on insisting upon the authorities to create the promotional avenue for the post of Record Keeper. Thus, the State of Odisha is constrained to file the present writ petition with a prayer for set aside the order passed in the Original Application, which is otherwise illegal and without jurisdiction. Hence, the delay in filing the writ petition should not be a bar to consider the prayer of the State of Odisha.

We have heard learned counsel for the parties and perused the record. On perusal of the observation made by learned Tribunal in the Original Application (as quoted above), it appears that no direction has been issued either for creation of promotional avenue for the post of Record Keeper nor to allow higher scale of pay to the petitioner and similarly situated employees. It is a pious observation of learned Tribunal and is left to the discretion of the State of Odisha to consider the same. The Government of Odisha in its wisdom thought it proper to enhance the scale of pay for the post of Record Keeper and also to grant RACP to the petitioner, which has been done pursuant to order passed in the Original Application. It further reveals that the State of Odisha has filed this writ petition almost after six years without explaining the inordinate delay in filing the same. It has only contended at paragraph-D of W.P.(C) No. 22504 of 2017 that 'learned Tribunal has committed an error of law in considering the scale of pay and to create promotional avenue for the post of Record Keeper, which is a non-cadre post and passed a direction to provide promotional avenue and other financial allowances. The direction of learned Tribunal vitiates the entire proceeding and if the said order is allowed to stand, it would occasion failure of justice.' That by itself is not a reason to condone the inordinate delay of six years.

On perusal of the order passed in the contempt proceeding, i.e., C.P. No.257(C) of 2012, we find that the compliance report submitted by the Government of Odisha reveals that the scale of Record Keeper has been enhanced and for stagnation in one cadre, the petitioner has been allowed RACP. Thus, we find no infirmity in the contempt proceeding initiated by learned Tribunal. Accordingly, both the writ petitions stand dismissed being devoid of any merit. No costs.

2018 (I) ILR - CUT- 1039

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

W.P.(C) NO.12795 OF 2007

RAMAKANTA MALLICK .....Petitioner

.Vrs.

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

ORISSA CIVIL SERVICES (Classification, Control and Appeal) Rules, 1962 – Rule17 – Joint inquiry – Enquiry report submitted under Rule 15 (7) of the OCS (CCA) Rules – Delinquents were asked to submit representation on the proposed punishment – Representation submitted – Authority imposed higher punishment than the proposed one – No opportunity given before imposing higher punishment – Held, not proper – The principles of *audi alteram partem was required to be followed.*

"Elaborate provisions have been made under the CCA Rules to comply with the principles of natural justice, so that delinquent government servant is not prejudiced while facing an enquiry. True it is that the provisions of Rule-15 is not clear as to whether the delinquent government Officer should be given an opportunity of hearing on the advice of OPSC, if a higher punishment is recommended and the Disciplinary Authority proposes to accept the said advice. However, doctrine of audi alteram partem is required to be followed at every stage of the disciplinary proceeding under Rule-15 of the CCA Rules. It may be apt at this stage to refer to proviso-(ii) to Rule 29(c)(ii) of CCA Rules for the purpose of our discussion, which deals with the situation at the appellate stage. It is provided therein that no order imposing enhanced penalty shall be passed, unless the appellant is given an opportunity of making any representation which he may wish to make against such enhanced penalty. Thus, even at the appellate stage, if the Appellate Authority wishes to enhance the punishment, he is required to give an opportunity to the delinquent Officer to submit his representation on such higher punishment proposed to be imposed. In the instant case, no appeal is provided as the disciplinary proceeding was initiated by the State Government under Rule 17 of the CCA Rules, but the principles enumerated and the object behind it, can be resorted to, while imposing a higher penalty. There can be no debate on the position of law that the CCA Rules do not provide for specific punishment for different misconduct/misdemeanor. The Rules leave it to the discretion of the Disciplinary Authority to impose punishment(s) having regard to the gravity of delinquency. In the instant case, while exercising such discretion, the Disciplinary Authority proposed to impose a particular punishment and asked the delinquent Officer to submit his representation on the same. However, as per the advice of OPSC, the Disciplinary Authority decided to impose a higher punishment. Accordingly, the notice to submit representation issued earlier by the Disciplinary Authority against the proposed punishment of 'withholding of one increment with cumulative effect' becomes redundant. He is required under law to give a further notice to the delinquent Officer to submit his representation on the proposed enhanced punishment before actually imposing it. Otherwise, it would amount to gross violation of Article 311(2) of the Constitution." *(Para 12)*

Case Laws Relied on and Referred to :-

1. AIR 1988 SC 686 : K.I.Shephard Vs. Union of India.
2. (1997) 4 SCC 611 : Ranjit Thakur Vs. Union of India.
3. AIR 2010 SC 3131 : (State of U.P. Vs. Saroj Kumar Sinha)
4. AIR 1972 SC 2128 (Delhi Cloth and General Mills co., vs Thejvir Singh)
5. 47 (1979) CLT 5 : (Jagannath Mohapatra v. Utkal University & Others)
6. 44 (1977) CLT 490 : (Madan Mohan Khatua Vs. State of Orissa)
7. AIR 1991 SC 1221: (J.K. Aggarwal Vs. Haryana Seeds Development Corporation Ltd. & Ors.
8. AIR 1986 SC 2118 : (Kashinath Dikshita vs Union Of India (Uoi) and Ors.)
9. 1985 (1) OLR 438 : (Hare Krishna Jena Vs. Addl. Superintendent of Police and others)

10. AIR 1983 SC 109 (The Board of Trustee of the Port of Bombay v.Dilipkumar Raghavendranath Nadkarni and Ors.)

For Petitioner : Mr. Aswini Ku. Mishra, Sr. Advocate
M/s.D.K.Panda, G.Sinha & A. Mishra

For Opp. Parties : Mr. M.S.Sahu, Addl. Govt. Adv.

JUDGMENT Date of Judgment: 28.06.2018

K.R. MOHAPATRA, J.

Petitioner, in this writ petition, calls in question the legality and propriety of order dated 24.07.2007 (Annexure-6) passed by learned Odisha Administrative Tribunal, Principal Bench, Bhubaneswar (for short, 'Tribunal') in O.A. No.1427 of 2003 dismissing the Original Application filed by the present petitioner.

2. Short narration of facts necessary to appreciate the contentions of learned counsel for the parties for proper adjudication of the case are as follows:-

In the year 1978, the petitioner was appointed as a Junior Engineer in the Water Resources Department of the Government of Odisha. He was promoted to the rank of Assistant Engineer in the year 1980 and to the rank of Assistant Executive Engineer in the year 1997. He was subsequently promoted to the cadre of Executive Engineer in the year 1999. During 1997-98, he was posted as Assistant Executive Engineer under the Hirakud Main Dam Circle and was allowed to function as Sub-Divisional Officer (SDO) of Hirakud Main Dam Sub-division. He was in-charge of repair and maintenance of main dam and in addition to that, he was also in-charge of opening and closing of sluice gates as and when directed by the higher authorities and to record the gauge attached to the left spillway. While continuing as such, the petitioner on 30.01.1998, got information that there was heavy rain at the upper catchment of river Mahanadi and there would be heavy inflow of rain water into the water reservoir. On receiving such information, the petitioner went to the spot at 7.00 AM and found that the water level had reached the optimum level of 630 feet. Thus, he intended to seek instruction from the Executive Engineer to take follow up action. But, the telephone in the office was out of order and due to his ankle problem he could not go down to the spillway office to inform the Executive Engineer. As such, the petitioner went to his residence and appraised the Executive Engineer about the situation at 8.00 AM. Keeping in view the situation and there was likelihood of increase in the water level at the reservoir, as pouring of rain at the upper catchment of river Mahanadi was still continuing, the petitioner was expecting an instruction from the higher authority at any moment to open sluice gates and accordingly made arrangement for availability of the mechanic and crane operator. However, nearly after five hours, the Executive Engineer and Superintending Engineer instructed the petitioner to open the gates at 1.20 PM. Before hand, at the instruction of the Executive Engineer, Main Dam Division, siren was blown at 12 noon on 30.01.1998. Accordingly, the first sluice gate was opened

at 1.20 PM and another at 1.40 PM. Unfortunately, at the relevant time, seven engineering students, who were taking bath in river Mahanadi, got swept away and died. After receiving such information, the sluice gates were closed at 3.00 PM and 3.05 PM respectively. Due to the tragedy, the State Government directed the Revenue Divisional Commissioner, Northern Division, Sambalpur (RDC) to hold an administrative enquiry into such incident. On the basis of the administrative enquiry report of the RDC, Government in the Water Resources Department initiated a disciplinary proceeding against Sri Jagannath Jena, Ex-Superintending Engineer, Hirakud Dam Circle, Dayanidhi Dehury, Ex-Executive Engineer, Hirakud Main Dam Division and the present petitioner vide memorandum No.21849 dated 19.06.1999 under Rule-17 of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 (for short, 'CCA Rules'). Accordingly, memorandum of charges was served on the petitioner alleging:—

(i) negligence in duty causing loss of 7(seven) students of UCE, Burla;

(ii) misconduct, contrary to the provisions of Rules-3 and 4 of Orissa Government Service Conduct Rules, 1959.

The petitioner submitted his written statement of defence before the Principal Secretary to Government in Water Resources Department on 10.08.1999. Upon receipt of the statement of defence, the Commissioner of Departmental Enquiry, General Administration Department was appointed as Inquiring Officer vide office order No.3616 dated 21.01.2000 of the Government of Odisha, to enquire into charges against the petitioner as well as other delinquents and CDI Case No.8 of 2000 was initiated. The Inquiring Officer, after conducting the enquiry, submitted his report on 13.06.2001. Referring to the Blue Book (a manual of reservoir operation of Hirakud Dam Project) it was held as follows:-

"*…..a man cannot shift away his responsibility. In short, Sri Mallick has been miserably failed in discharging his duties. Such an undesirable Officer should not be allowed to continue in the service to create similar devastation in future.*

It is suggested that exemplary punishment may be awarded and he should be reverted to the next junior rank and should not be given any independent job for creating such activities and jeopardize human life and public property."

The report was submitted to the Department of Water Resources under Rule-15 (7) of the CCA Rules. As such, the Commissioner-cum-Secretary of the Department vide his letter dated 03.07.2001 enclosing a copy of the enquiry report intimated the petitioner to submit his representation against the findings in the enquiry report within a period of 15 days. The petitioner submitted his representation on 31.07.2001. Considering his representation, show cause notice dated 31.01.2002 was served upon the petitioner proposing a penalty to withhold one increment with cumulative effect. The petitioner submitted his representation to the said notice on 11.02.2002. As required under law, the Department, thereafter consulted Odisha Public Service Commission (OPSC) to offer their views on the proposed punishment. The OPSC upon consideration of materials was of the view

that the punishment of withholding one increment with cumulative effect was inadequate and advised to impose a punishment of 'reduction in rank'. Agreeing with the views of OPSC, the Disciplinary Authority imposed punishment of 'reduction in rank' on the petitioner. Being aggrieved, the petitioner moved learned Tribunal in OA No.1427 of 2003 challenging the decision making process as well as the order of punishment dated 03.09.2003 reverting the petitioner from the rank of Executive Engineer Civil-II to Assistant Executive Engineer (Civil) on the following grounds:-

> "(i) *that the acceptance of recommendation of OPSC to impose a higher punishment of 'reduction in rank' without giving any reason is violative of principle of Rule-15(10) of CCA Rules;*
>
> *(ii) that no opportunity of hearing was given to the petitioner by the Disciplinary Authority while awarding higher punishment than that proposed by the Disciplinary Authority, i.e., stoppage of one increment with cumulative effect;*
>
> *(iii) that the petitioner was not given the opportunity to examine the RDC (ND) on his report, which was marked as an exhibit during enquiry proceeding by the CDI and was relied upon by the Inquiring Officer to find him guilty of the charges, which is in violation of the provisions of Rule 15(6) of the CCA Rules; and*
>
> *(iv) that the findings of the Inquiring Officer and the conclusion of the Disciplinary Authority in holding the petitioner guilty and imposing punishment upon him are perverse and based on no evidence."*

Hence, it was prayed before learned Tribunal to quash the punishment imposed by the Disciplinary Authority.

3. Counter affidavit was filed by the State Government denying assertions made by the petitioner and justifying the action taken against the petitioner.

Learned Tribunal, taking into consideration the rival contentions of the parties and on perusal of materials on record, dismissed the Original Application vide order dated 24.07.2007. Hence, this writ petition has been filed.

4. Mr.Mishra, learned Senior Advocate, assailing the impugned order under Annexure-6, submitted that learned Tribunal has not made any endeavour to see as to whether the petitioner was given adequate opportunity to defend himself in the disciplinary proceeding to prove his innocence. He was not supplied with relevant documents for which he could not defend him properly. The petitioner had submitted an application to supply enquiry report of the RDC (ND), basing upon which the disciplinary proceeding was initiated against him, but the same was not supplied. Further, the petitioner ought to have been allowed to examine the RDC, particularly when his report forms the basis of imposition of punishment. The petitioner was also not supplied with the written statements of defence submitted by other two delinquents, which has seriously prejudiced him, more particularly when a joint enquiry conducted against all of them. Initially, the petitioner was not allowed to examine himself; however, subsequently, he was allowed to be examined

as a witness, which reflects the conduct of the Inquiring Officer as well as the fairness of the enquiry proceeding. The conclusion arrived at by the Inquiring Officer is perverse and is an outcome of total non-application of mind with regard to involvement of the petitioner in the incident. Although higher authorities like the Superintending Engineer and Executive Engineer, upon whose instructions, the petitioner had opened the sluice gates have been inflected with lesser punishment, the petitioner, who was an Assistant Executive Engineer, has been imposed with a major punishment with reduction in the rank although he was not directly responsible for the incident. The OPSC, without proper application of mind, had recommended higher punishment of reduction in rank, which is illegal. In the instant case, although a higher punishment was recommended by OPSC, the petitioner was not given any opportunity to submit his representation to the same and the recommendation of OPSC was accepted unilaterally and mechanically. It was further submitted that the advice of OPSC is not binding on the Government, but the State Government, without due application of mind, mechanically accepted the advice of OPSC and inflicted the impugned order of punishment, which is *per se* illegal. Learned Tribunal has committed error of law in holding that there has been no violation of Rule 15(6) of the CCA Rules. Learned Tribunal went wrong in holding that non-examination of RDC is not fatal to the proceeding. Learned Tribunal also failed to appreciate that the findings of the Inquiring Officer are perverse and are outcome of total non-application of mind. The punishment imposed is also shockingly disproportionate. Since the punishment proposed to be imposed by the Disciplinary Authority for stoppage of one annual increment with cumulative effect is a major punishment, the advice of OPSC that the said punishment was inadequate is completely perverse. As such, Mr.Mishra prayed for setting aside the impugned order under Annexure-6, so also the punishment imposed by the Disciplinary Authority.

Mr. Mishra relied upon the following case laws in support of his case.

(i) **AIR 2010 SC 3131** (*State of U.P. Vs. Saroj Kumar Sinha*)

(ii) **AIR 1972 SC 2128** (*Delhi Cloth and General Mills co., vs Thejvir Singh*)

(iii) **47 (1979) CLT 5** (*Jagannath Mohapatra v. Utkal University & Others)*

(iv) **44 (1977) CLT 490** (*Madan Mohan Khatua Vs. State of Orissa*)

(v) **AIR 1991 SC 1221** (*J.K. Aggarwal Vs. Haryana Seeds Development Corporation Ltd. & Ors.*

(vi) **AIR 1986 SC 2118** (*Kashinath Dikshita vs Union Of India (Uoi) and Ors.*)

(vii) **1985 (1) OLR 438** (*Hare Krishna Jena Vs. Addl. Superintendent of Police and others*)

(viii) AIR 1983 SC 109 (*The Board of Trustee of the Port of Bombay v.Dilipkumar Raghavendranath Nadkarni and Ors.)*

5. Mr.Sahu, learned Additional Government Advocate, *per contra*, defending the impugned order under Annexure-6, submitted that this Court cannot sit over the enquiry proceeding and punishment imposed by the Disciplinary Authority as an Appellate Authority, re-appreciate the evidence and substitute its own finding. Mr.

Sahu reiterating the stand taken in the counter affidavit submitted that taking into consideration the facts and circumstances of the case, a joint enquiry as provided under Rule-17 of the CCA Rules, was initiated against the petitioner as well as two other delinquents following the procedure as laid down in Rule-15 of CCA Rules. The enquiry report cannot be said to be perverse as the same is based on legal evidence available on record and a well reasoned one. The petitioner has been desperately trying his level best to establish his innocence on the plea that he had merely carried out the instructions of his higher authorities in opening the sluice gates. But, it has been clearly proved from the materials available on record that the petitioner has failed to follow the guidelines and procedures laid down in the Blue Book. Thus, the Inquiring Officer has rightly held that the petitioner cannot shift his responsibility without complying with the guidelines and procedures enumerated in the Blue Book. All the relevant documents basing on which charges were framed against the petitioner have been supplied to him and the petitioner has been given ample opportunity to defend his case. The statements of defence of other delinquents were not required to be supplied to the petitioner as those do not form the basis for infliction of punishment on the petitioner. Pursuant to the direction of the Government, an administrative enquiry was conducted by the then RDC (ND) and he had submitted a report to the Government. The Government on examination of the report initiated proceeding against the petitioner as well as two other delinquent officers. The petitioner was allowed to examine himself as a witness in the enquiry proceeding and has cross-examined the witnesses of the Department. The Inquiring Officer taking into consideration the materials available on record held the petitioner guilty. As such, the RDC was not required to be examined in the enquiry proceeding.

Replying to the averments of the petitioner in the writ petition with regard to some technical aspects like water level at the reservoir, opening of the sluice gates, recording of volume of inflow/ discharge of water etc., Mr.Sahu, learned Additional Government Advocate submitted that the same are beyond the scope of consideration in the writ petition. However, it is apparent from the stand taken in the written statement of defence that although the petitioner was in-charge of recording water level and take appropriate steps, till the last moment he had not taken effective steps to intimate the higher authorities for their instructions to take follow up action. The punishment imposed by the Disciplinary Authority was just and adequate and the same needs no interference. Learned Tribunal, taking into consideration the facts and circumstances of the case in its totality, has rightly dismissed the Original Application, which needs no interference by this Court. Hence, he prayed for dismissal of the writ petition.

Mr.Sahu relied upon the following judicial pronouncements in supports of his contentions.

(i) **(2006) 6 SC 794**(*Union of India Vs. K.G.Soni*)

(ii) **(1997) 7 SCC 463** (*Union of India Vs. G.Ghayutham*)

6. The opposite party No.2-Odisha Public Service Commission, has neither entered appearance nor filed counter affidavit to the writ petition.

7. Although several contentions involving factual issues have been raised by Mr.Mishra, learned Senior Advocate appearing for the petitioner, the scope of Article 227 of the Constitution of India does not permit us to delve into factual issues which were not raised before learned Tribunal.

At the threshold, we feel it proper to delve into the issues with regard to procedural aspect of disciplinary enquiry. On perusal of record, it is apparent that considering the nature of allegations, a joint inquiry under Rule-17 of the CCA Rules was directed to be initiated and all the three government servants including the petitioner faced a common proceeding. It was specifically prescribed that Rule-15 of the CCA Rules would be followed in the proceeding. Accordingly, basing upon the imputations made memorandum of charges was served on the petitioner. The petitioner submitted his written statement of defence to the Principal Secretary to Government in the Department of Water Resources, Odisha on 10.08.1999. Accordingly, CDI Case No.8 of 2000 was initiated and Commission of Departmental Inquiry was appointed as Inquiring Officer. In course of enquiry, the petitioner submitted several representations before Inquiring Officer. In the representation dated 20.06.2000, the petitioner requested not to admit administrative enquiry report of the RDC (ND) as evidence in the disciplinary proceeding unless the author of the report, namely, RDC (ND) is examined as a witness to prove the same. He further filed representation to supply the written statement of defence of other two delinquents. In another representation dated 17.01.2001, the petitioner requested the Inquiring Officer to allow him to be examined as a witness in support of his case.

8. Admittedly, the administrative report submitted by the RDC (ND) was admitted as evidence in the proceeding and marked as Ext.E. It was tendered by PW-1, namely, Rathorgapuni Purohit, Chief Engineer and Basin Manager, Upper Mahanadi Basin, Burla, Sambalpur. The petitioner cross-examined PW-1 at length. The petitioner also does not dispute the authenticity of Ext.E. Taking into consideration the findings of the RDC (ND) in Ext.E in the administrative side, charges were framed against the petitioner as well as two other delinquent officers. However, on perusal of the enquiry report, it is crystal clear that the Inquiring Officer has not relied upon Ext.E to record his findings against the petitioner. He enquired into the matter independently basing upon the materials produced before him as well as evidence led by witnesses and came to a categorical conclusion that the petitioner was not at all serious about his duty for which he was stationed at Dam site. After a detailed discussion of the materials available on record, the Inquiring Officer found the petitioner guilty of negligence and misconduct. In addition to the above, PW-1 was competent to tender and prove Ext.E. Thus, non-supply of a copy of Ext.E to the petitioner or non-examination of RDC (ND) as a

witness in the disciplinary proceeding is not fatal to the enquiry proceeding. Similarly, the petitioner taking into consideration the imputations made against him filed his written statement of defence and accordingly he was proceeded with. The written statement of defence filed by other two delinquent officers have no relevance to the case of the petitioner, inasmuch as those do not form the basis to prove the charges against the petitioner.

Relying upon ***Saroj Kumar Sinha (supra)*****,** Mr.Mishra contented that official documents/communications basing upon which charges were framed should be supplied to the delinquent failing with the entire disciplinary proceedings shall stand vitiated. Mr. Mishra took exception to non-supply of Ext.E to the petitioner. Upon perusal of record, it appears that Ext.E is an administrative report submitted by the RDC (ND). The said document neither form foundation of the charges nor the same is relied upon by the Inquiring Officer in course of enquiry to render his findings. As such, the case law laid down in *Saroj Kumar Sinha (supra)* is not applicable to the case at hand.

He also relied upon the case of ***Kashinath Dikshita (supra)*** and submitted that onus was on State of Odisha to show that no prejudice was caused to the petitioner due to non-supply of Ext.E, Failure to supply Ext.E has occasioned in violation of Article-311(2) of Constitution. As we have already held that the Ext.E is neither foundation of the charges nor the findings of the Inquiring Officer are based on the same. Thus, the question of petitioner being prejudiced for non-supply of the document, does not arise at all and the case law has no application to the case at hand.

Although the petitioner claims to have filed a representation on 20.06.2000 before the Enquiring Officer to allow him to be represented by a legal practitioner, but it appears that he had never pressed the same at any stage of the proceeding. It further transpires from the representation to the enquiry report submitted by the petitioner on 31.07.2001 (Annexure-21) that he had not raised any objection with regard to non-consideration of his representation for engagement of the legal practitioner. On perusal of the representation under Annexure-21, the Original Application as well as the writ petition that the petitioner was well aware of his responsibilities as well as the procedures and technicalities of operation of reservoir as well as of the proceeding. He has not made out any case for taking assistance of a legal practitioner. Thus, the case of ***J.K.Aggarwal (supra)*****,** ***Hare Krishna Jena (supra)*** and the case of ***Board of Trusties of Port of Bombay (supra)*** have no application to the case at hand. The said cases are also distinguishable on facts.

An argument was advanced by Mr.Mishra, learned Senior Counsel that the representations of the petitioner were disposed of without assigning any reason and relying upon the case of ***Madan Mohan Khatua (supra)*** he submitted that the Disciplinary Authority is not expected to dispose of the representation of the petitioner without assigning any reason. He also submitted that under Rule 15(9) of

the CCA Rules, the Disciplinary Authority after receipt of the representation of the petitioner on the findings of the Inquiring Officer, is obliged to consider the record of the enquiry and record its findings on each charge. On perusal of the Original Application, it transpires that the petitioner has not taken such a ground before the learned Tribunal. However, the counter affidavit filed by the present opposite party No.1 before learned Tribunal discloses that the Disciplinary Authority considering the enquiry report of the CDI, G.A. Department and after an elaborate discussion, proposed punishment to withhold one increment with cumulative effect. Thus, in absence of any pleading before learned Tribunal and document to that effect, it is very difficult at this stage to entertain the contentions raised by Mr.Mishra, learned Senior Counsel which involves factual adjudication.

Mr.Mishra, further contended that the Enquiry Officer was appointed prior to submission of written statement of defence by the petitioner, which vitiates the proceeding itself. In support of his case, he relied upon the case of ***Jagannath Mohapatra (supra)***. There is no quarrel over the ratio decided in the said case. However, on perusal of record, it appears that the petitioner had submitted his written statement of defence before the Principal Secretary to Government in the Department of Water Resources Department, Odisha on 10.08.1999 and the Government appointed the Commissioner of Disciplinary Enquiry, G.A. Department as Inquiring Officer vide order No.3616 dated 21.01.2000. Thus, the submission of Mr.Mishra merits no consideration.

9. Although representation of the petitioner to examine him as a witness was initially rejected, but subsequently he was examined as a witness being permitted by the Inquiring Officer. Thus, in our opinion, the Inquiring Officer has committed no error of procedure or law in permitting the petitioner to examine himself as a witness at the appropriate stage of the proceeding.

Upon completion of the enquiry, the report was submitted on 13.06.2001 to the Department of Water Resources finding the petitioner guilty of the charges and recommending a punishment of 'reduction in rank', which is a major penalty under Rule-13 (vi) of CCA Rules. Upon receipt of the report, the Commissioner-cum-Secretary, vide his letter dated 03.07.2001, directed the petitioner to submit his representation against the findings of the Inquiring Officer. The petitioner, in response to the letter dated 03.07.2001, submitted his representation on 31.07.2001. After careful consideration of the enquiry report as well as the representation of the petitioner, Disciplinary Authority proposed imposition of punishment of 'withholding one increment with cumulative effect' on the petitioner. This being a major penalty under Rule-13(vi-A) of the CCA Rules, the Disciplinary Authority, in compliance of the provisions of Rule-15(10)(b) of the CCA Rules, asked the petitioner to submit his representation on the proposed punishment. Since it was necessary to consult the OPSC, the record of enquiry together with a copy of the notice given under Rule-15(10)(a) and the representation of the petitioner was

forwarded to the OPSC for its advice. However, the OPSC in exercise of its power conferred under the Constitution as well as the Regulations, recommended punishment of 'reduction in rank' in respect of the petitioner. Accordingly, punishment of 'reduction in rank' was imposed on the petitioner. Mr.Mishra, learned Senior Counsel strenuously argued that upon consideration of the representation of the petitioner, the Disciplinary Authority had proposed a punishment of 'withholding one increment with cumulative effect'. When a punishment of 'reduction in rank' was imposed on him, upon receipt of the advice of the Commission, the petitioner ought to have been given an opportunity before imposing a higher penalty. As such, imposition of punishment of 'reduction in rank' is *per se* illegal being violative of principles of natural justice. Mr.Sahu, learned Additional Government Advocate, on the other hand, contended that since there is no contemplation of further notice after receipt of the advice of the Commission and the petitioner had already been given opportunity to submit his representation under Rule-15(10)(a) of CCA Rules, he cannot plead violation of principles of natural justice.

Mr.Sahu relying upon the case of ***K.G.Soni (supra)*** contended that the Court should not interfere with the administrator's decision unless it is illogical or suffers from procedural impropriety or was shocking to the conscience of the Court. When imposition of punishment of 'reduction in rank' is neither illegal nor suffers from procedural impropriety nor was shocking to the conscience, the same should not be interfered with on the plea of violation of principles of natural justice. He further relying upon the case of ***G.Ganayutham (supra)*** submitted that the action of the Disciplinary Authority in initiating the proceeding as well as imposing the punishment upon the petitioner has successfully met the test of reasonableness, rationality and proportionality and needs no interference.

11. Admittedly, both 'reduction in rank' [Rule-13(vi)] as well as 'withholding increment with cumulative effect' [Rule 13(vi-A)] are major penalties. But the severity of each of the punishments under Sub-rule (vi) to (ix) of Rule-13 of CCA Rules has not been prescribed. A punishment/penalty which is more deterrent/severe in nature in comparison to other(s) can be said to be a 'higher' punishment/penalty. In other words, a penalty/punishment, which more adversely affect the service career of an employee, is a 'higher' punishment. However, it depends upon facts and circumstances of each case. In the instant case, 'reduction in rank' can certainly be said to be a higher punishment than 'withholding of one increment with cumulative effect'.

Although the Disciplinary Authority, upon consideration of representation of the petitioner, proposed punishment of 'withholding of increment with cumulative effect' and the petitioner was asked to submit his representation against the proposed penalty, the OPSC, on examination of record as well as getting clarification from the Government, came to a conclusion that in the facts and

circumstances of the case, the delinquent Officer, Sri R.Mallik (petitioner) should be awarded with punishment of 'reduction in rank' as stoppage of one annual increment with cumulative effect is inadequate. Basing upon the advice of OPSC, punishment of reduction in rank was imposed upon the petitioner. But, the petitioner was never given any opportunity to have his say on the punishment of 'reduction in rank' before it was imposed.

12. Elaborate provisions have been made under the CCA Rules to comply with the principles of natural justice, so that delinquent government servant is not prejudiced while facing an enquiry. True it is that the provisions of Rule-15 is not clear as to whether the delinquent government Officer should be given an opportunity of hearing on the advice of OPSC, if a higher punishment is recommended and the Disciplinary Authority proposes to accept the said advice. However, doctrine of *audi alteram partem* is required to be followed at every stage of the disciplinary proceeding under Rule-15 of the CCA Rules. It may be apt at this stage to refer to proviso-(ii) to Rule 29(c)(ii) of CCA Rules for the purpose of our discussion, which deals with the situation at the appellate stage. It is provided therein that no order imposing enhanced penalty shall be passed, unless the appellant is given an opportunity of making any representation which he may wish to make against such enhanced penalty. Thus, even at the appellate stage, if the Appellate Authority wishes to enhance the punishment, he is required to give an opportunity to the delinquent Officer to submit his representation on such higher punishment proposed to be imposed. In the instant case, no appeal is provided as the disciplinary proceeding was initiated by the State Government under Rule 17 of the CCA Rules, but the principles enumerated and the object behind it, can be resorted to, while imposing a higher penalty. There can be no debate on the position of law that the CCA Rules do not provide for specific punishment for different misconduct/misdemeanor. The Rules leave it to the discretion of the Disciplinary Authority to impose punishment(s) having regard to the gravity of delinquency. In the instant case, while exercising such discretion, the Disciplinary Authority proposed to impose a particular punishment and asked the delinquent Officer to submit his representation on the same. However, as per the advice of OPSC, the Disciplinary Authority decided to impose a higher punishment. Accordingly, the notice to submit representation issued earlier by the Disciplinary Authority against the proposed punishment of 'withholding of one increment with cumulative effect' becomes redundant. He is required under law to give a further notice to the delinquent Officer to submit his representation on the proposed enhanced punishment before actually imposing it. Otherwise, it would amount to gross violation of Article 311(2) of the Constitution. In the case of ***K.I.Shephard Vs. Union of India***, reported in AIR 1988 SC 686, the Hon'ble Supreme Court discussing various case laws came to hold as under:

> *"13 ....On the basis of these authorities it must be held that even when a State agency acts administratively, rules of natural justice would apply. As stated, natural justice generally*

> *requires that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed so that they may be in a position (a) to make representations on their own behalf; (b) or to appear at a hearing or-enquiry (if one is held); and (c) effectively to prepare their own case and to answer the case (if any) they have to meet."*

Thus, it can be safely concluded that though not specifically provided under Rule-15 of the CCA Rules, the Disciplinary Authority is required to comply with the doctrine of *audi alteram partem,* if he decides to impose a higher punishment as per the advice of OPSC. Consequently, the disciplinary proceeding from this stage is vitiated.

In the case of ***G.Ganayutham (supra)***, 'reasonableness' has been explained as under:-

> *"12..... Therefore, to arrive at a decision on "reasonableness" the Court has to find out if the administrator has let out relevant factors or taken into account irrelevant facts. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bona fide one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the Court to substitute its view."*

Further, discussing on the 'rationality' of an administrative action, Hon'ble Supreme Court held at paragraph-14 of the said decision as under:

> *"14. In other words, to characterize a decision of the administrator as "irrational" the Court has to hold, on material, that it is a decision "so outrageous" as to be in total defiance of logic or moral standards. Adoption of "proportionality" into administrative law was left for the future."*

Likewise, while explaining the term "*proportionality*", Hon'ble Supreme Court discussing the case law in ***Ranjit Thakur Vs. Union of India***, reported in (1997) 4 SCC 611 and different case laws and texts came to hold as under:-

> "..... *proportionality* used in human right context involves the balancing test and necessity test. The '*balancing test*' means scrutiny of excessive onerous penalty or infringement of rights or interests and a manifest imbalance of relevant considerations. The '*necessity test*' means that infringement of human rights in question must be by the last restrictive alternative."

13. In the case at hand, we are not required to discuss the '*proportionality*' of the administrative action by imposing the punishment as we have already held that principles of *audi alteram partem* has not been followed before imposition of the punishment and have decided to set aside the punishment imposed. However, taking into consideration the submissions of learned counsel for the parties, we certainly hold that the action of imposing punishment fails to qualify the test of reasonableness. Hence, it is amenable to judicial review. As has been held in the case of ***Delhi Cloth and General Mills co. (supra)***, the delinquent must be given a real and fair opportunity to defend himself in the proceeding. By not providing an opportunity to submit a representation before imposing a higher punishment of

'reduction in rank', which was not proposed by the Disciplinary Authority earlier, the petitioner is certainly prejudiced and the proceeding is vitiated from that stage.

14. We, therefore, set aside the punishment imposed upon the petitioner as well as the decision making process from the stage of accepting the advice of OPSC, and direct the Disciplinary Authority to give an opportunity to the petitioner to submit his representation on the proposed punishment and proceed in accordance with law.

15. The writ petition is accordingly disposed of with the modification in the impugned order under Annexure-6 as stated above. No costs.

2018 (I) ILR - CUT- 1052

S.K. MISHRA, J

W.P.(C) NO. 3231 OF 2017

KALPANA BISWAL ……..Petitioner

.Vrs.

STATE OF ODISHA & ORS. ……Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition challenging the action of CDA in not allowing transfer of plot – Allotment was made on 15.10.2007 and more than eleven years have elapsed in the meantime, as yet, the infrastructural development has not been completed – Fact not disputed by CDA – Stipulation by Govt. that the case of 3rd party interest cannot be considered before completion of two years of execution of lease deed and house built thereon – Held, the decision taken by the Government of Odisha that an original allottee or a person who has purchased a land from the original allottee can only sale the plot and house built thereon to the 3rd party with the permission of the R.D.C., Cuttack appears to be unreasonable – Direction accordingly.

For petitioner : M/s B.N.Samantaray
For opp. Parties : M/s. D.Mohapatra, M.Mohapatra

ORDER Date of Order : 20.06.2018

S.K. MISHRA, J

Heard learned counsel for the petitioner, learned Additional Government Advocate appearing for the opposite party no.1 and Mr. D. Mohapatra, learned counsel for the opposite party nos.2 to 4-Cuttack Development Authority.

In this writ petition, the petitioner has prayed to issue writ in the nature of certiorari/ mandamus directing the Cuttack Development Authority to issue transfer application form in his favour in respect of Plot No.13-3E/994 in Sectior-13 of Bidanasi Project Area and complete the formalities of transfer of allotment within a stipulated period.

It is stated by the learned counsel for the petitioner that though this Court in the case of **Pravat Kumar Tripathy –vrs.- C.D.A. and Another** (in W.P.(C) No.4902 of 2015) disposed of on 02.02.2015 and in the case of **Krushna Chandra Mohanty –vr.- State of Orissa** (in W.P.(C) No.15398 of 2016) disposed of on 14.09.2016 has held that meaning of date of lease-cum-sale of the plot is not the actual date when the lease was executed by the authority; rather, the relevant date of handing over possession of the piece of land to the allotttee, who in pursuance of the terms and conditions deposited the money and allotment was made in his favour, the Cuttack Development Authorities are not granting permission for transfer of allotment of the aforesaid plot vide Annexure-1 on the ground that at this stage as per Revenue and Disaster Management Department Letter No.3219/R & DM/dated 21.11.2016 and the case of 3rd party interest cannot be considered before completion of two years of execution of lease deed.

No counter affidavit has been filed by the learned Additional Government Advocate for the State.

Counter affidavit has been filed by the learned counsel for the Cuttack Development Authority.

The sum and substance of the defence plea is that Government of Odisha, Revenue and Disaster Management Department vide order No.RDM-LRGEA-CTC-0014 2015 dated 21.11.2015 delegated the powers to accord permission for transfer of leased out Government land allotted by CDA, Cuttack to an individual allottee to another person by way of sale, gift or mortgage. Ultimately, transfer of land vested with Revenue Divisional Commissioner (Central Division), Cuttack wherein in Clause-(1) of Annexure-A/3 to the counter affidavit filed by the Cuttack Development Authority. It has been stipulated by the Government of Odisha that in case of ***plots of land with houses built thereon*** taken on lease-cum-sale basis from the CDA, the Revenue Divisional Commissioner (Central Division), Cuttack shall accord permission for transfer of the said land and house on behalf of the Governor of Odisha, provided that two years' time has expired from the date of lease-cum-sale of the plot in question along with the house built thereon.

It is, therefore, argued by Mr. D. Mohapatra, learned counsel for the C.D.A. that since the petitioner has not constructed house on the said plot after purchased and the lease-cum-sale deed having not been executed, the permission for transfer of the land cannot be granted.

In the rejoinder affidavit, it is brought to the notice of this Court that the plot in question was initially allotted through lottery vide allotment No.19857 dated 15.10.2007 in favour of one Kalakar Biswal. He with the permission of the C.D.A. sold the said land to the present petitioner, who happens to be his younger brother in the year 2010. Though allotment has been made on 15.10.2007 in favour of Kalakar Biswal and more than eleven years have elapsed in the meantime, as yet, the infrastructural development in Sector-13 of Bidanasi Project Area has not been

completed. It is in fact not disputed by the learned counsel for the C.D.A. that there has been inordinate delay in developing the area of Sector-13 of Bidanasi Project Area for several problems. So, decision taken by the Government of Odisha that an original allottee or a person who has purchased a land from the original allottee can only sale the plot and ***house built thereon*** to the 3rd party with the permission of the R.D.C., Cuttack appears to be unreasonable. The State Government should be a model principal and when the C.D.A. has failed to develop the area in question within a reasonable time frame, it would be unreasonable on the part of the State Government to impose such conditions, as reflected under Clause-(1) of Annexure-A/3 to the counter affidavit filed by the Cuttack Development Authority. Now it is submitted that the land is being developed for building houses and people can start building houses.

Be that as it may, unless the residential area is fully developed with proper infrastructures, roads, electricity connection, drainage etc., it will be unreasonable to expect the allottees or purchasers to build a house on such allotted plot. Consequently, if a person has been allotted a plot for eleven years, his money is blocked and now he is facing grave problem and he is unable to sale the property to meet his legal necessity, then it will be unjust to him.

In that view of the matter, I think the Clause-(1) of Annexure-A/3 to the counter affidavit filed by the Cuttack Development Authority, as far as it relates to sale of the plot "with houses built thereon", in Sector-13 of the Bidanasi Project Area, residential development should not be made applicable. In other words, this Court directs that the C.D.A. and the concerned Revenue Authorities, while considering the case of transfer of a plot in Sector-13 shall not insist upon the condition that the original allottee or subsequent purchaser should have built a house on the plot while applying for sale.

Hence, I allow this writ petition directing the opposite party no.4 to supply the copy of the transfer application form to the petitioner and then process the case for recommending the 3rd party transfer of the purchased land of the petitioner within a period of three weeks of production of certified copy of this order. It is not disputed in this case that there is no double allotment or allotments through discretionary quota in this case. With such observations, this writ petition is disposed of. A free copy of this order be handed over to Mr. D. Mohapatra, learned counsel for the C.D.A. for early compliance.

2018 (I) ILR - CUT- 1055

S.K.MISHRA, J & DR. D.P. CHOUDHURY, J.

W.P.(C) NO.18521 OF 2017

MISS TEENA PATRA ……..Petitioner

.Vrs.

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

(A) CONSTITUTION OF INDIA, 1950 – Article 320 – Functions of Public service Commission – Discussed.

"A plain reading of Article 320 of the Constitution reveals that it shall be the duty of the Union and State Public Service Commission to conduct examination for appointment to the services of the Union and the services of the State respectively. Clause (2) provides that it is the duty of the Union Public Service Commission if requested by any two or more States to assist in framing and operating the schemes of joint recruitment which is irrelevant for the purpose of this case. Clause (3) of Article 320 provides that Public Service Commission, State or Union shall be consulted on all matters relating to method of recruitment to civil services and for civil posts on the principles to be followed in making appointments to civil services and post and in making promotions and transfers from one service to another and on all disciplinary matters and all allied activities. The most important is sub-clause (a) and (b) of Clause 3 of Article 320 of the Constitution. The Public Service Commission shall be consulted in the method of recruitment to the civil services and for civil posts and principle to be followed for making appointment to civil services and posts and making promotions etc and on the suitability of candidates such promotion, appointment or transfer. So as per the mandate of the Constitution of India, the method of recruitment and the principles to be followed in selection of candidates is in the exclusive domain of the Commission." *(Para 7)*

(B) ORISSA JUDICIAL SERVICES EXAMINATION, 2017 – Main Written Examination – Para 12 of the prospectus provides "HOW TO APPLY" – Clause (1) provides for submission of hard copy of online application with the annexure to the Commission well before the appointed date through registered post or speed post – Admittedly, the same has not been done – Held, the petitioner is not entitled for relief.

"It is the settled principle of law that if the law provides a particular thing to be done in a particular manner then it should be done in a particular manner. In other words, if a constitutional authority has issued direction in the shape of advertisement to the intending candidates to apply in a particular way then the application should be made in that prescribed format and the documents should be submitted through registered post or speed post. In this case the petitioner has not done so. She claims that she sent the documents and hard copy of online application through ordinary post which was never received by the Commission. So in this situation, this Court is of the opinion that the petitioner could not be granted the equitable relief of issuing a mandamus against the Commission to declare her result and to allow her to face the viva voce examination and finally to appoint her if she is found eligible to be so appointed." *(Para 9)*

For petitioner : M/s Sujata Jena, S. Mohanty, & G.B. Jena
For opp. Parties : M/s P. K. Mohanty, Senior Adv.,
D.N. Mohapatra, Smt. J. Mohanty,
P.R. Nayak, S.N. Dash,P.K.Pasayat & P. Mohanty

JUDGMENT Date of hearing : 29.1.2018 Date of Judgment : 26.06.2018

S.K.MISHRA, J.

In this writ application under Article 226 of the Constitution of India, the petitioner an applicant pursuant to an advertisement No.4 of 2017-18 for recruitment of Civil judges in Odisha Judicial Service has sought direction from this Court against the Odisha Public Service Commission, hereinafter referred to as "Commission" in brevity, to accept the hard copy of Online application form of the petitioner along with supporting documents and allow her to appear in the (Main) written O.J.S. Examination.

2. On 25.04.017 Advertisement No.4 of 2017-18 was issued inviting Online applications for OJS examination. The petitioner applied within the time specified in the advertisement. On 02.07.2017 she appeared in the preliminary written examination. On 22.07.2017 result was published and the petitioner was qualified to appear in the OJS main written examination. It is also borne out from the record that Annexure-2 series is the advertisement issued by the Commission. At the internal page 10 of the said advertisement in paragraph-12 with the heading "HOW TO APPLY" at Clause (i) a specific direction has been given. It is very important for the purpose of this case. Hence the same is quoted below:

> "12. Xxx xxx xxx
>
> i) At present, only the online applications are invited from candidates for admission to the Odisha Judicial Service preliminary written examination. Candidates who will qualify in the preliminarily written examination are required to send the printout/hard copy of the online application form along with challan (OPSC copy) showing payment of examination fee and specified documents/certificates etc. as provided under Para-8 of this advertisement, only by Registered Post or Speed Post to the Special Secretary, Odisha Public Service Commission, 19, Dr.P.K.Parija Road, Cutack-753001 so as to reach the same in OPSC on or before the prescribed date (which will be declared after publication of the result of O.J.S. preliminary written examination) failing which, his/her candidature for the recruitment shall be cancelled.(underlined for emphasis)
>
> The envelope containing the printout/hard copy of the online application form for main examination must be superscribed "APPLICATION FOR THE POST OF CIIVIL JUDGES IN ODISHA JUDICIAL SERVICE, 2017. The printout/hard copy of the online application form received after the prescribed date shall not be entertained. The Commission will not take any responsibility if the printout/hard copy of the online application form along with all required certificates/documents is not received in time."

3. However, the petitioner allegedly sent the hard copy of the online application form along with supporting documents to opposite party no.2 by post i.e., by ordinary post not by registered post or speed post. Therefore on 30.08.2017 the petitioner searched the web for downloading of the Admit card. She could come to know about rejection of her candidature due to non-submission of hard copy along with photo copy of the documents as required in paragraph-8 of the advertisement. On 31.08.2017 she filed this writ petition in court.

On 01.09.2017 this Court directed the opposite party No.2, the Commission to allow the petitioner to appear in the Main Written Examination for Orissa Judicial Services, 2017. On 04.09.2017 the petitioner was also directed to submit copy of the online application and other allied documents. The Court further directed not to publish the result of the petitioner without leave of the Court. The petitioner complied with the order passed by this Court and she was allowed to appear in the main written examination. Later the matter was listed on different dates. On 14.12.2017 the result of the main written examination was declared. But the result of the present petitioner was not declared. This Court on 20.12.2017 directed to evaluate the answer papers of the petitioner and file the result in a sealed cover and further directed that the declaration of the result of the main written examination will be subject to the result of the writ petition. On 26.12.2017 the final result was published.

4. Developing the case of the petitioner, Smt.Sujata Jena, learned counsel for the petitioner argued that non-submission of hard copy of on-line documents along with challan and requisite documents is not a mandatory requirement and non-fulfillment of the same should not stand as a bar for the petitioner to be called for the viva voce examination, if she is found to be qualified. Learned counsel for the petitioner submits that the petitioner is a brilliant student and she has qualified the preliminary written examination and all the documents she is relying upon has already been submitted in the Online application. So it was unfair on the part of the Commission to reject her candidature only on the ground of non-compliance of Clause-(i) of paragraph-12. It was argued that since soft copies of the documents were with the Commission, the petitioner should have been allowed to appear in the examination and result should have been published.

5. A detail counter affidavit has been filed by the Secretary of the Commission. The Commission brings to the notice of the Court that in total 22 numbers of candidates have not submitted hard copy of online application along with the supporting documents and their candidatures have been rejected, but the petitioner alone approached the Court. The Commission further takes the plea that in the recruitment process the method followed is uniform to all the candidates and the detail process in all aspect have been indicated in the advertisement. The petitioner admittedly had chosen not to comply the same for the reasons best known to her. There being no laches on the part of the Commission for rejection of the candidature of the petitioner for the aforesaid ground, no equitable relief can be granted to the petitioner as per law. It is further stated that vide Annexure-2 the advertisement in paragraph-1 itself as well as in paragraph-8 the condition of submission of hard copy of the online application and requisite documents and challan has to be submitted before the due date after declaration of result of preliminary written examination. The Commission denies the assertions made by the petitioner that she has submitted the hard copy of the application along with the documents by post or otherwise as

there is no verifiable documents available for that. Therefore, the Commission prays that the writ petition be dismissed.

6. Under Article 315 of Chapter II of Part XIV of the Constitution of India, there is a provision for establishment of Public Service Commission for the Union and a Public Service Commission for each of the State. Article 320 of the Constitution of India provides for function of the Public Service Commission. It is appropriate to take note of the exact provisions.

> **320. Functions of Public service Commission**-(1) It shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively.
>
> (2) It shall also be the duty of the Union Public Service Commission, if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required.
>
> (3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted-
>
> (a) on all matters relating to methods of recruitment to civil services and for civil posts;
> (b) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;
>
> (c) on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters ;
>
> (d) on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State.
>
> (e) on any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award,
>
> and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the President, or, as the case may be, the Governor of the State, may refer to them.
>
> Provided that the President as respects the all-India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor as respects other services and posts in connection with affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.
>
> (4) Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in Clause(4) of Article-16 may be made or as respects the manner in which effect may be given to the provisions of article 335.

> (5) All regulations made under the proviso to clause (3) by the President or the Governor of a State shall be laid for not less than fourteen days before each House of Parliament or the House or each House of the Legislature of the State, as the case may be, as soon as possible after they are made, and shall be subject to such modifications, whether by way of repeal or amendment, as both Houses of Parliament or the House or both Houses of the Legislature of the State may make during the session in which they are so laid.

7. A plain reading of Article 320 of the Constitution reveals that it shall be the duty of the Union and State Public Service Commission to conduct examination for appointment to the services of the Union and the services of the State respectively. Clause (2) provides that it is the duty of the Union Public Service Commission if requested by any two or more States to assist in framing and operating the schemes of joint recruitment which is irrelevant for the purpose of this case. Clause (3) of Article 320 provides that Public Service Commission, State or Union shall be consulted on all matters relating to method of recruitment to civil services and for civil posts on the principles to be followed in making appointments to civil services and post and in making promotions and transfers from one service to another and on all disciplinary matters and all allied activities. The most important is sub-clause (a) and (b) of Clause 3 of Article 320 of the Constitution. The Public Service Commission shall be consulted in the method of recruitment to the civil services and for civil posts and principle to be followed for making appointment to civil services and posts and making promotions etc and on the suitability of candidates such promotion, appointment or transfer. So as per the mandate of the Constitution of India, the method of recruitment and the principles to be followed in selection of candidates is in the exclusive domain of the Commission.

8. Judging in that light the Commission has framed the guidelines and the same has been given in detail in Annexue-2, the advertisement. In sub-paragraph of Paragraph-1 of Anexure-2, it is very clearly mentioned that the hard copy of online application form, along with the photocopies of the other documents should be submitted to the Commission. Again at paragraph-8 the same condition is reiterated and all the certificates have been given. Most important is paragraph-12 which provides “HOW TO APPLY”. At clause (a) it has been stipulated that the candidates must go through the said advertisement available in the website before filling up the online application. In Clause (1) it has been referred earlier it was very specifically mentioned that the hardcopy of online application with the annexures should be submitted to the Commission well before the appointed date through registered post or speed post. Admittedly, the same has not been done. It is the settled principle of law that if the law provides a particular thing to be done in a particular manner then it should be done in a particular manner. In other words, if a constitutional authority has issued direction in the shape of advertisement to the intending candidates to apply in a particular way then the application should be made in that prescribed format and the documents should be submitted through registered post or speed post. In this case the petitioner has not done so. She claims that she sent the documents and hard copy of online application through ordinary post which was never received

by the Commission. So in this situation, this Court is of the opinion that the petitioner could not be granted the equitable relief of issuing a mandamus against the Commission to declare her result and to allow her to face the viva voce examination and finally to appoint her if she is found eligible to be so appointed.

9. Learned counsel for the petitioner relies on a reported case of Sanjay Dhar-vrs.J & K Public Service Commission and another reported in AIR 2000 SC 3238 wherein Rule-9 of J & K Civil Service (Judicial) Recruitment Rules, 1967 was considered which requires that the petitioner, who applied for the post of District Judge has to produce a certificate of practice from the District Judge. In that case the Hon'ble Supreme Court held that a literal interpretation would defeat the object sought be achieved giving the example of an advocate practicing in High Court. An advocate practicing at High Court cannot possibly get an experience certificate from the District Judge, and therefore, the Hon'ble Supreme Court has ruled in favour of the petitioner. However, the facts of that case are distinguishable and law is also distinguishable. The petitioner in this case has not applied according to the procedure laid down in the advertisement.

10. On the basis of the aforesaid discussion, we are not willing to allow the writ application and the writ application is dismissed being devoid of merit. However, there shall be no order as to cost.

2018 (I) ILR - CUT-1060

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

JCRLA NO. 110 OF 2004

GOPAL SAGAR .....Appellant

.Vrs.

STATE OF ODISHA .....Respondent

(A) INDIAN PENAL CODE, 1860 – Section 302 – Offence under – Conviction – Appellant committing murder of his wife – Confession before the Gramaraskhi – Admissibility of such confession as evidence – Plea that confession and the evidence of child witnesses cannot be relied upon – Held, the confession made by an accused cannot be said to be inadmissible in evidence – But, when confession before a Gramarakhi is brought in evidence, the Court, as a rule of prudence should insist upon corroboration – In the case at hand, PWs-2 and 4, who are none other than the offspring of the appellant, in all unambiguous terms implicate their father to be the author of the crime – Credence of their testimony is unshaken in cross-examination – In

addition to the above, the confession/disclosure of appellant about the incident before PWs-2, 3 and 4 was spontaneous, proximate and above all, there was no reason as to why they would falsely implicate the appellant – Other circumstances – Conviction however altered to one under 304- Part I of IPC. (Para 13)

(B) INDIAN PENAL CODE, 1860 – SECTION 302 – Offence under – Conviction – Sentence of life imprisonment – Absence of m*ens rea* to commit murder – Effect of – Held, the order of conviction altered to one under 304 Part- I, IPC and to undergo R.I. for 10 years.

"*On a close perusal of the evidence on record in its entirety, it does not disclose that the appellant had mens rea to commit murder of his wife, but he had sufficient knowledge of the fact that the injury inflicted by him on his wife (deceased) would cause her death in ordinary course of nature. Though there was no pre-mediation or preparedness to commit offence, the appellant out of anger and frustration took the wooden pidha (M.O.1), which is commonly used in every household and dealt two blows on her head, when the deceased was sleeping. As such, there was no chance of resistance on the part of the deceased and thus the children could not know about the same though they were sleeping nearby.Taking into consideration the facts and circumstances of the case in its entirety, we are of the opinion that the appellant has committed the offence, which is culpable homicide not amounting to murder. Thus, we are inspired to set aside the conviction under Section 302 I.P.C..There is no evidence on record to the effect that the deceased was subjected to ill-treatment for demand of dowry. As such, no offence under Section 498-A I.P.C. is made out. There is material on record to show that the appellant had made an attempt to commit suicide repenting for his guilt. Thus, we are of the opinion that although conviction of the appellant under Section 309 I.P.C. is proved beyond reasonable doubt but conviction under Sections 302 and 498-A I.P.C. will not sustain and therefore, the same is set aside. Taking into consideration the facts and circumstances of the case, we feel it just and proper to convict the appellant for commission of offence under Section 304 Part-I, I.P.C. and sentence him to undergo R.I. for 10 years.* *(Paras 16 & 17)*

For Appellant : Mr. Hrusikesh Tripathy
For Respondent : Miss. Sabitri Ratho, Addl. Govt. Adv.

JUDGMENT Date of Judgment: 29 .06.2018

K.R. MOHAPATRA, J.

The convict namely, Gopal Sagar in Criminal Trial No. 123 of 2003 (arising out of G.R. Case No. 228 of 2002 of the Court of learned J.M.F.C., Laxmipur, corresponding to Laxmipur P.S. Case No. 57 of 2002), has filed this appeal assailing the judgment and order of conviction and sentence dated 9th September, 2004 passed in the aforesaid criminal trial, wherein, the appellant has been convicted under Sections 302/498-A/309 I.P.C. and has been sentenced to undergo imprisonment for life. In view of imposition of sentence of imprisonment for life passed under Section 302 I.P.C., no separate sentence has been imposed for commission of offence under Sections 498-A/309 I.P.C.

2. The short matrix of incident narrated in the FIR is that upon receiving information about the death of Soha Sagar (the deceased), the wife of the appellant,

the informant, namely, Darsan Takri, PW-1, who was the Gramarakhi of the village, went to the house of the appellant and found the body of the deceased lying in a pool of blood. It was stated in the F.I.R. that previously the appellant suspecting the character of the deceased (his wife) was frequently assaulting her, due to which the deceased had been staying with her brother at Narayanpatna for 1 and ½ months prior to the incident. On the request of the appellant, the deceased had returned to the matrimonial home prior to five days of the incident. On the date of the incident, the appellant, deceased and their children were sleeping after taking dinner. At about 2.00 A.M., the appellant gave two blows on the head of the deceased by means of a wooden pidha causing severe bleeding injury and due to the injury sustained, the deceased succumbed to death. After the incident, the appellant out of fear had rushed to the nearby railway track to commit suicide, but subsequently came back to his house and slit his neck by means of a blade with intention to commit suicide. Thereafter, the appellant went to the house of his elder brother, namely, Sarathi Sagaria and narrated the incident to his elder brother and sister-in-law (wife of elder brother) (PW-3). Hearing from the appellant, his elder brother and sister-in-law had gone to the spot and subsequently, the informant also reached the spot on receiving information and found that the deceased was lying dead in a pool of blood. On interrogation, the appellant had confessed his guilt before the informant and narrated the incident before him.

3. The FIR (Ext.1) was scribed by one Suryanarayan Pattnaik on the instruction of the informant and being read over and explained to him by the scribe, the informant put his signature on the FIR. Since the allegation disclosed cognizable offence under Sections 302/309 I.P.C., the O.I.C., Laxmipur Police Station registered the same as Laxmipur P.S.Case No.57 dated 11.11.2002 and took up investigation. On completion of the investigation, charge-sheet under Sections 302/498-A/309 I.P.C. was filed.

4. The plea of defence was complete denial of involvement of the appellant in the incident. The defence further took a plea that the Investigating Officer and O.I.C., Laxmipur Police Station was inimically disposed off against him as he was a Gramarakhi of the village and was not performing the household works of the OIC. Due to the untimely death of his wife, the appellant was crying, in course of which he fell down on some wooden plank resulting injury to his person.

5. The prosecution in order to bring home the charges examined eight witnesses. PW-1 is the informant and the Gramarakhi of the village Laxmipur; PW-2 and PW-4 are the son and daughter of the appellant respectively. PW-3 is the sister-in-law (elder brother's wife) of the appellant. PW-5 is the co-villager and a post-occurrence witness. PW-6 is the Medical Officer of Laxmipur P.H.C., who conducted autopsy over the dead-body. PW-7 is the Police Constable, who carried the dead-body for postmortem. PW-8 is the OIC of Laxmipur Police Station and IO of the case.

6. In addition to the oral evidence, the prosecution relied upon Ext.1, the FIR; endorsement and signature thereon marked as Ext.1/1 to Ext.1/4; inquest report and endorsement and signature thereon Ext.2 to Ext.2/2; seizure lists Ext.3, Ext.4 and Ext.11, postmortem report as Ext.5, letter of requisition of the weapon of offence to the Medical Officer as Ext.6 and the report of the Medical Officer as Ext.7 and Ext.8; command certificate and dead-body challan as Ext.9 and Ext.10 respectively; spot map as Ext12; forwarding letter of Medical Officer for chemical examination as Ext.13 and report of the chemical examination as Ext.14. The prosecution also reliedupon MO-1, the wooden pidha and MOs. 2 to 7 in support of their case. The accused-appellant examined himself as DW-1 in support of his plea.

7. Learned Session Judge, on scrutiny of evidence, both oral as well as documentary, and relying upon the M.Os. 1 to 7 convicted and sentenced the appellant, as aforesaid. Assailing the same, the appellant wrote a letter to this Court, which has been entertained as a memo of appeal and the appeal was registered appointing Sri Hrusikesh Tripathy as the counsel to prosecute the appeal.

8. Learned counsel for the appellant does not dispute the death of the deceased to be homicidal in nature. Thus, the question that remains to be adjudicated in this appeal is with regard to involvement of the appellant in commission of the crime. Learned counsel for the appellant assailing the impugned judgment submitted that there is no ocular witness to the incident. The story spelt out in the FIR is concocted. Although the informant (PW-1) categorically deposed in his evidence that he knows reading and writing in Oriya, the FIR was written by one Suryanarayan Pattnaik and the appellant was only a signatory to the same. Said Suryanarayan Pattnaik was not examined. Although PWs-2 and 4 were sleeping with their mother after taking dinner, they deposed to have not seen the occurrence. They are only the post-occurrence witnesses. Further, PWs-2 and 4 are child witnesses and their evidence cannot be relied upon to hold the appellant guilty. The so-called extra-judicial confession made by the appellant before PW-3 and his elder brother as well as PW-1 is a weak piece of evidence and the conviction cannot sustain basing upon such extra-judicial confession. The so-called confession of the appellant before the informant (PW-1), who was a Police Officer, being a Gramarakhi, is not admissible in evidence. Referring to the evidence of the Medical Officer PW-6, learned counsel for the appellant submitted that the fatal injury on the head of the deceased could be possible by fall on a hard and blunt substance. He also submitted that there are material contradictions in the evidence of the witnesses.

9. Learned counsel for the appellant, in the alternative, took a plea that the case of the prosecution, if accepted in toto, would not attract a conviction under Sections 302/309 IPC. It would at best attract a conviction under Section 304 Part-II IPC. Hence, he prayed for setting aside the impugned judgment of conviction and sentence.

10. Miss Sabitri Ratho, learned Additional Government Advocate, on the contrary, refuting the submission of Mr.Tripathy submitted that the evidence, both oral and documentary, if considered in its entirety, would implicate the appellant, and none else, to be the author of the crime. Elaborating her submission, she submitted that there are materials on record, which suggest that there was frequent quarrel between the couple and the appellant was assaulting the deceased quite often for which the deceased prior to 1 and ½ months of the incident, had left the matrimonial home and was staying with her brother. Five days prior to the incident, on the request of the appellant, she had returned to her matrimonial home. The appellant in his statement under Section 313 Cr.P.C., categorically admitted that he was suspecting character of the deceased. Thus, the motive is well-established. The appellant also does not dispute that on the ill-fated night after taking dinner, the appellant, the deceased and their children slept in one room and the incident occurred at about 2.00 AM. The appellant had not shifted the deceased to the hospital for her treatment, which would have been the normal reaction of the appellant. On the other hand, after committing the crime, he rushed to the house of his elder brother (husband of PW-3) and informed him about the incident. No material could be placed on record by the defence to disbelieve the evidence of the PW-3 about the confession made by the appellant before them (she and her husband). The extra-judicial confession is very weak piece of evidence. But, in the instant case, the appellant immediately after the incident rushed to the house of his elder brother, which situates nearby and voluntarily made a confession before him and his wife (PW-3), which was quite natural. There is also close proximity of time of occurrence and confession made by the appellant and as such, there was no possibility of any concoction. As such, the same is admissible in evidence and a conviction can be based relying upon the same. She further submitted that the age of PW-2, the son of the appellant and the deceased was about 15 years, when his evidence was recorded. He was about 14 years of age at the time of the incident. He had already crossed the age of discretion and his statement is consistent and believable. Likewise, there is no reason to disbelieve the evidence of PW-4 (the daughter of the appellant), who was about 13 years of age at the time of the incident and her statement was recorded, when she was 14 years of age. There is no reason as to why the children would falsely implicate their father for the death of their mother. Taking into consideration the postmortem report (Ext.5) and report of the Medical Officer on the query of the I.O. (Ext.8/1) about the possibility of injuries by means of MO-1, there can be no iota of doubt that the appellant had committed the offence by means of MO-1. The appellant also does not deny that after the incident he had made an attempt to end his life. Although the plea of enmity of the I.O. (PW-8) and informant (PW-1) with the appellant was taken, no material could be placed by the appellant to substantiate the same. Hence, the judgment of conviction and sentence needs no interference.

11. We have heard learned counsel for the parties with raft attention and perused the materials on record meticulously.

12. Ext.1, the FIR, has been scribed by one Suryanarayan Pattnaik, who has not been examined in this case. PW-1, the informant, also in his evidence, categorically stated that as per his instruction, the written report was scribed by Suryanarayan Pattnaik. After scribing the report, he (Suryanarayan Pattnaik) read over and explained the contents of PW-1, who acknowledging the same to be true and correct, gave his signature thereon (Ext.1/1). Only a suggestion was put to PW-1 to the effect that he got the FIR scribed by Suryanarayan Pattnaik in order to concoct the incident to which PW-1 answered in negative. The FIR is not the encyclopedia of all relevant facts. It is an information to launch the prosecution. When the FIR (Ext.1) was proved by PW-1, non-examination of the scribe, namely, Suryanarayan Pattnaik, cannot be fatal to the prosecution case. Although the appellant challenges the correctness of the narration of the incident in the FIR, no material could be placed by him to raise any doubt with regard to the same. The incident occurred at about 2.00 A.M. in the night of 10/11.11.2002. PW-1 upon receipt of the information went to the house of the appellant in the morning of 11.11.2002 and thereafter lodged the FIR at about 11.00 AM in the Police Station. Although the plea of the enmity of the appellant with the IO was taken, no endeavour was made to bring home the same. Thus, the contention of learned counsel for the appellant with regard to the correctness of the narration of incident in the FIR does not hold good.

13. After the incident, the appellant rushed to the house of his brother. The evidence of PW-3, sister-in-law of the appellant, revealed that in the morning of 11.11.2002 at about 4.00 AM, the appellant had gone to her house and disclosed that in the previous night he had killed his wife. He was not sure as to whether his wife was, by then, alive. He also disclosed that out of fear of Police, he had slit his own neck to commit suicide. The PW-3 along with his husband had immediately rushed to the house of the appellant and found that the deceased was lying dead in a pool of blood with severe fracture injuries on her head. MO-1 was lying near to the dead-body. Admittedly, there was no enmity between the appellant and PW-3. Hence, there is no reason as to why PW-3 would depose falsehood against her brother-in-law. Learned counsel for the appellant submitted that the hearsay evidence of PW-3 regarding the incident is not admissible in evidence. Law is no more *res integra* on this issue.

In the case of ***S.Arul Raja Vs. State of Tamil Nadu***, reported in (2010) 47 OCR (SC)-204, Hon'ble Supreme Court while dealing with scope of Section 24 of the Evidence Act, held as follows:

> "49. The evidentiary value of the extra-judicial confession must be judged in the facts and circumstances of each individual case. Extra-judicial confession, if voluntarily made and fully consistent with the circumstantial evidence, no doubt, establishes the guilt of the

accused. The extra-judicial confession, if voluntary, can be relied upon by the Court along with other evidence in convicting the accused. However, the extra-judicial confession cannot ipso facto be termed to be tainted. An extra-judicial confession, if made voluntarily and proved, can be relied upon by the Courts."

In the case at hand, the extra-judicial confession made by the appellant before PWs-1 and 3 was voluntary and is fully consistent with the circumstantial evidence. However, an argument has been advanced by learned counsel for the appellant that the extra-judicial confession made by appellant before the PW-1 is not admissible in evidence as he was a Gramarakhi and thus was a Police Officer. Thus, the same is inadmissible in evidence as per Section-25 of the Evidence Act. The argument has no substance in view of the law laid down by Hon'ble Full Bench of this Court in the case of ***Gurua Naik Vs. State of Orissa***, reported in (2014) 57 OCR-820, which read as follows:

"23. No where the Act or the Rules prescribe any power or authority on the part of the Grama Rakshi to investigate a case or to submit a report (charge-sheet) under Section 173, Cr.P.C. The powers to be exercised by the Grama Rakshi, is primarily for surveillance, prevention of crime in the village, providing assistance to police in discharge of their duties and provide assistance to Panchayat and Revenue Authorities, whenever required. So far as power of arrest by the Grama Rakshi or assistance by him to a private person to arrest a culprit are concerned, similar power is given to even a private person under Section 43 of the Cr.P.C., which provides that any private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence or is a proclaimed offender and make over any person so arrested to the police officer or to the police station. For the aforesaid power of arrest on the part of a private person, a private person making an arrest in a given case cannot be treated as a police officer within the meaning of Section 25 of the Evidence Act. Such a view, if taken, becomes too far fetched. In view of such fact, similar power given to a Grama Rakshi in Rule 17 of the Rules will not make him a 'police officer' within the meaning of Section 25 of the Evidence Act, because he has neither further power of investigation nor has authority of submitting charge-sheet against the person arrested.

xx xx xx

25. From the duties and responsibilities of a Grama Rakshi, as discussed above, it is clear that he (a Grama Rakshi), for the nature of his duties, has got proximate relationship with the regular police establishment. Because of his position in the scheme of things and his vulnerability as a rustic person coupled with the dominant supervision over him by the police, there is possibility of his being influenced by an Investigating Officer to secure a conviction in certain cases, though not all. It may so happen that in a case, where there is no other evidence, the extra judicial confession of the accused before a Grama Rakshi may be brought on record by examining the Grama Rakshi under Section 161, Cr.P.C. The Grama Rakshi in such a case, because of his inferior position, is bound to support his statement during trial. The accused, otherwise in such a case, may take advantage of Section 24 of the Evidence Act. We, however, taking a clue from the case of Francis Stanly @ Stalin (supra), are constrained to hold that the Court in such a situation, when confession before a Grama Rakshi is brought in evidence, should insist, as a rule of prudence, on corroboration.

26. The discussion supra, therefore, shows that the view expressed by the Division Bench of this Court in Madan @ Undu Barik's case is erroneous and subsequent decisions of this Court on the said point like Dusasan Bhoi and others vs. State of Orissa, 1981 CRL. L.J. 1452; Boisakhu Kollar vs. State, 60 (1985) CLT 61 and Pandru Khadia vs. State of Orissa,

> 1992 CRL. L.J. 762, etc. are also erroneous. They are held to be not good law in view of the development of law, as discussed supra.
>
> 27. In view of the decisions of Hon'ble Supreme Court discussed supra and of this Court in Khageswar Khatua's case (supra), the view taken in Madan @ Undu Barik's case and other similar decisions in the case of Dusasan Bhoi and others vs. State of Orissa, 1981 CRL. L.J. 1452; Boisakhu Kollar vs. State, 60 (1985) CLT 61 and Pandru Khadia vs. State of Orissa, 1992 CRL. L.J. 762, are overruled to the extent they hold that the confession made to a Grama Rakshi is inadmissible in evidence under Section 25 of the Evidence Act."

Thus, the confession made by an accused (appellant) cannot be said to be inadmissible in evidence. But, as held supra, when confession before a Gramarakhi is brought in evidence, the Court, as a rule of prudence should insist upon corroboration. In the case at hand, PWs-2 and 4, who are none other than the offspring of the appellant, in all unambiguous terms implicate their father to be the author of the crime. Credence of their testimony is unshaken in cross-examination.

In addition to the above, the confession/disclosure of appellant about the incident before PWs-2, 3 and 4 was spontaneous, proximate and above all, there was no reason as to why they would falsely implicate the appellant.

14. DW-1 (appellant) in his evidence deposed that PW-2 (his son) was not present at the spot on the date of occurrence. He was working in a shop at Berhampur. In his cross-examination, PW-2 has categorically stated that he had some back to his village from Berhampur 7 to 8 days prior to Deepavali and his mother was killed 2 days after Deepavali. He had narrated the incident vividly in his evidence and there is nothing on record to disbelieve the same. The evidence of P.W.2 was quite clear and inspires confidence. Although in the statement recorded under Section 313 Cr.P.C., the appellant had stated that P.W.2 has stated falsely being tutored by his elder brother, no suggestion to that effect put to P.W. 2 during his cross-examination. Likewise, P.W. 4 also supports the prosecution case in material particulars.

A plea has been taken by learned counsel for the appellant that P.Ws.2 and 4 being child witnesses, their evidence is not admissible in law. Law is well settled in the case of ***Suryanarayana –v- State of Karnatak***, reported in (2001) 9 SCC 129, which is quoted below:-

> "the evidence of the child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus an easy prey to tutoring. The evidence of the child witness must find adequate corroboration before it is relied upon as the rule of corroboration is of practical wisdom than of law."

15. On a scrutiny of evidence of P.Ws. 2 and 4, it appears that they have intellectually matured to understand the question and have given consistent and rational answers thereto. The testimony of P.Ws.2 and 4 finds corroboration with the evidenced of P.Ws.1 and 3 in all material particulars. Thus, the same can be safely relied upon to bring home the charges. Further, both P.Ws. 2 and 4 have attained the age of discretion and have vividly described the incident. There is no

reason as to why they would depose falsehood against their father. No material is also placed before us which would raise any semblance of doubt to the testimony of P.Ws. 2 and 4. In addition to the above, the Medical Officer (P.W.6), in his deposition, categorically stated that he found external injuries of a lacerated wound over left periatal region of 4" length x 3" breadth and 3" depth as well as 2 multiple bruise mark over anterior chest wall of average size of length 2 c.m. x breadth 2.c.m.. On dissection, P.W.6 found that left side of cerebral hemisphear was lacerated and congested. He opined the cause of death to be shock due to external and internal intra carnial haemorrhage. He also opined vide Ext.8/1 that the injury could be possible by wooden pidha (M.O.1). He proved the postmortem report (Ext.6), the query of the I.O. with regard to possibility of the injury by M.O.1 (Ext.8) and his report under Ext.8/1 affirming such possibility. The appellant (D.W.1) in his deposition, has taken a plea that after taking meal when he and his wife, went to sleep, his wife (deceased) fell down on the ground and died. Admittedly, no attempt was made by the appellant to take her to hospital. On the contrary, the appellant immediately after the incident, went to the nearby railway track to commit suicide. However, being unsuccessful on returning therefrom, he slit his neck by means of a blade and rushed to the house of P.W.3 to inform about the incident. P.W. 6, the Medical Officer, who examined the appellant also opined that injury on the neck of the appellant can be possible by means of blade. In that view of the matter, we are of the opinion that the appellant was author of the crime and none else.

16. On a close perusal of the evidence on record in its entirety, it does not disclose that the appellant had *mens rea* to commit murder of his wife, but he had sufficient knowledge of the fact that the injury inflicted by him on his wife (deceased) would cause her death in ordinary course of nature. Though there was no pre-mediation or preparedness to commit offence, the appellant out of anger and frustration took the wooden pidha (M.O.1), which is commonly used in every household and dealt two blows on her head, when the deceased was sleeping. As such, there was no chance of resistance on the part of the deceased and thus the children could not know about the same though they were sleeping nearby.

17. Taking into consideration the facts and circumstances of the case in its entirety, we are of the opinion that the appellant has committed the offence, which is culpable homicide not amounting to murder. Thus, we are inspired to set aside the conviction under Section 302 I.P.C.. There is no evidence on record to the effect that the deceased was subjected to ill-treatment for demand of dowry. As such, no offence under Section 498-A I.P.C. is made out. There is material on record to show that the appellant had made an attempt to commit suicide repenting for his guilt. Thus, we are of the opinion that although conviction of the appellant under Section 309 I.P.C. is proved beyond reasonable doubt but conviction under Sections 302 and 498-A I.P.C. will not sustain and therefore, the same is set aside. Taking into consideration the facts and circumstances of the case, we fee l it just and proper to

convict the appellant for commission of offence under Section 304 Part-I, I.P.C. and sentence him to undergo R.I. for 10 years.

18. In the result, the appeal is allowed in part. The appellant is convicted under Section 304 Part-I, I.P.C. and is sentenced to undergo R.I. for 10 years. The appellant was arrested on 11.11.2002 and since then, he is in custody for more than 15 years. As such, he be set at liberty forthwith, if he is not required incarceration in any other case.

2018 (I) ILR - CUT- 1069

DR. A.K.RATH, J.

S.A. NO. 291 OF 1990

LINGARAJ @ LINGA NAYAK & ANR. ……..Appellants

.Vrs.

ABHIMANYU BHOI ……...Respondent

CONSTITUTION OF INDIA,1950 – Article 227 – In a petition seeking issue of a Writ of certiorari under Article 227 of the Constitution of India, the Tribunal/Court whose order is impugned, whether be made a party and when? – Held, the following.

"The proposition that can safely be culled out is that the authorities or the tribunals, who in law are entitled to defend the orders passed by them, are necessary parties and if they are not arrayed as parties, the writ petition can be treated to be not maintainable or the court may grant liberty to implead them as parties in exercise of its discretion. There are tribunals which are not at all required to defend their own order, and in that case such tribunals need not be arrayed as parties. To give another example: in certain enactments, the District Judges function as Election Tribunals from whose orders a revision or a writ may lie depending upon the provisions in the Act. In such a situation, the superior court, that is the High Court, even if required to call for the records, the District Judge need not be a party. Thus, in essence, when a tribunal or authority is required to defend its own order, it is to be made a party failing which the proceeding before the High Court would be regarded as not maintainable." Jogendrasinhji Vijaysingh vrs. State of Gujarat and others, (2015) 9 SCC 1 followed." *(Para 10)*

Case Laws Relied on and Referred to :-

1. A.I.R. 1925 : Mst.Farid-un-nisa v. Munshi Mukhtar Ahmad & Anr .
2. AIR 1986 Ori. 242 : Privy Council 204, Musi Dei v. Labanya Bewa & Anr.
3. AIR 1986 Ori. 53 : Narayan Mishra and others v. Champa Dibya (dead) & Ors.
4. 1993 (II) OLR 485 : Narayan Parida v. Artabandhu Jena.
5. AIR 1963 SC 1203 : Mst. Kharbuja Kuer v. Jangbahadur Rai & Ors.

For Appellants : Mr.S.P.Mishra, Sr.Advocate
Ms.Neha Sharma
For Respondent : Mr.Siddhartha Mishra

JUDGMENT Date of Hearing :16.4.2018 Date of Judgment:2.5.2018

DR.A.K.RATH, J.

Defendant nos.1 and 2 are the appellants against a confirming judgment.

2. The plaintiff-respondent instituted the suit for declaration of title, recovery of possession and set aside the order of mutation passed by the Tahasildar in Mutation Case No.78 of 1983. The case of the plaintiff is that one Basudev Naik was the original owner of the suit land. He died leaving behind him two sons, namely, Lingaraj @ Linga Nayak and Nisakara Nayak, defendant nos.1 and 2. After death of Basudev, defendant nos. and 2 inherited the suit property. The suit land fell to the share of defendant no.2 in the partition. He sold the same to one A.Laxman Patra, defendant no.4 and his wife, A.Surama Patra, defendant no.3 by means of two registered sale deeds dated 18.7.1963 and 11.1.1965 respectively for valid consideration and thereafter delivered possession. Defendant no.4 purchased the suit land in favour of his wife. On 30.6.1969 defendant no.4 sold the said land to the plaintiff by means of a registered sale deed for valid consideration and thereafter delivered possession. The suit plot had been recorded in the name of the plaintiff in the record of right. It was further pleaded that defendant no.1 was an attesting witness in both the sale deeds. He had no semblance of right, title and interest over the suit land. But then, on the report of the Social Welfare Extension Officer, Tikabali, the S.D.O., Baliguda initiated O.L.R. Case No.27 of 1977 against him under Section 23 of the Orissa Land Reforms Act ("O.L.R.Act"). Defendant nos.1 and 4 were parties to the said proceedings. After due enquiry, the S.D.O., Baliguda dropped the case on 7.12.1979 holding that the case is not maintainable. Against the said order, defendant no.1 filed appeal before the A.D.M., Phulbani. By order dated 21.8.1981, the appellate authority directed to restore the suit plots in favour of defendant no.1. According to the plaintiff, the sale transactions were effected before coming into operation of the O.L.R.Act. The A.D.M. had no jurisdiction to pass the order. With this factual scenario, the suit was instituted seeking the reliefs mentioned supra.

3. Defendant no.1 filed written statement denying the assertions made in the plaint. The case of defendant no.1 was that the suit property was the joint property of defendant nos. 1 and 2. The same had not been partitioned. Defendant no.2 had no exclusive right to sell the said land. Defendant nos. 1 and 2 mortgaged their kitchen garden to defendant nos.3 and 4. Defendant nos. 3 and 4 had fraudulently obtained their signatures on the sale deeds. Neither consideration was paid, nor delivery of possession was made. They are scheduled caste persons. Defendant nos. 3 and 4 do not belong to scheduled caste or scheduled tribe. No permission was accorded by the revenue authority for alienation of the land. The alienation was null and void. The A.D.M. had rightly passed the order. He is in possession of the suit land. The civil court has no jurisdiction to try the suit.

4. Defendant no.4 filed written statement supporting the stand of the plaintiff. Defendant nos. 1 and 3 were set ex parte. 5. Stemming on the pleadings of the parties, learned trial court struck seven issues. Parties led evidence, oral and documentary to substantiate their cases. Learned trial court decreed the suit holding that there was partition of the properties between the defendant nos. 1 and 2. The suit land fell to the share of defendant no.2. No fraud was played on defendant no.2, when he executed the two sale deeds. Permission of the revenue authority was not necessary for execution of the sale deeds, Exts.7 and 8. Possession of the suit land was delivered to defendant no.4. Defendant no.4 and his wife alienated the land to the plaintiff under Ext.1. The proceeding under the O.L.R. Act was without jurisdiction and void. The plaintiff was not a party to that case. The decision of the A.D.M. is not binding on him. Order of mutation of the land in favour of defendant no.1 is void. Unsuccessful defendant nos. 1 and 2 filed T.A.No.9 of 1988 before the learned District Judge, Phulbani, which was eventually dismissed.

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

> "1. Whether order of the Addl. District Magistrate under the O.L.R.Act can be declared to be invalid without such officer being made party to the suit?
>
> 2. Whether the sale deeds dated 18.07.1963 and 11.01.1965 vide Exts.7 and 8 are void, since no permission to alienate the land under Sec.23 of the Orissa Land Reforms Act was accorded by the competent authority?
>
> 3. Whether the learned lower appellate court is justified in dismissing the appeal when it came to a conclusion that the vendors of the sale deeds are schedule caste illiterate persons and the documents are not read over and explained to them ?"

7. Heard Mr.S.P.Mishra, learned Senior Advocate along with Ms.Neha Sharma, learned Advocate for the appellants and Mr.Siddhartha Mishra, learned Advocate on behalf of Mr.R.P.Mohapatra, learned Advocate for the respondent.

8. Mr.S.P.Mishra, learned Senior Advocate for the appellants submitted that the substantial questions of law enumerated in grounds no.1 and 2 may not arise for consideration. He submitted that learned appellate court is not justified in dismissing the appeal, when it came to a conclusion that the vendors of the sale deeds are scheduled caste illiterate persons and the contents of the sale deeds had not been read over and explained to them. To buttress the submission, he placed reliance on the decisions in the case of Mst.Farid-un-nisa v. Munshi Mukhtar Ahmad and another, A.I.R. 1925 Privy Council 204, Musi Dei v. Labanya Bewa and another, AIR 1986 Ori. 242, Narayan Mishra and others v. Champa Dibya (dead) and others, AIR 1986 Ori. 53 and Narayan Parida v. Artabandhu Jena, 1993 (II) OLR 485.

9. Per contra, Mr.Siddhartha Mishra, learned Advocate for the respondents submitted that defendant no.2 had executed two successive sale deeds. Neither he filed written statement, nor examined as witness. Defendant no.1 was the attesting witness in both the sale deeds. Thus defendant no.1 cannot assail the execution of the sale deeds. The sale deeds had been executed for a valid consideration and possession of the lands had been delivered to the vendor.

10. Since this Court has formulated the substantial questions of law, it is desirable to answer the same. In Jogendrasinhji Vijaysingh v. State of Gujarat and others, (2015) SCC 1, the question arose before the Supreme Court as to whether in a petition for issue of a writ of certiorari under Article 227 of the Constitution of India, the tribunal/court whose order is impugned in a petition must be a party to the petition so that the writ sought from the court can be issued against the tribunal/court ? On a survey of decisions, the apex Court in paragraph-43 of the report held thus:

"43. xxx xxx xxx

> Therefore, the proposition that can safely be culled out is that the authorities or the tribunals, who in law are entitled to defend the orders passed by them, are necessary parties and if they are not arrayed as parties, the writ petition can be treated to be not maintainable or the court may grant liberty to implead them as parties in exercise of its discretion. There are tribunals which are not at all required to defend their own order, and in that case such tribunals need not be arrayed as parties. To give another example: in certain enactments, the District Judges function as Election Tribunals from whose orders a revision or a writ may lie depending upon the provisions in the Act. In such a situation, the superior court, that is the High Court, even if required to call for the records, the District Judge need not be a party. Thus, in essence, when a tribunal or authority is required to defend its own order, it is to be made a party failing which the proceeding before the High Court would be regarded as not maintainable."

11. The law laid down by the apex Court in the case of Jogendrasinhji (supra) in the context of an application under Article 227 of the Constitution of India proprio vigore applies to the facts of this case as well. The Additional District Magistrate is neither necessary nor proper party to the suit.

12. The sale deeds were executed on 18.7.1963 and 11.1.1965. The Orissa Land Reforms Act came into force with effect from 1.10.1965. The A.D.M. de hors its jurisdiction in passing the order of restoration. The order is non-est in the eye of law.

13. The principle governing the execution of deed by an illiterate woman is well known. In *Mst. Kharbuja Kuer v. Jangbahadur Rai and others*, AIR 1963 SC 1203, the apex Court held thus:

> "In India paradahnashin ladies have been given a special protection in view of the social conditions of the times; they are presumed to have an imperfect knowledge of the world, as by the pardah system they are practically excluded from social intercourse and communion with the outside world.
>
> xxx xxx xxx
>
> It is, therefore, manifest that the rule evolved for the protection of pardahnashin ladies shall not be confused with other doctrines, such as fraud, duress and actual undue influence, which apply to all persons whether they be pardahnashin ladies or not.
>
> xxx xxx xxx
>
> In Geresh Chunder Lahoree v. Mst. Bhuggobutty Debia, 13 Moo Ind App 419 (PC) the Privy Council held that as regards documents taken from pardahnashin women the court has to ascertain that the party executing them had been a free agent and duly informed of what shewas about. The reason for the rule is that the ordinary presumption that a person

> understands the document to which he has affixed his name does not apply in the case of a paradahnashin woman.
>
> xxx xxx xxx
>
> The burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a pardahnashin lady to establish that the said document was executed by her after clearly understanding the nature of the transaction. It should be established that it was not only her physical act but also her mental act. The burden can be discharged not only by proving that the document was explained to her and that she understood it, but also by other evidence, direct and circumstantial."

Mt.Farid-un-nisa (supra) has been followed in Mst. Kharbuja Kuer (supra). Narayan Mishra (supra), Musi Dei (supra) and Narayan Parida (supra) reiterated the principles laid down in Mst. Kharbuja Kuer. There is no quarrel over the proposition of law.

14. Both the courts below concurrently held that there was partition of the suit schedule land. Defendant no.2 alienated the suit land in favour of defendant nos.3 and 4. Defendant no.2 neither filed the written statement, nor examined as a witness. Defendant no.1 was the attesting witness in both the sale deeds. When the executant of the sale deeds has not come forward, it is difficult on the part of the Court to hold that he was an illiterate person. The finding of the appellate court on that score is perverse. The substantial questions of law are answered accordingly.

15. In the wake of aforesaid, the appeal, sans merit, deserves dismissal. Accordingly, the appeal is dismissed. There shall be no order as to costs.

2018 (I) ILR - CUT- 1073

DR.A.K. RATH, J.

S.A. NO. 82 OF 2000

KALYANI MAHANA ……..Appellant

.Vrs.

BANSHIDHAR SAHU & ANR. ……..Respondents

PARTITION ACT,1893 – Section 4 – Partition suit by transferee of share in dwelling-house – Scope and ambit of – Discussed – *Ghantesher Ghosh v. Madan Mohan Ghosh and others*, AIR 1997 SC 471 followed.

> *"A mere look at the aforesaid provision shows that for its applicability at any stage of the proceedings between the contesting parties, the following conditions must be satisfied:*
>
> *(1) A co-owner having undivided share in the family dwelling house should effect transfer of his undivided interest therein;*
>
> *(2) The transferee of such undivided interest of the co-owner should be an outsider or stranger to the family;*

(3) Such transferee must sue for partition and separate possession of the undivided share transferred to him by the concerned co-owner;

(4) As against such a claim of the stranger transferee, any member of the family having undivided share in the dwelling house should put forward his claim of pre-emption by undertaking to buy out the share of such transferee; and

(5) While accepting such a claim for pre-emption by the existing co-owner of the dwelling house belonging to the undivided family, the court should make a valuation of the transferred share belonging to the stranger transferee and make the claimant co-owner pay the value of the share of the transferee so as to enable the claimant co-owner to purchase by way of pre-emption the said transferred share of the stranger transferee in the dwelling house belonging to the undivided family so that the stranger transferee can have no more claim left for partition and separate possession of his share in the dwelling house and accordingly can be effectively denied entry in any part of such family dwelling house". (Para 10)

Case Laws Relied on and Referred to :-

1. AIR 2000 SC 2684 : Babulal v Habibnoor Khan (Dead) by L.Rs. & Ors.
2. AIR 1997 SC 471 : Ghantesher Ghosh v. Madan Mohan Ghosh & Ors.
3. AIR 1971 Ori.-127 : Alekha Mantri vs. Jagabandhu Mantri & Ors.

For Appellant : Mr. A.R. Dash, Mr. Ayushman Mahanta.
For Respondents : Mr. Budhiram Das.

JUDGMENT Date of Hearing :24.04.2018 Date of Judgment:04.05.2018

DR. A.K. RATH, J.

Defendant no.2 is the appellant against a reversing judgment.

02. Plaintiff-respondent no.2 instituted the suit for declaration of title over the suit property, registered sale deed no.5 of 1990 executed by the defendant no.1 in favour of the defendant no.2 is illegal and in the alternative retransfer of the suit land in faovur of the plaintiff and partition. The case of the plaintiff was that plaintiff and defendant no.1 are sons of Bhimasen Sahu. Their father had no property except the ancestral old house. On 28.5.62 the ancestral house of the family was partitioned. Defendant no.1 was allotted a share. After partition, the plaintiff and his father lived together. Thereafter, they had purchased the suit land jointly. They had constructed a house over the same. Defendant no.1 had not contributed any amount towards purchase of the suit land. Defendant no.1 had no semblance of right, title and interest or possession over the same. After death of his father, the plaintiff became the absolute owner of the property. In January, 1990, the defendant no.2 laid a claim over the suit property on the pretext that she had purchased the suit property from defendant no.1 by means of a registered sale deed. Thereafter the plaintiff ascertained that the defendant no.1 had sold the suit house to defendant no.2 by means of a registered sale deed. The defendant no.1 had no title over the property. The sale without his consent is void. Further, the plaintiff being a co-sharer had a preferential right to purchase the suit house. With this factual scenario, he instituted the suit seeking the reliefs mentioned supra.

03. Defendant no.2 entered contest and filed a written statement pleading inter alia that the plaintiff and defendant no.1 were in joint mess and property. The defendant no.1 and his father purchased the suit land, converted it to homestead and constructed a house. All of them were in possession of the same. There was no partition between the plaintiff, defendant no.1 and their father on 28.5.62. It was further pleaded that after death of the father of the plaintiff and defendant no.1, there was partition between them in respect of the suit land on 2.12.86 in presence of the local gentries. The suit land fell to the share of defendant no.1. Thereafter, the defendant no.1 sold the suit land to defendant no.2 on 3.1.90 for a consideration Rs.4,000/- and delivered possession. Defendant no.2 is in possession of the suit land. Defendant no.1 was set exparte.

04. On the interse pleadings of the parties, learned trial court struck five issues. Parties led evidence, oral and documentary, to substantiate their cases. Learned trial court held that there was partition between Bhimasen and his two sons, plaintiff and defendant no.1, in the year 1962. The suit land was purchased by Bhimasen by means of a registered sale deed dated 27.4.1967, Ext.1. The same cannot be treated to be the exclusive property of the plaintiff alone. There is no evidence that after partition in the year 1962, the plaintiff and his father had purchased the suit land out of their joint income. The suit land was mutated in the name of Bhimasen in the year 1970. The patta was issued in his favour. The plaintiff is entitled to relief of partition. The defendant no.1 sold a portion of suit homestead which is less than his share. The sale of the suit land by defendant no.1 in favour of defendant no.2 is legal and valid. Held so, it decreed the suit preliminarily. Felt aggrieved, the plaintiff filed T.A. No.6/24 of 1994-99 before the learned Additional District Judge, Sonepur. Learned lower appellate court held that the suit land was the self-acquired property of Bhimasen. After his death his two sons, plaintiff and defendant no.1 succeeded to the suit land as tenants in common. There was no partition between the brothers on 2.12.86 and the suit property never fell to the share of defendant no.1. Plaintiff being a class-I heir can challenge the alienation. The defendant no.1 had transferred his interest in contravention of Sec.22 of Hindu Succession Act. The plaintiff being a co-sharer has preferential claim. The defendant no.1 could not have sold the suit land without the consent of the plaintiff. Defendant no.2 is a stranger to the family. She is liable to be evicted. Held so, it modified the decree and evicted the defendant no.2 from the suit land and directed the defendants to execute the sale deed in respect of half share of the defendant no.1 in favour of the plaintiff.

05. The second appeal was admitted on the substantial questions of law enumerated in ground nos.2(b) and (c) of the appeal memo. The same are:

> "2(b) Whether the respondent in the lower appellate court if has not filed any regular cross-objection could no longer raise contentions against the findings of the trial court in respect of any of the issues in the suit, at the time of hearing of the appeal ?
>
> (c) Whether in a case of completed sale in favour of an outsider (defendant no.2) by the Class-I heir in the absence of severance of status by partition and especially when the

> inconvenient effects sometimes resulting from transfer to an outsider by a co-heir of his or her interest in property simultaneously inheriting along with other co-heirs is conspicuously absent as evident from the evidence in the suit, the lower appellate court is justified in law in holding that the transfer is voidable at the instance of the non-alienating co-heirs u/s.22 of the Hindu Succession Act, 1956 ?"

06. Heard Mr. A.R. Dash, learned Advocate along with Mr. Ayushman Mahanta, learned Advocate for the appellant and Mr. Budhiram Das, learned Advocate, on behalf of Mr.N.C. Pati, learned Advocate for the respondents.

07. Mr. A.R. Dash, learned Advocate for the appellant, submitted that the courts below failed to consider the import of Sec.4 of the Partition Act. He further contended that there was partition of the suit house between the plaintiff and defendant no.1. The suit property fell to the share of defendant no.1. He alienated the same in favour of the defendant no.2 by means of a registered sale deed for a valid consideration. The defendant no.2 is in possession of the same.

08. Per contra, Mr. Budhiram Das, learned Advocate for the respondents, submitted that there was no partition of the suit property between the plaintiff and defendant no.1. Defendant no.1 transferred his undivided interest in favour of defendant no.2. The alienation is illegal. Learned lower appellate court has rightly allowed the appeal.

09. The suit is essentially a suit for declaration that the sale deed is void and partition. There is no prayer for eviction of defendant no.2. The question does arise as to whether the suit at the behest of the co-sharer is maintainable.

09. In *Alekha Mantri vs. Jagabandhu Mantri and others*, AIR 1971 Ori.-127, this Court held that Sec.4 of the Partition Act would also be applicable where the suit for partition was brought by a member of the undivided family against the stranger transferee and it is not necessary that the latter should have filed the suit.

10. There were divergent views of different High Courts including this Court in the case of *Alekha Mantri* (supra) with regard to scope and ambit of Sec. 4 of the Partition Act. The same has been set at rest by the apex Court in the case of *Ghantesher Ghosh v. Madan Mohan Ghosh and others*, AIR 1997 SC 471. The apex Court held thus:

> "A mere look at the aforesaid provision shows that for its applicability at any stage of the proceedings between the contesting parties, the following conditions must be satisfied:
>
> (1) A co-owner having undivided share in the family dwelling house should effect transfer of his undivided interest therein;
>
> (2) The transferee of such undivided interest of the co-owner should be an outsider or stranger to the family;
>
> (3) Such transferee must sue for partition and separate possession of the undivided share transferred to him by the concerned co-owner;
>
> (4) As against such a claim of the stranger transferee, any member of the family having undivided share in the dwelling house should put forward his claim of pre-emption by undertaking to buy out the share of such transferee; and

(5) While accepting such a claim for pre-emption by the existing co-owner of the dwelling house belonging to the undivided family, the court should make a valuation of the transferred share belonging to the stranger transferee and make the claimant co-owner pay the value of the share of the transferee so as to enable the claimant co-owner to purchase by way of pre-emption the said transferred share of the stranger transferee in the dwelling house belonging to the undivided family so that the stranger transferee can have no more claim left for partition and separate possession of his share in the dwelling house and accordingly can be effectively denied entry in any part of such family dwelling house".

11. In *Babulal v Habibnoor Khan (Dead) by L.Rs. and others*, AIR 2000 SC 2684, the apex Court taking a cue from Ghantesher Ghosh (supra) held that one of the basic conditions for applicability of Sec. 4 as laid down by the aforesaid decision and also as expressly mentioned in the Section is that the stranger/transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned. Before Sec. 4 of the Partition Act can be pressed in service by any of the other co-owners of the dwelling house, it has to be shown that the occasion had arisen for him to move under Sec.4 of the Act because of the stranger transferee himself moving for partition and separate possession of the share of the other co-owner which he would have purchased. It was further held that if the ratio of Alekha Mantri (supra) is held to take the view that a stranger purchaser who does not move for partition of joint property against the remaining co-owners either as a plaintiff or even as a defendant in the partition suit claiming to be as good as the plaintiff nor even as a successor of the decree holder seeks execution of partition decree, can still be subjected to Sec.4 of the Partition Act proceedings, then the said view would directly conflict with the decision of this Court in Ghantesher Ghosh's case (supra) and to that extent it must be treated to be overruled.

12. In view of the authoritative pronouncement of the apex Court in the decisions cited supra, the irresistible conclusion is that the suit is not maintainable. The substantial questions of law are answered accordingly.

13. A priori, the impugned judgments are set aside. The appeal is allowed. Consequently, the suit is dismissed.

2018 (I) ILR - CUT- 1077

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

JAIL CRIMINAL APPEAL NO. 53 OF 2008

KARMA LAKRA .....Appellant

.Vrs.

STATE OF ORISSA .....Respondent

INDIAN PENAL CODE,1860 – Section 302 – Offence under – Conviction – Analysis of evidence – Although the Evidence of P.Ws.3, 6 and 7 are

of no help to the prosecution, the evidence of the eye-witness, P.W.5 relating to assault on the head of the deceased by the appellant using an axe remains un-demolished – P.W. 5, the wife of deceased also stated about the previous dispute – No suggestion to her about relationship – Medical evidence corroborates the oral testimony of P.W. 5 – Held, the appellant is the author of the crime – Conviction and sentence upheld.

"An analysis of evidence of P.Ws.3, 6 and 7 are of no way help the prosecution, however the evidence of the eye-witness, namely, P.W.5 relating to assault on the head of the deceased by the appellant using an axe remains un-demolished. She has also indicated about the dispute between the appellant and the deceased over taking of liquor. Interestingly no suggestion has been given to her that she has been deposing falsely as she happens to be a close relation of the deceased. The version of P.W.5 relating to attack on the head of the deceased gets corroborated from the version of the doctor conducting post mortem examination, namely, P.W.4, who has clearly stated that the cause of death was due to injury to the vital centres of the brain and the injuries described by him are sufficient to cause death in ordinary course of nature. He has further testified that the axe produced before him can cause the injuries noted on the body of the deceased. Further, from the chemical examination report under Ext.14, it is clear that the blood of human origin of Group-A has been found on the axe as well as on the towel (M.O.IV) and underwear (M.O.V) of the deceased. All these clearly point out the appellant to be the author of the crime." *(Para 9)*

For appellant : Mr. S.K.Mohapatra
For respondent : Ms. Samapika Mishra, Addl.Standing Counsel.

JUDGMENT Date of Judgment: 25.06.2018

BISWAJIT MOHANTY, J.

The present appeal is directed against the judgment dated 28.5.2008 passed by the learned Adhoc Additional Sessions Judge, Fast Track Court, Rourkela in Sessions Trial Case No.8/2 of 2008 in convicting the appellant under Section 302 of the Indian Penal Code. The appellant has also challenged the consequential sentences of imprisonment for life and of direction for payment of fine of Rs.10,000/-, in case of default in making payment, to undergo R.I. for six months more.

2. The case of the prosecution as revealed from the F.I.R. (Ext.3/1) is as follows:

P.W.3 (informant), who is the domesticated son-in-law of the deceased Budhu Lakra when returned to his in-laws' house on 23.10.2007 at around 2.30 p.m., saw her mother-in-law (P.W.5) crying. P.W.5 intimated to him that on the same date around noon when his father-in-law was returning from thrashing floor, on the road he was assaulted by the appellant by means of an axe (M.O.II) and accordingly, he succumbed to the injuries. Hearing this, P.W.3/informant rushed to the spot and saw his father-in-law, namely, Budhu Lakra lying dead on the road. He noticed injuries on the head and back of the deceased inflicted by the axe. After committing the offence, the appellant had fled away. After the village people were

intimated about the incident, they came to the spot. Accordingly, he reported the matter to Kuarmunda Out Post at 5.00 p.m. on 23.10.2007 and after making necessary station diary entries, the F.I.R. was sent to Biramitrapur police station for its registration. Accordingly, the F.I.R. under Ext.3/1 was registered at Biramitrapur police station at 6.30 p.m. on the same day. After registration of the case, the investigation commenced.

During course of investigation, the I.O.(P.W.8) examined P.W.3 and scribe of the F.I.R.-P.W.6 and other witnesses, visited the spot and later on continued his investigation on the next day morning. In course of such investigation, he seized blood stained earth, weapon of offence stained with blood lying at the spot, conducted inquest over the dead body and sent the same for post mortem examination. He also seized the wearing apparels of the deceased, namely, M.O.IV and M.O.V, and upon arrest of the appellant on 24.10.2007, he seized the wearing apparels of the appellant, recovery of which was given by the appellant himself from a concealed place. He also sent a number of seized materials for chemical examination and after completion of investigation, submitted charge sheet against the appellant and accordingly, the appellant stood trial for committing an offence punishable under Section 302 of Indian Penal Code.

3. The prosecution in order to bring home the charge examined as many as eight witnesses and exhibited fourteen documents. P.W.1 is a post occurrence witness. P.W.2 is a witness to the seizure. P.W.3 is the informant. P.W.4 is the doctor, who conducted the post mortem examination. P.W.5 happens to be the wife of the deceased and mother-in-law of the informant (P.W.3). P.W.6 is the scribe of the F.I.R. P.W.7 claims to be a witness to the disclosure statement under Ext.7/1 and witness to the seizure under Ext.1/2. P.W.8 is the Investigating Officer. None has been examined from the side of the appellant and nor any document has been exhibited on his behalf. While from the side of the prosecution, five material objects were marked, no material objects have been marked on behalf of the appellant.

4. The plea of the appellant was one of the complete denial.

5. The learned trial Court after scanning the evidence on record, came to hold that prosecution has succeeded in establishing the ingredients of Section 300, IPC against the appellant beyond reasonable doubt and accordingly, convicted him under Section 302, IPC.

6. Mr. S.K.Mohapatra, learned counsel for the appellant submitted that the learned court below has gone wrong in recording the conviction of the appellant relying on the testimony of P.W.5 as she happens to be a relative of the deceased. Secondly, he submitted that the F.I.R. under Ext. 3/1 should be totally ignored on account of testimonies of P.Ws.3 and 6 as both of them have admitted in the cross-examination that the F.I.R. under Ext.3/1 was prepared as per dictation/saying of the police. Further, the informant (P.W.3) has himself made it clear that he does not

know the contents of the F.I.R. In such background, Mr. Mohapatra, learned counsel for the appellant submitted that once the substratum of the prosecution case goes, the learned trial court has gone wrong in not treating the entire prosecution case to have collapsed. Lastly and alternatively, he submitted that conceding for a moment but not admitting that the appellant had assaulted the deceased but since such assault took place under an inebriated condition, therefore it cannot be said that the appellant had the intention to cause death. In such background, he prayed that the present Jail Criminal Appeal should be allowed and the appellant should be set at liberty.

7. Ms. Samapika Mishra, learned Addl. Standing Counsel on the other hand defended the impugned judgment and submitted that the submission made by Mr. Mohapatra cannot be accepted as there is no legal principle that the testimony of an eye-witness ought to be ignored merely because such witness happens to be a relative of the deceased. In this context, she further submitted that the version of P.W.5 has been well corroborated by the versions of the witnesses like P.Ws.3 and 4. Secondly, she submitted that the F.I.R. cannot be treated as a compendium of the entire prosecution case and merely because in cross-examination, both P.Ws.3 and 6 have stated that the F.I.R. under Ext.3/1 was prepared as per the dictation of the police that would not imply the entire prosecution case to be false, particularly, when testimony of P.W.5, who happens to be the eye-witness to the occurrence remains un-demolished. With regard to last submission of Mr. Mohapatra, she pointed out that such submission has no legs to stand as there is no evidence to show that the appellant committed the offence under an inebriated condition. She further submitted that the finding of human blood of Group-A on the Tangia (M.O.II) as well as the wearing apparels of the deceased under M.O.IV and M.O.V only reflects that it is the appellant making use of axe, has committed the crime and for which he has been correctly convicted by the learned trial court.

8. In order to appreciate the submissions of both the counsels, let us scan the evidence on record.

However, before entering into such an exercise, let it be noted that the homicidal nature of death of the deceased Budhu Lakra has remained undisputed.

P.W.1 is a post occurrence witness, who has seen the deceased lying on the ground with bleeding injury on his head and back.

P.W.2 is a witness to the seizure of Tangia and the wearing apparels of the appellant. But in the cross-examination, he says that he does not know about the contents of the seizure list.

P.W.3, who happens to be the informant has testified that the police seized the blood stained earth, sample earth and Tangia from the spot and he signed over the same at Exhibit-2. However, in cross-examination he says that he does not know about the contents of the document over which his signature was taken and he

appended such signature as per saying of the police. On re-examination on recall, he broadly corroborated his version as made in the F.I.R. and stated that after ascertaining about the incident from P.W.5, he went to the spot and found the dead body of his father-in-law on the road with bleeding injuries on the head and back and thereafter he went to the police station and P.W.6 scribed the F.I.R. as per his saying and on understanding the contents of the same, he signed the same with Ext.3 as his signature. However, in the cross-examination, he stated that the F.I.R. was prepared by P.W.6 being dictated by the police and he has no knowledge about the contents. Such testimony of P.W.3 greatly affects his credibility.

P.W.4 is the doctor, who conducted post mortem examination. He found the following injuries on the body of the deceased.

> "1. Incised wound-4"x ½" x 2" bone depth over scalp and skull (left parietal) and brain material was protruding outside scalp.
>
> 2. Incised would-3" x ½" x 3" over left pinna.
>
> 3. Incised would-3" x ½" penetrating to thorax with 9th rib cut through on the right side".

He further stated that the brain was cut through and such injury corresponds to injury no.1 and there was bleeding injury inside the brain. Right posterior chest wall had an incised wound corresponding to injury no.3 and he opined that the cause of death was due to injury on the vital centres of the brain and hemorrhage from all the sides of the injuries. All the injuries were ante mortem in nature and were sufficient to cause death in ordinary course of nature. He also testified that time since death was within 24 hours prior to post mortem examination. He proved the post mortem report as Ext.4. He further testified that as per the requisition of the I.O., he examined the axe and opined that the injuries detected are possible with the axe produced. Such opinion was marked as Ext.5. P.W.4 was not cross-examined by the defence. However, upon a query by the Court, he made it clear that the injuries were caused due to assault by external human force with sharp cutting weapon.

P.W.5 is the widow of the deceased and is the eye-witness to the occurrence. As per her testimony, she had seen the appellant assaulting her husband by means of a Tangia on his head. She saw the incident when she came out after hearing the shout of the husband. Her husband had sustained bleeding injury and died immediately. On seeing her, the appellant fled away leaving the Tangia near the dead body. After returning of P.W.3, she told the incident to him. She testified that there existed some dispute between her deceased husband and the appellant. In the cross-examination, she has stated that none was present near her house when the incident took place and that there existed no other house near her house. While denying existence of any land dispute between the appellant and the deceased, she stated that the dispute between them was on account of taking of liquor. She also admitted existence of visiting terms between them and stated that the appellant was

loitering here and there like mad. She denied the suggestion that no such incident had taken place and that the appellant had not assaulted her late husband in Tangia and that she had not seen the incident and he was deposing falsehood.

P.W.6 is the scribe of the F.I.R. Though in examination-in-chief he has stated that P.W.3 had approached him to write down the F.I.R. and accordingly as per his instruction, he has prepared the F.I.R. under Ext.3/1, however, in the cross-examination he has stated that the F.I.R. was scribed by him at the police station as per saying of the police. This clearly affects his credibility. However, he denied a suggestion that P.W.3 has never told him about the appellant assaulting the deceased.

P.W.7 happens to be a social worker, who speaks of confession by the appellant before the police and leading to discovery of wearing apparels of the appellant from a concealed place in jungle. However, in the cross-examination he has stated that when the appellant did not tell anything about the incident, the police beat him four to five times and after such beating, he confessed his guilt and offered to give recovery. Further, he has stated that he has not signed any paper at the police station. All these throw a great cloud on the disclosure statement of the appellant.

P.W.8, who happens to be the I.O. has stated that P.W.3 has lodged a written report on 23.10.2007 alleging that the appellant has killed the father-in-law by assaulting him with a Tangia. After getting such F.I.R., he made the station diary entry and sent the same to the Biramitrapur police station for its registration as Ext.3/1. During course of investigation, he examined P.Ws.3 and 6 and commanded one constable Indramani Patra to guard the spot which he visited at 6.30 p.m. He also examined witnesses at the spot and recorded their statements. On the next day i.e. 24.10.2007 as per his direction, photographs of the deceased were taken and he seized the blood stained earth, weapon of offence vide seizure list Ext.2/1. He also held inquest over the dead body at 8.00 a.m. and found injury on the body of the deceased. Thereafter, he dispatched the dead body to P.W.4 and at 11.45 a.m. of 24.10.2007, he arrested the appellant from his house, who confessed to the crime and offered to give recovery of his wearing apparels as per the statement under Ext.7/1. Accordingly, the wearing apparels of the appellant, namely, lungi and banion were seized and the same have been marked as M.O.I and M.O.III. Thereafter, he seized the wearing apparels of the deceased, which have been marked as M.O.IV and M.O.V. Thereafter, he made a query to P.W.4 by sending M.O.II (axe) to know whether the injuries on the deceased can be possibly made with the said weapon. P.W.4 opined in affirmative. On 29.10.2007 he prayed to S.D.J.M.,Panposh to pass order for sending the incriminating materials for chemical examination vide Ext.12. After passing of the order, he dispatched all the materials to the RFSL, Sambalpur for chemical examination vide forwarding letter under Ext.13 and Ext.14 is the chemical examination report and on completion of investigation, he submitted the charge sheet. In cross-examination, he testified that

after conducting investigation at the spot on 23.10.2007, he came back to the outpost directing guarding of the spot by the constable. He examined the wife of the deceased (P.W.5) and others and recorded their statements. He denied a suggestion that the appellant being assaulted by him made confessional statement. Though P.W.8 speaks of recording of confessional statement in presence of the witnesses and though the disclosure statement Ext.7/1 refers to P.Ws.2 and 7 as witnesses, however P.W.2 is silent on such disclosure statement and leading to discovery and as indicated earlier P.W.7 has stated that the statement was made under coercion. Therefore, much importance cannot be attached to the disclosure statement under Ext.7/1 and recovery of M.O.I and M.O.III.

9. An analysis of evidence as indicated above would show that though the evidence of P.Ws.3, 6 and 7, no way help the prosecution, however the evidence of the eye-witness, namely, P.W.5 relating to assault on the head of the deceased by the appellant using an axe remains un-demolished. She has also indicated about the dispute between the appellant and the deceased over taking of liquor. Interestingly no suggestion has been given to her that she has been deposing falsely as she happens to be a close relation of the deceased. The version of P.W.5 relating to attack on the head of the deceased gets corroborated from the version of the doctor conducting post mortem examination, namely, P.W.4, who has clearly stated that the cause of death was due to injury to the vital centres of the brain and the injuries described by him are sufficient to cause death in ordinary course of nature. He has further testified that the axe produced before him can cause the injuries noted on the body of the deceased. Further, from the chemical examination report under Ext.14, it is clear that the blood of human origin of Group-A has been found on the axe as well as on the towel (M.O.IV) and underwear (M.O.V) of the deceased. All these clearly point out the appellant to be the author of the crime.

10. Now to the contentions raised by Mr. Mohapatra, learned counsel for the appellant. His first submission was that since P.W.5 happens to be the wife of the deceased, her version as eye-witness ought to be ignored. There is no principle of law that the evidence of a witness, who happens to be a relative of the victim of the crime ought to be discarded. Rather it is settled that when a witness is a close relative, his/her evidence has to be scrutinized critically and carefully. Here, P.W.5 is a natural witness to the occurrence, who has clearly testified about the incident and the assault on the head of the deceased. P.W.4 doctor in his post mortem report clearly indicates about injuries on the head with an opinion that the cause of death was on account of injury on the vital centres of the brain. Thus, to a large extent he corroborates the version of P.W.5. With regard to lack of any independent corroboration by any co-villager, it may be noted here that P.W.5 in her cross-examination has clearly stated that there existed no other house near her house. Therefore, it is not unnatural not to get a neighbour as a witness to the occurrence under such circumstances. However, P.W.1, a co-villager also makes it clear that the deceased suffering injury on the head. Further, as indicated earlier no suggestion

has been given to P.W.5 that she is deposing falsely as the deceased happens to be a close family relative. Further, the testimony of P.W.5 also indicates some motive to carry out the assault. It is also well settled that the conviction can be based on the testimony of a single eye-witness, who is wholly reliable. Here we have no doubt in our mind that the P.W.5 has testified truthfully. Therefore, we refuse to accept the first submission made by the learned counsel for the appellant vis-à-vis acceptance of testimony of P.W.5. With regard to second submission of learned counsel for the appellant that once the credibility of the F.I.R. stands demolished in view of the testimonies of P.Ws.3 and 6, the entire story of the prosecution should have disbelieved, we are of the considered opinion that the same is not a sound proposition of law. As rightly contended by Ms. Mishra, learned Addl. Standing Counsel, the F.I.R. is not a compendium of entire prosecution case and merely because the credibility of the same is affected, prosecution case cannot be said to have collapsed completely particularly when version of the eye-witness like P.W.5 remains un-demolished and well corroborated. With regard to last and alternate submission of Mr.Mohapatra, learned counsel for the appellant that since the act was committed under an inebriated condition, there was no intention to commit murder and accordingly the appellant cannot be held guilty under Section 302 I.P.C., we will only say that this alternative submission of Mr. Mohapatra has no legs to stand inasmuch as there exists no evidence on record to show that the act was committed under the influence of liquor. Further, the nature of injuries inflicted on the vital part of the body of the deceased clearly show the force with which the attack was carried out with the help of axe. This clearly gives out the intention of the appellant. Further, the doctor has clearly testified that all the injuries were possible by the axe and were sufficient in ordinary course of nature to cause death. All these clearly make out a case as rightly concluded by the learned court below under Section 300 I.P.C.

11. In view of the foregoing discussions, we are not inclined to interfere with the impugned judgment and sentences passed by the learned Adhoc Additional Sessions Judge, Fast Track Court, Rourkela in Sessions Trial No.8/2 of 2008 and accordingly, we dismiss the Appeal. L.C.R. be sent back forthwith.

2018 (I) ILR - CUT-1084

BISWANATH RATH, J.

O.J.C. NO.5399 OF 1993

M/S.FERRO SCRAP NIGAM LTD., ROURKELA, REPRESENTED BY ITS M. D. .....Petitioner

.Vrs.

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

ORISSA MUNICIPAL ACT, 1950 – Section-131(I) (kk) – Levy of an Octroi on goods brought within the limits of a Municipal area of Rourkela for consumption, use or sale therein – Consignments for use involved in the assessment of Octroi is either loader, dozer, bulldozer or heavy earthmoving equipments – Petitioner's plea that levying Octroi by including earth moving equipments as Motor Vehicle, is contrary to the definition involving Orissa Municipal Act and Section 2, Clause 28 of the Motor Vehicles Act, 1983 – Government in the department of Housing & Urban Development has accorded sanction of imposition of Octroi on goods brought within the limits of the district of Sundargarh for consumption, use or sale therein of the items indicated therein by way of a Notification – Nobody challenges to the notification – Interpretation of the various provisions of Orissa Municipal Act and Motor Vehicles Act – Held, there has been right demand of Octroi involving the items involved by the Municipal Authorities.

"Taking the whole above into consideration, this Court finds, there remains no dispute that each of the items involved herein is in the use of the petitioner-Company after being brought the petitioner for being used and/or consumed within the Notified Council Area and further looking to the provision at Section 131(1) of the Act and the proviso therein, the State Government has the power to charge Octroi. It is as a consequence, Government in its legislative wisdom has brought a Notification for charging Octroi involving the particular item as clearly appearing in Annexure-10 not being challenged by anybody as of now has a binding force on all parties concerned, and therefore, there has been right demand of Octroi involving the items involved by the Municipal Authorities.". (Para 10)

Case Laws Relied on and Referred to :-

1. 1992 Supp.(3) SCC 133 : M/s.Central Coal Fields Ltd. V. State of Orissa & Ors.
2. AIR 1968 Orissa 1 (V 55 C 1) : Messrs Bolani Ores Ltd. & Anr. v. State of Orissa represented by the Collector, Keonjhar
3. AIR 1985 Orissa 263 : M/s. Binayak Sabatho& Sons v. Municipal Council,Berhampur & ors.
4. AIR 1968 Orissa 1 (V 55 C 1) : M/s.Bolani Ores Ltd. & Anr. vrs. State of Orissa & Ors.
5. AIR 1989 Ori 76 : Nabin Chandra Narayan Das vrs. Dhenkanal Municipality & Anr.
6. AIR 1963 SC 906 : Burmah Shell Oil Storage & Distributing Co. India Ltd. Vrs. The Belgaum Borough Municipality
7. AIR 1969 Gujarat 344 : Jafarabad Municipality vrs. Kathiawar Industries Ltd.,

For Petitioner : M/s. S.D.Das, Sr.Advocate, D.Mohanty, H.S.Satpathy, D.K.Mallik, D.R.Bhatta, D.R.Sundaray, A.N.Sahu & M.Panda

For Opp. Party. : K.K.Mishra, Addl. Govt. Adv.
M/s. P.K.Nayak, H.B.Dash, A.S.R.Dash & G.Mohapatra.

JUDGMENT Date of Hearing : 18.04.2018 Date of Judgment : 18.06.2018

BISWANATH RATH, J.

This writ petition involves a challenge to the orders passed, vide Annexures-12, 13 and 14. Annexure-12 is a demand involving the petitioner on the non-payment of the outstanding amount indicated therein towards payment of

Octroi involving five consignments. Annexure-13 is an order passed by the Executive Officer considering the objection of the petitioner in the matter of collection of Octroi from the petitioner on particular head following a development through O.J.C.No.2887/1992 and Annexure-14 involves again a demand for payment of outstanding dues of Octroi involving the petitioner.

2. Short facts involving the case are that the petitioner is a Government of India undertaking having its Head Office at Bhilai in erstwhile Madhya Pradesh, presently, in Chhattisgarh and having one of its Plant Office at Rourkela in the district of Sundargarh in the State of Odisha. Petitioner-company is mainly based for collection and processing of scrap, which is ultimately used by the respective Steel Plants for production of steel. The petitioner-company for processing its plant within the premises of different Steel Plants and one of such plants situates within the premises of Rourkela Steel Plant. For using in its factory premises, petitioner-company purchased a lot of machineries/equipments and the said machineries/ equipments are purchased from different machinery manufacturers and uploaded in the factory premises of the petitioner at Rourkela**.** After being transportation of items/equipments by the Manufacturing Company, the petitioner-Company is plying such machineries inside its factory premises in Odisha. Dispute herein involves transportation of equipments in question to the work site of the petitioner-company at Rourkela and a consequential demand taking place in the year 1990 when Octroi Department of Notified Area Council (Steel Township), Rourkela alleged to have been demanded payment of Octroi on the consignments without any reason, basis and foundation. One of such consignments was not allowed to enter into the Notified Area Council area of Rourkela. Petitioner-company compelling with the situation gave an undertaking to deposit the duty, if any, is found to be leviable after verification and sent its officials to the office of the opposite party no.3 for having necessary discussion. In the process, the petitioner was issued with a demand notice levying 1% of the value as Octroi Tax, vide Annexure-2. Finding difficulty in receiving the consignment at its premises, the petitioner was also compelled to give undertaking to the effect that payments as and when required for making over will be after discussions with the opposite party no.3 on the legality of the claim arrived amicably. While the matter stood thus, opposite party no.3 wrote a letter to the petitioner indicating therein that the consignment brought inside the Notified Area Council is leviable with Octroi by issuing correspondence at Annexure-5. Petitioner-company wrote back seeking for extension of time. In the meantime, there have been several correspondences involving the demand. Finding no resolve on the issue involved and seeing opposite party no.3 determined to collect Octroi Tax and on the petitioner's failing to make the opposite party no.3 understand that the consignments involved are not leviable with Octroi Tax, the petitioner-Company filed a writ petition in this Court in O.J.C. No.2887 of 1992, which was disposed of on 5.11.1992, directing the parties to work out their differences on verification of the materials to be supplied by the petitioner.

Consequent upon such development, the matter was discussed in between the petitioner and the opposite party no.3. On rejection of the claim of the petitioner, the opposite party no.3 went on communicating its resolve on the validity in charging of the Octroi Tax. Consequently, a demand notice was also issued vide Annexure-14 resulting filing of the present writ petition.

3. Sri S.D.Das, learned senior counsel appearing for the petitioner reiterating all the developments taken place in between and as narrated hereinabove, challenging to the demand of the opposite party no.3 submitted that the opposite party no.3 levying Octroi by including the petitioner's earth moving equipments as Motor Vehicle, is contrary to the definition involving Orissa Municipal Act and Section 2, Clause 28 of the Motor Vehicles Act, 1983. Besides, the claim also remains contrary to the Orissa Gazette dated 22nd June, 1984 where the notification clearly includes the items involved in the demand on the premises that the equipments involved herein should be termed as off road equipments. Sri Das, learned senior counsel submitted that levy of Octroi on the items involved becomes bad. Sri Das also contended that for the protection in the Constitution of India at Article 14 for equality before law or equal protection of law within the territory of India being overlooked by the opposite party no.3, particularly, when there is exemption of such equipment to Rourkela Steel Plant under Section 133 of the Orissa Municipal Act, involving the similar equipments making a demand involving the petitioner attracts violation of Article 14 of the Constitution of India. Sri Das, learned senior counsel further also submitted that in the event the demand of the opposite party no.3 is encouraged, it will lead to detrimental to the growth of the industry. It ultimately also affects the public at large, as stated by Sri Das. Taking this Court to the Industrial Policy Resolution,1989, Sri Das, learned senior counsel contended that for the specific exemption involving Industrial Policy Resolution, 1989, the Notified Area Council is estopped by law from withdrawing or not enforcing the provision contained in the Industrial Policy Resolution, 1989. Taking this Court to decisions in the cases of ***M/s.Central Coal Fields Ltd. V. State of Orissa and others,*** *1992 Supp.(3) SCC 133*, ***Messrs Bolani Ores Ltd. and another v. State of Orissa represented by the Collector, Keonjhar,*** *AIR 1968 Orissa 1 (V 55 C 1)* and **M/s.** ***Binayak Sabatho & Sons v Municipal Council, Berhampur and others,*** *AIR 1985 Orissa 263,* Sri Das, learned senior counsel contended that the decisions have the direct application to the case of the petitioner. In the above premises, Sri Das, learned senior counsel prayed this Court for interfering with the impugned demand and setting aside the same.

4. Sri Nayak, learned counsel appearing for the opposite party no.3 on the other hand taking this Court to the Gazette Notification at Annexure-10 and for the detailed discussion held by the Executive Officer, Notified Area Council (Steel Plant), Rourkela appearing at Annexure-13 contended that for the nature of the instrument involved herein strictly comes under Clause 12 and Clause 15 of the

Gazette Notification dated 30th May 1984 issued by the Housing and Urban Development Department and, therefore, contended that the petitioner has no escape from the liability involved herein. Petitioner's claim on the basis of the benefit of the Industrial Policy Resolution, 1989 available at page 35 of the brief, Sri Nayak submitted that the benefit of Industrial Policy Resolution, 1989 is provided as a matter of inception to the new industrial unit and as such, has no application to the industries existed long since. Therefore, there is no question of application of Industrial Policy Resolution, 1989 to the case at hand. So far the petitioner's claim on the basis of decisions is concerned, Sri Nayak opposed the claim of the petitioner on the premises that the decisions cited by the learned counsel are all involving the issue in relation to Motor Vehicle Taxation Act, 1975 or the Motor Vehicle Act involved therein. Sri Nayak, learned counsel also contended that the decisions cited herein above have no application to the case at hand. In the circumstances, Sri Nayak, learned counsel submitted that there being no infirmity in the impugned order and the demand, there is no scope for this Court for interfering in either of the impugned orders.

5. Considering the rival contentions of the parties, this Court finds the matter strictly involves herein is with regard to levy of the Octroi Tax by the Notified Area Council (Steel Township), Rourkela on the entry of five consignments, vide Annexure-13 for use of the same inside the Notified Area Council area. From the documents appended to the writ petition, this Court finds the consignments involved in the assessment of Octroi of levy is either loader, dozer, bulldozer or heavy earthmoving equipments. It is at this stage, since relevant this Court takes note of certain provisions from the Orissa Municipal Act, 1950. Section 3(3) of the Orissa Municipal Act, 1950 reads hereunder :-

> "Section 3(3)-"Carriage" means any wheeled vehicle with springs or other appliances acting as springs, which is used for conveyance of human beings and includes any kind of bicycle, tri-cycle, rickshaw, cycle-rickshaw, but does not include a motor vehicle within the meaning of the Motor Vehicle Act, 4 of 1939."
>
> Section 3(29) of the Orissa Municipal Act, 1950 reads hereunder :-
>
> "3(29) "Public road" means any street, road, square, court, allay, passage or riding path over which the public have a right or way, whether a thoroughfare or not, and includes-
>
> (a) the roadway over any public bridge or causeway;
>
> (b) the footway attached to any such road, public bridge or causeway; and
>
> (c) the drains attached to any such road, public bridges or causeway and the land, whether covered or not by any payment verandah or other structure, which lies on either side of the roadway up to the boundaries of the adjacent property whether that property is private property or property belonging to the State;
>
> Section-131(I)(kk) of the Orissa Municipal Act, 1950 reads hereunder :-
> "131(I)(kk)- An Octroi on goods brought within the limits of a Municipal area for consumption, use of sale therein."

The definition at Sections 3(3) and 3(29) of the Orissa Municipal Act no doubt did not include motor vehicle within the meaning of Section 4 of the Motor Vehicles Act, 1939. But however reading of Sub-Section (29) of Section 3 of the Orissa Municipal Act, it is observed, it has a wider inclusion. Similarly, coming to the provision at Sub-Section (1) of Section 131 of the Orissa Municipal Act, this provision gives a right to the Municipal Authority the power of imposition of different types of taxes including Octroi Tax as specifically provided in Section 131(kk) but however with a rider that no such imposition of Octroi shall be made without sanction of the State Government. This Court here finds, the document at Annexure-10 appended to the writ petition by the petitioner lacks no doubt that Government in the department of Housing & Urban Development exercising the power conferred on it by proviso to Clause-kk of Sub-Section (1) of Section 131 of the Orissa Municipal Act, 1950 has accorded sanction of imposition of Octroi on goods brought within the limits of the district of Sundargarh for consumption, use or sale therein of the items indicated therein. Clauses-12, 15 & 64 of the Government's order dated 30th May, 1984 appearing at Annexure-10 bring the following :-

> "12. Motor vehicles, Motor Car, Jeep, Tractor, Rickshaw and Trailer Motor Cycle, Scooter, Auto Rickshaw etc.
>
> 15. Spare parts of Motor car, Trucks, Motor cycles and other vehicles as detailed in item 12 not including dozers and dumpers and heavy earth moving machinery.
>
> 64. All kinds of cycles and watches and their parts, tyres, tubes, flaps, except for heavy vehicles for industrial use."

Reading of serial no.12 therein, it appears, Government has sanctioned the imposition of Octroi Tax on motor vehicles etc. Similarly, reading of serial no.15 makes it clear that there shall be no Octroi Tax in respect of spare parts involving dozers, dumpers and heavy earth moving machineries. Reading of the above two provisions makes it clear that the word 'motor vehicle' has a wider inclusion and also includes dozers, dumpers and heavy earth moving machineries for its clear indication in the Section 15 taken note herein above. Similarly, reading of serial no.64, the same only prescribes exclusion of charging of Octroi Tax for spare parts, tyres, tubes, flaps etc. used in heavy vehicles for industrial use. A microscopic scan of the provision at serial no.64, it further claries that this item keeps the parts, tyres, tubes and flaps only involving heavy vehicles for industrial use away from Octroi Tax.

6. Now coming back to the definition of "motor vehicle" under the Motor Vehicles Act, 1988, Sub-Section 28 of Section 2 of the Motor Vehicles Act defines as follows :-

> "2-Definitions (28)- "motor vehicle" or "vehicle" means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type

> adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding [twenty-five cubic centimeters]"

This Court also finds that this definition has a bearing on the case for the followings :-

For the petitioner's claiming exemption of Octroi Tax for the items involved herein on the premises that for the particular type of item involved herein and more specifically for being utilized only in industrial premises and not coming to road, this Court taking a similar claim on similar situation in the case of ***M/s.Bolani Ores Ltd. & another vrs. State of Orissa & others,*** AIR 1968 Orissa 1 (V 55 C 1) but however involving a question of registerability of such items under the Motor Vehicles Act, particularly taking the case of dumpers, bull-dozers and scrappers engaged to remove the overburdened earth and are pushed by bull-dozers. Shovels as already said are used to dig the ore. Paragraph-17 of the said decision the Hon'ble Court observed as follows :-

> "17. xxx xxx From the evidence it appears that Trax Cavetrors (item No. 4) are used for loading dumpers and bulldozers (items Nos. 5 and 6). The scrapers are engaged to remove the over-burdened earth and are pushed by bulldozers. Shovels (item No. 9) as already said are used to dig the ore. Thus, none of these machineries are adapted or suitable for any use on the roads, nor have they any purpose to serve on the roads. These items Nos. 4 to 9, that is (4) Caterpillar 955 Trax Cavetror, (5) Caterpillar D/7 Tractor Bull-dozers, (6) Caterpillar D/6 Bull-dozers, (7) Caterpillar 619 Scrapers. (8) Euclid 8/7 scraper and (9) Unikop one cubic Meter shovel do not therefore come within the ambit of the definition of motor vehicle and are not liable for registration under Section 22 of the Act.

From the reading of the aforesaid paragraph, it clearly appears, this Court in its Division Bench vide the above judgment has already held that rockers and dumpers must, therefore, be held to be motor vehicles within the meaning of the Act. The Hon'ble Division Bench on the items such as Trax Cavetrors, bull-dozers and scrapers observed that there may not be coming within the ambit of definition of Motor Vehicle. The view of this High Court is based on analysis that since these items are not adapted or suitable for any use on the roads and not having any purpose to serve on the roads are not motor vehicles. This Court clarifies here that the contingency involved in the aforesaid writ petition was registerability of the items involved therein under the Motor Vehicles Act and nothing beyond and as there is no such question of Octroi Tax involved therein, as such this decision is of no much relevance to the case at hand for the case at hand involves imposition of Octroi Tax. In a subsequent development, Hon'ble apex Court in a batch of cases reported in ***1992 Supp.(3) SCC 133*** taking up the question whether dumpers and rockers with rubber tyres used for transportation of goods within the enclosed factory premises are liable for taxation in paragraphs-7 & 9 observed as follows :-

> "7. Learned counsel for the appellants in these appeals have not challenged the view of the High Court regarding vires of the impugned Act before us or to its retrospectivity but have addressed us only on the fact situation to contend that the Dumpers (which includes Rockers)

are vehicles not adapted for use upon roads and, therefore, they are outside the scope of Section 2(b) of the impugned Taxation Act, 1975 and hence not within the ambit of the charging Section. Section 3(1) provides that subject to the other provisions of the Act, on and from the date of commencement of the Act, there shall be levied on motor vehicles, used or kept for use within the State, a tax at the rate specified under the Schedule. It is evident that the tax is chargeable on using or keeping for use a motor vehicle; a motor vehicle adapted for use on roads. Now it has to be seen whether Dumpers and Rockers are motor vehicles adapted for use on roads.

9. It would be appropriate now to mention that some documentary material was sent to us by the appellants by means of an affidavit after we had reserved judgment. That material is suggestive of the fact that Dumpers in some States are granted permission to run on public roads at a speed not exceeding 16 kms. per hour and on bridges and culverts at a speed not exceeding 8 kms. per hour. From this it is suggested that they have a minimum weight and safe laden weight fixed on some principles. Pictures of various types of Dumpers have also been sent to us which indicate prominently one factor that these Dumpers run on tyres, in marked contrast to chain plates like caterpillars or military tanks. By the use of rubber tyres it is evident that they have been adapted for use on roads, which means they are suitable for being used on public roads. The mere fact that they are required at places to run at a particular speed is not to detract from the position otherwise clear that they are adapted for use on roads. The very nature of these vehicles make it clear that they are not manufactured or adapted for use only in factories or enclosed premises. The mere fact that the Dumpers or Rockers as suggested are heavy and cannot move on the roads without damaging them is not to say that they are not suitable for use on roads. The word 'adapted' in the provision was read as 'suitable' in Bolani Ores case by interpretation on the strength of the language in Entry 57, List-II of the Constitution. Thus on that basis it was idle to contend on behalf of the appellants that Dumpers and Rockers were neither adaptable nor suitable for use on public roads. Thus on the fact situation, we have no hesitation in holding that the High Court was right in concluding that Dumpers and Rockers are vehicles adapted or suitable for use on roads and being motor vehicle per se, as held in Bolani Ores case, were liable to taxation on the footing of their use or kept for use on public roads; the network of which, the State spreads, maintains it and keeps available for use of motor vehicles and hence is entitled to a regulatory and compensatory tax (Exemptions claimable apart). The appellants, therefore, in our view, have no case for grant of any relief in these appeals."

Here the Hon'ble apex Court ultimately in confirmation of subsequent view of the Orissa High Court involved therein deciding the dumpers and rockers whether need registration thereby come under the definition of 'Motor Vehicle' held on the fact situation, therefore, it must be held that dumpers and rockers are vehicles adapted or suitable for use on roads and being motor vehicles per se were liable to tax on footing of their use or kept for use on public roads. It appears, by this judgment of the Hon'ble apex Court, the decision of the Orissa High Court in M/s.Bolani Ores Ltd. (supra) has lost its force.

In view of the above development in the Hon'ble apex Court, there remains no doubt that the items involved, particularly, the dumpers and rockers come within the definition of 'Motor Vehicle".

7. It is at this stage, considering a decision of a Full Bench of this Court in the case of ***Nabin Chandra Narayan Das vrs. Dhenkanal Municipality & another*** reported in AIR 1989 Ori 76, this Court taking into consideration as to whether there can be levy of Octroi on cinematograph films brought from outside for exhibition in the cinema halls in different towns in Orissa considering the point involved herein after observing that the cinematographic films are brought within the Municipal Area for use/consumption, justified the notification bringing such item within the Clause-kk of Section 131(I).

8. This Court here involving the dispute involved herein likes to take note of certain other decisions of various courts, which are as follows :-

In the case of ***Burmah Shell Oil Storage & Distributing Co. India Ltd. Vrs. The Belgaum Borough Municipality*** reported in AIR 1963 SC 906 involving a question of levying Octroi on its petroleum products brought inside the Octroi limits for sale, the Hon'ble apex Court held "It is sufficient if the goods are brought inside the area to be delivered to the ultimate consumer in that area because the taxable event is the entry of the goods, which are meant to reach an ultimate user and consumer in the area. In the aforesaid case, Hon'ble apex Court again discussing the word, "terminal tax" was a kind of Octroi, observed as follows :-

"The word, 'Octroi' comes from the word "Octroyer" means 'to grant' and in its original use meant "an import", or "a toll" or "a town duty" on goods brought into a town. At first Octrois were collected at ports but being highly productive, towns began to, collect them by creating Octroi limits. They came to be known as "Town duties". These were collected not only on 'imports' but also on 'exports'.

In the aforesaid decision, the Hon'ble apex Court while discussing the word 'use' has observed as follows :-

> "There may be certain commodities which though put to use are not 'used up' in the process. A motor car brought into an area for use is not used up in the same sense as foodstuffs. The two expressions 'use' and 'consumption' together, therefore, connote the bringing in of goods and animals not with a view to taking them out again but with a view to their retention either for use without using them up or for consumption in a manner which destroys, wastes, or uses them up. In this context, the word 'consumption', as has been shown above, must receive a larger meaning than merely the act of consuming in the generally understood sense."

It is considering the applicability of the above case to the case at hand, this Court observed, for the facts involving the case at hand, the particular items involved herein are not only brought to the Notified Municipal Area within the Sundargarh District but are also brought for the purpose of use by the industry. Therefore, the decision has a direct application to the case at hand. In another

decision in ***Jafarabad Municipality vrs. Kathiawar Industries Ltd.,*** AIR 1969 Gujarat 344, Gujarat Court considering the question as to whether the salt manufactured by the plaintiff-company at its salts works and exported uncrushed or crushed was liable to Octroi Duty. The Gujarat High Court held as follows :-

> "…Therefore, "considering the purpose for which the uncrushed salt is brought and the effect on that salt of the accomplishment of that purpose there is no doubt that uncrushed salt is brought in for use by the factor and Octroi is leviable on the uncrushed salt so brought to the factory for crushing."

In another unreported decision of the Hon'ble apex Court in ***S.M.Ram Lal & Co.,*** a case involving wool sent for dyeing by the Head Office in Delhi to their factory in Faridabad township in the district of Gurugaon, the Hon'ble apex Court observed that unless it is shown that the wool was brought within the limits of the Notified Area Council, Faridabad Township, with the object of converting it into a different commercial commodity, it is not liable to Octroi.

The decision, vide AIR 1985 Orissa 263 as relied upon by Sri S.D.Das, learned senior counsel for the petitioner for the change in the facts situation has no application to the case at hand.

9. Taking into account the aforesaid decisions and further considering the admission of the petitioner in the case at hand that the items involved therein since claimed to be utilized in the industrial premises of the petitioner, the decisions referred to herein above including S.M.Ram Lal (supra) have a direct application to the case at hand.

10. Taking the whole above into consideration, this Court finds, there remains no dispute that each of the items involved herein is in the use of the petitioner-Company after being brought the petitioner for being used and/or consumed within the Notified Council Area and further looking to the provision at Section 131(1) of the Act and the proviso therein, the State Government has the power to charge Octroi. It is as a consequence, Government in its legislative wisdom has brought a Notification for charging Octroi involving the particular item as clearly appearing in Annexure-10 not being challenged by anybody as of now has a binding force on all parties concerned, and therefore, there has been right demand of Octroi involving the items involved by the Municipal Authorities, O.Ps.2 & 3.

11. Therefore, this Court while declining to interfere with the demand involved herein, vide orders under Annexures-12, 13 &14 since valid and refusing the prayer involved herein by the petitioner dismisses the writ application.

12. Since the petitioner is enjoying a conditional stay order against the Municipal Authorities not enforcing the demand under Anenxure-14 subject to the petitioner's depositing a sum of Rs.1,50,000/- on furnishing bank guarantee for Rs.2,00,000/-, this Court since dismissing the writ application directs the Municipal Authorities to receive the balance amount after deduction of Rs.1,50,000/- being

already paid by the petitioner following the interim direction of this Court along with interest @ 6% per annum from the date of deposit of the conditional amount of Rs.1,50,000/- only on the balance amount. The petitioner is also directed to deposit the balance amount within a period of fifteen days from the date of this order. The writ application stands dismissed with the above direction. However, in the circumstances, there is no order as to cost.

2018 (I) ILR - CUT- 1094

BISWANATH RATH, J.

W.P.(C). NO.18893 OF 2015

SASMITA KAR .....Petitioner

.Vrs.

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

RECURITMENT – Sikhya Sahayak – Advertisement has the specific condition that one will be entitled to 4 grace marks for each year and maximum for 5 years for previous experience – The language in the advertisement is very much clear and the only indication in this regard appears to be 4 grace marks will be awarded for each year and nothing beyond or behind – Petitioner has previous experience of 4 years 11 months 29 days – Claim of relaxation – Whether permissible – Held, No.

Considering the attachment of condition in the advertisement, the ratio in the above Hon'ble Apex Court's decision and further considering the claim of the learned Senior Counsel on rounding off of the year so as to complete benefit to the petitioner, this Court finds, there is no power provided in the statute nor was any such stipulation made in the advertisement and also in the statutory Rules permitting any scope for such rounding off or giving particular grace marks for any fraction of the year so as to bring up a candidate to the maximum requirement. In my considered view in the above circumstance, no such rounding off or relaxation was permissible. Condition in the advertisement being sacrosanct and having been applied in respect of all such candidates, there is no possibility of adding words to the said condition for providing or giving the extra benefit of rounding off or relaxation to the petitioner. If an advertisement is published with specific conditions and anybody is affected by the stipulations or has any doubt in the conditions stated therein, it is appropriate for such candidate to approach the competent authorities at the threshold of the interview and not after exhaustion of the interview process and after allowing the interview process to continue with such conditions. Further, law is also settled that once a candidate has accepted the conditions and appeared in the interview is estopped to make an attempt for alteration or interpretation for any such conditions." (Paras 10 & 12)

Case Laws Relied on and Referred to :-

1. (2015) 3 SCC 404 : Union of India (UOI) and others vrs. Surender Singh Parmar.
2. AIR 1990 S.C. 1381: Miss Shainda Hasan vrs. State of Uttar Pradesh & Ors.
3. (2011) 15 SCC 304 : Bhanu Pratap vrs. State of Haryana & Ors.

4. (2011) 15 SCC 304 : Bhanu Pratap vrs. State of Haryana & Ors.
5. AIR 1990 SC 1381 : Miss Shainda Hasan vrs. State of Uttar Pradesh & Ors.
6. (2000)7SCC372 : State of M.P. versus Pradeep Kumar .

For petitioner : Mr. Jayanta Rath, Sr. Advocate,
M/s. D.N. Rath, P.K. Rout.

For Opp.parties : Mr. D. Mohapatra, Standing Counsel.

JUDGMENT Date of Hearing :15.05.2018 Date of Judgment : 18.06.2018

BISWANATH RATH, J.

This is a writ petition seeking quashing of the order passed by the opposite party no.4 dated 01.10.2015 appearing at Annexure-7 and further directing the opposite parties to issue offer of engagement in favour of the petitioner as Sikhya Sahayak from the date persons placed below the petitioner in the merit list of 2006 was extended with such other benefits.

2. This is in the second round of litigation at the instance of the same petitioner involving non-engagement of the petitioner in the post of Sikhya Sahayak involving a recruitment of the year 2006. In the first round of litigation in W.P.(C) No.7520 of 2009, this Court while disposing of the writ petition in consideration of the case of the petitioner vide order dated 05.01.2015 directed as follows :-

> "Considering the nature of grievance, the writ petition is disposed of directing opp. party no.4- District Project Co-ordinator (SSA), Cuttack to consider and take a decision on petitioner's representation at Annexure-4 after giving opportunity of being heard to the petitioner within a period of two weeks from the date of submission of certified copy of this order along with a copy of the writ petition under intimation to her."

3. It is pursuant to the above direction of this Court, it appears that the District Project Office, Sarva Shiksha Abhiyan, Cuttack considered the case of the petitioner and on verification of materials made the following observations :-

> "A. Smt. Kar was engaged as Non Formal Education Facilitator vide order No.1429, dated 16th March 1996 of erstwhile Dist. Inspector of Schools, Salipur.
>
> B. Subsequently on abolition of the Non Formal Education Scheme, she was disengaged with effect from 31st March 2001 pursuant to order No.2318, dated 31st March 2001 of erstwhile Dist. Inspector of Schools, Salipur. As such incumbency of Smt. Kar (petitioner) under erstwhile Non Formal Education Scheme comes to 5 years 16 days.
>
> C. So inconsonance with the provisions laid during said recruitment year, Smt. Kar (petitioner) was entitled for 20 grace marks. However inadvertently she was awarded with 16 grace marks. As such her candidature could not came under zone of consideration."

Depending on the aforesaid observation, though the District Project Coordinator admitted non-selection of the petitioner as an inadvertent error, but on the premises that the petitioner never ventilated her grievance during the recruitment process at least till validity of the merit panel upto 29.10.2007 and further on the premises that there was no vacancy left to consider the candidature of the petitioner and thereby expressed his inability to accommodate the petitioner. Further taking aid

of the direction of this Court vide order dated 06.01.2009 passed in W.P.(C) No.11926 of 2008, submitted that for the aforesaid direction of this Court not only the vacancies occurred at the relevant point of time have been filled through fresh recruitment process, but in the meantime two additional recruitment processes vide different advertisement has already been done, however, nothing prevented the petitioner to participate in the fresh recruitment process as taken place in the meanwhile.

4. It is at this stage, this Court likes to take note of the facts involving the case at hand;

The petitioner is a trained Graduate and had applied for the post of Sikhya Sahayak pursuant to an advertisement issued by opposite party no.2 published in daily 'Sambad' on 13.10.2006 for engagement as Sikhya Sahayak. As per the advertisement for Cuttack Sadar and Municipal Limit, 59 posts of Sikhya Sahayak were notified. The consideration was made in terms of the Government Resolution dated 31.05.2006 lays down the procedure in the matter of selection of Sikhya Sahayak. As per the procedure laid down in the resolution dated 31.05.2006, 70% of posts were reserved for CT candidates and 30% posts were reserved for B.Ed candidates. Since the petitioner was a trained Graduate, she was to be considered against 30% quota. It was further stipulated therein that 33.3% of posts of each category are to be reserved for Women. Consequently, 18 posts in the 30% category fell to Women candidates and further considering the resolution etc., six posts fell to the Women category in the unreserved category. Referring to the clause contained in the advertisement at paragraph (ga), petitioner claimed that there is a clear mention that there is provision for benefit for the experienced candidate to the extent of their experience marks for a maximum of 5 years by 31.03.2001 and the candidates entitled to the benefit would be getting 4 additional marks for each year maximum to the extent of 20 marks in addition to the marks obtained in the interview process. Petitioner claimed that since she was engaged as Non-Formal Facilitator under Salipur Education district with effect from 16.03.1996 and continued till 31.03.2001 at Tirabindha Non-Formal Education Centre under Jignipur Gram Panchayat of Nischintakoili Block for which a certificate was also issued in favour of the petitioner by the District Inspector of Schools, she is entitled to full 20 marks following the above condition. Alleging non-selection of the petitioner, the petitioner has claimed that in spite of the petitioner having completed five years as Non-Formal Facilitator, instead of providing her 20 marks she has been awarded with 16 marks only and in the event proper marks could have been awarded to the petitioner, the petitioner would have secured 68.353 marks, i.e., 4 marks more than the marks awarded to her as 64.353%. The petitioner claimed that for the positioning of the petitioner on wrong calculation of marks, the petitioner has been prevented from getting into the job involved. Finding no way, she filed W.P.(C) No.7520 of 2009 which matter was disposed of by an order of this Court directing the opposite parties therein to consider the representation of the petitioner pending at their end.

5. Shri Rath, learned senior counsel appearing for the petitioner taking this Court to the Clause contained in Annexure-1 and further taking this Court to the period of working of the petitioner, submitted that there is calculational error by the authorities and in fact the petitioner would have been awarded with 20 marks for her completing 5 years as Non-Formal Facilitator. Taking this Court to the provisions involving Orissa Civil Service (Pension) Rules, 1992, particularly Rule-47(3) providing pattern of calculation in case of fraction of the year and the definition of year following the provisions in Orissa General Clauses Act, 1937, Shri Rath, learned senior counsel appearing for the petitioner contended that even assuming that the opposite parties calculated the working of the petitioner to be 4 years 11 months 29 days, following the aforesaid provisions, the working experience so far the petitioner should have been calculated to be of 5 years and thus, she should have been awarded 20 marks and thus selected. Shri Rath, again taking this Court to a decision of the Hon'ble Apex Court in the case of ***Union of India (UOI) and others vrs. Surender Singh Parmar,*** reported in (2015) 3 SCC 404, submitted that for the ratio decided therein, the decision has also a clear support to the case of the petitioner.

6. Shri D. Mohapatra, learned Standing counsel appearing for the School & Mass Education Department, however, referring to the direction of this Court in W.P.(C) No.7520 of 2009, W.P.(C) No.11926 of 2008 and further taking to the calculation aspect during the consideration of the case of the other candidates for the particular vacancy taking the plea that the petitioner in fact had not completed 5 years in total working as Non-Formal Facilitator and in fact her experience comes to be 4 years 11 months and 29 days, as such Shri Mohapatra, claimed that the action of the opposite parties in the award of 16 marks is justified. Shri Mohapatra, learned Standing counsel appearing for the School & Mass Education Department further taking this Court to the calculation aspect involving all the candidates, submitted that for securing of more marks by the other candidates than the petitioner and looking to the vacancy available at that point of time, the petitioner was kept away from consideration. Shri D. Mohapatra, learned Standing counsel appearing for the School & Mass Education Department further apart from producing the records to establish her working experience issue also relied upon two decisions of the Apex Court in the case of ***Miss Shainda Hasan vrs. State of Uttar Pradesh and others,*** reported in AIR 1990 S.C. 1381 and in the case of ***Bhanu Pratap vrs. State of Haryana and others,*** reported in (2011) 15 SCC 304, taking this Court to the discussions and the observations of the Apex Court, contended that for the support of the aforesaid two decisions in the case of official opposite parties, there is no room left for consideration of the case of the petitioner any further. Shri Mohapatra, also in the premises that no vacancy involving the year 2006 is available presently and further for there being two interviews already held in the meantime, submitted that the petitioner cannot be considered presently.

7. It is at this stage, this Court finds, disposal of the first round of litigation at the instance of the petitioner in W.P.(C) No.7520 of 2009 wherein this Court vide order dated 05.01.2015 while disposing of the said writ petition passed the following orders:-

> "Heard.
>
> Petitioner's case is that as certified by the District Inspector of Schools, Salipur under Annexure-2, the petitioner was working as a N.F.E. Facilitator under Salipur Education District from 16.3.1996 to 31.3.2001 at Tirabindha N.F.E. Centre. Pursuant to advertisement dated 13.10.2006 at Annexure-1, she submitted application for engagement as Sikshya Sahayak. In the advertisement, specific provision has been made for awarding 20 grace marks to Non-Formal Facilitator and Non-Formal Supervisor having C.T./B.Ed degree. However, in the final merit list at Annexure-3, the petitioner was awarded 16 marks grace as a result of which she was placed at serial no.15 instead of serial no.6. Thus, she has been illegally deprived of engagement. In this connection, petitioner submitted representation at Annexure-4 to opp. party no.4-District Project Co-ordinator (SSA), Cuttack. However, no action has been taken on the petitioner's representation.
>
> Considering the nature of grievance, the writ petition is disposed of directing opp. party no.4- District Project Co-ordinator (SSA), Cuttack to consider and take a decision on petitioner's representation at Annexure-4 after giving opportunity of being heard to the petitioner within a period of two weeks from the date of submission of certified copy of this order along with a copy of the writ petition under intimation to her."

There is another development involving W.P.(C) No.11926 of 2008 involving similar issue again involving same recruitment process, whereby this Court vide order dated 06.01.2009 while disposing the said writ petition passed the following orders:-

> "xxxxxxx not to fill up the vacancies of Shiksha Sahayaka from the selection list prepared in 2006. On the other hand, the authorities are directed to take expeditious steps for initiation of fresh recruitment process and candidates from the select list.xxxxx"

8. It is at this stage, this Court finds, following the aforesaid order, there were at least 3 fresh recruitment processes undertaken in the meantime. It is not known as to why the petitioner had not attended in either of the interviews or obtained at least some interim orders involving filling up vacancies involved therein. Be that as it may, this Court taking into account the direction of this Court involving W.P.(C) No.7520 of 2009 the Authorities in consideration of the case of the petitioner, thereafter have come to observe as follows :-

> "xxxx xxxxx xxxxxx
>
> Verified the materials / information on record, which reveals as follows :-
>
> A. Smt. Kar was engaged as Non Formal Education Facilitator vide order No.1429, dated 16th March 1996 of erstwhile Dist. Inspector of Schools, Salipur.
>
> B. Subsequently on abolition of the Non Formal Education Scheme, she was disengaged with effect from 31st March 2001 pursuant to order No.2318, dated 31st March 2001 of erstwhile Dist. Inspector of Schools, Salipur. As such incumbency of Smt. Kar (petitioner) under erstwhile Non Formal Education Scheme comes to 5 years 16 days.

> C. So inconsonance with the provisions laid during said recruitment year, Smt. Kar (petitioner) was entitled for 20 grace marks. However inadvertently she was awarded with 16 grace marks. As such her candidature could not came under zone of consideration.
>
> Being such the situation the inadvertent error could have been rectified had the petitioner brought this fact to the notice of the authority concerned. However it is found that the petitioner never ventilated her grievance during the recruitment process. Besides the petitioner had also not filed any objection during validity of the merit panel which remained valid upto 29th October 2007. In addition to this presently no vacancy is left to consider the candidature of the petitioner, thereby to provide her engagement as Shiksha Sahayaka. Apart from this Hon'ble High Court while disposing W.P.(C) No.11926 of 2008 had directed in order No.7, dated 06th January 2009 "xxxxxx not to fill up the vacancies of Shiksha Sahayaka from the selection list prepared in 2006. On the other hand, the authorities are directed to take expeditious steps for initiation of fresh recruitment process and candidates from the select list xxx". It is not out of place to clarify here that after such disposal, 3 fresh recruitment process vide different advertisement has already been done.
>
> Hence in such circumstances it is of the considered view that no action can be taken in the matter at this level owing to extremely barred by the time. On such view, representation of the petitioner is disposed of."

9. From the aforesaid, this Court finds, the Competent Authority in its complete domain considering the case of the petitioner even though observed that the incumbency of Smt. Kar under erstwhile Non Formal Education Programme comes to five years and sixteen days again in the next paragraph there is also a clear observation by the competent authority that Smt. Kar, the present petitioner was entitled for 20 grace marks, but however contended that for her not ventilating the grievance at appropriate time and further for department entering into three fresh recruitment processes, the Authority expressed its inability to accommodate the petitioner any further. Same opposite parties again through their additional affidavit took just a reverse plea that the petitioner had not completed five years clearly making out two contradictory stands by the same authorities. Be that as it may, this Court entering into the question as to whether the petitioner has in fact completed five years of service or not as Non Formal Educational Facilitator ? Looking to the service records of the petitioner produced by the Department, this Court finds, the petitioner had in fact 4 years, 11 months and 29 days to her credit as Non Formal Educational Facilitator.

10. Considering the rival contentions, and the different decisions cited at Bar, this Court finds here that the advertisement appearing at annexure-1 has the specific condition that one will be entitled to 4 grace marks for each year and maximum for 5 years, i.e., one will be entitled to maximum of 20 marks. The language in the advertisement is very much clear that one will be entitled for 4 marks for each year. Looking to the language in the advertisement, this Court observes, the only indication in this regard appears to be 4 grace marks will be awarded for each year and nothing beyond or behind. Now taking into account the decision of the Apex Court in the case of ***Bhanu Pratap vrs. State of Haryana and others,*** reported in (2011) 15 SCC 304, in paragraph-7 the Hon'ble Apex Court held as follows :-

> "17. There is no power provided in the statute nor was any such stipulation made in the advertisement and also in the statutory Rules permitting any such rounding off or giving grace marks so as to bring up a candidate to the minimum requirement. In our considered opinion, no such rounding off or relaxation was permissible. The Rules is permissible or possible by adding some words to the said statutory Rules for providing or giving the benefit of rounding off or relaxation."

Considering the attachment of condition in the advertisement, the ratio in the above Hon'ble Apex Court's decision and further considering the claim of the learned Senior Counsel on rounding off of the year so as to complete benefit to the petitioner, this Court finds, there is no power provided in the statute nor was any such stipulation made in the advertisement and also in the statutory Rules permitting any scope for such rounding off or giving particular grace marks for any fraction of the year so as to bring up a candidate to the maximum requirement. In my considered view in the above circumstance, no such rounding off or relaxation was permissible. Condition in the advertisement being sacrosanct and having been applied in respect of all such candidates, there is no possibility of adding words to the said condition for providing or giving the extra benefit of rounding off or relaxation to the petitioner.

11. Similarly, taking into account the decision of the Apex Court in the case of ***Miss Shainda Hasan vrs. State of Uttar Pradesh and others,*** reported in AIR 1990 SC 1381, a case involving appointment of a teacher and the claim for relaxing qualification of experience in favour of selected candidate, the Apex Court in appreciating the decision of Allahabad High Court, in paragraph-5 held as follows :-

> "5. The High Court has rightly held the relaxation granted by the Selection Committee to be arbitrary. In the absence of statutory rules providing power of relaxation, the advertisement must indicate that the Selection Committee / Appointing Authority has the power to relax the qualifications. Regarding "Working knowledge of Urdu" we do not agree with the High Court that the said qualification is unjust. The college being a Muslim minority institution prescribing the said qualification for the post of Principal, is in conformity with the object of establishing the institution."

12. From the whole analysis of the above aspect and the decisions of the Apex Court, this Court observes, once the Authority would be allowed entering into relaxation of the conditions involving the statute or the advertisement or the circulars since not arbitrary and further since has been applied to all cases considered in the same advertisement will be giving a handle with the authorities involved in the interview process which is not permissible in the eye of law. If an advertisement is published with specific conditions and anybody is affected by the stipulations or has any doubt in the conditions stated therein, it is appropriate for such candidate to approach the competent authorities at the threshold of the interview and not after exhaustion of the interview process and after allowing the interview process to continue with such conditions. Further, law is also settled that once a candidate has accepted the conditions and appeared in the interview is estopped to make an attempt for alteration or interpretation for any such conditions.

This Court also observes, in the event the completed interviews are interfered in this atmosphere, it will be unsettling the prospect of many selected candidates in the meantime. Taking into account the divergent response of the contesting opposite parties in the matter of petitioner's experience of 5 years or not, taking into consideration that in the meantime, for the development taken place in between particularly vacancies of the year 2006 having been filled up through separate selection process, this Court finds no vacancy of the said year is also available to be considered. There has been even two subsequent interviews leaving no scope to consider the case of the petitioner otherwise even. In the case of ***State of M.P.*** *versus* ***Pradeep Kumar*** as reported in **(2000)7SCC372** the Hon'ble Apex Court held that law aids the vigilant and not those who sleep over their right.

13. Considering the aforesaid and taking into account clear condition in the advertisement, further taking into account that for the direction of this Court involving another writ petition, vacancies being filled-up through fresh advertisement process and for the support of the decisions referred to hereinabove to the case of the opposite parties, this Court finds, there is no scope for interfering in such matters.

14. The writ petition thus stands dismissed. No cost.

2018 (I) ILR - CUT- 1101

BISWANATH RATH, J.

W.P.(C). NO. 3631 OF 2018

ALUPTA AKANKSHA BISWAL .....Petitioner

.Vrs.

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

ADMISSION – Pursuant to an advertisement for filling up the seats in the Medical Colleges through NEET, the petitioner as a physically handicapped candidate submitted application – Faced the medical test and got admitted as per procedure prescribed – Another letter for medical check up on the question of physical handicapness – Held, not permissible, the law is fairly settled that once an advertisement is set into motion, it is to be abided by the scheme of advertisement and there is no question of bringing new conditions – In the process this Court interfering in the order vide Annexure-8 and also in the orders vide Annexures-5 to 7, sets aside the same and directs the opposite parties to treat the petitioner as a duly selected candidate in the NEET Examination – While observing that the petitioner has been already

made to suffer, which might have affected her educational atmosphere, this Court directs the opposite parties not to disturb the petitioner any further.

For Petitioner : M/s. Sameer Kumar Das
For Opp. parties :

ORDER Date of Order : 21.06 2018

BISWANATH RATH, J.

In spite of notice through Special Messenger and date of appearance being expired, there is no appearance on behalf of the opposite party no.2, the sole contesting opposite party. Learned counsel for the State on previous occasion also declined to represent the opposite party no.2, for which this Court was constrained to issue notice to the opposite party no.2 through Special Messenger at the cost of the petitioner. Therefore, this matter is decided only hearing the learned counsel for the petitioner and considering the submissions of Shri U.K. Sahoo, the learned Additional Standing Counsel.

Heard Shri Sameer Kumar Das, learned counsel for the petitioner and Shri U.K. Sahoo, learned State Counsel.

The factual scenario available in the case and for the particular pleading of the petitioner that the petitioner is an applicant pursuant to an advertisement for filling up the seats in the Medical Colleges; through NEET conducted at centrally level. Petitioner being a physically handicapped candidate as per the scheme of advertisement, the petitioner was required to produce P.C. certificate and this apart following a further notice vide Annexure-2, the petitioner and similarly situated candidates were required to be presented before the Committee of Doctors, set up by the Competent Authority. Even though the petitioner was provided required medical certificate yet by virtue of the notice under Annexure-2, the physical handicapped candidates involving the NEET rank holders for the purpose of admission in P.C. category for MBBS & BDS were directed to attend a Medical Board at C.T.-II, SCB medical College, Cuttack on 14.07.2017 & 15.07.2017. Petitioner's further case is that pursuant to issuance of a notification vide Annexure-3 indicating that the decision of the Board for above purpose shall remain binding pursuant to the notice under Annexure-2. As a consequence, petitioner along with others were placed before the Board constituted for the purpose before the Committee as indicated in the Annexure-3 and the list of eligible P.C. candidates was also prepared and circulated vide Annexure-4 indicating the name of the petitioner at Sl.No.10 therein. It is at this stage, learned counsel for the petitioner alleges that after the petitioner took admission in the MKCG Medical College, Berhampur and while she was continuing with her education, she was surprised to receive a letter vide Annexure-5 asking her to appear before the AIIMS Authority for another health check up on the question of physical handicapness. But however,

the AIIMs authority declined to examine the petitioner for the petitioner already examined by the competent Board. Petitioner has been again troubled by virtue of the letter under Annexure-7 in pursuant to a development vide Annexure-6 asking her to appear before the Standing Medical Board in the Office of the CDMO, Ganjam for examination of her health status. There also appears another communication vide Annexure-8 directing the petitioner once again to appear before the constituted committee in the Office Chamber of DMET (O), Heads of Department Building, 1st floor, on 7.03.2018 at 11.30 A.M. It is at this stage of the matter, petitioner approached this Court challenging the repeated action of the opposite parties asking the petitioner to appear before the different authority for health check up, in spite of the fact that the petitioner has already been examined by a competent Board following the scheme of the advertisement. Taking this Court to the entire development, Shri Das, learned counsel for the petitioner submitted that once a candidate is examined by a competent Medical Board in terms of the advertisement and the notice vide Annexure-2 and further for the condition attached in Annexure-3 clearly indicating that the report of the Board remain final, there was no question of putting the petitioner again for physical test. It is in the above premises, Shri Das, learned counsel for the petitioner submitted that the correspondences/ directions vide Annexures-5, 6, 7 & 8 are all bad in law and should be interfered with and set aside.

Even though there is no appearance on behalf of the contesting opposite party-the opposite party no.2, but however, the opposite party no.4 filed a counter affidavit and taking reliance of the amended provisions submitted that they have been empowered to bring appropriate Rule but as of now, there has been no rule framed under the Right of Persons with Disabilities Act, 2016 and as such opposite party no.4 becomes helpless. Perusing the counter averments, this Court finds, the counter averment is wholly irrelevant for the purpose of determination of the dispute involving the case. It is at this stage of the matter, considering the submission of the learned counsel for the petitioner, this Court finds, there is no dispute that the petitioner is a selected candidate in the NEET Examination in the physically handicap category conducted centrally. Now coming to the question of her selection in the category of physical handicapness, there is no dispute that along with application, the petitioner had already submitted a physical handicap certificate clearly indicating that she belongs to the category of Locomotor Disability and she was suffering at 45% with permanent physical impairment/blindness in relation to her spine. Subsequently, on the issuance of the notice under Annexure-2, it appears the petitioner has been once again placed before a Medical Board in the SCB Medical College, Cuttack where she has been found to be in the list of eligible P.C. (lower locomotary disability) candidate as clearly appearing in the serial no.10 under Annexure-4. It is under this background, this Court finds, once the condition in the advertisement and the notification subsequent to the advertisement are

complied, the opposite parties have no business in asking the petitioner to be placed before any other Board for retest.

In the circumstances, this Court finds, the communications under Annexures-5 to 8 are not sustainable in the eye of law for having no legal support. Law is fairly settled that once an advertisement is set into motion, it is to be abided by the scheme of advertisement and there is no question of bringing new conditions. In the process this Court interfering in the order vide Annexure-8 and also in the orders vide Annexures-5 to 7, sets aside the same and directs the opposite parties to treat the petitioner as a duly selected candidate in the NEET Examination. While observing that the petitioner has been already made to suffer, which might have affected her educational atmosphere, this Court directs the opposite parties not to disturb the petitioner any further. The writ petition stands disposed of with the above direction.

2018 (I) ILR - CUT- 1104

S.K. SAHOO, J.

CRLA NO.204 OF 2011

GHADUA MUDULI & ANR. ….....Appellant

.Vrs.

STATE OF ORISSA ….....Respondent

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 20(b)(ii)(C) – Offence under – Conviction – Appeal – Appellants were found transporting commercial quantity of 270 kilograms of contraband ganja in a Bolero vehicle without any license in contravention of provision of the N.D.P.S. Act – There is non-compliance of mandatory provision of section 42 of the N.D.P.S. Act and non-production of the station diary entry, Malkhana register, dispatch register during trial – Brass seal was also not produced in Court at the time of production of the seized articles – Respectable and independent persons of the locality where search was made have not been examined – Compliance of section 57 of the N.D.P.S. Act is also doubtful – The informant has investigated the case – Held, the prosecution has not successfully established the charge beyond all reasonable doubt – The impugned judgment and order of conviction of the appellants is not sustainable in the eye of law. (Paras 8 to13)

Case Laws Relied on and Referred to :-

1. (2010) 46 OCR 855 : Sk. Faiyaz -Vrs.- State of Orissa.
2. (2010) 45 OCR 606 Bata Krushna Sahu -Vrs.- State of Orissa.
3. 2016) 64 OCR (SC) 827 : State of Rajasthan -Vrs.- Jag Raj Singh @ Hansa.

4. (1994) 7 OCR (SC) 283 : State of Punjab -Vrs.- Balbir Singh.
5. (2010) 45 OCR 606 : Bata Khrushna Sahu -Vrs.- State of Orissa
6. (2016) 65 OCR 702 : Panchanan Das -Vrs.- State of Orissa
7. A.I.R. 1981 S.C. 613 : Prem Chand (Paniwala) -Vrs.- Union of India.
8. (2003) 9 SCC 86 : Babudas -Vrs.- State of M.P.
9. A.I.R. 2001 S.C. 1002 : Gurbax Singh -Vrs.- State of Haryana.
10. (1994) 7 OCR (SC) 283 : Punjab -Vrs.- Balbir Singh.
11. (2016) 64 OCR (SC) 827 : State of Rajasthan -Vrs.- Jag Raj Singh @ Hansa.
12. (2004) 29 OCR (SC) 378 State of West Bengal -Vrs.- Babu Chakraborty
13. (1997) 12 OCR 203 : Bhima Gouda -Vrs.- State of Orissa.

For Appellants : Mr. Smruti Ranjan Mohapatra
For State : Mr. Prem Kumar Patnaik Addl. Govt. Advocate

JUDGMENT Date of Hearing & Judgment: 25.05.2018

S. K. SAHOO, J.

The appellants Ghadua Muduli and Tularam Bhoi @ Tulu faced trial in the Court of learned Addl. Sessions Judge-cum- Special Judge, Jeypore in Criminal Trial No. 38 of 2010 for offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') on the accusation that on 04.02.2009 at about 5.00 a.m. on N.H. 43 near village Tangini, they were found transporting commercial quantity of 270 kilograms of contraband ganja in a Bolero vehicle bearing registration No.OR-02-AS-0344 without any license in contravention of provision of the N.D.P.S. Act.

The learned trial Court vide impugned judgment and order dated 15.03.2011 found the appellants guilty of the offence charged and sentenced each of them to undergo rigorous imprisonment for twelve years and to pay a fine of Rs.1,00,000/- (rupees one lakh), in default, to suffer further rigorous imprisonment for two years.

2. The prosecution case, as per the first information report (Ext.10) lodged by Hemanta Kumar Panda (P.W.4), Inspector in charge of Pottangi police station on 04.02.2009 is that on that day in the night at about 2.30 a.m., he received reliable information that contraband ganja was being transported in a Bolero vehicle bearing registration no.OR-02-AS-0344 from Koraput side towards Salur. He made P.S. station diary entry no.68 dated 04.02.2009 and since he had reason to believe that delay would be caused in obtaining the search warrant which would facilitate the accused persons to escape with contraband ganja, he thought it prudent to conduct raid without obtaining search warrant. P.W.4 accordingly recorded the grounds of belief in the station diary and sent a report to the Superintendent of Police, Koraput who was his immediate superior officer after making P.S. D.R. No. 173 dated 04.02.2009. Constable C/295 R.N. Biswal was asked to hand over the report to Superintendent of Police, Koraput. Then P.W.4 along with other staff proceeded towards Sunki in police jeep for detection of the case.

It is the further prosecution case as per the first information report that on 04.02.2009 at about 5.00 a.m., P.W.4 found one Bolero vehicle bearing registration no.OR-02-AS-0344 was coming from Koraput side. He stopped the vehicle with the assistance of his staff on N.H.43 near village Tangiri. Two occupants were found in the vehicle and smell of ganja was coming from the vehicle. P.W.4 called one independent witness Bhuban Prasad Roula (P.W.2) of village Pottangi and suspecting that contraband ganja was being transported, he asked the driver of the vehicle about his identity who disclosed his name as Tularam Bhoi @ Tulu (appellant no.2) and the other occupant gave his identity as Ghadua Muduli (appellant no.1). When P.W.4 expressed his intention to search the vehicle and gave his option to both the appellants as to whether they were willing to be searched before any Executive Magistrate or any Gazetted Officer, they submitted their wilingness to be searched in the presence of Executive Magistrate. P.W.4 sent requisition to the District Magistrate, Koraput for deputing one Executive Magistrate to the spot and guarded the vehicle till the arrival of the Executive Magistrate. P.W.5 Sunil Kumar Nayak who was the Executive Magistrate -cum-B.D.O., Pottangi arrived at the spot on 04.02.2009 at 3.00 p.m. and in his presence, the personal searches of P.W.4 as well as other witnesses were taken and nothing objectionable articles were found. Then the Bolero vehicle was searched and 28 nos. of gunny bags containing ganja were found inside the vehicle. P.W.4 called the weighman namely Bipra Charan Badtia (P.W.1) who came to the spot with weighing instruments to weigh the ganja. After P.W.1 took the weight, P.W.4 prepared a weighment chart and sample packets of 24 grams in duplicate from each of the ganja packets. Paper slips containing signatures of the appellants, witnesses, P.W.5, weighman were prepared and personal seal impression of P.W.4 was given on the same. A paper slip was also kept inside the polythene packet which contained sample ganja. Thereafter it was kept in a paper envelope and sealed with the personal seal of P.W.4. A paper slip was also kept in the bulk ganja packets which were also sealed properly with the personal brass seal impression of P.W.4. P.W.4 prepared the seizure list of the bulk exhibits and also the sample packets. He also seized the offending vehicle which was used for transportation of ganja. The appellants and the witnesses put their signatures in the seizure list. The personal brass seal impression of P.W.4 was given on the seizure list. Copy of the seizure list was handed over to each of the appellants and personal seal of P.W.4 was given in the zima of P.W.5, the Executive Magistrate.

As prima facie case under section 20(b) of the N.D.P.S. Act was made out against the appellants, they were arrested by P.W.4 after explaining the grounds of arrest and intimation was given to their family members.

After detection of the case, P.W.4 drew up a plain paper F.I.R. at the spot and returned to the police station with the appellants along with the seized materials and registered Pottangi P.S. Case No. 05 dated 04.02.2009 under section 20(b) of

the N.D.P.S. Act. He continued with the investigation of the case and kept the 28 nos. of seized gunny bags of ganja in the Malkhana of the police station along with 56 nos. of sample packets. The weighing instruments which were seized from the weighman were given in his zima. P.W.4 sent a full report of arrest and seizure under section 57 of the N.D.P.S. Act to the Supdt. of Police, Koraput on 05.2.2009 and on the very day, he forwarded the appellants to the Court of learned Sessions Judge -cum- Special Judge, Koraput-Jeypore and also prayed for a direction to the clerk in-charge of Malkhana to receive the seized ganja packets and 28 nos. of sample packets and also made a prayer to the Court to send the rest 28 nos. of sample packets to R.F.S.L., Berhampur for chemical analysis.

The learned Sessions Judge -cum- Special Judge, Koraput directed P.W.4 to send the sample packets for chemical examination through S.D.J.M., Koraput. As per the orders of the Court, the sample packets were dispatched by the S.D.J.M., Koraput to R.F.S.L., Berhampur on 06.02.2009. On 07.02.2009 the bulk quantity of ganja packets were handed over the clerk in-charge of Malkhana, Jeypore. P.W.4 seized the station diary register, dispatch register and Malkhana register of Pottangi police station which were left in the zima of the S.I. Dayanidhi Nayak as per zimanama Ext.15. The Bolero vehicle was released in favour of the owner Dillip Ku. Sahu (P.W.3) as per the order of the Court. P.W.4 received the chemical examination report (Ext.16) which indicated that the exhibits marked as A-1 to Z-1, AA-1 and AB-1 contained flowering and fruiting tops of cannabis plant, commonly known as ganja. As per the orders of the Supdt. of Police, Koraput, P.W.4 handed over the charge of investigation to Shri A.K. Patnaik, S.D.P.O., Sunabeda on 28.01.2010 who submitted charge sheet under section 20(b) of N.D.P.S. Act on 30.01.2010.

3. On receipt of charge sheet, the learned Sessions Judge -cum- Special Judge, Koraput-Jeypore took cognizance of offence under section 20(b)(ii)(C) of the N.D.P.S. Act on 02.02.2010. Charge was framed on 04.08.2010 and the appellants pleaded not guilty and claimed to be tried.

4. The defence plea of the appellants was one of denial.

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

P.W.1 Bipra Charan Badtia was the weighman who came to the spot with the weighing instruments being called by the police and weighed the ganja found in 28 gunny bags and the total weight came to 270 kgs. He also prepared two sample packets of ganja of 24 grams each from each of the gunny bags. He is a witness to the seizure list Ext.1. He further stated about the seizure of the weighing instruments as per seizure list Ext.2 and taking zima of the same as per zimanama Ext.3. He proved the sample packets of ganja as well as twenty eight packets of bulk ganja seized by police.

P.W.2 Bhubana Prasad Roulo is an independent witness who stated about the appellants carrying contraband ganja in the Bolero vehicle which was detained by P.W.4. He further stated about the search of the vehicle and seizure of the ganja packets located inside the vehicle in presence of the Executive Magistrate. He is a witness to the seizure list Ext.1 and also weighment chart Ext.4.

P.W.3 Dillip Kumar Sahu was the owner of the offending Bolero vehicle and he stated that the appellant no.2 Tularam Bhoi @ Tulu was the driver of the vehicle and on 03.02.2009 he had taken the vehicle from him telling that he would carry a family from Sunabeda to Bhubaneswar and subsequently he came to know about the detention of the vehicle for illegal transportation of ganja.

P.W.4 Hemanta Kumar Panda was the Inspector in charge, Pottangi police station who conducted the search and seizure of contraband ganja from the Bolero vehicle and he also investigated the case from the date of detection till 28.01.2010 when the investigation was handed over to one A.K. Patnaik, S.D.P.O., Sunabeda who on completion of investigation submitted charge sheet.

P.W.5 Sunil Kumar Naik was the B.D.O. -cum- Executive Magistrate, Pottangi who came to the spot as per the direction of the District Magistrate, Koraput and was present when the search of Bolero vehicle was taken and 28 bags of ganja were recovered from the vehicle which on weighment found to be 270 kgs. He also stated about the preparation of the sample packets and further stated that he kept the brass seal with him which was handed over to him by P.W.4.

The prosecution exhibited sixteen documents. Exts.1, 2 and 14 are the seizure lists, Exts.3, 5, 9 and 15 are the zimanamas, Ext.4 is the weighment chart, Ext.6 is the D.R. No. 173 dated 04.02.2009 of IIC, Pottangi P.S., Ext.7 is the option of appellant no.1 Ghadua Muduli, Ext.8 is the option of appellant no.2 Tularam Bhoi, Ext.10 is the F.I.R., Ext.11 is the formal F.I.R., Ext.12 is the carbon copy of detail report sent to S.P., Koraput, Ext.13 is the carbon copy of letter of S.D.J.M., Koraput to R.F.S.L., Berhampur and Ext.16 is the chemical examination report.

The prosecution also proved forty seven material objects. M.O.I to XXVIII are the sample packets of ganja, M.O.XXIX to LVI are the packets of ganja, M.O.LVII is the brass seal.

No witness was examined on behalf of the defence.

6. The learned trial Court after analysing the evidence on record came to hold that stopping of the vehicle in question at the relevant point of time by the Pottangi police officials is well proved by the prosecution. Taking into account the evidence of independent witness (P.W.2), the Executive Magistrate (P.W.5) and the investigating officer (P.W.4), the learned trial Court came to hold that that the prosecution has well proved that huge quantity of ganja was being transported in the Bolero vehicle and there is no reason as to why the Executive Magistrate (P.W.5)

would speak falsehood. It was further held that on a conspectus viewing of the evidence of P.Ws.2, 3, 4 and 5, it is a crystal clear that the appellant Tularam Bhoi was the driver of the vehicle and the appellant Ghadua Muduli was the lone occupant of the vehicle and commercial quantity of ganja was being transported by the two appellants in the vehicle without any authority. It was further held that the report of the chemical examiner marked as Ext.16 clearly revealed that it was nothing but flowering and fruiting tops of cannabis plant commonly known as ganja. Learned trial Court also came to hold that the prosecution has well proved that the appellants were possessing and transporting commercial quantity of ganja in a Bolero vehicle without any authority or license which proved the offence under section 20(b)(ii)(C) of the N.D.P.S. Act against the appellants.

7. Mr. Smruti Ranjan Mohapatra, learned counsel appearing for the appellants strenuously contended that mandatory provision under section 42 of the N.D.P.S. Act has not been complied with which has vitiated the search and seizure. He asserted that even though it is the prosecution case that on receiving reliable information relating to transportation of ganja, station diary entry was made by P.W.4 but neither the station diary entry nor the copy of the same was produced in Court during trial and marked as exhibit. It is further contended that there is every doubt of sending the grounds of belief to the Superintendent of Police, Koraput and the material witnesses in that respect have neither been examined nor material documents relating to the receipt of such a vital report at the S.P.'s office have been proved during trial and therefore, it is argued that everything has been subsequently stage managed to show the compliance of section 42 of the N.D.P.S. Act. Learned counsel for the appellants further contended that no witness of the locality from where the vehicle was detained and searched was examined and P.W.4 has not complied with the provisions laid down under section 100(4) of the Criminal Procedure Code as he had not called two or more independent and respectable inhabitants of the locality to remain present when the offending vehicle was searched and it appears that the seizure witness P.W.2 is a stock witness of the prosecution. Learned counsel for the appellants further contended that P.W.4 who was the Inspector in-charge of Pottangi police station has not only conducted the search and seizure but he is also the investigating officer and he being an interested witness should not have conducted the investigation which has resulted in causing serious prejudice to the appellants. Learned counsel for the petitioner further contended that P.W.4 was the Malkhana in-charge and though it is stated that the contraband articles and the sample packets after its seizure were kept in malkhana before its production in Court but neither the Malkhana register nor its copy were proved during trial. Learned counsel for the appellants further contended that the original report of arrest and seizure in compliance of the provision under section 57 of the N.D.P.S. Act has also not been proved and what was produced before the Court during trial was the carbon copy of such report. The learned counsel further submitted that though P.W.4 has stated that the brass seal was handed over to P.W.5

but the evidence of P.W.5 goes to show that the brass seal was with P.W.4 till it was produced in Court during trial. It is argued that since punishment prescribed under the N.D.P.S. Act are very stringent in nature, it was required on the part of the prosecution to prove that all the mandatory provisions are being duly complied with and the contraband articles and the sample packets were kept in safe custody till it is produced in Court and dispatched for chemical examination and in the case in hand, the prosecution has failed to bring clinching materials on record on those aspects and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellants. The learned counsel for the appellants placed reliance in the cases of **State of Rajasthan -Vrs.- Jag Raj Singh @ Hansa reported in (2016) 64 Orissa Criminal Reports (SC) 827, State of West Bengal -Vrs.- Babu Chakraborty reported in (2004) 29 Orissa Criminal Reports (SC) 378 and Bhima Gouda -Vrs.- State of Orissa reported in (1997) 12 Orissa Criminal Reports 203** relating to the effect of non-compliance of the provisions under sections 42(1) and 42(2) of the N.D.P.S. Act.

Mr. Prem Kumar Patnaik, learned Addl. Govt. Advocate on the other hand supported the impugned judgment and contended that since the vehicle was detained and search and seizure was made in a public place, therefore, section 43 of the N.D.P.S. Act and not section 42 of the N.D.P.S. Act is applicable in the case. He further contended the appellants were found in the offending vehicle when it was detained and the appellant no.2 was driving the vehicle and commercial quantity of ganja was found in it. He further submitted that in the presence of the Executive Magistrate (P.W.5), search of the vehicle was taken and ganja packets were recovered and the weighman (P.W.1) weighed the ganja and prepared sample packets which were sealed at the spot with paper slips and the bulk quantity of ganja packets and sample packets in sealed condition were kept in the police station malkhana and therefore, it cannot be said that there was any scope for tampering with the articles seized. He further submitted that even though the station diary entry book, diary book and Malkhana register were not produced in the trial Court but the seizure list indicates about the seizure of those documents and the oral evidence relating to keeping of the articles in malkhana has remained unshaken and therefore, the learned trial Court was justified in convicting the appellants under section 20(b)(ii)(C) of the N.D.P.S. Act.

8. Adverting to the contentions regarding compliance of the provision under section 42 of the N.D.P.S. Act, in case of **State of Rajasthan -Vrs.- Jag Raj Singh @ Hansa reported in (2016) 64 Orissa Criminal Reports (SC) 827** while discussing regarding the compliance of section 42 of the N.D.P.S. Act in case of a vehicle which was seized at the public place carrying contraband articles, it was held that since the jeep cannot be said to be a public conveyance within the meaning of Explanation to section 43 of the N.D.P.S. Act, hence, section 43 was clearly not attracted and provisions of section 42(1) proviso were required to be complied with and it was further held that the aforesaid statutory mandatory provisions having not

complied with, the High Court did not commit any error in setting aside the conviction.

The present is not a case where P.W.4 suddenly carried out search in the vehicle at a public place. P.W.4 himself stated that he received the reliable information regarding transportation of ganja in a Bolero vehicle and he has come up with a case of compliance of section 42 of the N.D.P.S. Act. There is no material that the offending vehicle comes within public conveyance and when search was conducted after recording information under section 42(1), therefore, even though the detention was made during night and seizure was made in a public place during day time, compliance of the provisions of section 42 of the N.D.P.S. Act is mandatory.

The Hon'ble Supreme Court while discussing the provision under section 42 of the N.D.P.S. Act in case of **State of Punjab -Vrs.- Balbir Singh reported in (1994) 7 Orissa Criminal Reports (SC) 283** has been pleased to hold that the object of N.D.P.S. Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore, these provisions make it obligatory that such of those officers mentioned therein, on receiving information, should reduce the same to writing and also record reasons for the benefit while carrying out arrest or search as provided under the proviso to section 42(1). To that extent they are mandatory. Consequently the failure to comply with these requirements thus affects the prosecution case and therefore, vitiates of the trial. The decision rendered in the case of **Baldev Singh** (supra) was further considered by a five-Judge Bench in the case of **Karnail Singh -Vrs.- State of Haryana reported in (2009) 44 Orissa Criminal Reports (SC) 183** wherein it was held in the concluding paragraph as follows**:-**

> "17. In conclusion, what is to be noticed is Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of section 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:
>
> (a) The officer on receiving the information (of the nature referred to in sub-section (1) of section 42 from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1).
>
> (b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior .

> (c) In other words, the compliance with the requirements of Sections 42 (1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.
>
> (d) While total non-compliance of requirements of sub-sections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001."

In view of the settled position of law, now it is to be seen whether the contentions raised by the learned counsel for the appellants that there is non-compliance of mandatory provision under section 42(1) and 42(2) of the N.D.P.S. Act is sustainable or not. In the first information report (Ext.10), the Inspector in charge, Pottangi police station (P.W.4) has mentioned that when he received a reliable information at 2.30 a.m. regarding transportation of ganja in a Bolero vehicle bearing registration No.OR-02-AS-0344 from Koraput side towards Salur, he noted the fact vide P.S. S.D. vide S.D. Entry No. 68 dated 04.02.2009 and he believed that there would be delay caused in obtaining a search warrant which would facilitate the accused persons to escape with the contraband ganja and he thought it prudent to conduct raid without obtaining a search warrant. Accordingly, he recorded his grounds of belief in the P.S. station diary and sent a report to Superintendent of Police, Koraput who was the immediate superior as per the P.S. D.R. No.173 dated 04.02.2009. While deposing in Court, P.W.4 has also made similar statement.

Though the station diary book and dispatch register of Pottangi police station were seized under seizure list Ext.14 on 08.02.2009 by P.W.4 along with Malkhana register but neither the station diary book nor the dispatch register was produced in Court during trial. Even the authenticated copies of the station diary and dispatch register were also not produced. Therefore, there was no material before the trial Court that any such entry was in fact been made. In view of the mandatory provision of section 42 of the N.D.P.S. Act, the Court is required not only to verify that the reliable information was taken down in writing but also the grounds of belief was also recorded as per the second proviso to section 42(1) of the N.D.P.S. Act and copy of the same was sent to the immediate official superior in view of sub-section (2) of section 42 of the N.D.P.S. Act.

P.W.4 has stated that he sent the report to Superintendent of Police, Koraput as per Ext.6 through C/295 R.N. Biswal and in that respect P.S. D.R. No.173 dated 04.02.2009 was made. The concerned constable through whom the report under Ext.6 is stated to have been dispatched has not been examined. P.W.4 admits that there is no initial or signature either of Superintendent of Police or any officer who is in charge of Superintendent of Police in token of having perused Ext.6. He has further stated that Ext.6 has not been diarized in the office of Superintendent of Police. He has further stated that though he had collected Ext.6 from the office of Superintendent of Police but he has not seized the same. On perusal of Ext.6, it appears that a seal impression of the Superintendent of Police finds place on it and the date has been given to be 04.02.2009 but no signature of any person from the S.P. office is there on Ext.6. Admittedly, nobody from the S.P. office has been examined to depose relating to the receipt of Ext.6 in their office and no seizure list has been prepared relating to seizure of Ext.6 from the office of Superintendent of Police, Koraput.

Therefore, when the person concerned who carried Ext.6 to the office of Superintendent of Police, Koraput has not been examined, none of the persons from the office of Superintendent of Police, Koraput has been examined to say about the receipt of Ext.6 in their office, none of the documents from the office of Superintendent of Police, Koraput has been produced during trial relating to receipt of Ext.6 and even the receipt of such an important document has not been diarized and the dispatch register of Pottangi police station relating to dispatch of Ext.6 has not been proved, the contention of Mr. Mohapatra that there is every doubt relating to the compliance of the mandatory provision under section 42 of the N.D.P.S. Act has got substantial force. In a case of this nature where the prosecution is required to prove the compliance of the mandatory provision under section 42 of the N.D.P.S. Act, all the relevant documents which are connected with such compliance are required to be proved before the trial Court in accordance with law and similarly all the concerned witnesses should be examined in Court to prove the vital aspect. In absence of proof of the oral as well as documentary evidence relating to compliance of such provision, the prosecution case should be viewed with suspicion.

9. P.W.4 was the officer who conducted search and seizure and he is also the investigating officer who investigated the case from the date of seizure i.e. 04.02.2009 till 20.08.2010 and the subsequent officer formally submitted charge sheet one day after. The learned counsel for the appellants placed reliance in case of **Bata Khrushna Sahu -Vrs.- State of Orissa reported in (2010) 45 Orissa Criminal Reports 606** wherein it has been held that P.W.8 who was the person who conducted the search and allegedly recovered gunny bags M.Os. I, II and III and therefore, the investigation of the case by P.W.8 himself renders the charge against the petitioner vulnerable.

In case of **Panchanan Das -Vrs.- State of Orissa reported in (2016) 65 Orissa Criminal Reports 702**, I have held that in a case under the N.D.P.S. Act, where stringent punishment has been prescribed, ordinarily if a police officer is the informant in the case, in the fairness of things, the investigation should be conducted by some other empowered police officer or at least the investigation should be supervised by some other senior police officer as the informant police officer is likely be interested in the result of the case projected by him. However, if the informant police officer in the exigencies of the situation conducts investigation and submits final form, it cannot be per se illegal. The defence has to prove in what way such investigation is impartial, biased or has caused prejudice to the accused.

Since the investigation of a case under N.D.P.S. Act is required to be carried out by a person who is absolutely impartial, unbiased and unmotivated, when P.W.4 received the reliable information, searched the vehicle and seized the contraband articles and lodged the first information report, in all fairness of things, he should not have investigated the matter without any exigencies of the situation.

10. Law is well settled that the provisions of sections 100 and 165 of the Code of Criminal Procedure, 1973 which are not inconsistent with the provisions of the N.D.P.S. Act are applicable for effecting search and seizure under the N.D.P.S. Act.

Section 165 Cr.P.C. deals with search by an officer in charge of a police station or by a police officer making an investigation into any offence which he is authorized to investigate. Sub-section (4) of section 165 of the Code states that the provisions of the Code as to search-warrants and the general provisions as to searches contained in section 100 of Cr.P.C. shall, so far as may be, apply to a search made under section 165 Cr.P.C. Sub-section (4) of section 100 of Cr.P.C. states that before making a search under Chapter-VII, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and the officer may issue an order in writing to such persons or any of them to be a witness to the search.

Even though sub-section (4) of section 100 Cr.P.C. states that such provision is applicable to Chapter-VIII but in view of sub-section (4) of section 165 of Cr.P.C., the procedure has to be followed in all cases of search by either the officer in charge of the police station or a police officer making an investigation into any offence which he is authorised to investigate. If any subordinate officer is entrusted by the officer in charge to carry out such search by an order in writing, then such subordinate officer has also to follow the procedure laid down under section 100 Cr.P.C. Even though section 100 Cr.P.C. states about the search of a closed place but in view of definition of ‘place’ as per section 2 (p) of Cr.P.C., it includes a house, building, tent and vessel.

The independent witnesses who have been examined in the case are P.W.1 and P.W.2, out of which P.W.1 was the weighman and they belonged to Mouza Pottangi which is a different village than the place where the seizure was effected. P.W.2 has stated in his evidence that he had attended the Koraput Court as a prosecution witness in various types of cases and he also attended Pottangi police station on many occasions. He has also written the first information reports for the informants. Since P.W.2 is a stock witness of the prosecution, therefore, this Court has to be very cautious in accepting his evidence. A stock witness is a person who is at the back and call of the police. He obliges police with his tailored testimony.

In case of **Prem Chand (Paniwala) -Vrs.- Union of India reported in A.I.R. 1981 S.C. 613**, the Hon'ble Supreme Court emphasized the need of the State to issue clear orders to the Police Department to free the processes of investigation and prosecution from the contamination of concoction through the expediency of stockpiling of stock-witnesses. In case of **Babudas -Vrs.- State of M.P. reported in (2003) 9 Supreme Court Cases 86**, it was held as follows:-

> "4....From the evidence of PW-17, we notice that undoubtedly, he is a stock witness who has been appearing as a witness for recovery on behalf of the prosecution even as far back as the year 1965, therefore, we will have to very cautious in accepting his evidence."

None of the persons of the locality from where the contraband articles were seized in the Bolero vehicle has been examined. The timing of search and seizure, non-availability of independent and respectable witnesses of the locality and non-inclination of such persons even though available to become witnesses to the search and seizure are the factors to be taken note of while assessing the non-compliance of sections 100(4) and 165(4) of Cr.P.C. If after making reasonable efforts, the police officer is not able to get public witnesses to associate with the raid or arrest of the accused, the arrest and the recovery made would not be necessarily vitiated.

In the case in hand, though the vehicle was detained at 5.00 a.m. on 04.02.2009 but after the arrival of the Executive Magistrate at 3.00 p.m. on 04.02.2009, the search and seizure was made. P.W.2 has stated that he was sleeping in his house at 3 a.m. when Pottangi Thana babu called him to accompany him for detection of the case and accordingly, he went with him. According to P.W.4, the spot of detection i.e. Tangini Ghati was about 18 Kms. away from Pottangi police station and village Tangini was about 1 Km. away from the place of detection. There is absolutely no evidence that at the time of search and seizure, there was non-availability of independent and respectable witnesses of the locality or non-inclination of such persons even though available to become witnesses to the search and seizure rather P.W.2 has stated that besides him, two to four others were also there. P.W.4 has stated that since he had taken one independent witness from Pottangi along with him, he did not feel the necessity of procuring another independent witness from village Tangini or from hamlet Jodimathili which according to him was 2 Kms. away from the spot. Therefore, learned counsel for the

appellants is right in his submission that there is violation of provision under section 100 (4) of Cr.P.C. in carrying a stock witness like P.W.2 from his house during the night for the search and seizure.

11. The next contention raised by the learned counsel for the appellants regarding the non-seizure of the original report of arrest and seizure under section 57 of the N.D.P.S. Act.

P.W.4 has stated that on the very next day he has reported to his superior officer under section 57 of the N.D.P.S. Act but the report has not been seized. What was proved during trial as Ext.12 is the carbon copy of the report which was objected to by the defence. No witnesses from the office of the Superintendent of Police, Koraput have also been examined to state about receipt of such report under Ext.12 which was dispatched by P.W.4. Therefore, when the original report has not been produced and no competent witness from S.P. office has been examined and no corresponding documents from the office of Superintendent of Police, Koraput has been proved relating to receipt of the full report under section 57 of the N.D.P.S. Act in their office, it is very difficult to accept that there is substantial compliance of such provision. In case of **Gurbax Singh -Vrs.- State of Haryana reported in A.I.R. 2001 S.C. 1002**, it is held that it is true that provisions of Sections 52 and 57 of the N.D.P.S. Act are directory. Violation of these provisions would not ipso facto violate the trial or conviction. However, I.O. cannot totally ignore these provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. In case of **State of Punjab -Vrs.- Balbir Singh reported in (1994) 7 Orissa Criminal Reports (SC) 283,** it is held that the provisions of sections 52 and 57 of the N.D.P.S. Act which deal with the steps to be taken by the officers after making arrest or seizure under sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.

12. The contraband ganja as well as the sample packets after seizure was brought to the police station and it is stated to have been kept in the Malkhana by P.W.4 before its production in Court. The evidence of P.W.4 is totally silent as to whether any entries were made in the Malkhana register before keeping the seized articles and sample packets in the Malkhana and also taking the same for production in Court. The Malkhana register was not produced during trial. The copy of the Malkhana register showing the corresponding entries in such register relating to the keeping of the contraband ganja as well as sample packets and taking it out was also not proved. It was the duty of the prosecution to adduce cogent and clinching evidence regarding safe custody of the seized articles along with sample packets in the malkhana of Pottangi police station. Rule 119 of the Orissa Police Rules which deals with Malkhana register states, inter alia, that all the articles of which police

take charge, shall be entered in detail, with a description of identifying marks on each article, in a register to be kept in P.M. form No. 18 in duplicate, and a receipt shall be obtained whenever any article or property of which the police take charge is made over to the owner or sent to the Court or disposed of in any other way and these receipt shall be numbered serially and filed, and the number of receipts shall be entered in column No.7. Therefore, it is clear that whenever any article is seized and kept in police malkhana, details thereof should be entered in the Malkhana register and while taking it out, the entry should also be made in such register. This would indicate the safe custody of the articles seized during investigation of a case before its production in Court. When the Malkhana register of Pottangi police station has not been proved in the case, it is difficult to believe that the seized articles along with the sample packets were in safe custody before its production in Court for being sent for chemical analysis.

Though P.W.4 stated the brass seal was handed over to P.W.5 as per zimanama Ext.9 after the search and seizure and preparation of the seizure list was over but P.W.5 has stated in the cross-examination that he took time twice to produce the seal and he had returned the seal to the Inspector in–charge and then brought it back from him. The statement of P.W.5 raises doubt about the handing over of the brass seal by P.W.4 as per zimanama Ext.9 rather it presupposes that a zimanama was created without handing over the personal brass seal to P.W.5.

Law is well settled that the brass seal used in sealing the contraband articles should be kept in the zima of a respectable person and it is required to be produced before the Court at the time of production of the seized articles and sample packets for verification by the Court. The order sheet dated 05.02.2009 of the learned Sessions Judge -cum- Special Judge, Koraput is totally silent regarding production of the brass seal in question and its verification when the seized articles were produced. Even though P.W.4 has mentioned in the F.I.R. that his personal seal impression was given in the seizure list but on verification of the seizure list (Ext.1), it appears that such averment is not correct. When the sample packets as well as bulk quantity of ganja were with P.W.4 who was also the in-charge of Malkhana and he was also having the brass seal with him, the possibility of tampering cannot be ruled out. Learned counsel for the appellants placed reliance in case of **Sk. Faiyaz -Vrs.- State of Orissa reported in (2010) 46 Orissa Criminal Reports 855 and Bata Krushna Sahu -Vrs.- State of Orissa reported in (2010) 45 Orissa Criminal Reports 606** wherein it has been held that the prosecution is required to prove the proper sealing of seized articles and complete elimination of tampering with such articles during its retention by the investigating agency. Burden of proof of entire path of journey of the articles from the point of seizure till its arrival before chemical examiner has to be proved by adducing cogent, reliable and unimpeachable evidence.

13. In view of the forgoing discussions, I am of the humble view that when there is non-compliance of mandatory provision of section 42 of the N.D.P.S. Act and non-production of the station diary entry, Malkhana register, dispatch register during trial, when the brass seal was not produced in Court at the time of production of the seized articles, respectable and independent persons of the locality where search was made have not been examined, when the compliance of section 57 of the N.D.P.S. Act is also a doubtful feature and moreover P.W.4 being the informant of the case has investigated the case and taken the assistance of stock witness like P.W.2, it cannot be said that the prosecution has successfully established the charge under section 20(b)(ii)(C) of the N.D.P.S. Act against the appellants beyond all reasonable doubt.

Therefore, the impugned judgment and order of conviction of the appellants under section 20(b)(ii)(C) of the N.D.P.S. Act and the sentence passed there under is not sustainable in the eye of law.

Accordingly, the Criminal Appeal is allowed. The appellants are acquitted of the charge under section 20(b)(ii)(C) of the N.D.P.S. Act. The appellants who are in jail custody shall be set at liberty forthwith if their detention is not required in any other case. Lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

2018 (I) ILR - CUT- 1118

S.K. SAHOO, J.

CRIMINAL APPEAL NO.379 OF 2008

DR. SUSHIL KUMAR PATI ….....Appellant

.Vrs.

STATE OF ODISHA (VIG.) ….....Respondent

(A) PREVENTION OF CORRUPTION ACT, 1988 – Section 7 and Section 13(2) read with section 13(1)(d) – Offence under – Ingredients thereof – Standard of burden of proof between prosecution and accused – Principles – Indicated.

"For arriving at the conclusion as to whether all the ingredients of the offences i.e. demand, acceptance and recovery of illegal gratification have been satisfied or not, the Court must take into consideration the facts and circumstances brought on the record in their entirety. The burden rests on the accused to displace the statutory presumption raised under section 20 of the 1988 Act by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in section 7 of the 1988 Act. The standard of burden of proof on the accused vis-à-vis the standard of burden of proof on the prosecution would differ. The evidence of the complainant should be corroborated in material particulars and the

complainant cannot be placed on any better footing than that of an accomplice and corroboration in material particulars connecting the accused with the crime has to be insisted upon. Even if the trap witnesses turn hostile or are found not to be independent, if the evidence of the complainant and the other circumstantial evidence on record is found to be consistent with the guilt of the accused and not consistent with his innocence, there should be no difficulty for the Court in upholding the prosecution case" *(Para 7)*

(B) PREVENTION OF CORRUPTION ACT, 1988 – Section 7 and Section 13(2) read with section 13(1)(d) – Offence under – Conviction – Allegation that the appellant being a public servant employed as Orthopaedic Specialist in Rourkela Government Hospital, Rourkela, demanded and accepted an amount of Rs.150/- as gratification for issuing fitness certificate – Ingredients of offence – Evidence thereof – Whether satisfied for maintaining the conviction & sentence – Held, no, the proof of demand of illegal gratification is the gravamen of the offences under sections 7 and 13(2) read with 13(1)(d)(i) and (ii) of 1988 Act and in absence thereof, unmistakably the charge would fail – Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would not be sufficient to bring home the charge under the aforesaid sections of the Act. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under sections 7 or 13 of the Act would not entail his conviction there under.

"The prosecution case suffers from serious infirmities. The reasoning assigned by the learned trial Court is faulty and genuine material evidence available on record in favour of the appellant has been overlooked and it appears that the impugned judgment is one sided in favour of the prosecution. In the absence of any clinching evidence relating to the demand and acceptance of the bribe money by the appellant and the fact that there is possibility of planting the tainted money, I am of the view that the guilt of the appellant has not been established beyond all reasonable doubt and therefore, I am constrained to give benefit of doubt to the appellant." *(Para 7 & 13)*

Case Laws Relied on and Referred to :-

1. A.I.R. 1980 S.C. 1558 : Gulam Mahmood A. Malek -Vrs.- State of Gujarat.
2. A.I.R. 1981 S.C. 765 : Shankarlal Gyarasilal Dixit-Vrs.- State of Maharashtra.
3. A.I.R. 2005 S.C. 4095 : State of A.P. -Vrs.- R. Jeevaratnam.
4. A.I.R. 1984 SC 1453 : State of U.P. -Vrs.- Dr. G.K. Ghosh.
5. A.I.R. 1958 S.C. 500 : State of Bihar -Vrs.- Basawan Singh.
6. (2015) 62 OCR (SC) 91: Gurjant Singh -Vrs.- State of Punjab.
7. A.I.R. 2005 S.C. 119 : State of West Bengal -Vrs.- Kailash Chandra Pandey.
8. A.I.R. 1980 S.C. 873 : Hazari Lal -Vrs.- The State (Delhi Admn.)
9. (2014) 13 SCC 55 : B. Jayaraj -Vrs.- State of Andhra Pradesh
10. (2014) 58 OCR 566 : Bhagirathi Pera -Vrs.- State of Orissa.
11. (2015) 3 SCC 247 : M.R. Purushotham -Vrs.- State of Karnataka
12. A.I.R. 2013 S.C. 3368 : State of Punjab -Vrs.- Madan Mohan Lal Verma.
13. (2009) 44 OCR 425 : State of Maharashtra -Vrs.- Dnyaneshwar.
14. A.I.R. 2002 S.C. 486 : Punjabrao -Vrs.- State of Maharashtra
15. A.I.R. 2016 S.C. 2045 : V. Sejappa -Vrs.- State
16. A.I.R. 1979 S.C. 1191 : Panalal Damodar Rathi -Vrs.- State of Maharashtra.

17. (2016) 64 OCR (S.C.) 1016 : Mukhitar Singh -Vrs.- State of Punjab
18. (2015) 62 OCR (SC) 91 : Gurjant Singh -Vrs.- State of Punjab
19. A.I.R. 1984 SC 1453) : State of U.P. -Vrs.- Dr. G.K. Ghosh.
20. A.I.R. 2005 S.C. 409 : State of A.P. -Vrs.- R. Jeevaratnam.
21. A.I.R. 1958 S.C. 500 : State of Bihar -Vrs.- Basawan Singh .
22. A.I.R. 1980 S.C. 1558 : Gulam Mahmood A. Malek -Vrs.- State of Gujarat

For Appellant : Mr. Hemanta Kumar Mund
For Respondent : Mr. Sanjay Kumar Das. Standing Counsel (Vig.)

JUDGMENT Date of Argument: 10.05.2018 Date of Judgment: 30.05.2018

S. K. SAHOO, J.

The appellant Dr. Sushil Kumar Pati faced trial in the Court of learned Special Judge (Vigilance), Sambalpur in T.R. Case No. 20 of 2002 for offences punishable under section 7 and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereafter '1988 Act') on the accusation that on 12.11.2000 being a public servant employed as Orthopaedic Specialist in Rourkela Government Hospital, Rourkela, he demanded and accepted an amount of Rs.150/- from P.W.3 Surendranath Mohanty as gratification other than legal remuneration as a motive or reward for doing an official act, viz. issuing fitness certificate in favour of P.W.3 and thereby committed criminal misconduct by corrupt means by obtaining for himself pecuniary advantage of Rs.150/-.

The learned trial Court vide impugned judgment and order dated 26.08.2008 found the appellant guilty of the offences charged and sentenced him to undergo rigorous imprisonment for one year and to pay a fine of Rs.1000/-, in default, to undergo rigorous imprisonment for three months on each count under section 7 and section 13(2) read with section 13(1)(d) of the 1988 Act and the substantive sentences of imprisonment were directed to run concurrently.

2. The factual matrix of the prosecution case, as per the written report (Ext.3) presented by P.W.3 Surendranath Mohanty before the Superintendent of Police, Vigilance, Sambalpur on 11.11.2000 is that he was working in the P.H.D. Office at Rourkela and on 05.06.2000 he fell down and sustained fracture injury on his leg. He was treated at Life Line Clinic, Rourkela from 06.06.2000 to 11.06.2000 and was discharged. On 13.07.2000 he felt severe pain for which he met the appellant in Rourkela Govt. Hospital for treatment. After checking P.W.3, the appellant advised him to take rest for a period of six months. P.W.3 felt better after a few months. He was transferred to Keonjhar Town and in that connection he met the appellant on 10.11.2000 and requested him to issue a medical fitness certificate. The appellant checked P.W.3 and told him that the condition of his leg is better and he asked Rs.150/- for his treatment. When P.W.3 expressed his reluctance to pay such amount, the appellant told him that unless the demand amount of Rs.150/- is fulfilled, medical fitness certificate would not be granted in his favour and no further medicine would be prescribed. Even after much persuasion by P.W.3, the appellant sticked to his demand. As his joining at Keonjhar was necessary, P.W.3

agreed on compulsion to pay the demanded amount. The appellant told P.W.3 to come on 12.11.2000 which was a Sunday and there would be less number of patients on that day and he would issue medical fitness certificate on that day after receipt of Rs.150/-. Finding no way out, P.W.3 lodged the first information report as he was compelled to give bribe money of Rs.150/- on 12.11.2000 to the appellant for getting the medical fitness certificate as well as for medicine prescription.

P.W.6 Nabakishore Pattnaik, D.S.P. (Vigilance), Rourkela received the written report from P.W.3 and sent it to Superintendent of Police, Vigilance, Sambalpur who directed the officer in charge of Vigilance police station, Sambalpur to register the case and accordingly, Sambalpur Vigilance P.S. Case No. 57 dated 11.11.2000 was registered under section 7 and section 13(2) read with section 13(1)(d) of the 1988 Act.

P.W.6 was directed by the Superintendent of Police, Vigilance, Sambalpur to detect the case by laying a trap and to investigate the case.

On 12.11.2000 a preparation for the trap was held at Vigilance Unit Office, Rourkela. In presence of all the witnesses and Vigilance Officers, P.W.3 was introduced to the trap party members and he narrated his grievance as mentioned in the F.I.R. P.W.3 produced three nos. of fifty rupees G.C. notes to be used in the trap. The numbers of the G.C. notes were noted down by P.W.1 in a piece of paper and kept it with him for comparison after detection. A demonstration relating to the reaction of phenolphthalein powder with sodium carbonate solution was made and the sample chemical liquid was collected in two bottles and those were labeled and sealed. The G.C. notes were smeared with phenolphthalein powder and it was kept in the left side shirt pocket of P.W.3 with instruction to give it to the appellant only on demand. A preparation report (Ext.1) was made and the trap party members and P.W.3 signed thereon. P.W.2 Banamali Nayak was asked to accompany P.W.3 to act as over hearing witness, to see the passing of tainted notes from P.W.3 to the appellant and then to relay signal to the trap party members by brushing his head with his hands.

After preparation of the trap, the trap party members along with P.W.3 proceeded to Rourkela Government Hospital in a jeep and parked their vehicle at a reasonable distance from the hospital. P.W.3 followed by P.W.2 proceeded to the hospital and P.W.3 met the appellant in room no.34 in the upstairs of the hospital. On seeing P.W.3, the appellant asked him whether he had brought the demanded money. When P.W.3 replied in affirmative, the appellant asked him to keep the money in the pen stand kept on the table of that room and accordingly, P.W.3 kept the tainted money in the pen stand. The appellant wrote a certificate in favour of P.W.3 and then after locking the room, he along with P.W.3 came to the downstairs of the hospital for putting the O.P.D. number in the certificate. The appellant put the O.P.D. number in the fitness certificate written by him and handed over the same to P.W.3. At about 11.20 a.m. P.W.6 and the other trap party members received pre-

arranged signal from P.W.2 and accordingly they rushed inside the hospital and found room no.34 of the hospital was under lock and key. They came to the outdoor of the hospital which was in room no.3 and found the appellant sitting there. P.W.3 was also found sitting with the appellant. P.W.6 gave his identity so also that of the other team members to the appellant and challenged him to have received Rs.150/- as bribe from P.W.3 to which the appellant denied. P.W.6 took the hand wash of the appellant in sodium carbonate solution which did not change its colour. The solution was kept in a bottle and labeled and sealed. P.W.3 disclosed before P.W.6 that as per the direction of the appellant, he had kept the tainted money amounting to Rs.150/- in a pen stand on the table of the appellant in room no.34. On being asked by P.W.6, the appellant opened the lock of room no.34. The trap party members entered inside the room and found the tainted G.C. notes were kept inside the pen stand on the table. On the request of P.W.6, P.W.1 brought out the tainted money and compared the numbers of the G.C. notes with that already noted in a piece of paper which tallied. P.W.6 seized the tainted G.C. notes under seizure list Ext.6. He also seized the pen stand in which the tainted money was kept and the chit of paper in which P.W.1 had noted down the numbers of G.C. notes at the time of preparation. The O.P.D. ticket, medical fitness certificate, sealed sample bottles were also seized under different seizure lists. P.W.6 prepared detection report vide Ext.2 in which all the trap party members including the appellant signed. On 12.11.2000 P.W.6 made over the charge of investigation to P.W.5 Akshaya Kumar Sahoo, Inspector of Vigilance, Rourkela Unit who examined the witnesses, sent the exhibits to R.F.S.L., Ainthapali, Sambalpur for examination and opinion. On 18.12.2000 P.W.5 received the report of the chemical examiner. He produced all the relevant documents before the Deputy Secretary to Government of Odisha who accorded sanction for prosecution of the appellant. He received the sanction order on 21.12.2001 and on completion of investigation, he submitted charge sheet on 21.12.2001 against the appellant.

3. The defence plea of the appellant was one of complete denial of the occurrence and it was pleaded that P.W.3 had come to the hospital for his treatment and the appellant had given him one advisory certificate and a prescription. On 12.11.2000 P.W.3 collected medical fitness certificate from him and on that day the appellant noticed some peculiar and abnormal behaviour of P.W.3 who was trying to touch the hands of the appellant while collecting medical fitness certificate. It was further pleaded by the appellant that he was not aware as to who kept the tainted money inside the pen stand and since the room in question was the duty room, many persons used to come to that room.

4. In order to prove its case, the prosecution examined six witnesses.

P.W.1 Prabhas Chandra Rout was the Asst. Engineer, R.D.A., Rourkela who was a member of the trap party and he stated about the preparation for the trap as well as preparation of the detection report after the trap.

P.W.2 Banamali Naik was the Junior Engineer, National Highway Division and he acted as over hearing witness and stated about the preparation for the trap as well as detection.

P.W.3 Surendra Nath Mohanty is the informant in the case and he stated about the demand of bribe made by the appellant to him for issuance of fitness certificate and further stated about the preparation for the trap as well as detection.

P.W.4 Dhobei Charan Sahoo was the Deputy Secretary to Government of Odisha, General Administrative Department and he was the sanctioning authority who proved the sanction order (Ext.4).

P.W.5 Akshaya Kumar Sahoo was the Inspector of Vigilance, Rourkela Unit who took over charge of investigation from P.W.6 and submitted charge sheet.

P.W.6 Naba Kishore Patnaik was the D.S.P., Vigilance, Rourkela who was the trap laying officer and he stated about the preparation for the trap, recovery of tainted money and preparation of the detection report.

The prosecution exhibited twelve documents. Ext.1 is the preparation report, Ext.2 is the detection report, Ext.3 is the first information report, Ext.4 is the sanction order, Ext.5 is the chemical examination report, Exts.6 to 10 and 12 are the seizure lists and Ext.11 is a sheet of paper.

The prosecution proved four material objects. M.O.I is the seal, M.O.II, M.O.III and M.O.IV are the G.C. notes.

The appellant exhibited three documents. Ext.A is the medical certificate dated 13.07.2000, Ext.B is the fitness certificate dated 12.11.2000 and Ext.C is the prescription dated 12.11.2000.

5. The learned trial Court after assessing the evidence on record came to hold that the evidence of P.W.3 is believable and non-seizure of any outdoor ticket dated 10.11.2000 from P.W.3 and outdoor register relating to that date from the hospital did not belie the prosecution story and non-examination of any patient present in the outdoor of the hospital on 10.11.2000 at the time of demand of bribe by the appellant is no way helpful to the defence. It is further held that the evidence of P.W.3 finds corroboration from the evidence of other witnesses in material particulars. It is further held that there is no evidence on record showing that P.W.3 had prior enmity or dispute with the appellant and therefore, the plea taken by the defence that P.W.3 might have kept the tainted money in the pen stand taking advantage of temporary absence of the appellant in room no.34 cannot be accepted. It was further held that the fact that phenolphthalein powder was traced in the hand wash of the appellant on chemical examination is not a circumstance appearing against the appellant as there was every possibility of contamination of phenolphthalein powder to the hands of the appellant from the hand of P.W.3 while taking and returning fitness certificate. It was further held that even though the

evidence of P.W.3 about demand and acceptance of bribe by the appellant from him is not supported from the evidence of P.W.2 but since the evidence of P.W.3 finds corroboration from the evidence of P.W.1 and P.W.5 on material particulars, there is nothing to disbelieve such evidence.

6. Mr. Hemant Kumar Mund, learned counsel appearing for the appellant strenuously contended that the learned trial Court has not assessed the evidence on record in its proper perspective. He argued that the appellant had not demanded anything from P.W.3 on 13.07.2000 when he granted advisory certificate vide Ext.A to him advising him to take rest for six months and even though P.W.3 visited the hospital on several occasion for his treatment after 13.07.2000 and before 10.11.2000 but on none of the occasion the appellant demanded anything from P.W.3. It is contended that in view of such previous conduct of the appellant, the alleged demand stated to have been made on 10.11.2000 is a doubtful feature. He asserted that even though the demand of bribe is stated to have been made in the outdoor but the outdoor register has not been seized to show that P.W.3 visited the outdoor on that day. No prescription relating to the treatment of P.W.3 on 10.11.2000 has been proved and therefore, it is argued that it is very difficult to accept that P.W.3 visited the appellant on that day in the outdoor during course of which the demand was made. It is further contended that the demand is stated to have been made in presence of several patients in the outdoor which is quite unbelievable. He emphasized on the conduct of P.W.3 in not reporting the demand of bribe made by the appellant to his higher authorities which according to Mr. Mund is a suspicious feature. It is contended that as per the evidence of P.W.3, fitness certificate was not necessary for his joining and therefore, why P.W.3 would pursue for such a certificate and would even agree to pay bribe? It is further contended that P.W.3 seems to have hatched out a story of demand of bribe to falsely implicate the appellant for the best reason known to him. He highlighted that the non-acceptance of bribe money from P.W.3 by the appellant with his hands and asking P.W.3 to keep the money in the pen stand is another suspicious feature as there was nobody inside the room at that point of time. It is further contended that there was every opportunity on the part of P.W.3 to plant the tainted money inside the pen stand without the knowledge of the appellant. It is further contended that the explanation given by the appellant immediately after the trap shows his bonafideness and it rules out the presentation of an afterthought story. He contended that in the facts and circumstances of the case, benefit of doubt should be extended in favour of the appellant. The learned counsel relied upon the decisions in the cases of **Gulam Mahmood A. Malek -Vrs.- State of Gujarat reported in A.I.R. 1980 S.C. 1558 and Shankarlal Gyarasilal Dixit-Vrs.- State of Maharashtra reported in A.I.R. 1981 S.C. 765.**

Mr. Sanjay Kumar Das, learned Standing Counsel appearing for the Vigilance Department on the other hand contended that there is no infirmity or

illegality in the impugned judgment of the learned trial Court and the prosecution has proved all the three aspects i.e. demand, acceptance and recovery of bribe money and the explanation furnished by the appellant is not acceptable. It is contended that when P.W.3 would have been benefited by the issuance of fitness certificate by the appellant, there was no earthly reason on his part to bring false accusation against the appellant had there been no demand. The learned counsel for the Vigilance Department relied upon the decisions of the Hon'ble Supreme Court in the cases of **State of A.P. -Vrs.- R. Jeevaratnam reported in A.I.R. 2005 S.C. 4095**, **State of U.P. -Vrs.- Dr. G.K. Ghosh reported in A.I.R. 1984 Supreme Court 1453**, **State of Bihar -Vrs.- Basawan Singh reported in A.I.R. 1958 S.C. 500**, **Gurjant Singh -Vrs.- State of Punjab reported in (2015) 62 Orissa Criminal Reports (SC) 91**, **State of West Bengal -Vrs.- Kailash Chandra Pandey reported in A.I.R. 2005 S.C. 119, Hazari Lal -Vrs.- The State (Delhi Admn.) reported in A.I.R. 1980 S.C. 873** and contended that the appeal should be dismissed.

7. Law is well settled that proof of demand of illegal gratification is the gravamen of the offences under sections 7 and 13(2) read with 13(1)(d)(i) and (ii) of 1988 Act and in absence thereof, unmistakably the charge would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would not be sufficient to bring home the charge under the aforesaid sections of the Act. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under sections 7 or 13 of the Act would not entail his conviction thereunder. For arriving at the conclusion as to whether all the ingredients of the offences i.e. demand, acceptance and recovery of illegal gratification have been satisfied or not, the Court must take into consideration the facts and circumstances brought on the record in their entirety. The burden rests on the accused to displace the statutory presumption raised under section 20 of the 1988 Act by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in section 7 of the 1988 Act. The standard of burden of proof on the accused vis-à-vis the standard of burden of proof on the prosecution would differ. The evidence of the complainant should be corroborated in material particulars and the complainant cannot be placed on any better footing than that of an accomplice and corroboration in material particulars connecting the accused with the crime has to be insisted upon. Even if the trap witnesses turn hostile or are found not to be independent, if the evidence of the complainant and the other circumstantial evidence on record is found to be consistent with the guilt of the accused and not consistent with his innocence, there should be no difficulty for the Court in upholding the prosecution case. (**Ref:- B. Jayaraj -Vrs.- State of Andhra Pradesh reported in (2014) 13 Supreme Court Cases 55, Bhagirathi Pera -Vrs.- State of Orissa reported in (2014) 58 Orissa**

Criminal Reports 566, M.R. Purushotham -Vrs.- State of Karnataka reported in (2015) 3 Supreme Court Cases 247, State of Punjab -Vrs.- Madan Mohan Lal Verma reported in A.I.R. 2013 S.C. 3368, **State of Maharashtra -Vrs.- Dnyaneshwar reported in (2009) 44 Orissa Criminal Reports 425**, **Punjabrao -Vrs.- State of Maharashtra reported in A.I.R. 2002 S.C. 486**, **V. Sejappa -Vrs.- State reported in A.I.R. 2016 S.C. 2045**, **Panalal Damodar Rathi -Vrs.- State of Maharashtra reported in A.I.R. 1979 S.C. 1191**, **Mukhitar Singh -Vrs.- State of Punjab reported in (2016) 64 Orissa Criminal Reports (S.C.) 1016**, **Gurjant Singh -Vrs.- State of Punjab reported in (2015) 62 Orissa Criminal Reports (SC) 91**, **State of U.P. -Vrs.- Dr. G.K. Ghosh reported in A.I.R. 1984 Supreme Court 1453**).

In case of **Krishan Chander -Vrs.- State of Delhi reported in (2016) 3 Supreme Court Cases 108**, it is held that the demand for the bribe money is sine qua non to convict the accused for the offences punishable under sections 7 and 13(1)(d) read with section 13(2) of the 1988 Act. In case of **P. Satyanarayana Murthy -Vrs.- District Inspector of Police reported in (2015) 10 Supreme Court Cases 152**, it is held that the proof of demand has been held to be an indispensable essentiality and of permeating mandate for an offence under sections 7 and 13 of the Act. Qua section 20 of the Act, which permits a presumption as envisaged therein, it has been held that while it is extendable only to an offence under section 7 and not to those under section 13(1)(d)(i) & (ii) of the Act, it is contingent as well on the proof of acceptance of illegal gratification for doing or forbearing to do any official act. Such proof of acceptance of illegal gratification, it was emphasized, could follow only if there was proof of demand. Axiomatically, it was held that in absence of proof of demand, such legal presumption under section 20 of the Act would also not arise.

8. According to the prosecution case, the demand of bribe by the appellant for issuance of fitness certificate in favour of P.W.3 was made first on 10.11.2000 and again on 12.11.2000.

Demand of bribe on 10.11.2000:-

Adverting to the first demand made on 10.11.2000, the appellant specifically denied about any meeting with P.W.3 on that day in the hospital and the later requesting him to grant a fitness certificate in order to enable him to join service at Keonjhar.

In the first information report (Ext.3), it is mentioned by P.W.3 that on 10.11.2000 he met the appellant and requested him to grant fitness certificate. The appellant checked him and opined that the leg of P.W.3 was in a better condition but he asked Rs.150/- for his treatment. When P.W.3 expressed his reluctance to pay such amount, the appellant told him that unless the demand amount of Rs.150/- is fulfilled, he would neither grant fitness certificate nor write any prescription and in

spite of repeated request of P.W.3, the appellant sticked to his demand. It is further mentioned that as for joining at his new place of posting at Keonjhar town, the certificate was necessary, on compulsion P.W.3 agreed to pay the bribe money. On being examined during trial, P.W.3 has supported his version made in the first information report and stated that he requested the appellant to issue a medical fitness certificate in his favour to enable him to join at Keonjhar to which place he was transferred.

In the cross-examination, P.W.3 has however stated that his authorities had not asked him to submit fitness certificate for joining in the office. If that was the state of affairs, the conduct of P.W.3 in approaching the appellant on 10.11.2000 for grant of such certificate and insisting him for such certificate and even getting agreed to pay the bribe money appears to be unbelievable. When there was no necessity for such a certificate for the purpose of his joining at the new place of posting, why P.W.3 would meet the appellant in the hospital and insist him to issue such certificate.

P.W.3 has further stated that on 13.07.2000 the appellant had granted him a medical certificate marked as Ext.A which was seized on his production by Vigilance Police. He further stated that he had not produced such certificate in the office after the same was granted by the appellant and had kept the same with him. There is no accusation against the appellant that when he issued the medical certificate (Ext.A) in favour of P.W.3, he raised any demand. P.W.3 has further stated that in between 13.07.2000 and 10.11.2000, he had met the appellant on several dates in connection with his treatment. There is also no accusation that on any occasion prior to 10.11.2000, the appellant had raised any demand from P.W.3 for his treatment. In the background of the case, when on several occasion the appellant had treated P.W.3 and even issued medical certificate (Ext.A) without any demand, it appears strange as to why all on a sudden he would raise the demand on 10.11.2000. The previous conduct of the appellant in not raising any demand from P.W.3 and providing the required treatment goes against the prosecution case of raising demand on 10.11.2000.

P.W.3 has stated that many patients were present in the outdoor on 10.11.2000 when he was examined by the appellant and those patients were present when the demand was made by the appellant. First of all, raising of demand of bribe in such a scenario in presence of other patients appears to be an unbelievable story. The investigating officer (P.W.5) has neither examined any patients who were present at the outdoor of the hospital on 10.11.2000 nor had he seized the O.P.D. register of the hospital of the concerned date or any O.P.D. ticket issued to P.W.3. When specific questions in that respect were put to P.W.5, he replied that he did not think it to be necessary. The learned trial Court has also not given any importance to the non-seizure of those documents or non-examination of any patient. When a situation in which the alleged demand of bribe is stated to have been made appears

to be doubtful or improbable, it was the duty of the prosecution to adduce acceptable evidence to show that the appellant was so fearless and careless that he did not even hesitate to demand bribe in a public place like outdoor that to in the presence of other patients. Moreover the seizure of such documents like O.P.D. register and O.P.D. ticket and examination of patients would have lent corroboration to the presence of P.W.3 in the outdoor on 10.11.2000 particularly when the appellant denied that he had met P.W.3 on 10.11.2000 in the hospital.

Therefore, in view of the foregoing discussions, it is very difficult to accept that on 10.11.2000 the appellant demanded Rs.150/- from P.W.3 for issuance of a medical fitness certificate.

Demand of bribe on 12.11.2000:-

P.W.3 has stated that on 12.11.2000 when he met the appellant in a room in the upstairs of the hospital, the appellant asked him whether he had brought the demanded money and when he replied in the affirmative, the appellant asked him to keep the money in the pen stand kept on the table in that room which was in a shape of a glass and after he kept the money in the pen stand, the appellant caught hold of that pen stand and wrote a certificate in his favour.

P.W.3 has stated in the cross-examination that he along with P.W.2 first went to the outdoor of the hospital which is situated on the ground floor and could not find the appellant there and then they went to the upstairs of the hospital and met him in room no.34. P.W.3 has further stated in the cross-examination that the appellant had not told him on 10.11.2000 specifically to meet him in the outdoor of the hospital on 12.11.2000. Therefore, it appears from the evidence of P.W.3 that even though he was asked by the appellant to come on 12.11.2000 to the hospital for collecting the fitness certificate but he was not told by the appellant as to where exactly he would be available and at what time. P.W.3 seems to be searching for the appellant in the hospital to give him bribe money for obtaining fitness certificate even though such a certificate was not asked for by his authority for joining his duty.

The over hearing witness (P.W.2) is completely silent regarding any demand stated to have been made by the appellant to P.W.3 even though he remained outside the room near the door of room no.34 which was open and there was a curtain on the entrance door of the room. P.W.3 has stated that no patient was present either inside the room or outside. In such a situation, had there been any demand by the appellant, it would not have missed the ears of P.W.2 who had accompanied P.W.3 for a specific purpose. The silence of P.W.2 on such a material aspect speaks volumes regarding the alleged demand made inside room no.34 on 12.11.2000.

In case of **Gulam Mahmood A. Malek -Vrs.- State of Gujarat reported in A.I.R. 1980 S.C. 1558**, it is held that the complainant in a trap case is in the

nature of an accomplice and before any Court could act on his testimony, corroboration in material particulars is necessary.

In case of **State of Bihar -Vrs.- Basawan Singh reported in A.I.R. 1958 S.C. 500**, it is held that independent corroboration does not mean that every detail of what the witnesses of the raiding party have said must be corroborated by independent witnesses. Corroboration need not be direct evidence that the accused committed the crime; it is sufficient even though, it is merely circumstantial evidence of his connection with the crime.

In view of the foregoing discussions, it is difficult to accept the evidence of P.W.3 without any corroboration either from direct evidence or from circumstantial evidence that on 12.11.2000 the appellant reiterated the demand of Rs.150/- from him for issuance of fitness certificate.

9. **Acceptance of bribe money by appellant:-**

P.W.3 has stated that on 12.11.2000 when he replied in affirmative to the query made by the appellant as to whether he had brought the demanded money, the appellant asked him to keep the money in the pen stand kept on a table in that room and accordingly, he kept the money in the pen stand.

It appears from the evidence of P.W.3 that there was no patient either inside or outside room no.34 by the time he reached there.

If according to the prosecution case, the appellant was so fearless two days before that he demanded bribe money from P.W.3 in the outdoor of the hospital in presence of other patients, he would not have asked P.W.3 to put the money in the pen stand rather he would have accepted the money in his own hands from P.W.3 and either kept it in his pant or shirt pocket or in the drawer of the table as there was nobody to see it. On the other hand, if the appellant was afraid that there was possibility of being trapped in case of acceptance of money from P.W.3 directly with his own hands, in ordinary course he would not have asked P.W.3 to keep the money in the pen stand on the table which could easily be detected by anybody.

P.W.3 admitted to have stated before the Vigilance Police that the appellant went inside another room to boil water before he came to the downstairs and further admitted that the said statement is correct. Similarly P.W.2 has stated in the cross-examination that adjacent to room no.34, there was an indoor room and that the doctor came out of room no.34 followed by P.W.3 after some time. Therefore, there was ample opportunity for P.W.3 to plant the tainted money in the pen stand in the temporary absence of the appellant which would have taken a few seconds.

The learned Standing Counsel for the Vigilance Department placed reliance in case of **State of A.P. -Vrs.- R. Jeevaratnam reported in A.I.R. 2005 S.C. 4095** wherein the Hon'ble Court disbelieved the explanation furnished by the respondent that the tainted money must have been put into his brief case when he had gone to

the bath room as both P.Ws.1 and 2 denied that the respondent went to the bath room.

The case in hand is distinguishable from the facts of **R. Jeevaratnam** (supra) inasmuch as here P.W.3 admitted that in between his entry to room no.34 and exit, the appellant had been to the adjoining room to boil water. The appellant himself has stated before the trap laying officer (P.W.6) that while P.W.3 was sitting in front of him in a stool, he left to the dressing room for some work. Therefore, P.W.3 had scope and opportunity to plant money in the pen stand unlike the case of **R. Jeevaratnam** (supra).

Conduct of the appellant:-

The conduct of the appellant immediately after P.W.6 challenged him to have received bribe money from P.W.3 is very relevant. P.W.1 has stated that on examination, the appellant stated that he had not accepted any money from P.W.3 and that he had not demanded bribe from P.W.3 either on the previous day or on that day and that on that day at about 11.00 a.m. P.W.3 came to him and wanted to take a fitness medical certificate from him though he was not treated at R.G. Hospital and that he denied to issue the same but on repeated request, he issued the certificate. P.W.1 has further stated that the appellant stated that he left the room to the dressing room for some work while P.W.3 was sitting in front of him in a stool and after returning to room no.34, he called P.W.3 to outside and locked the room. P.W.2 has stated that when the Vigilance D.S.P. challenged the appellant to have demanded and accepted the bribe, he denied to have demanded or accepted any money. P.W.6, the trap laying officer has stated that he had mentioned the explanation given by the appellant in the detection report Ext.2. On perusal of the detection report (Ext.2), it reveals that on examination of the appellant, he not only denied to have demanded or accepted any bribe money but further stated that on that day at about 11.00 a.m. P.W.3 came to him and wanted to take a medical fitness certificate from him though he was not treated at R.G. Hospital and he denied to issue the same but on repeated request of P.W.3, he issued the certificate and that he left to the dressing room for some work while P.W.3 was sitting in front of him on a stool and after returning to the room, he called P.W.3 to outside and locked the room.

When the appellant on being confronted by the trap laying officer (P.W.6) about the acceptance of bribe money, without fumbling or getting panicked gave a spontaneous explanation right at the moment when the crime is allegedly committed and there was no opportunity to fabricate such explanation or concoct a story, the explanation becomes admissible as *res gestae* within the meaning of section 6 of the Evidence Act.

P.W.1 has stated that the hand washes of both the hands of the appellant were taken in colourless sodium carbonate solution and there was no change in colour. P.W.6 has also stated that he took the washes of both the hands of the

appellant in sodium carbonate solution and the colour of the solution did not change. The hand wash of the appellant collected in a bottle and marked as 'C' was sent for chemical examination and it was found to be faintly pink and phenolphthalein was detected in the sodium carbonate solution. The learned trial Court has not given any importance to the finding of phenolphthalein in the hand wash of the appellant as there was every possibility of contamination of phenolphthalein powder to the hands of the appellant from the hand of P.W.3 while taking and returning the medical fitness certificate.

A Court has to be more careful, cautious and meticulous in scrutinizing the evidence on record when the accused has not touched the tainted money nor such money was recovered from his personal belongings. If the money is recovered from inside any object even from the room where the accused was present, the Court has to keep in mind whether there was any possibility of tainted money being planted by the decoy witness cunningly without the notice of the accused. Situation may so arise where the accused may not be in a position to say as to how the tainted money was recovered from his room or from inside any object in his room. In absence of his knowledge, he may not take a specific plea except pleading ignorance. In such a situation, the Court is not absolved of its responsibility to scan the evidence with eagle eyes so that an innocent person gets justice and frees himself from unnecessary harassment and victimization.

10. **Recovery of bribe money:-**

Even though recovery of the tainted money from the pen stand is not disputed by the appellant but since there was possibility of planting the money by P.W.3 without the notice of the appellant, mere recovery of the tainted money is not sufficient to fasten his guilt in the absence of any clinching evidence with regard to demand and acceptance of the amount as illegal gratification.

In case of **Sita Ram -Vrs.- The State of Rajasthan reported in 1975 Criminal Law Journal 1224**, the evidence of the complainant was rejected and it was held that there was no evidence to establish that the accused had received any gratification from any person. On that finding the presumption under Section 4(1) of the Prevention of Corruption Act was not drawn. All that was taken as established was the recovery of certain money from the person of the accused and it was held that mere recovery of money was not enough to entitle the drawing of the presumption under Section 4(1) of the Prevention of Corruption Act. In case of **Suraj Mal -Vrs.- The State (Delhi Administration) reported in 1979 Criminal Law Journal 1087,** it was held that mere recovery of money divorced from the circumstances under which it was paid was not sufficient when the substantive evidence in the case was not reliable to prove payment of bribe or to show that the accused voluntarily accepted the money.

Therefore recovery of tainted money from the pen stand kept on the table in room no.34 is in itself not such an incriminating circumstance basing on which a verdict of guilt can be passed against the appellant.

11. The submission of the learned counsel for the Vigilance Department that there was no earthly reason on the part of P.W.3 to bring false accusation against the appellant had there been no demand, is not convincing.

Motive behind false implication operates in the mind of the informant and it is very often not within the reach of the accused. The appellant may not be in a position to know the motive of P.W.3 in implicating him falsely. In case of **Shankarlal Gyarasilal Dixit** (supra), it was held that different motives operate on the mind of different persons in making of unfounded accusations.

When the evidence of P.W.3 regarding demand of bribe money by the appellant and instruction given by the appellant to him to keep the money in the pen stand is not acceptable in view of the discussions above made, merely because the appellant fails to say what was the specific motive on the part of P.W.3 to falsely implicate him in the crime, the evidence of P.W.3 would not be automatically accepted.

12. Learned counsel for the Vigilance Department placed reliance in the case of **State of West Bengal -Vrs.- Kailash Chandra Pandey reported in A.I.R. 2005 S.C. 119** wherein it is held that the Appellate Court should be slow in re-appreciating the evidence as the trial Court has the occasion to see the demeanour of the witnesses and it is in a better position to appreciate the evidence and the Appellate Court should not lightly brush aside the appreciation done by the trial Court except for cogent reasons.

I am of the humble view that it is the duty of the Appellate Court to see if there is any error in the appreciation of evidence by the trial Court. The sustainability of the judgment of the trial Court depends upon the soundness of the reasons given in support of the findings and the conclusion. An Appellate Court should not adopt the reasoning given by the trial Court without evaluating the evidence at all otherwise it would not be a legal judgment in the eye of law. As a first Court of appeal, the High Court must apply its independent mind and record its own findings on the basis of its own assessment of evidence.

13. In view of the foregoing discussions of the evidence, it is apparent that the prosecution case suffers from serious infirmities. The reasoning assigned by the learned trial Court is faulty and genuine material evidence available on record in favour of the appellant has been overlooked and it appears that the impugned judgment is one sided in favour of the prosecution. I am fully satisfied that sufficient, cogent and reliable evidence is not available on record which established the guilt of the appellant. Once the story of demand falls through, the authenticity of trap becomes highly doubtful because acceptance of bribe germinates through

demand. In the absence of any clinching evidence relating to the demand and acceptance of the bribe money by the appellant and the fact that there is possibility of planting the tainted money, I am of the view that the guilt of the appellant has not been established beyond all reasonable doubt and therefore, I am constrained to give benefit of doubt to the appellant.

In the result, the criminal appeal is allowed. The impugned judgment and order of conviction of the appellant under section 7 and section 13(2) read with section 13(1)(d) of the 1988 Act and the sentence passed thereunder is hereby set aside and the appellant is acquitted of all the charges. The appellant is on bail by virtue of the order of this Court. He is discharged from liability of his bail bond. The personal bond and the surety bond stand cancelled.

2018 (I) ILR - CUT- 1133

S. N. PRASAD, J.

W.P. (C). NO.21593 OF 2016

ABHISHEK KUMAR RAI ……..Petitioner

.Vrs.

I.I.T., BHUBANESWAR & ORS. ……..Opp.Party

INDIAN INSTITUTE OF TECHNOLOGY ACT, 1961 – Statute No.12 – Appointments – Petitioner pursuant to an advertisement, applied for the post of Assistant Professor – Petitioner found not suitable, however recommended for being engaged as a 'visiting faculty' on contractual basis for a period of one year – Petitioner accepted the offer and joined – Extension was given for two consecutive years – When extension not given further, the petitioner filed the writ petition seeking a direction to delete the word 'visiting' from the appointment letter and to appoint him as Assistant Professor as per the recruitment/selection process raising other ancillary questions like that the selection process was bad and that the Selection Committee had no jurisdiction to change the terms of the selection – Whether such a relief can be granted to the petitioner – Answer is no, as there were materials contrary to the allegations made by the petitioner – Writ petition dismissed.

"The provision as contained in Article 226 of the Constitution of India pertains to exercising the power, if there is any legal vested right and if the same has been infringed. But getting the contract as per the offer of appointment as Visiting Faculty, now praying to strike down the word 'visiting' from the offer of appointment cannot be said to be the legal vested right of the petitioner. The decision of Selection Committee in declaring the petitioner unsuccessful cannot be termed as without jurisdiction, but simultaneously engaging the

petitioner on contract basis can also not to be termed as the action beyond jurisdiction reason being that when the authority has called upon the candidates to participate in the selection and on merit in comparison with the candidature of other candidates. When the Selection Committee has thought it not proper to select the petitioner on regular basis as per the advertisement, they could have gone for selection in view of the provision of Statute No.17 of the Act, 1962 which contains provision for contractual appointment but the authority had taken decision to select from the same list of the candidates, who have been declared to be unsuccessful. It is for time saving and due to public interest, to provide teaching staffs in the subject. Hence it cannot be said to be without jurisdiction. Moreover, the petitioner, if aggrieved, ought to have challenged the said action at appropriate time. This Court, after appreciating the arguments advanced on behalf of the parties, is of the view that the admitted position in this case is that the selection has been initiated for fulfilling the post of Assistant Professor in the subject in question in which the petitioner along with the others had participated, but by virtue of the decision of the Selection Committee, he has been declared to be unsuccessful being incompetent and as such, he has not been recommended. The petitioner has not challenged his non-selection/non-recommendation on any ground whatsoever rather when he has been offered the assignment by way of Visiting Faculty, he has accepted the terms and conditions mentioned in the offer of appointment and started discharging his duty." *(Para 9)*

Case Laws Relied on and Referred to :-

1. (2008) 3 SCC 512 : K. Manjusree v. State of Andhra Pradesh &Anr.
2. (1986) 3 SCC 156 : Central Inland Water Transport Corporation Limited & Anr. v. Brojo Nath Ganguly & Anr.
3. (1997) 9 SCC 527 : Raj Kumar & Ors v. Shakti Raj & Ors.
4. (1982) 1 SCC 223 : Chhaganlal Keshavlal Mehta v. Patel Narandas Haribhai,
5. (2005) 5 SCC 172 : Rajesh Kumar Gupta & Ors. v. State of U.P. & Ors.
6. (2011) 5 SCC 697 : Union of India and others v. Tantia Construction Private Limited.
7. (2006) 5 SCC 258 : Life Insurance Corporation of India & Anr. v. Smt. S. Sindhu
8. (2003) 2 SCC 721 : Bank of India and Ors. v. O.P. Swaranakar Etc.
9. (2010) 8 SCC 372 : Dr. Basuvaiah v. Dr. H.L. Ramesh and Ors.
10. (1987) 1 SCC 124 : S.P. Sampath Kumar v. Union of India & Ors.
11. (1997) 3 SCC 261 : L. Chanra Kumar v. Union of India.

For Petitioner :M/s. Prafulla Kumar Rath, R.N. Parija, A.K. Rout, S.K. Pattnaik & A. Behera
Mr. R.K. Rath, Senior Counsel.

For Opp. Parties :Mr. Milan Kanungo, Senior Counsel
M/s.Sidhartha Das, S.K. Mishra, S.R. Mohanty, B.N. Ratha & A.K. Mohanty,
Mr. Anup Kumar Bose, ASGI.

JUDGMENT Date of Hearing :17.04.2018 Date of Judgment : 02.05.2018

S. N. PRASAD, J.

This writ petition has been filed under Article 226 and 227 of the Constitution of India wherein direction has been sought for upon the opposite parties to strike down the word 'visiting' from the appointment order under Annexure-1 or in alternative to direct the opposite parties to select the petitioner and issue engagement order pursuant to the selection process under Annexure-10.

2. The brief facts of the case of the petitioner is that he, being eligible to hold the post of Assistant Professor, has made an application in terms of the advertisement published by the Indian Institute of Technology, Bhubaneswar in which he had participated for regular appointment, but he has been appointed as 'Visiting' at the level of Assistant Professor in the School of Earth, Ocean & Climate Science of the Indian Institute of Technology Bhubaneswar and as such, according to the petitioner, the authorities have committed illegality in appointing him as Visiting Faculty in place of regular incumbent as Assistant Professor.

According to the petitioner, he has filled up his application form in pursuant to the advertisement under Annexure-4 which has been issued for filling up the regular vacancies and as such, no stretch of imagination he can be appointed as Visiting Faculty.

The contention raised by the learned counsel for the petitioner in assailing the terms of appointment on various grounds i.e. according to him, terms and conditions of the advertisement has been changed which cannot be allowed to be done once the selection process has been started.

Learned counsel for the petitioner has argued out the case by submitting that even though he has accepted the terms of appointment that will not cease him to assail the said order because of the settled position of law there cannot be estoppel against the law and here in the instant case, the appointment is to be made strictly in terms of the recruitment rule wherein the provision has been made under the Indian Institute of Technology Act, 1961 and statute governing the field wherein under the Statute no.12 the process of appointment has been given whereby and whereunder the selection committee is supposed to make appointment on regular basis which is to be filled up by virtue of issuance of an advertisement and the appointment on contract basis is altogether a separate process as provided under the Statute No.17.

According to the petitioner, since open advertisement has been published, it will be an appointment under the provision of the Statute No.12 and hence, if any decision has been taken by the authority in course of selection process after issuance the advertisement for filling up the post on regular basis and it cannot be deviated and if deviated, it will be said to be contrary to the statutory provision and in that pretext, the aggrieved party cannot be precluded from challenging the action of the authority.

To substantiate his argument, learned counsel for the petitioner has relied upon the judgments rendered by the Supreme Court in the cases of ***Central Inland Water Transport Corporation Limited and Another v. Brojo Nath Ganguly and Another, reported in (1986) 3 SCC 156; Raj Kumar and Others v. Shakti Raj and Others, reported in (1997) 9 SCC 527, Chhaganlal Keshavlal Mehta v. Patel Narandas Haribhai, (1982) 1 SCC 223; Rajesh Kumar Gupta and Others v. State of U.P. and Others, reported in (2005) 5 SCC 172.***

The other ground has been taken by the learned counsel for the petitioner that the petitioner, having no option at the time of selection, has accepted the offer of appointment and subsequent thereto he has challenged the same on the ground of arbitrariness of the opposite parties since they have acted contrary to the settled position of law by changing the terms and conditions of the advertisement which they cannot do.

In view of the principle laid down that once the process of selection begins, the rules of terms cannot be allowed to be changed. In this regard, he has relied upon the judgment rendered by Hon'ble the Supreme Court in the case of ***K. Manjusree v. State of Andhra Pradesh and Another, reported in (2008) 3 SCC 512***.

The ground has been taken that the opposite parties have come out with the plea in the counter affidavit that the petitioner has not been found suitable and competent for the said position as per the opinion of the Selection Committee and as such, he has not been taken into regular engagement, but however, considering the urgency, he has been appointed purely on contract basis for a period of one year which they cannot do, but the authority, without any jurisdiction, has compelled the petitioner to discharge his duty as a Visiting Faculty which is against the terms of advertisement as also the statutory rule.

Learned counsel petitioner has tried to impress upon the Court that there is discrepancy made in the para-10 of the counter affidavit and para-4 of the affidavit filed by the opposite parties by way of an objection to the miscellaneous application, since at para-10 of the counter affidavit, it has been stated that the petitioner has been found to unsuitable and as such, his name does not find place in the recommendation paper submitted by the Selection Committee for the post of Assistant Professor, but thereafter on the same day, the Selection Committee unanimously decided to have a second sitting and select few candidates on purely temporary basis to meet the demand of teaching while at paragraph-4 of the affidavit filed by the opposite parties by way of an objection to the miscellaneous application wherein it has been stated by opposite parties that amongst the candidates appeared for the interview, the petitioner was not found suitable for the position by the selection committee. However, IITs across the country can appoint Faculty at any given time on purely temporary basis to meet the demands of Teaching on specialized subjects. Thus, in such a category, the petitioner was offered Visiting Faculty (on contract) position on temporary basis for one year. The petitioner joined the Institute on 12.3.2014 accepting the offer of temporary position for one year.

According to the petitioner, in paragraph-10 of the counter affidavit, the statement has been made to the effect that the petitioner has not been found to be suitable, but the said stipulation has not been made at paragraph-4 of the affidavit filed by the opposite parties by way of an objection to the miscellaneous application and as such, there is no contradiction which is nothing but a false affidavit to mislead this Court and on this ground alone, the writ petition is fit to be allowed.

He has also submitted that the petitioner might take the plea of alternative remedy, since under the statue there is arbitration clause under the provision of Section-30 of the Notification dated 29th June, 2012 issued by the Ministry of Human Resource Development (Department of Higher Education), Government of India, but on the ground of availability of alternative remedy, this Court is not precluded from exercising the power conferred under Article 226 of the Constitution of India in exercise of its power of judicial review and to support his contention, he has relied upon a judgment rendered by Hon'ble the Supreme Court in the case of ***Union of India and others v. Tantia Construction Private Limited, reported in (2011) 5 SCC 697.***

3. Opposite parties have appeared and filed detailed counter affidavit *inter alia* it has been stated therein that the selection process has been initiated in terms of the Statute No.12 of the Indian Institutes of Technology, Kharagpur which confers power of appointment by constituting a Selection Committee for filling up post under the Institute by advertisement or by way of promotion from amongst the members of the staff of the institute.

In the case of post of Assistant Professor, the Selection Committee shall consist of the Director being the Chairman and the two nominees of the Board, one being an expert but other than a member of the Board, one expert nominated by the Senate and head of the department, if the post for which selection is being made is lower in status than that occupied by the Head of Department.

In view thereof, advertisement under Annexure-4 to the writ petition inviting applications for filling up of the different posts. One of the posts is the Assistant Professor, for which, at least 3 years teaching/research/professional experience excluding, however, the experience gained while pursuing Ph.D. Candidates should have demonstrated research capabilities in terms of publications in reputed journals and conference proceedings. Eligible candidates with less than 3 years experience, as mentioned above, may be considered for Assistant Professor Position on contract. Such candidates may apply to the position of Assistant Professor in the online portal.

The petitioner, who at the time of making application was in Norway and as such, as instructed in the advertisement, has submitted application through online i.e. through Skype. He was called upon to participate in the selection process which was conducted on 30th November, 2013 through video conference (skype). The petitioner was found not suitable/competent for the said position and was accordingly rejected by the Selection Committee. Hence, the name of the petitioner was not recommended by the Selection Committee for the position of Assistant Professor, since there was extreme urgency of the faculty member in the subject in question, on the very same day, the Selection Committee unanimously decided to have a second sitting and select few candidates on purely temporary basis to meet the demands of teaching. Accordingly, two candidates including the petitioner who

appeared through Skype interview were recommended by the Selection Committee to be appointed as Visiting Faculty (on contract) in the School of Earth, Ocean and Climate Sciences (SEOCS) and as per the norms of IIT, the name of the petitioner was forwarded for approval to the Board of Governors, Indian Institute of Technology, Bhubaneswar and consequently, his name was approved by the Board of Governors for the position of Visiting Faculty on contract basis for a period of one year.

4. Mr. Millan Kanungo, learned Senior Counsel appearing for the opposite party-Indian Institute of Technology, Bhubaneswar submits that the offer of appointment contains the condition that the appointment will be effective from the date of the joining, communicate the acceptance to the undersigned within 15 days from the date of issue of the letter and join the Institute on or before 28th February, 2014. The offer is for a period of one year. The terms and conditions governing the appointment have been given in Annexure-I to the said letter which contains the condition of duration of appointment which is for a period of one year. The appointment may be terminated any time by one month's notice on either side.

The petitioner has accepted the offer of appointment by showing his willingness to report duty on 12.03.2014. Accordingly, he has reported on 12.3.2014 and his joining was accepted, as would be evident from Annexure-A/2 to the counter affidavit. The petitioner started discharging his duty and he has been given extension twice, but third time it was refused reason being that the contract period is not to be extended more than for a period of three years as per the Office Order No.130/2016 dated 31st August, 2016 under Annexure-A/3 to the counter affidavit. The petitioner thereafter invoked the jurisdiction of this Court by making prayer to strike down the words 'visiting faculty' from the appointment letter dated 8.1.2014.

Mr. Kanungo, further submits that the petitioner has entered into a contract by accepting the terms and conditions of the said contract which was issued in the shape of offer of appointment dated 8.1.2014 and once it has been accepted, the same cannot be rewritten by the court of law by striking it down after accepting it for substantial period.

To support his contention, he has relied upon the judgment rendered by Hon'ble the Supreme Court in the case of ***Life Insurance Corporation of India and Anr. v. Smt. S. Sindhu, reported in (2006) 5 SCC 258***.

His further contention is that the petitioner once accepted the offer of appointment, he will be ceased to challenge the same since he was knowing about the facts, condition mentioned in the offer of appointment and shown his willingness and accepted the same. Hence, once accepted, he is ceased to challenge the terms of appointment.

To substantiate his contention, he has relied upon the judgments rendered by Hon'ble the Supreme Court in the cases of **Bank of India and Ors. v. O.P.**

Swaranakar etc., reported in *(2003) 2 SCC 721; and Punjab and Sind Bank and Anr. v. S. Ranveer Singh Bewa and Anr., reported in (2004) 4 SCC 484*.

Further ground has been taken by him that the petitioner was declared to be unsuccessful on the day of the interview for regular appointment which he has not challenged rather when he was offered the assignment of Visiting Faculty, he has accepted the same and as such, once he has not challenged the selection process in which he was declared to be incompetent and unsuitable, he will be ceased to question the decision of the selection committee by making a prayer to strike down the words 'visiting faculty' from the offer of appointment and if it will be allowed to the petitioner which amounts ultimately to interfering with the decision of the selection committee which should not be done by the court of law for the reason that the decision taken by the expert committee should not be interfered with by the court of law to strengthen his argument, he has relied upon judgment rendered by Hon'ble the Supreme Court in the case of ***Dr. Basuvaiah v. Dr. H.L. Ramesh and Ors., reported in (2010) 8 SCC 372***.

So far as the contention raised by the petitioner that there is discrepancy in between the statement made by the opposite parties at paragraph-10 to the counter affidavit vis-à-vis paragraph-4 of the affidavit filed by the opposite parties by way of an objection to the miscellaneous application.

It has been submitted by Mr. Kanungo that the objection of the miscellaneous application cannot be said to be the counter affidavit rather it is only by way of controverting statement made in the miscellaneous application and as such, the concise statement has been given, it does not mean that whatever has been stated by the opposite parties at paragraph-10 of the counter affidavit will be of no value rather it is the specific case of the opposite parties that the petitioner was unsuccessful in the selection process and that is the reason he has been inducted as a Visiting Faculty otherwise he would have challenge the same at the threshold, but instead of doing so, he has accepted the offer of appointment of Visiting Faculty.

He has also taken the ground of availability of alternative remedy of the clause of arbitration and as such, he has submits that this writ petition is not maintainable.

5. Heard the learned counsel for the parties, appreciated their arguments, gone through the relevant documents as has been brought on record by the learned counsel for the parties and from its perusal, it is evident that the IIT, Bhubaneswar is the creation of the statute which was created by the Notification issued on 29th June, 2012 in exercise of the powers conferred by sub-section (2) of Section-1 of the Institutes of Technology (Amendment) Act, 2012. The Central Government has established the Indian Institute of Technology at Bhubaneswar.

6. The object of the institute to provide expertees in the technical education across the country and for that purpose various Indian Institute of Technology has

been created from time to time and under that series, the Indian Institute of Technology, Bhubaneswar has also been established by virtue of the Institute of Technology (Amendment) Act, 2012.

The institute in question is governed by the Institute of Technology Act, 1961 which also contains the provision of appointment under Statute No.12 as contained under the Indian Institute of Technology, Kharagpur effective from 6th November, 1962 for the opposite party-Institute herein also. The appointment is to be made by virtue of an advertisement. For better appreciation, the Statute No.12 is being referred herein below:-

"**12.** ***Appointments***

(1) All posts at the Institute shall normally be filled by advertisement, but the Board shall have the power to decide, on the recommendations of the Director that a particular post be filled by invitation or by promotion from amongst the members of the staff of the Institute.

(2) *While making appointments, the Institute shall make necessary provision for the reservation of posts in favour of the scheduled castes and scheduled tribes in accordance with the decisions of the Board.*

(3) *Selection Committees for filling posts under the Institute (other than the posts on contract basis) by advertisement or by promotion from amongst the members of staff of the Institute shall be constituted in the manner laid down below namely:*

(a) In the case of posts of Deputy Director and Professor, the Selection Committee shall consist of:

(i)	*Director*	*Chairman*
(ii)	*One nominee of the Visitor*	
(iii)	*Two nominees of the Board, one being an expert but other than a member of the Board*	*Members*
(iv)	*One expert nominated by the Senate other than a member of the Senate*	*Member*

(b) In the case of posts of Assistant Professor, Senior Scientific Officer and Lecturer, the Selection Committee shall consist of:

(i)	*Director*	*Chairman*
(ii)	*Two nominees of the Board, one being an expert but other than a member of the Board*	*Members*
(iii)	*One expert nominated by the Senate and*	*Member*
(iv)	*Head of the Department concerned, if the post for which selection is being made is lower in status than that occupied by the Head of the Department.*	*Member*

(4) In the absence of Director, any member of the staff of the Institute who is appointed to perform the current duties of the Director shall be the Chairman of the Selection Committees in the place of the Director.

(5) In the absence of the Deputy Director, the Director may nominate any member of the staff of the Institute to work on the Selection Committee in his place.

(6) Where a post is to be filled on contract basis or by invitation, the Chairman may, at his discretion, constitute such adhoc Selection Committees, as circumstances of each case may require.

(7) Where a post is to be filled by promotion from amongst the members of the Institute or temporarily for a period not exceeding twelve months, the Board shall lay down the procedure to be followed.

(8) Notwithstanding anything contained in these Statutes, the Board shall have the power to make appointments of persons trained under 'approved' programmes in such manner as it may deem appropriate. The Board will maintain a schedule of such 'approved' programmes.

(10) The Selection Committee shall examine the credentials of all persons who have applied and may also consider other suitable names suggested, if any, by a member of the Selection Committee or brought otherwise to the notice of the Committee. The Selection Committee may interview any of the candidates as it thinks fit and shall at the discretion of its Chairman cause a written test or tests to be held among all or some of the candidates as the Chairman may think fit, and shall make its recommendations to the Board or the Director as the case may be, the names of the selected candidates being arranged in order of merit.

(14) Candidates selected for interview for a post under the Institute may be paid such traveling allowances as may be determined by the Board from time to time in this behalf.

(15) All appointments made at the Institute shall be reported to the Board at its next meeting."

7. It is evident from the provision as quoted hereinabove that the post is to be filled up by way of Selection Committee, since we are concerned herein with the post of Assistant Professor and as such, this Court is dealing with the Selection Committee which is to be constituted for selecting the Assistant Professor which consist of a committee known as Selection Committee presided over by the Chairman and the two nominees of the Board, one being an expert but other than a member of the Board, one expert nominated by the Senate and head of the department, if the post for which selection is being made is lower in status than that occupied by the Head of Department.

In terms of the said provision, an advertisement was published by the opposite party-Institute inviting applications for Faculty Position which includes the Faculty of Assistant Professor. The advertisement has been made as rolling advertisement.

The petitioner, in terms of the said advertisement, has submitted his application through online and after scrutiny of his candidature, he was asked to participate in the Interview Board through video conference (Skype) on 30.11.2013, but he has not been found suitable/competent for the said post. Accordingly, rejected by the Selection Committee and as such, his name was not recommended by the committee for the position of Assistant Professor.

It is to note here that to this effect, specific statement has been made at paragraph-10 to the counter affidavit that the petitioner while filing response by giving specific reference to the statement made at paragraph-10 has not controverted

regarding contention raised by the opposite parties that the petitioner has found to be not suitable/competent for the said position.

Further statement has been made at paragraph-10 of the counter affidavit that on the same date, the selection committee unanimously decided to have a second sitting and select few candidates on purely temporary basis to meet the demand of teaching. This part of the statement made therein has not been controverted in the rejoinder affidavit, as would be evident from the parawise reply filed by the petitioner in the rejoinder affidavit.

The Selection Committee on the basis of their subsequent decision which they have taken on 30.11.2013 for selecting the petitioner as a Visiting Faculty for a period of one year on contract basis and as such, the offer was made to the petitioner by issuing the offer of appointment dated 8.1.2014 under Annexure-1 to the writ petition which the petitioner has accepted by giving his joining on 12.3.2014, as would be evident from A/2 to the counter affidavit filed on behalf of the opposite parties.

It is evident from the offer of appointment that the communication has been made to the petitioner regarding the decision taken by the Chairman, Board of Governors of the Institute, who have approved his appointment to the post of Visiting Faculty at the level of Assistant Professor in the School of Earth, Ocean & Climate Science of the Indian Institute of Technology Bhubaneswar. The offer is for a period of one year. The terms and conditions governing the appointment have been stipulated in Annexure-1 which contains the condition of duration of appointment which is for a period of one year. The appointment may be terminated any time by one month's notice on either side. The petitioner, after accepting it, has started discharging his duty and also submitted application for extension of the contract period and it was extended twice i.e. one on 8.1.2015 and another on 8.1.2016.

It is evident from the Office Order No.130/2016 dated 31st August, 2016 under Annexure-A/3 to the counter affidavit that the tenure of the Visiting Faculty will be for a period up to a maximum of three years with annual review. Accordingly, the competent authority, was having no option, to extend the period of contract beyond the period of two years. However, the petitioner has made an application for its extension vide his application dated 1.3.2016 which has annexed under Annexure-8 to the additional affidavit filed on behalf of the opposite parties.

Thus, it is evident that the petitioner has fully agreed with the terms and conditions of the appointment and in pursuant thereto, he has also sought for extension which was granted up to a maximum period of three years and lastly he has sought for the extension, but the same was refused and thereafter, he has approached this Court by filing the instant writ petition praying therein to strike down the words 'visiting faculty' from the offer of appointment dated 8.1.2014.

8. The following issues are before this Court for determination:-

(i) Whether on the ground of alternative remedy the writ petition is maintainable?

(ii) Whether the terms and conditions of the appointment once accepted by the petitioner can he be allowed to be challenged?

(iii) Whether the High Court sitting under Article 226 of the Constitution of India or any constitutional court can rewrite the terms of contract?

(iv) Whether once the petitioner has been declared to be incompetent/ unsuccessful being not suitable for the selection can he be allowed to be continued by taking him in the regular establishment and to select the petitioner on contract can be said to be without jurisdiction?

(v) Whether once the selection process begins, the rules of selection can be changed?

9. This Court, after appreciating the submissions advanced on behalf of the parties, based upon the authoritative pronouncements of Hon'ble the Apex Court, is answering the issues formulated as hereinabove.

Issue No.(i)

The question of alternative remedy has been raised by the learned counsel for the opposite parties by referring to the provision of Section 30 of the Institutes of Technology Act, 1961 while reverting the said ground, the learned counsel for the petitioner submits that even in case of availability of alternative remedy, the writ court can interfere by exercising extraordinary jurisdiction conferred Article 226 of the Constitution of India and moreover, the petitioner has raised the question of jurisdiction and as such, the writ petition is maintainable.

This Court, after appreciating the arguments advanced on behalf of the parties in this regard, is of the view that the power conferred to this Court under Article 226 of the Constitution of India is the basic structure of the Constitution and the power of judicial review is a basic and essential future of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution of India, but if any constitutional amendment made by Parliament takes away from the High Court the power of judicial review in any particular area and vests it in any other institutional mechanism or authority, it would not be violative of the basic structure of doctrine, so long as the essential condition is fulfilled, namely, that the alternative institutional mechanism or authority set up by the parliamentary amendment is no less effective than the High Court.

This view has been taken by Hon'ble the Supreme Court in the case of ***S.P. Sampath Kumar v. Union of India and Others, reported in (1987) 1 SCC 124***, but this issue has been consider again by the 7 Judges Bench in the case of ***L. Chanra Kumar v. Union of India, reported in (1997) 3 SCC 261*** by taking contrary view from the ratio laid down in the case of *S. Sampath Kumar*, it has been held on the issue whether the power of judicial review vested in the High Court and Supreme Court under Article 226 and 227 and 32 is part of the basic structure of the Constitution and it has been held therein that the jurisdiction conferred upon the High Courts under Article 226/227 and upon the Supreme Court under Article 32 of

the Constitution is a part of the inviolable basic structure of our constitution. While this jurisdiction cannot be ousted, other courts and tribunals may perform a supplemental role in discharging the power conferred by Articles 226/227 and 32 of the Constitution.

Thus, it is evident that on the ground of alternative remedy, the power of judicial review cannot be said to be not exercised by the High Court.

It is also legal proposition that the High Court sitting under Article 226 of the Constitution of India is having its discretionary power and if the issue regarding jurisdiction or violation of statutory rule or fundamental right is being invoked the writ court even though the alternative remedy is available can exercise its jurisdiction.

Reference may be made in this regard to the judgment in the case of ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Others, reported in (1998) 8 SCC 1.***

In the instant case, since the petitioner has raised an issue of jurisdiction of the Selection Committee and as such, without entertaining the writ petition, this issue cannot be answered. Hence, relying upon the aforesaid position of law, the instant writ petition is held to be maintainable.

Since according to the petitioner, the Selection Committee has invited applications for regular appointment, but contrary to the advertisement issued has gone for contractual engagement. Thus, it is contrary to the provision as contained in Statue No.12 of the Indian Institute of Technology, Kharagpur.

This Court, after appreciating the argument of the learned counsel for the petitioner and in order to adjudicate this issue as to whether the action of the Selection Committee is without jurisdiction or not, thinks it proper to held herein that the writ petition is maintainable and accordingly the plea taken by the opposite parties that on the ground of availability of forum of arbitration under Section-30 of the Notification dated 29th June, 2012 issued by the Ministry of Human Resource Development (Department of Higher Education), Government of India, the writ will not lie and is hereby rejected.

In view thereof, the Issue No.(i) is answered in favour of the petitioner.

Issue No.(ii)

Whether the terms and conditions of the appointment once accepted by the petitioner can he be allowed to be challenged?

Rival submissions have been made on behalf of the parties by relying upon the relevant judgments.

This Court, after appreciating their rival submission and the judgments relied upon by them, is of the view that the judgments relied upon by the petitioner in this respect is the judgment rendered by Hon'ble the Supreme Court in the case of *Central Inland Water Transport Corporation Limited* (supra).

The said judgment is in the light of the bargaining power of workmen and Hon'ble the Supreme Court, dealing with such situation, has laid down the proposition at paragraph-100, has taken into consideration the public interest at large and if any terms of the contract in between the corporation and its officers which affects large number of persons, then in that respect, Hon'ble the Supreme Court has observed that if any terms of contract is opposed to public policy, it is void under Section-30 of the Indian Contract Act.

The judgment rendered in the case of *Raj Kumar* (supra) has been pronounced in a given fact of the said case that the examinations were conducted under the 1955 Rules and after the results were announced, it exercised the power under the proviso to para-6 of 1970 Notification and the posts were taken out from the purview thereof. Thereafter the Selection Committee was constituted for selection of the candidates. The entire procedure is also obviously illegal.

The Hon'ble Apex Court by taking the factual aspect of the said case has been pleased to hold that the question of estoppel will not be applicable, if there is glaring illegalities in the procedure to get the candidates for examination under the 1955 Rules, so also in the method of selection and exercise of the power in taking out from the purview of the Board and also conduct of the selection in accordance with the Rules. Therefore, the principle of estoppel by conduct or acquiescence has no application to the facts in this case.

The judgment rendered in the case of *Chhaganlal Keshavlal Mehta* (supra) wherein the ratio has been laid down at paragraph-22 that estoppel deals with questions of facts and not of rights. A man is not estopped from asserting a right which he had said that he will not assert. It is also a well-known principle that there can be no estoppel against a statute.

The other judgment rendered in the case of *Rajesh Kumar Gupta* (supra) wherein it has been laid down by Hon'ble the Supreme Court regarding the principle of estoppel, but on the fact that the candidates had no occasion to protest against the criterion adopted by the State Government and in that situation it was held that the plea of promissory estoppel will not be applicable.

The opposite parties has relied upon the judgment in this respect in the case of *Punjab and Sind Bank* (supra) wherein it has been laid down that once the employees accepted the conditions under the scheme cannot approbate and reprobate nor can they be permitted to withdraw.

The judgment rendered in the case of *Bank of India* (supra) wherein it has been laid down at paragraph-117 that one who knowingly accepts the benefits of a contract or conveyance is estopped to deny the validity or binding effect on him of such contract or conveyance.

In a case which fall in consideration before Hon'ble the Supreme Court in the case of ***State of Punjab and others v. Krishan Niwas, reported in AIR 1997 SC***

2349 at paragraph-4 wherein the incumbent, after accepting the order of punishment, has joined the post and thereafter he has challenged the order of punishment. Hon'ble the Supreme Court has been pleased to hold that by his conduct he has accepted the correctness of the order and then acted upon it. Under these circumstances, the Civil Court would not have gone into the merits and decided the matter against the appellants.

It is also need to refer herein the ratio of Hon'ble the Supreme Court in the case ***Municipal Council, Samrala v. Sukhwinder Kaur, reported in (2006) 6 SCC 516*** wherein Hon'ble the Supreme Court has been pleased to hold that the appointments were temporary ones. She was aware that her services could be terminated without notice. She accepted the terms and conditions of the said offers of appointments without any demur. Although there was no fixed period of contract of employment between the employer and the workman concerned and thus, no question of its renewal on its expiry, but there existed a stipulation in the contract that the Executive Officer has the power to dismiss her without issuing any notice and since she has accepted, the same which the incumbent cannot challenge.

After going through the judgments relied upon on behalf of the leaned counsel appearing for the parties and coming across with the factual aspect, in my considered view, the petitioner was knowing very well with the terms and conditions of the appointment which was for a period of one year on contract basis and as such, he once accepted the terms and conditions cannot come forward to challenge after substantial period and as such, the judgment relied upon by the learned counsel for the petitioner in this regard is not applicable in the facts and circumstances of the case, rather in my considered view, the factual aspect involved in this case is governed with the judgments relied upon by the learned counsel for the opposite parties.

In view thereof, the argument advanced on behalf of the petitioner with respect to this issue is not sustainable in the eye of law.

Accordingly, the Issue No.(ii) is answered against the petitioner.

Issue No.(iii)

The issue is that as to whether the High Court sitting under Article 226 of the Constitution of India can rewrite the terms of contract?

It is settled that the contract is in between the parties with their mutual settlement. It is upto the party to accept it or not to accept it. In case of acceptance, it is binding upon both the parties and in case of disagreement, it will not be given effect to and once the party is accepted it, he cannot come forward to challenge it, since his demand is not being meted out and as such, he cannot invoke the jurisdiction of the court of law under Article 226 of the Constitution of India by seeking a direction to rewrite the terms of contract.

In this regard, the reliance which has been placed by the learned counsel for the parties in the case of *Life Insurance Corporation of India* (supra) is governed the field wherein at paragraph-8, it has been laid down that the courts and Tribunals cannot rewrite contracts and direct payment contrary to the terms of the contract, that too to the defaulting party.

This Court, after appreciating the arguments advanced on behalf of the parties and after going through the judgments relied upon them, is of the view that the petitioner, when found to be unsuccessful to the selection process, has accepted the offer of appointment as Visiting Faculty and to that effect he has been given the offer of appointment along with the terms and conditions apprising him specifically that the appointment is contractual. He, after accepting it consciously, has discharged his duty. Hence, the terms and conditions given in the offer of appointment is binding upon the parties, since it is the settled position of law that when the appointment is on contract, the service rule applicable for the employees working under the establishment on regular basis will not be applicable rather the same will be governed on the basis of the terms and conditions mentioned in the offer of appointment and once the terms and conditions made in the offer of appointment has been accepted it binds the parties and as such, seeking a direction from this Court to delete the words "visiting faculty" from the offer of appointment amounts to rewriting the contract by seeking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, but according to my considered view, after going through the judgments relied upon by the parties, I am of the view that the judgment relied upon by the learned counsel for the petitioner is not applicable in the facts and circumstances of the case rather it is judgment rendered by Hon'ble the Supreme Court in the case of *Life Insurance Corporation of India* (supra) wherein at paragraph-8, it has been laid down that the courts and Tribunals cannot rewrite contracts and direct payment contrary to the terms of the contract, that too to the defaulting party.

However, the factual aspect of this case is different to that of the factual aspect governing the field in the case of *Life Insurance Corporation of India* (supra), but the facts remains that the petitioner had entered into a contract by accepting the offer of appointment and after accepting and getting the extension twice, last one on his request, he cannot seek a direction from this Court invoking the extraordinary jurisdiction conferred to this Court under Article 226 of the Constitution of India to delete the word 'visiting' from the offer of appointment.

According to my considered view, the provision as contained in Article 226 of the Constitution of India pertains to exercising the power, if there is any legal vested right and if the same has been infringed. But getting the contract as per the offer of appointment as Visiting Faculty, now praying to strike down the word 'visiting' from the offer of appointment cannot be said to be the legal vested right of the petitioner.

Hence, this Court refrains itself from exercising its jurisdiction to extend the relief to the petitioner by striking down the word 'visiting' from the offer of appointment.

Accordingly, Issue No.(iii) is answered against the petitioner.

Issue No.(iv)

The petitioner has been found to be unsuccessful and to that effect the specific stand has been taken by the opposite parties at para-10 of the counter affidavit. For ready reference, the said paragraph is being referred herein below:-

> *"That in reply to para-1 of the Writ Application it is most respectfully submitted that allegation made by the petitioner is false and baseless. The petitioner appeared for an interview on 30th November, 2013 through video conference (skype) for the selection of Assistant Professor Position along with other candidates. Amongst the candidates who appeared for the interview the petitioner was found not suitable/competent for the said position and was accordingly rejected by the selection committee, the name of the petitioner does not find place in the recommendation paper submitted by the selection committee for the position of Assistant Professor. Thereafter on the very same day the selection committee unanimously decided to have a second sitting and select few candidates on purely temporary basics to meet the demands of teaching. Accordingly, two candidates including the petitioner who appeared through Skype interview were recommended by the selection committee to be appointed as visiting faculty (on contract) in the School of Earth, Ocean and Climate Sciences (SEOCS) and as per the norms of IIT the name of the petitioner was forwarded for approval to the Board of Governors, Indian Institute of Technology, Bhubaneswar (Opposite party no.2) and consequently, his name was approved by the Board of Governors for the position of visiting faculty on contract basics for a period of one year. The above action of the institution cannot be termed as illegal and arbitrary. The documents pertaining to selection and recommendation are confidential documents, and the answering Opp. Parties craves leave of this Hon'ble Court to provide the same at the time of hearing."*

The response has been filed to the rejoinder affidavit filed by the petitioner, but no rebuttal reply has been given to that effect.

It is evident from the statement made at para-10 of the counter affidavit that the petitioner was declared to be unsuccessful in course of scrutiny of his candidature by the Selection Committee which was constituted in terms of the Statute No.12. The petitioner has been apprised with respect to the result, but in the second half he was offered with the offer of appointment of Visiting Faculty and thereafter, due communication was made seeking his willingness which he has accepted ad thereafter, he has given his joining to render his service as a Visiting Faculty.

Learned counsel for the opposite parties, in course of argument, has produced the original record pertaining to the selection process containing the Interview Performance Evaluation and this Court, after going through it, has found that the petitioner has secured 85 marks out of 100 and two selected candidates, namely, Dr. Dibakar Ghosal and Dr. Indra Sekhar Sen have got 90 and 95 marks respectively. The Selection Committee has assessed the performance of all the candidates consist of five members.

This Court for ready reference is reflecting the marks obtained by the petitioner along with other candidates herein below:-

Name	Marks (Out of 100)
Dr. Kavita Tripathy	Absent
Dr. Dibakar Ghosal	90
Dr. Saroj Kumar Mondal	45
Dr. Himanshu Mittal	40
Dr. Indra Sekhar Sen	95
Dr. Nishi Rani	Absent
Dr. Shailesh Agarwal	Absent
Dr. Ankur Roy	40
Dr. Abhishek Kumar Rai	85
Dr. Sanghamitra Ghosh	85

The petitioner as well as one Dr. Sanghamitra Ghosh who has got 85 has not found to be meritorious and suitable in comparison to that of candidates of Dr. Dibakar Ghosal and Dr. Indra Sekhar Sen and accordingly they have been declared to be unsuccessful in the selection process.

The petitioner has raised the question that he cannot be held to be an unsuccessful candidate.

It is not in dispute, so far as legal position is concerned, the jurisdiction of the court of law as has been held by Hon'ble the Supreme Court in the cases of ***UPSC v. K. Rajaiah and Others, reported in (2005) 10 SCC 15; Union of India and Another v. A.K. Narula, reported in (2007) 11 SCC 10; M.V. Thimmaiah and Others v. Union Public Service Commission and Others, reported in (2008) 2 SCC 119; and Union Public Service Commission v. M. Sathiya Priya and others passed in Civil Appeal No.10854 of 2014*** wherein it has repeatedly observed and concluded that the recommendations of the Selection Committee cannot be challenged except on the ground of mala fides or serious violation of the statutory rules. The courts cannot sit as an appellate authority or an umpire to examine the recommendations of the Selection Committee like a Court of Appeal. This discretion has been given to the Selection Committee only, and the courts rarely sits as a Court of Appeal to examine the selection of a candidate; nor is it the business of the Court to examine each candidate and record its opinion. Since the Selection Committee is manned by experts in the field, the court to trust their assessment unless it is actuated with malice or bristles with *mala fides* or arbitrariness.

In view of the settled position of law, this Court is of the view that the Selection Committee has assessed the candidature of one or other candidates including the petitioner. They, while assessing the inquiry report, has found that the petitioner along with one Dr. Sanghamitra Ghosh have obtained 85 marks each while selected candidates have got 90 and 95 respectively and accordingly, both of them have been selected.

Hence, this Court cannot sit over the assessment made by the Selection Committee as an Appellate Authority. Furthermore, the candidates cannot take a calculate chance and appear at the interview, then only after the result of the interview not selected. He cannot turn round and subsequently contend that the process of interview was unfair or Selection Committee was not properly constituted.

Reference in this regard may be made to the judgment rendered by Hon'ble the Supreme Court in the cases of ***Om Prakash Shukla v. Akhilesh Kumar Shukla and others, reported in AIR 1986 SC 1043; Madan Lal and others v. State of Jammu and Kashmir and others, reported in AIR 1995 SC 1088; and Dr. Basuvaiah*** **(supra) .**

The petitioner in the instant writ petition has sought for a direction to strike down the word 'Visiting' from the offer of appointment.

If this Court strike down the word 'Visiting' from the offer of appointment which would mean interfering with the decision of the Selection Committee which, in view of the settled position of law as discussed above, will not be proper to do by exercising the power of appeal sitting under Article 226 of the Constitution of India otherwise the same will amounts to interfering with the decision of the expert body.

In view of the discussion made above, the petitioner became declared to be incompetent/unsuccessful cannot be allowed to be continued in service as regular Faculty Member.

So far the issue of jurisdiction as has been raised, it cannot be said that the appointing authority has exceeded its jurisdiction in selecting the petitioner on contract although the petitioner had participated in selection process for regular appointment, but became unsuccessful thereafter he has not questioned it rather he has willingly accepted the offer i.e. appointment on contract basis and continued in service.

The decision of Selection Committee in declaring the petitioner cannot be termed as without jurisdiction, but simultaneously engaging the petitioner on contract basis can also not to be termed as the action beyond jurisdiction reason being that when the authority has called upon the candidates to participate in the selection and on merit in comparison with the candidature of other candidates. When the Selection Committee has thought it not proper to select the petitioner on regular basis as per the advertisement, they could go for selection in view of the provision of Statute No.17 of the Act, 1962 which contains provision for contractual appointment but the authority had taken decision to select from the same list of the candidates, who have declared to be unsuccessful. It is for time saving and due to public interest, to provide teaching staffs in the subject. Hence it cannot be said to be without jurisdiction. Moreover, the petitioner, if aggrieved, ought to have challenged the said action at appropriate time.

Accordingly, the Issue No.(iv) is answered against the petitioner.

Issue No.(v)

Learned counsel for the petitioner has submitted that the advertisement has been issued in terms of the provision of Statue No.12 of the Indian Institute of Technology, Kharagpur which provides for appointment in the regular manner while Statute No.17 provides for appointment on contract basis.

The advertisement has been issued under Annexure-1 to fill up the regular post in which the petitioner had participated, but after conclusion of the same, the petitioner has been appointed as the Visiting Faculty, which according to him, is the change of selection process which cannot be allowed to be done.

He has placed reliance upon the judgment rendered by Hon'ble the Supreme Court in the case of *K. Manjusree* (supra).

While, on the other hand, learned counsel appearing for the opposite party-Institute submits that there is question of change any rule of advertisement and in terms of Statute No.12, there is no deviation from any terms and conditions of the advertisement. The petitioner had participated in the selection process, but he has not been found to be successful and he has become incompetent to get his engagement in the regular capacity as per the guideline in the subject in question. Hence, he has been offered with the appointment as Visiting Faculty which he has accepted and not only accepted rather the contract was extended twice, as would be evident from order dated 15.10.2014 (Annexure-6), 2.1.2015 (Annexure-7) and third time on the application of the petitioner vide application dated 9.3.2016 (Annexure-8) which so fortify the fact that during entire service terms, the petitioner was not at all aggrieved with his engagement, rather he thereafter also submitted application requesting the authority to extend the period further, but not agreed by the authorities, as would be evident from the letter of the petitioner under Annexure-8 annexed to the additional affidavit filed by the opposite parties. This clearly suggests that when the contract period has not been extended, the instant writ petition has been filed and as such, in this pretext, it cannot be said that there is change of any rule.

This Court, after appreciating the arguments advanced on behalf of the parties, is of the view that the admitted position in this case is that the selection has been initiated for fulfilling the post of Assistant Professor in the subject in question in which the petitioner along with the others had participated, but by virtue of the decision of the Selection Committee, he has been declared to be unsuccessful being incompetent and as such, he has not been recommended.

The petitioner has not challenged his non-selection/non-recommendation on any ground whatsoever rather when he has been offered the assignment by way of Visiting Faculty, he has accepted the terms and conditions mentioned in the offer of appointment and started discharging his duty. He has got extension twice.

The question of change of terms of advertisement does not arise here because none of the condition of the advertisement has been changed rather it is a case where the petitioner has participated in terms of the selection process issued by way of advertisement in Annexur-1 and after scrutiny of his candidature, he has found to be not upto mark to be selected on regular basis as Assistant Professor since he has been found to be incompetent and not recommended and as such, it is a case of non-selection.

Hence, it cannot be said that the rule of selection has been changed as has been contented by the learned counsel for the petitioner.

As such, in my considered view, the contention and ground raised by the petitioner in this regard is not fit to be accepted.

Accordingly, the Issue No.(v) is answered against the petitioner.

10. In view of discussion made hereinabove, the writ petition deserves to be dismissed and accordingly, it is dismissed. Interim order dated 15.12.2016 stands vacated.

2018 (I) ILR - CUT- 1152

S. N. PRASAD, J.

W.P.(C) NO.548 OF 2005

DR. GANAPATI PRASAD CHOUDHURY ….....Petitioner

.Vrs.

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

SERVICE – Petitioner joined in the post of Asst. Archivist in Berhampur University – The Syndicate upgraded the post to that of Archivist in view of the need for taking the responsibility for the work of museum subject to approval of the State Government – Petitioner was allowed to work as Archivist with a higher scale of pay with an undertaking that in case the up gradation is not approved by the State Govt. the petitioner will be brought back to his original post of Asst. Archivist and the scale of pay paid to him prior to sanction of the said higher scale, the differential amount thereof would be refunded by him as per the undertaking given – Writ petition challenging the direction reverting back to the original post and to refund the excess amount paid by way of higher scale of pay – Whether can be accepted – Held, No.

"Admittedly the petitioner has been given the higher pay scale, which according to the University is of the post of Archivist which has been created by virtue of the decision taken by the Syndicate but subject to approval by the State Government. The petitioner since was working as Asst. Archivist was allowed to function as Archivist along with higher scale of pay

as per the decision of the Syndicate w.e.f. 5.2.1997 subject to an undertaking given by the petitioner that in case of non-approval, he will have to refund the entire amount, which he will receive by virtue of getting higher pay scale. The petitioner has furnished an undertaking and finally decision of the Syndicate has not been approved by the State Government and thereafter the petitioner has been directed to come to the pre-upgraded post i.e. to the post of Asst. Archivist which is a sanctioned post created by the competent authority of the State Government for the Berhampur University having its own pay scale. Since the post of Archivist is not created for the Berhampur University and even if the petitioner has allowed to discharge duty of Archivist with higher scale of pay, it will be said to be against the non-existence post and if any salary has been obtained by the petitioner by rendering service to the post of Archivist which is non-existence post, he has got no right to remain in the post and further he, as per the undertaking given by him in the offer of appointment is liable to refund the entire amount." *(Para 10)*

For Petitioner : M/s. Jayant Ku. Rath, C.K. Rajguru, D.N. Rath, S.N. Rath, P.K. Rout, S. Mishra.
For Opp. Parties : M/s. B.S. Mishra-II, N.N. Mohapatra, A.R.Mishra, A.P. Dhirasamanta, M.R. Mishra, S.R. Subudhi, M/s. S.K. Das, S.S. Swain.

JUDGMENT Date of Hearing & Judgment : 10.05.2018

S. N. PRASAD, J.

This writ petition is for quashing the order passed by the opposite party no.4 as contained under Annexure-18 dated 22.12.2004 passed by the Registrar, Berhampur University, whereby and where under, the reply to the show cause filed by the petitioner dated 8.11.2004 has been found to be not acceptable with a further direction upon them to declare the petitioner to have been appointed as Archivist with effect from the date he was so appointed and to extend all the benefit for the post of Archivist which the petitioner is enjoying from the date of his appointment and to pay to him the pay scale fixed to the post of Archivist in which the salary of the petitioner has been fixed w.e.f. 5.2.1997.

2. Case of the petitioner in brief is that in pursuance to an advertisement published by the opposite party no.2-University to fill-up the post of Assistant Archivist which was created by the Government vide office order dated 23.12.1985 w.e.f. 1.1.1985, he has been declared to be successful and in consequence thereof, he has been appointed as Asst. Archivist, joined the post on 08.10.1985. The post of Asst. Archivist was upgraded to that of Archivist in view of the need for taking the responsibility for the work of museum. The decision to that effect was taken by the Museum Committee as per Annexure-1.

Case of the petitioner is that after up-gradation of the post of Asst. Archivist to that of post of Archivist, he has started discharging his duty as Archivist in pursuance to the office order dated 21.07.1999 but thereafter the authorities have issued an order on 29.07.2004 since the decision of the University to upgrade the post of Asst. Archivist to that of Archivist has not been approved by the State Government, as such they have decided to go on their substantive post and in view of such decision a show cause notice was issued to the petitioner on 8.11.2004

asking the petitioner to explain as to why the petitioner should not be brought back to his original post of Asst. Archivist and the scale of pay paid to him prior to sanction of the said higher scale be not recovered as per the undertaking given in the office order dated 21.07.1999 (Annexure-11). The petitioner has given reply but the same has not been accepted and thereby this writ petition has been filed.

3. The contention raised by the petitioner is that it is the decision of the Syndicate being the Apex Body of the University, the post of Asst. Archivist has been upgraded to the post of Archivist and in pursuance to the decision, he has been allowed to render his duty as Archivist and also given the higher scale of pay, hence directing him to go to the post of Asst. Archivist by taking a decision to recover the excess amount paid by virtue of rendering his service as Archivist is nothing but an arbitrary exercise of power of the authority and there is no fault of the petitioner for making recovery excess salary which has been paid to the petitioner by holding the post of Archivist since the petitioner has performed duty of higher responsibility.

It is the further case of the petitioner as would be evident from the rejoinder affidavit that he has been given the higher scale of pay w.e.f. 1.1.2006 by virtue of implementation of the Pay Revision, whereby and where under the post of Asst. Archivist and Archivist carry one grade pay, i.e Rs.4200/- with the one pay scale i.e. Rs.9300-35800, therefore be it Asst. Archivist or Archivist the financial implication of both the posts became equal w.e.f. 1.1.2006. It is the further case of the petitioner that while continuing as Archivist after re-designation was selected on open process of selection i.e through advertisement selection etc. as Research Officer and joined to the post of Research Officer on 19.12.2011 which is a higher post i.e. carrying scale of pay of Rs.15600-39,100/- with a grade pay of Rs. 5400/- and since the petitioner is continuing as Research Officer, i.e. in the higher post with higher grade pay as Archivist on the re-designation of the post of Assistant Archivist to the post of Archivist w.e.f February, 1997 till 01.01.2006, when the scale of pay of both Asst. Archivist and Archivist are made equal is to be considered as to whether the petitioner may get the benefit or recovery from the salary of the petitioner.

4. Counter affidavit has been filed by both the University and the opposite party-State. The University has taken the plea that there is no post like that of post of Archivist, however the Syndicate has taken decision for up-gradation of the post of Asst. Archivist to that of Archivist subject to approval by the Vice-Chancellor and in anticipation of concurrence from the Government as well as approval of the Chancellor, the petitioner has been asked to perform duty as Archivist by granting him higher scale of pay than that post of Archivist but when the approval had been declined by the Government, the University having no option but to recover the excess amount which has been paid to him in lieu of his posting to the post of Archivist and thereby a show cause notice was issued in pursuance to the decision taken by the authority under Annexure-12 and 13 and in the light of the same, show cause notice was issued and when t he authoritie s are found that the reply is not

satisfactory, the reply given under the show cause notice has been rejected, hence there is no illegality committed by the authority.

While on the other hand, the opposite party-State has taken stand in the counter affidavit that in absence of the post of Archivist, the very posting of the petitioner by way of up-gradation of the post of Asst. Archivist to that post of Archivist will be said to be illegal and when there is no post, the employee cannot get the pay scale of the higher post.

It has been stated that since the petitioner has accepted the terms and conditions of the decision of the Syndicate as would be evident from Annexure-11 and when the approval has been declined, the petitioner has got no right to assail the action of the opposite party-University before this Court since in open eye, he has accepted the conditions and thereby he has started discharging his duties with an undertaking that in case of non-approval by the State Government or Chancellor, the excess amount, if paid any, shall have to be recovered. It has further been stated that the post of Asst. Archivist has been re-designated as 'Curator', the post of Archivist is not in existent post in the Berhampur University.

In the light of such statement, Mr. Amit Pattnaik, learned Addl. Govt. Advocate submits that there is no case on merit, as such the writ petition is fit to be dismissed.

5. Heard the learned counsel for the parties and after appreciation of the rival submissions, this Court has gathered from the pleading made in the writ petition, the admitted fact i.e. the petitioner initially was appointed as Asst. Archivist in terms of the advertisement published by the Berhampur University which is a sanctioned created post by the competent authority. The petitioner, while discharging his duty, the Syndicate of the University has taken decision to upgrade the post of Asst. Archivist to that of the post of Archivist in pursuance of the recommendation made by the Museum Committee as would be evident from Annexure-1. It is evident from Annexure-1, that the Museum Committee while taking decision to upgrade the post of Asst. Archivist to that of Archivist which was taken in view of needs greater responsibility for the works of Museum/Archival Cell and the said decision has been taken into consideration the fact that there is post of Archivist in the Sambalpur and Utkal University. Annexure-1 clearly reflects that there is no post like that of Archivist and as such decision was taken to upgrade the post of Asst. Archivist to that of Archivist.

6. The Deputy Registrar of the University, accordingly has made communication to the Under Secretary to the Governor of Odisha requesting therein to upgrade the post of Asst. Archivist to that of Archivist in the scale of pay of Rs.2000-60-2300-EB-75-3200-100-3500 and to place the matter before the Chancellor for its consideration which would be evident from Annexure-2 dated 11.06.1991. The Deputy Secretary to the Governor has sought for some clarification from the Deputy Registrar, Berhampur University on 22.04.1992 which relates to

the financial implication in case of up-gradation of the post of Asst. Archivist, the workload of Archivist and other staff working in the Berhampur University Museum and the staffing pattern in the State Museum. The Deputy Registrar, Berhampur University in response to the communication dated 22.04.1992, has made communication on 5.6.1992 sending the required information regarding up-gradation of Asst. Archivist to that of post of Archivist. The Under Secretary to His excellency the Governor of Orissa has made correspondence to the Joint Secretary to the Government of Odisha stating therein that the financial implication of the proposal is negligible and requested to examine the matter in right perspective, while the matter was under consideration, decision was taken vide office order dated 5.2.1997 by upgrading the post of Asst. Archivist to that of post of Archivist in anticipation of the approval of the Chancellor, Berhampur University with a pay scale of Rs.2000-60-2300-EB-75-3200-100-3500.

7. It has been resolved that the petitioner who was holding the post during the relevant time as Asst. Archivist was re-designated to the post of Archivist subject to the condition of approval by the Chancellor and accordingly shall receive the scale of pay of Rs.2000-60-2300-EB-75-3200-100-3500 from the date he reports himself for duty with the stipulation since the proposal is subject to approval of the Chancellor and regularization by following the proper procedure, the petitioner is required to furnish an undertaking that in the event of non-approval by the Chancellor etc., the differential amount that he shall receive on being assigned to officiate as Archivist shall be recovered from his monthly salary with the further stipulation therein that in consequence of the up-gradation of the Asst. Archivist to that of Archivist, the post of Asst. Archivist has been ceased.

8. The consequential decision was taken by the authority on 21.07.1999 (Annexure-11), whereby and where under the scale of pay of the petitioner has been fixed w.e.f. 1.1.1996 and subsequent increment thereon which has been sanctioned in accordance with the Orissa Universities Revised Scale of Pay, 1999 i.e. Rs.5300-150-8300/- up to 4.2.1997 and in the scale of pay Rs.6500-200-10500/- w.e.f. 5.2.1997 on up-gradation of the post as Archivist with the condition that the pay in the revised scale will be drawn after obtaining an undertaking from the employees that excess amount, if any, detected in future, will be refunded by them and more over in case of employees those who have been upgraded and allowed higher scale of pay shall require to give an undertaking to the effect that, all financial benefits on the revised scale granted to them will be refunded in the event of the disapproval of the Chancellor/Government/Audit objections, if any.

Proposal of up-gradation of the post of Asst. Archivist to that of the post of Archivist has been declined vide communication dated 29.07.2004 and in consequence thereof, direction has been issued that the employees upgraded are required to be restored to their pre-upgradation rank in due course of law and excess salary disbursed to them may be subjected to immediate recovery and compliance report.

9. In terms of the aforesaid decision, a show cause notice was issued to the petitioner on 8.11.2004 asking him to reply as to why he be not brought back to the original scale of pay paid prior to sanction of the said higher scale of pay and excess amount paid to him shall not be recovered as per the undertaking given by you during the time of allowing higher scale.

The petitioner has submitted reply as stipulated in the show cause but the same having not been found satisfactory as would be evident from Annexure-18 dated 22.12.2004, which is impugned in this writ petition.

10. Admittedly the petitioner has been given the higher pay scale, which according to the University is of the post of Archivist which has been created by virtue of the decision taken by the Syndicate but subject to approval by the State Government. The petitioner since was working as Asst. Archivist was allowed to function as Archivist along with higher scale of pay as per the decision of the Syndicate w.e.f. 5.2.1997 subject to an undertaking given by the petitioner that in case of non-approval, he will have to refund the entire amount, which he will receive by virtue of getting higher pay scale. The petitioner has furnished an undertaking and finally decision of the Syndicate has not been approved by the State Government and thereafter the petitioner has been directed to come to the pre-upgraded post i.e. to the post of Asst. Archivist which is a sanctioned post created by the competent authority of the State Government for the Berhampur University having its own pay scale.

Further admitted position is that there is no post of Archivist in the University as would be evident from Annexure-1 and also the stand taken by the opposite party-State in the counter affidavit, meaning thereby the petitioner has been allowed to continue as Archivist by giving higher pay scale only in pursuance of the decision of the Syndicate who admittedly has got no jurisdiction to take final decision and that is the reason, the up-gradation of the post along with higher pay scale has been made subject to the approval of the State Government and the undertaking has also been taken, in case of non-approval, the pay scale, if drawn shall have to be refunded back.

11. It is the settled legal position that the post is to be created by the State Government with the concurrence of the Finance Department. It is also not in dispute that Syndicate under the Universities Act is the authority to take decision but he is not the final authority to create a post rather he can be said to be recommending body and the final decision lies with the State Government through Higher Education Department, so far as creation of the post is concerned which he also required concurrence of the Finance Department since it relates to the financial implication upon the State exchequer.

Further admitted position is that the post of Archivist is not created for the Berhampur University and even if the petitioner has allowed to discharge duty of Archivist with higher scale of pay, it will be said to be against the non-existence post

and if any salary has been obtained by the petitioner by rendering service to the post of Archivist which is non-existence post, he has got no right to remain in the post and further he, as per the undertaking given by him in the offer of appointment is liable to refund the entire amount.

12. This Court is making this observation on the principle that if anybody will be allowed to continue against non-sanctioned post, it will be said to be continuation of the illegal appointment, since illegal appointment has been dealt with by the constitution Bench of the Hon'ble Supreme Court in the case of **Secretary, State of Karnataka vrs. Umadevi (3)** reported in *(2006) 4 SCC 1* and further in the case of **State of Karnataka and others vrs. M.L. Kesari and others** reported in *(2010) 9 SCC 247*, wherein such type of appointment which has been made against a post which is not sanctioned or person appointed having no eligibility condition will be said to be illegal appointment, meaning thereby the defect which is not in the nature of curable defect will be said to be illegal appointment and illegal appointment cannot be legalized, since it is non-curable.

13. In view of such legal position, in my considered view when the State Government has not approved the post of Archivist, the decision taken by the authority in making recovery the higher amount cannot be said to be unjustified and now it is to be seen as to whether the principle of natural justice has been followed or not. It is not the case of the petitioner that the decision has been taken by the authority without following the principle of natural justice rather it is evident from the material available on record that show cause notice has been issued to the petitioner which has well been responded by him and in pursuance thereto, Annexure-18 has been passed, as such it cannot be said that the petitioner has not been provided an opportunity of being heard rather the decision has been taken after following the principle of natural justice.

The petitioner contends in the rejoinder affidavit that admittedly he has been assigned the duty to perform service as Archivist w.e.f. 5.2.1997 with the higher pay scale of Rs.2000-60-2300-EB-75-3200-100-3500 but he has already been given the same pay scale as that of Archivist by virtue of recommendation of the pay revision w.e.f. 1.1.2006 and continue to get the pay scale till the date when he has got a new assignment of the post of Research Officer i.e. w.e.f. 19.12.2011, the post which carries higher pay scale, as such even if any recovery is to be made the same is to be made w.e.f. 5.2.1997 until 31.12.2005, since after 1.1.2006 he is getting the same pay scale as that of higher scale of pay which has been extended to him by virtue of holding the post of Archivist as per the decision of the Syndicate.

14. However, the rejoinder affidavit has been filed and this plea has been taken by the petitioner for the first time in the said affidavit having not pleaded in the writ petition, as such the same has not been respondent either by the Berhampur University or by the opposite party-State, hence according to my conscious view, no adjudication can be made on that ground rather it would appropriate to relegate the

matter, so far as the period from 1.1.2006 to 19.12.2011 is concerned, before the competent authority to take decision in this regard, as to whether any recovery is to be made on account of excess withdrawal of salary, if the authority will come to a decision which is adverse to the petitioner, the same shall be communicated to him by passing an order of recovery, same shall be communicated to the petitioner and in that event the petitioner will have to refund back the amount as per the decision already taken by the authorities vide impugned order and in pursuance to the undertaking given by him at the time of getting higher pay scale.

15. In case, opposite party will come to the conclusion that the recovery is not admissible for the aforesaid period, same shall be communicated to the petitioner and no recovery shall be made for the aforesaid period (1.1.2006 to 19.12.2011) but the authorities in that circumstances will be at liberty to recover the amount from 5.2.1997 till 31.12.2005 as per their own decision, which is not being interfered with.

16. So far as the part of direction which relates to the period from 1.1.2006 to 19.12.2011, the authorities will take its independent decision after scrutinizing the record without being prejudiced by the order passed by this Court and decision in this regard shall be taken preferably within a period of eight weeks from the date of receipt of copy of this order.With this observation and direction, the writ petition stands disposed of.

2018 (I) ILR - CUT- 1159

J.P.DAS, J.

CRIMINAL REVISION NO.452 OF 2015

ARNAPURNA PANIGRAHI ……..Petitioner.

Vrs.

STATE OF ODISHA ……...Opp-Party.

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 – Section 14 read with Rule 13(7) of Juvenile Justice (Care and Protection of Children) Rules, 2007 – Proceeding against the Child in conflict with law (CCL) not completed within the prescribed statutory time limit – Application was filed before the Juvenile Justice Board to terminate the proceeding – Rejected on the ground that the delay was due to a talk of compromise and that there is no such provision for termination of proceeding in the relevant Orissa Rules and it was submitted that Central Rule was not applicable – Petitioner C.C.L charged for the offences under Sections 498-A/506/34, of I.P.C. read with Section 4 of the D.P. Act – Facing trial for a petty offence and the

trial has not been completed within the statutory period – No extension of time by the appropriate authority – Held, the C.C.L was entitled to seek termination of the proceeding since the proceeding was not completed within the mandatory period. (Paras 4 to 7)

For Petitioner : M/s. U.R. Jena, P.K. Samantaray
For Opposite Party : Addl.Standing Counsel
For Informant : M/s B.S.Dasparida, S.K.Dash, S.Mohapatra, K.Mohanty

JUDGMENT Date of Hearing : 13.04.2018 Date of Judgment : 08.05.2018

J.P.DAS, J

This is an application under Section 401 read with Section 397 of the Criminal Procedure Code to set-aside the order dated 01.07.2015 passed by the learned Principal Magistrate, Juvenile Justice Board, Bhadrak in J.G.R. No.40 of 2013 rejecting the application filed on behalf of the present petitioner to terminate the proceeding since the enquiry was not completed within the stipulated period, not even within a period of two years after production of the J.C.L. before the Juvenile Justice Board.

2. The J.C.L. was charge-sheeted for the offences punishable under Section 498-A/506/34, I.P.C. read with Section 4 of the D.P.Act along with other family members of the victim who were separately charge-sheeted for being adults. The allegation against the present petitioner C.C.L who happened to be the niece of the victim was that she also tortured the victim relating to demand of dowry.

3. It was submitted by learned counsel for the petitioner that the marriage between the parties took place in the year 2001. The victim lodged the F.I.R. in the year 2013 alleging dowry demand and torture against her in-laws. She arrayed the present C.C.L as an accused who was thirteen-year-old at the time of the alleged occurrence. It was submitted by learned counsel for the petitioner further that considering the age of the C.C.L. at the time of the alleged occurrence, it is improbable and impossible that she could have joined other in-laws of the victim to commit cruelty towards the victim so as to be liable under Section 498-A,I.P.C.. Be that as it may, it was submitted that the petitioner was produced before the Board on 05.09.2013 and the charges were framed on 26.12.2013. Since the proceeding was not concluded, one application was filed before the learned Juvenile Justice Board on behalf of the petitioner on 21.05.2015 to terminate the proceeding as per Rule 13(7) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (in short, "2007, Rules"). The said application has been rejected by the learned Juvenile Justice Board by the impugned order with the observation that there was delay in disposal of the case since it was brought to the notice of the court that there was a talk of compromise between the parties for which the informant-victim could not be examined. It has also been mentioned in the impugned order that it was submitted on behalf of the State that there is no such provision for termination of proceeding in

the relevant Orissa Rules of 2000 and it was submitted that Central Rule was not applicable to the present proceeding.

4. The Rule-13(7) of 2007 Rules provides as follows:

"**13-Post-production processes by the Board:**

xx xx xx xx

(7) In all other cases except where the nature of alleged offence is serious, delay beyond four to six months shall lead to the termination of the proceedings."

There being no definition as to non-serious offences, it has been provided under Rule-11(9) of 2007 Rules as follows:

xx xx xx xx

"**(11) Pre and Post-production action of Police and other agencies::**

xx xx xx xx

(9) For all other cases involving offences of non-serious nature (entailing a punishment of less than 7 years imprisonment for adults) and cases where apprehension is not necessary in the interest of the juvenile, the Police or the Juvenile or the Child Welfare Officer from the nearest Police Station, shall intimate the parents or guardian of the juvenile about forwarding the information regarding nature of offence alleged to be committed by their child or ward along with his socio-economic background to the Board, which shall have the power to call the juvenile for subsequent hearings."

The mandate for early disposal of the proceeding against C.C.L was incorporated in the Juvenile Justice Act by way of amendment in the year 2006. By way of amendment, it was provided in Section 14 of Juvenile Justice (Care and Protection of Children Act, 2000) (in short, "2006 Act") that an enquiry shall be completed within a period of four months from the date of its commencement unless the period is extended by the Board having regard to the circumstances of the case and in special cases after recording the reasons in writing for such extension. Thereafter, the Central Rules as 2007 Rules came into force incorporating the time limit for disposal of the proceeding and its termination if not disposed of, and hence, the said provision could not have been incorporated in the Rule of the State of the year 2000. That apart, the matter has been finally included in the statute in Juvenile Justice Act of 2015. In Section 14(2) of 2015 Act, it has been provided as follows:

(2) The inquiry under this Section shall be completed within a period of four months from the date of first production of the child before the Board, unless the period is extended, for a maximum period of two more months by the Board, having regard to the circumstances of the case and after recording the reasons in writing for such extension."

Further Section 14(4) provides as follows:

(4) If inquiry by the Board under sub-section(2) for petty offences remains inconclusive even after the extended period, the proceedings shall stand terminated:

The Act has also defined petty offence under Section 2(45) as follows:

(45) "petty offences" includes the offences for which the maximum punishment under the Indian Penal Code(45 of 1860) or any other law for the time being in force is imprisonment up to three years;

5. In the present case, the petitioner-C.C.L has been charged for the offences under Sections 498-A/506/34, I.P.C. read with Section 4 of the D.P.Act and maximum period of punishment is up to three years for the offence under Section 498-A,I.P.C.

6. Thus, as per record, the petitioner C.C.L is facing trial for a petty offence and the trial has not been completed within the statutory period. It is also not found on record as to whether there was any extension of time by the appropriate authority or there was any consideration for that.

7. In view of the aforesaid facts and circumstances and the position of law, the C.C.L was entitled to seek termination of the proceeding since the proceeding was not completed within the mandatory period which has been illegally rejected by the learned trial court.

8. Accordingly, the impugned order dated 01.07.2015 passed by the learned Principal Magistrate, Juvenile Justice Board, Bhadrak in J.G.R. Case No.40 of 2013 is set-aside and the proceeding is terminated so far as the present petitioner-C.C.L is concerned and the C.C.L. is set at liberty.The criminal revision is accordingly, allowed. The L.C.R. be sent back immediately.

2018 (I) ILR - CUT-1162

DR. D.P.CHOUDHURY, J.

CRLMC NOS.258 & 696 OF 2004
AND
CRLMC NO.2626 OF 2007

FANI BHUSAN DAS & ORS. .....Petitioners

Vrs.

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

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 362 – Provisions under – No Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error – Order taking cognizance – Whether an interlocutory or final order – Held, the order taking cognizance being an interlocutory order, the same can be reviewed – Provision of Section 362 of Cr. P.C would not apply. (Para 21)

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 197 read with Section 19 of the Prevention of Corruption Act, 1988 – Sanction for prosecution – Question can be raised at any stage – No cognizance of

offence can be taken without there being any sanction for prosecution in respect of the act alleged which has got nexus with the discharge of duty by public servant – Charge sheet and order of cognizance for offences under IPC and PC Act occurred after retirement of the Govt. Servant – Requirement of Sanction – Held, it is clear that after retirement of a Government servant, no criminal prosecution can lie without any sanction for commission of offence under the IPC whereas the offence under the provisions of the P. C Act, 1988 would continue in absence of sanction. (Para 38)

Case Laws Relied on and Referred to :-

1. AIR 1977 SC 2185 : Amar Nath and others –V- State of Haryana & Ors.
2. (2014) 11 SCC 388 : State of Bihar and others –V- Rajmangal Ram.
3. (2016) 2 SCC 143 : N.K.Ganguly –V- Central Bureau of Investigation, New Delhi.
4. 2012 (II) OLR 697 : Birabar Sethi @ Birendra Sethi –V- State of Orissa.
5. 2015 (II) OLR 93 : Prakash Mishra –V- State of Odisha and others.
6. (1998) 9 SCC 268 : State of Tamil Nadu –V- M.M. Rajendrawn.
7. 1999 (II) OLR (SC) 334 : State of Kerala –V- V. Padmanabhan Nair.
8. 2001 Cril LJ (SC) 3505 : P.K.Pradhan –V- State of Sikkim represented by the Central Bureau of Investigation.
9. (2002) 23 OCR (SC) 510 : Raj Kishore Roy –V- Kamleswar Pandey & another.
10. AIR 2005 SC 359 : State of Orissa –V- Debendra Nath Padhi.
11. (2014) 16 SCC 807 : State of Punjab –V- Labh Singh.

For Petitioners : Mr. Sanjit Mohanty, Senior Advocate
M/s. S.Mohanty, S.K.Mund, M.K.Mohanty & R.K.Mohapatra,
M/s. R.K.Mohapatra, M.K.Mohanty, D.P.Das,S.Mohanty, B.P.Routray, D.Mohanty & J.Dash
M/s. S.K.Mund, J.K.Panda, J.N.Panda, J.Sahu, A.K.Dei & D.P.Das

For Opp. Parties: Mr. Prasanna Kumar Pani, Standing Counsel Vigilance

JUDGMENT Date of Hearing:04.04.2018 Date of Judgment:19.06.2018

Dr.D.P.CHOUDHURY, J.

These applications have been filed under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as "the Code") to quash the orders dated 02.12.2003 and 12.02.2004 of taking cognizance of offence under Sections 13(2) read with Section (1)(d) of the P.C. Act and under Section 120-B of the Indian Penal Code (in short 'the IPC') passed by the learned Special Judge, Bhubaneswar in T.R. No.26 of 2003 and issuance of process against the present petitioners. Since these applications arise out of the above common orders of taking cognizance though preferred by two accused persons, they are being disposed of by this common judgment.

2. The factual matrix leading to the case of the prosecution is that there was a proposal for construction of "Toshali Plaza" (a multi storied building) in the year 1990. The State Vigilance, after getting information that certain irregularities have been committed while giving tender to the co-accused M/s.M.K. Jena, a private

contractor, enquired about the matter. At that time, co-accused Nalini Kanta Mohanty was the Minister of Housing and Urban Development Department. Orissa State Housing Board (in short "OSHB") was entrusted to make proposal for construction of the said building after selecting the contractor and after due approval of the State Government in Housing and Urban Development Department, the construction work to commence.

3. It is alleged inter alia that the tender was called by the OSHB where three contractors including the co-accused M.K.Jena participated. Since said M.K.Jena has quoted more price in the first instance, his bid became L-3. After revision of the offers of the contractors, the bid of M.K.Jena also became L-3. On 31.8.1990, all the contractors were asked to negotiate and after negotiation, the bid of M/s.M.K.Jena was L-2 and bid of M/s.Unit Construction Co. (P) Limited remained as L-1.

4. However, the Chairman of OSHB ignoring the L-1 bid on flimsy grounds, recommended the bid of L-2 for award of the contract. At that time, petitioner-Chitta Ranjan Pal, being Secretary of OSHB, has suggested to recommend the bid to M/s.M.K.Jena, L-2 bidder. But said recommendation of the OSHB was annulled by the then Hon'ble Chief Minister. Thereafter, again the tender was called for. This time, three contractors submitted their bids and the bid of M/s.M.K.Jena at Rs.10,25,48,275/-, which was 33.28% excess of the estimated cost and during negotiation, M/s.M.K.Jena reduced it's rate to Rs.10,23,77,565/-, i.e, 33.06% excess over the estimated cost and in the process, its bid was sent to the Government for approval on 29.6.1991.

5. Be it stated that the Jointer Secretary to Government in Housing and Urban Development Department (H & U.D.) placed the file on 5.7.1991 to the petitioner-Fani Bhusan Das, who was then Secretary of the Department and he instead of endorsing the file to the Minister of State, directly sent the file to the co-accused Nalinikanta Mohanty, Cabinet Minister of H & U.D. Department on the same day with his signature. On 6.7.1991, the Minister approved the same. As the conspiracy was hatched shed out for giving favour to the co-accused M/s.M.K.Jena by the OSHB in the first instance and also in the second instance, the FIR was lodged by the D.S.P. Vigilance, Cell(D), Cuttack on 4.8.95 to prosecute seven persons including the present petitioners for the commission of offence under Section 13(2) read with Section 13(1)(d) of P.C. Act, 1988 and Sections 120-B/420 of IPC.

6. The investigation was proceeded, documents were seized, witnesses were examined and after completion of the investigation, charge-sheet was submitted against the present petitioners and other co-accused persons including the then Cabinet Minister in-charge, namely, Nalinikanta Mohanty

7. It is also the case of the petitioners that after submission of the charge-sheet, learned Special Judge, Vigilance, Bhubaneswra took cognizance of the offence under Section 13(2) read with Section (1)(d) of the P.C.Act and issued process vide

his order dated 2.12.2003 and subsequently, vide order dated 12.2.2004, he took cognizance of the offence under Section 120-B of IPC by observing that he had not taken cognizance of the said offence inadvertently although prima facie case under Section 120-B was made out against the present petitioners.

SUBMISSIONS

8. Mr. M.K. Mohanty, learned counsel for the petitioner-Fani Bhusan Das in CRLMC Nos.258 and 696 of 2004, submitted that charge sheet although has been submitted by adding section 120-B I.P.C., but the learned trial court did not take cognizance of such offence, but later on took cognizance of the offence by adding the same to the offences under which cognizance has been taken at the first instance and such procedure of taking cognizance of offence under Section 120-B I.P.C. is absolutely illegal. He further submitted that the contents of the charge sheet are only meant for the first tender which was cancelled by the Hon'ble Chief Minister. Moreover, there is nothing found from the record that the present petitioner is involved in tendering process and approval of the tender recommended by the O.S.H.B. He further submitted that as per instruction of then Minister-in-charge, the Joint Secretary-cum-Director placed the part file where the present petitioner has no any role except placing the matter to the Hon'ble Minister-in-charge. Further he submitted that the present petitioner has already given opinion that the L-1 bid may be approved, because that is the recommendation of the O.S.H.B. In any circumstances, the present petitioner cannot be held responsible either for the offence under Section 13(2) read with 13(1(d) of P.C. Act or under Section 120-B I.P.C.

9. Mr. Mohanty, learned counsel for the petitioner-Fani Bhusan Das further submitted that the Scheme was approved or not, is not the question, because the proposal of the O.S.H.B. has been mooted out being its project, but not of the State Government. The present petitioner has no role than only to place the matter before the learned Minister-in-charge for acceptance of the tender and its learned Minister-in-charge was to take final decision. Moreover, in this case sanction under Section 197 Cr.P.C. has not been obtained to prosecute petitioner, for which order of taking cognizance is bad and illegal.

10. Mr. Mund, learned counsel for the petitioner-Chita Ranjan Pal submitted that the petitioner being the Secretary of the O.S.H.B., has participated in the Tender process to select co-accsued-Mr. M.K. Jena, but said report of that Committee was not accepted and annulled by the then Hon'ble Chief Minister. Subsequently when the Tender Committee was formed, the petitioner was not there in the Committee and by that time the petitioner was transferred. He further submitted that in the present case, the offence under Section 120-B I.P.C. has been added for the second time which is not permissible under law. He also submitted that sanction under Section 197 Cr.P.C. is necessary for taking cognizance for the offence under Section 120-B I.P.C., for which the impugned order is illegal and improper.

11. Mr. Pani, learned Standing Counsel for the State Vigilance Department in respect of CRLMC Nos.258 and 696 of 2004 submitted that the State Government has got absolute role while approving recommendation of the O.S.H.B. to finalise the tender. In the instant case the Hon'ble Chief Minister after cancelling the first tender, the second tender was called for. For the second tender State have got role either to allow or reject the tender. Since the present petitioner was the Secretary of the concerned Department, submitted proposal to the Minister-in-charge to approve the tender recommended by the O.S.H.B., the conspiracy angle of the present petitioner cannot be denied. Moreover, when the project before its approval has been set under tendering process, the petitioner being Secretary of State Government should have brought out this fact to the notice of learned Minister-in-charge. He further submitted that the Joint Secretary has clearly mentioned in the office note that for project the Tender Committee was formed and it is for the State Minister to take a decision in the matter. But the present petitioner instead of sending the file to the learned State Minister, has sent it to the learned Cabinet Minister who is a co-accused in this case. So, conspiracy of the present petitioner in the matter cannot be ruled out.

12. Mr. Pani, learned Standing Counsel for the Stated Vigilance Department, in respect of CRLMC No.2626 of 2007, submitted that it is a fact that the petitioner was not the Secretary of the O.S.H.B. during second tender call and by that time he was transferred. According to him, the present petitioner since has become a party to the earlier Tender Committee which was cancelled by the Hon'ble Chief Minister, he has got also prima facie role in the case of prosecution.

DISCUSSIONS

13. It is admitted fact that the petitioner-Chitta Ranjan Pal was the Secretary of the OSHB. It is not in dispute that he was involved in first tender process while it was discussed and allowed in favour of the co-accused M/s.M.K.Jena even if he is the second lowest bidder.

14. The concerned tender file was called for by this Court and on going through the same, it appears that the other bidder, namely, M/s.Unit Construction Limited was not selected in the tender process as its performance and dealings were not known to the Department. It further appears from the file that as per the P.W.D. Code, a bidder if at all not able to show his prior acquaintance or expertise about his performance or dealings in any project, he would not be qualified for bid. However, the present petitioner-Chitta Ranjan Pal has recommended the name of M/s.M.K.Jena to get the bid for the construction of "Toshali Plaza". Accordingly, the matter was moved to the Government but at Government level, the then Hon'ble Chief Minister rejected the proposal.

15. After rejection of the proposal, the tender in question was again called for. It is admitted by the learned Standing Counsel for the State Vigilance that the tender when called again, the petitioner-Chitta Ranjan Pal was not the Secretary of OSHB

and he has been transferred by then. It is only contended by Mr.Pani that when the petitioner is involved in the first tender process and recommended the name of L-2 ignoring the name of L-1 and he has also been charge-sheeted, for that the order of taking cognizance is not bad in law.

16. Here, the entire case revolves around the tender process of third time. As it appears from the FIR that for the third time, the bid amount was excessively higher than the estimated price of the bid fixed in the year 1990, which is just one year before the third term of bid. However, since the first tender process has been cancelled and it was made in a less price than the final one and by the final tender, the petitioner-Chitta Ranjan Pal transferred, prima facie case against him cannot be said to have been made out.

17. In respect of the petitioner-Fani Bhusan Das, challenge has been made to the order dated 02.12.2003 of taking cognizance of offence under Sections 13(2) read with Section (1)(d) of the Act, 1988 in CRLMC No.258 of 2004 and the order dated 12.2.2004 of taking cognizance of offence under Section 120-B of IPC in CRLMC No.696 of 2004 and issuance of summon thereby. The impugned order dated 2.12.2003 is as follows:

"Order dt.2.12.2003:-

Charge sheet in BBSR (Vig.) G.R. 124/99 along with other connected papers is received from A.C.J.M., BBSR and put up.
Perused the record. As there is prima facie U/s 13(2) r/w (1)(d) of the P.C.Act. Cognizance is taken. Issue summons to the accused persons fixing 19.1.2004 for appearance of the accused."

18. The aforesaid order does not disclose that cognizance of offence under Section 120-B of IPC was taken on that date although charge-sheet has been filed for commission of offence under Sections 13(2) read with Section (1)(d) of the Act, 1988 read with Section 120-B of IPC. It appears that a petition was filed by the prosecution on 12.2.2004 to add Section 120-B of IPC as the cognizance of the said offence has not been taken on 2.12.2003 and basing on that petition, learned Court below has passed the following order on 12.2.2004:

"Order dated 12.2.2004:-

The record is put up on the strength of advance petition filed by the learned Spl. P.P., Bhubaneswar. He also filed another petition mentioning that as there is sufficient evidence against the accused persons, charge sheets U/s 13(2), P.C. Act and 120-B I.P.C. have been filed. But the Court has taken cognizance of the offence U/s 13 (2) P.C. Act only on 2.12.03 and perhaps inadvertently did not take cognizance of the offence U/s 120-B, IPC.

On perusal of record, it appears that there is also material against the accused persons U/s 120-B IPC and inadvertently cognizance for this offence has not been taken on 2.12.03.

Hence, cognizance U/s 120-B IPC is also taken against all the accused persons. Put up on the date fixed."

19. The aforesaid order shows that the learned Special Judge admitted that inadvertently cognizance of offence under Section 120-B has not been taken but

there are materials against the accused persons for such offences. So, he also took cognizance of offence under Section 120-B of IPC on that day.

20. The challenge has been made to the order adding Section 120-B of IPC later on the ground that the Court has already applied his judicial mind and found a prima facie case under Section 13(2) read with Section (1)(d) of the Act, 1988 and subsequent order of taking cognizance of offence under Section 120-B of IPC amounts to reviewing the order, which is not permissible under the Code. Learned Standing Counsel for the Vigilance submitted that it is not rewriting of the order but it is an order adding Section 120-B of IPC when there is already material against the petitioners. Section 362 of the Code shows that save and otherwise provided by the Court or by any law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error. So, there should be test to find out whether it is a final order or a judgment.

21. Now the question arises whether the order of taking cognizance and issuance of a process is an interlocutory order or not. The term "interlocutory order" is used in a restricted sense. It denotes an order of purely interim or temporary nature. It is not always converse of the term "final order". An order which overrides important rights and liabilities cannot be termed as "interlocutory order" as reported in the case of ***Amar Nath and others –V- State of Haryana and others; AIR 1977 SC 2185.*** Thus, on the other hand, an interlocutory order does not finally dispose of the rights of the parties. It would be difficult to provide a straightjacket formula. The real test would be that if the judgment/order disposes of the rights of the parties, it would be a final order. If it does not dispose of the rights of the parties, it would be an interlocutory order. Now, the order of taking cognizance of the offence is not deciding the rights of the parties finally. So, it is an interlocutory order but not a final order. Hence, Section 362 of the Code would not apply to the impugned order dated 2.12.2003. Apart from this, the order of taking cognizance passed on 12.2.2004 is also considered after application of judicial mind by the learned Special Judge with regard to Section 120-B of IPC. So, the cognizance of offence under Section 13(2) read with Section (1)(d) of the Act, 1988 as has been taken on 2.12.2003 has to be read along with order dated 12.2.2004 where cognizance of offence under Section 120-B of IPC was taken and as such, they cannot be read separately to make the later one is an substitute for a former one. Hence, the contention of the learned counsel for the petitioners, in the facts and circumstances of the case, is brushed aside.

22. It is clear from the FIR and CD that the present petitioner-Fani Bhusan Das was the Commissioner-cum-Secretary of the H & U.D. Department. The tender process was actually conducted by the OSHB, which is an institution created under the statute, i.e, Orissa Housing Board Act, 1968 (in short 'the Act, 1968'). Under Section 17(1) of the Act, 1968, the OSHB can undertake housing schemes. Under

such scheme, OSHB has undertaken to construct the multi storied building, namely, "Toshali Plaza" at Satyna Nagar, Bhubaneswar. Section 17 of the Act, 1968 is as follows:

> *"**17.Powers and duties of Board to undertake housing Schemes:-***
>
> *(1) Subject to the provisions of this Act and subject to the control of the State Government, the Board may from time to time, incur expenditure and undertake works in any area for the framing and execution of such housing schemes as it may consider necessary.*
>
> *(2) The State Government may, on such terms and conditions as they may think fit to impose, entrust to the Board the framing and execution of any housing scheme whether provided for by this Act or not, and the Board shall thereupon undertake the framing and executing of such scheme as if it had been provided for by this Act.*
>
> *(3) The Board may, on such terms and conditions as may be agreed upon and with the previous approval of the State Government, take over for execution any housing scheme on behalf of a local authority or Co-operative society or on behalf of an employer when the houses are to be built mainly for the residence of the employees of the concerned local authority, co-operative society or the employer and any such scheme shall be executed by the Board as if it had been provided for by this Act."*

23. The aforesaid provision is clear to show that only with the approval of the State Government, the OSHB would undertake to incur an expenditure and work in an area. Section 18(g) of the Act, 1968 shows that the Housing Scheme includes the construction and reconstruction of buildings. So by reading Section 17 and 18(g) of the Act, 1968, it is clear that only after approval of the project or housing scheme, the OSHB would undertake construction/reconstruction of the building.

24. In the instant case, the FIR, CD and statement of witnesses recorded during investigation show that the OSHB had proposed to the housing scheme, namely, "Toshali Plaza". For that, the tender was called for at the first instance and in that tender, there were seventeen bidders and out of that, three bidders at pre-qualified stage, were selected. It is further revealed from the material and the concerned case record that the co-accused M.K.Jena was the third lowest bidder. Although he was third lowest bidder, his case was forwarded at first to undertake the work but the then Hon'ble Chief Minister did not approve the tender. Subsequently, another tender was called for and the same was also not successful. It is alleged by the prosecution that the third tender was called for and the same was done in a manner so that sufficient time was not given to receive better competitive offers. The co-accused M.K.Jena has got the only lone bid of course with higher price of Rs.10,25,48,275.00, which is more excess than the previous bid amount. It is revealed from the material on record including the concerned seized file relied upon by the prosecution that the co-accused Nalinikanta Mohanty being in-charge of the Housing and Urban Development Department as Minister, has asked the Joint Secretary to put up the tender file for approval in favour of co-accused M.K.Jena as sent by the OSHB and accordingly the Joint Secretary R.N.Rath placed the file through the petitioner-Fani Bhusan Das, who was the Secretary of the Department and admittedly, the petitioner-Fani Bhusan Das wrote that lowest tender may be

accepted along with the Scheme at Flag-'A' of the concerned file for kind consideration. It is pertinent to note that the Joint Secretary-cum-Director Housing has clearly mentioned that the Scheme in question has not been approved by the Government as the said file was with the Minister of State, H & U.D. Department for approval of the same. So, he suggested to approve the scheme and then to approve the lowest tender of Sri M.K.Jena. Such proposal was sent to the present petitioner-Fani Bhusan Das on 5.7.1991. Of course, the note of the Director shows that as desired by the Minister, the file is placed before him but while the present petitioner, being the Secretary, has sent the file to the Minister, should have brought all the facts, as stated by the Director, about non-approval of the Scheme "Toshali Plaza", which is the condition precedent for approving the tender. But instead of doing that, he straight suggested for acceptance of the lowest tender along with approval of the scheme on the same day, i.e, on 5.7.1991. On the next day, co-accused-Nalinikanta Mohanty then Minister, H & U.D. approved the same.

25. It is revealed from the same file that on 9.4.1991, the Joint Secretary to Government-cum-Director of Housing has placed the proposal of the Board before the petitioner to approve the Scheme as required under Sections 17(1), 54(1) and 15(1)(a) of the Act, 1968. The file has also been sent by the present petitioner on 17.4.1991 to the Minister (S), Works, Housing and Urban Development Department. The Minister of State sent the file to the co-accused Nalinikanta Mohanty on 9.9.1991. That proposal was approved by the co-accused Nalinikanta Mohanty on 21.09.1991.

26. The aforesaid scenario clearly shows the Scheme has been approved twice once on 6.7.1991 while approving the Scheme and the lowest tender of M.K.Jena and secondly on 21.9.1991. It shows that Minister of State has kept the file and sent the same only after five months of keeping the same with him to the then co-accused-Nalinikanta Mohanty, then Cabinet Minister. But it would be deemed that on 6.7.1991, the Scheme along with lowest tender has been accepted. No doubt, Rules of Business of Government of Orissa shows that the Minister-in-charge or the Minister of State-in-charge of a Department or a branch or branches thereof shall be primarily responsible for the disposal of business appertaining to department or branch. When the Minister-in-charge has approved the Scheme and also the tender, it cannot be said that it has not been approved by the State Government. Whether, the file should have gone to Cabinet or not is the discretion of the Minister concerned. Of course, when the file is pending for approval of the Scheme with the Minister of State before the file is placed for approval of the Scheme along with the approval of the tender, it should have been brought on record by the Secretary-in-charge. Every senior officer is supposed to bring the facts into notice of the Minister otherwise the assistance, as required by the Minister, would be lacking. It is important to note that mere placing of file before the Minister as per the advice of the Minister is not the ground to exonerate his liabilities because it is for the Secretary to place the entire facts even if with the repeated notes of the next below

officer. In spite of the noting, if at all the Minister direct for discussion and with discussion, he spells out some matter then it would have been prudent for the concerned Secretary or Commissioner to do the needful. Every now and then, shifting of responsibility of the concerned Minister will not shift his responsibility or liability but it would only show sharing the intention of the concerned Minister. Something has happened in this case. Whether the present petitioner has got intention or not but since he has sent the file after giving his remark, the concerned Minister, who is co-accused in this case, has approved the same. Mere endorsement to the note of the next below officer would mean the negligence but any opinion without giving the reasons of a senior officer would not be enough to get away from the liability prima facie.

27. In terms of the above discussion, the prima facie case under the relevant Sections of the Act, 1988 cannot be said to be non-application of judicial mind by the learned Special Judge, Vigilance. But, here one aspect has come up that sanction has not been obtained because the petitioner-Fani Bhusan Das is a senior officer to have acted purportedly in discharge of his duty. On the other hand, the act complained of has got nexus with the discharge of the duty as public servant.

28. Sections 13(1)(d) and 13(2) of the Act are as follows:

> *"13.(1)- A public servant is said to commit the offence of criminal misconduct:-*
> *xx xx xx xx*
> *d) if he,—*
> *(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or*
> *(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or*
> *(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or*
> *xx xx xx xx*
> *(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than four years but which may extend to ten years and shall also be liable to fine."*

29. In terms of the above discussion, when the petitioner-Fani Bhusan Das, being the Secretary of the Department, recommended for acceptance of the lowest tender along with the Scheme to the Minister concerned, who is also co-accused in this case, without examining the pros and cons of the tender cannot be said to have no role for sanctioning of the tender for the co-accused M.K.Jena proves prima facie case under the provisions of the Act, 1988. The subsequent conduct of Fani Bhusan Das can be also taken into consideration because the file when mooted out the Finance Department for giving the Government guarantee of Rs.957.43 lakhs, the Finance Department, after many queries from the Administrative Department headed by the present petitioner, approved the guarantee but that guarantee has also been approved at the level of the Chief Minister. Also it appears from the concerned file that after retirement of the present petition, the matter has also re-agitated by the

Department and it went to the Chief Minister. Now the doubt raised in the mind why the file was not moved to the Chief Minister to get the approval of the Scheme and the tender as was a tender of more than Rs.10.00 corores. The Minister concerned has got role by not sending the file to the Chief Minister but the note should have been put up by the present petitioner by enlightening the provisions so that it could have gone to the Chief Minister, if necessary to the Cabinet for approval. Learned counsel for the petitioner submitted that the approval has been made by the Hon'ble Chief Minister and the Cabinet but the file does not disclose so. On the other hand, the conduct of the petitioner is also found by further progress in the tender where the estimate has been revised to Rs.1928.46 lakhs on the proposal of the OSHB. Be that as it may, when it is at the stage of taking cognizance of the offence, merits of the case needs no further discussion, but the material available on record including the concerned file cannot deny the prima facie case against the present petitioners. Hence on merit, the impugned order of taking cognizance of the offence under the Act, 1988 is to be sustained.

30. Now, the question arises about the sanction for prosecution of the offences against the present petitioner before taking cognizance of the offences, as raised by the learned counsel for the petitioner.

31. Learned counsel for the petitioner submitted that admittedly here is no sanction obtained for prosecuting the petitioner-Fani Bhusan Das. The question of sanction against the petitioner-Chitta Ranjan Pal does not arise as on merit, as discussed above, no prima facie case is made out as the first tender was annulled and pecuniary benefit has been given to co-accused-M.K.Jena. So far the petitioner-Fani Bhusan Das is concerned, learned counsel for the petitioner submitted that the petitioner retired from service on 28.2.1995 on attaining the age of superannuation and the FIR was lodged on 4.8.1995. But the cognizance of the offence was taken on 2.12.2003 for the offence under the Act, 1988 and for the offence under the IPC, cognizance was taken on 12.2.2004. He submitted that the Hon'ble Supreme Court in the case of ***State of Punjab –V- Labh Singh; (2014) 16 SCC 807,*** has made it clear that the protection under Section 197 of the Code would applicable to the retired Government servants in respect of the offences punishable under the Indian Penal Code. In that case, the Hon'ble Supreme Court did not approve the action of the State in such case to wait till retirement of the Government servant and then file charge-sheet so as to stop the protection available to the accused under Section 19 of the Act, 1988. He, therefore, submitted that the action of the State by not obtaining the sanction makes the entire impugned order of taking cognizance vulnerable.

32. Learned counsel for the petitioner also relied on the decision of the Hon'ble Supreme Court in the case of ***N.K.Ganguly –V- Central Bureau of Investigation, New Delhi; (2016) 2 SCC 143*** where Their Lordships have quashed the proceeding for the offence under Section 120-B of IPC read with Sections 13(1)(d) and (2) of the Act, 1988 due to lack previous sanction. He also relied on the decisions of this

Court in the case of ***Birabar Sethi @ Birendra Sethi –V- State of Orissa; 2012 (II) OLR 697*** and ***Prakash Mishra –V- State of Odisha and others; 2015 (II) OLR 93***.

33. Per contra, Mr.Pani, learned Standing Counsel for the State Vigilance, relying upon the decision of the Hon'ble Supreme Court in the case of ***State of Tamil Nadu –V- M.M. Rajendrawn; (1998) 9 SCC 268, State of Kerala –V- V. Padmanabhan Nair; 1999 (II) OLR (SC) 334, P.K.Pradhan –V- State of Sikkim represented by the Central Bureau of Investigation; 2001 Cril LJ (SC) 3505, Raj Kishore Roy –V- Kamleswar Pandey & another; (2002) 23 OCR (SC) 510*** and ***State of Orissa –V- Debendra Nath Padhi; AIR 2005 SC 359,*** submitted that although question of sanction arises but the same can be decided at any stage but the accused facing prosecution under the Act, 1988 cannot claim any immunity on the ground of sanction after retirement even if the Court takes cognizance after his retirement.

34. After hearing both sides, it is necessary to find out the position of law in this regard. It is reported in the case of ***State of Bihar and others –V- Rajmangal Ram; (2014) 11 SCC 388*** where Their Lordships, at paragraphs-7 and 8, have observed in the following manner:

> *"7. The above view also found reiteration in **Prakash Singh Badal vs. State of Punjab** wherein it was, inter alia, held that mere omission, error or irregularity in sanction is not to be considered fatal unless it has resulted in failure of justice. In **Prakash Singh Badal,** it was further held that Section 19(1) of the PC Act is a matter of procedure and does not go to the root of jurisdiction. On the same line is the decision of this Court in **R. Venkatkrishnan vs. C.B.I.** In fact, a three Judge Bench in **State of M.P. vs. Virender Kumar Tripathi** while considering an identical issue, namely, the validity of the grant of sanction by the Additional Secretary of the Department of Law and Legislative Affairs of the Government of Madhya Pradesh instead of the authority in the parent department, this Court held that in view of Section 19 (3) of the PC Act, interdicting a criminal proceeding mid-course on ground of invalidity of the sanction order will not be appropriate unless the court can also reach the conclusion that failure of justice had been occasioned by any such error, omission or irregularity in the sanction. It was further held that failure of justice can be established not at the stage of framing of charge but only after the trial has commenced and evidence is led (Para 10 of the Report).*
>
> *8. There is a contrary view of this Court in **State of Goa vs. Babu Thomas** holding that an error in grant of sanction goes to the root of the prosecution. But the decision in **Babu Thomas** has to be necessarily understood in the facts thereof, namely, that the authority itself had admitted the invalidity of the initial sanction by issuing a second sanction with retrospective effect to validate the cognizance already taken on the basis of the initial sanction order. Even otherwise, the position has been clarified by the larger Bench in **State of M.P. vs. Virender Kumar Tripathi**."*

35. It is reported in the case of ***K.Kalimuthu –V- State by DSP; (2005) 4 SCC 512;*** where Their Lordships, at paragraph-15, have observed in the following manner:

> *"15.The question relating to the need of sanction under Section 197 of the Code is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceeding. The question*

whether sanction is necessary or not may have to be determined from stage to stage. Further, in cases where offences under the Act are concerned the effect of Section 197, dealing with question of prejudice has also to be noted."

36. It is reported in the case of ***State of Punjab –V- Labh Singh (Supra),*** where Their Lordships, at paragraphs-10, 11 and 12, have observed as under:

"*10. However as regards charges for the offences punishable under the Penal Code, the High Court was absolutely right in setting aside the order of the Special Judge. Unlike section 19 of the P.C Act, the protection under section 197 of Cr.P.C. is available to the concerned public servant even after retirement. Therefore, if the matter was considered by the sanctioning authority and the sanction to prosecute was rejected first on 13.09.2000 and secondly on 24.09.2003, the court could not have taken cognizance insofar as the offences punishable under the Penal Code are concerned. As laid down by this Court in* ***State of H.P –V- Nishant Saree,*** *the recourse in such cases is either to challenge the order of the Sanctioning Authority or to approach it again if there is any fresh material.*

11. In the circumstances, in our view the order under appeal passed by the High Court is correct insofar as charges under IPC are concerned but must be set aside as regards charge under P.C Act is concerned.

12. Before we part, we must record that we do not approve the stand taken by the appellant in the petition. The prosecution cannot keep waiting till a public servant retires and then choose to file charge-sheet against him after his retirement, thereby setting at naught the protection available to him under Section 19 of the P.C Act. The appeal thus stands allowed partly. No order as to costs."

37. It is reported in the case of ***N.K.Ganguly (Supra),*** where Their Lordships, at paragraphs-35, 36 and 37, have observed in the following manner:

"35. From a perusal of the case law referred to supra, it becomes clear that for the purpose of obtaining previous sanction from the appropriate Government under Section 197 of CrPC, it is imperative that the alleged offence is committed in discharge of official duty by the accused. It is also important for the Court to examine the allegations contained in the final report against the Appellants, to decide whether previous sanction is required to be obtained by the respondent from the appropriate government before taking cognizance of the alleged offence by the learned Special Judge against the accused. In the instant case, since the allegations made against the Appellants in the final report filed by the respondent that the alleged offences were committed by them in discharge of their official duty, therefore, it was essential for the learned Special Judge to correctly decide as to whether the previous sanction from the Central Government under Section 197 of CrPC was required to be taken by the respondent, before taking cognizance and passing an order issuing summons to the appellants for their presence.

Answer to Point No.(iii)

36.We have adverted to the contentions advanced by the learned counsel appearing on behalf of both the parties. We find much merit in the contention advanced by the learned senior counsel & other counsel appearing on behalf of the appellants and accept the same. We accordingly pass the following order:

37. For the aforesaid reasons, we set aside the impugned judgment and order of the High Court dated 27.05.2013 passed in ***Prof. N.K.Ganguly –V- CBI*** *and order and order dated 7.10.2014 passed in Application No. 277KH of 2014 in Special Case No. 18 of 2012 and quash the proceedings taking cognizance and issuing summons to the appellants in Special Case No. 18 of 2012 by the Special Judge, Anti Corruption (CBI), Ghaziabad, U.P.*

in absence of previous sanction obtained from the Central Government to prosecute the appellants as required under Section 197 of CrPC. The appeals are allowed. All the applications are disposed of.

38. With due regard to the aforesaid decisions, it is clear that the sanction for prosecution is necessary under Section 197 of the Code or under Section 19 of the Act, 1988 depending on the facts and circumstances of the case. It is also clear from the aforesaid judicial pronouncements that the question of sanction can be raised at any stage. But, it is made clear that under Section 197 of the Code that no cognizance of offence can be taken without there being any sanction for prosecution in respect of the act alleged which has got nexus with the discharge of duty by such public servant who is removable by the sanction of the State Government or the Central Government. Also it is clear that after retirement of a Government servant, no criminal prosecution can lie without any sanction for commission of offence under the IPC whereas the offence under the provisions of the Act, 1988 would continue in absence of sanction. A person if in service can claim for sanction for prosecution under the Act, 1988 or under the IPC depending on the nature of the offence alleged against him.

39. Now, adverting to the present case, it appears that the petitioner-Fani Bhusan Das has retired from service since 28.2.1995 but the FIR and the charge-sheet were submitted after his retirement, cognizance of offence under IPC was taken without any sanction order accompanying the prosecution although such prosecution should not have been made as observed by the Hon'ble Supreme Court in the case of ***State of Punjab –V- Labh Singh (Supra).*** But the prosecution against him will not be defective so far as the offences under the Act, 1988 are concerned without any sanction of prosecution being obtained. Since the cognizance of offence has been taken after the retirement of the petitioner-Fani Bhusan Das without any sanction of prosecution obtained for the offence under Section 120-B of IPC, the same would not stand but prosecution under Section 13(2) read with Section 13 (1)(d) is valid being not defective.

40. Mr.Mohanty, learned counsel for the petitioner-Fani Bhusan Das further submitted that the FIR was lodged on 8.9.1995 but the petitioner admittedly has got retired from service prior to that. According to him, the charge-sheet was submitted on 9.5.2003 and the cognizance was taken on 2.12.2003 at first instance and in second instance, on 12.2.2004. He submitted that since the police report submitted much after the retirement of the petitioner, under the provisions of Orissa Civil Services (Pension) Rules, 1992, the prosecution cannot lie. In support of his submission, he relied on the decision of this Court in the case of ***Laxman Prusty –V- State of Orissa; 2013 (I) OLR 671*** where His Lordship observed that in view of Clause (c) of Sub-rule (2) of Rule 7 of the said Rule, the criminal proceeding, being started five years after the retirement, such criminal proceeding is not maintainable. At the same time, learned Standing Counsel for the State Vigilance submitted that in the case of ***Prahallad Kar –V- State of Orissa; (2000) 19 OCR 231,*** His Lordship

observed that bar created for institution of criminal proceeding cannot govern the field and be treated as period of limitation for such prosecution in absence of any period of limitation prescribed either in Prevention of Corruption Act or in the Code.

41. When analyzing the aforesaid two decisions, Rule-7 of Orissa Civil Services (Pension) Rules, 1992 is placed in the following manner:

> *"**7. Right of Government to Withhold or Withdraw Pension-***
>
> *(1) The Government reserve to themselves the right of withholding a pension or gratuity, or both either in full or in part, or withdrawing a pension in full or in part, whether permanently or for specified period and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government, if in any departmental or judicial proceedings, the pensioner found guilty of grave misconduct or negligence in duty during the period of his service including service rendered on re-employment after retirement:*
>
> *Provided that the Odisha Public Service Commission shall be consulted before any final orders are passed:*
>
> *Provided further that when a part of pension is withheld/withdrawn, the amount of such pension shall not be reduced below the amount of minimum limit.*
>
> *(2) (a) xx xx xx xx*
> *(b) xx xx xx xx*
>
> *(c) No judicial proceedings, if not instituted while the Government servant was in service, whether before his retirement or during his re-employment, shall be instituted in respect of a cause of action which arose or in respect of an event which took place, more than four years before such institution.*
>
> *(d) In the case of Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceeding are continued under clauses (a) and (b), a provisional pension as provided in rule 66 shall be sanctioned.*
>
> *(e) Where the Government decide not to withhold or withdraw pension but order recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one-third of the pension admissible on the date of retirement of a Government servant.*
>
> ***Explanation-For the purpose of this rule,-***
>
> *(a) Departmental proceedings shall be deemed to be instituted on the date on which the statement of charges are issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from the date of his suspension; and*
>
> *(b) judicial proceedings shall be deemed to be instituted,-*
>
> *(i) in the case of criminal proceedings, on the date on which the complaint or report of a Police Officer, of which the Magistrate takes cognizance, is made; and*
>
> *(ii) in the case of civil proceedings, on the date of presentation of the Plaint in the Court."*

Explanation (b) in the above provision explains the judicial proceeding. Such proceeding shall be deemed to have been instituted in case of a criminal proceeding, on the date on which the complaint or report of a police officer on which the learned Magistrate took cognizance.

42. In the case of ***State of Maharashtra –V- Keshav Ramchandra Pangare and another; AIR 1999 SC 3846*** where Their Lordships, at paragraph-10, have observed in the following manner:

> *"10.Relying upon the decision in* ***Kailash Nath (AIR 1989 SC 558 : 1989 Cri LJ 813)*** *(Supra), the learned Single Judge of the Bombay High Court in* ***Prabhakar Govind Sawant –V- State of Maharashtra, 1991 Mah LJ 1051,*** *rejected the contention that the prosecution was barred under Rule 27 of the Pension Rules as it was launched after the period of four years. In that case, the learned Judge also referred to Article 254 of the Constitution and held that the provisions of the Criminal Procedure Code shall have an overriding effect and shall prevail notwithstanding any provision in the Pension Rules framed by the State Government. It is unfortunate that the attention of the learned Single Judge was not drawn to the said decisions which are of binding nature at least as far as the High Court is concerned. That apart, learned Single Judge, instead of jumping into a conclusion solely based on Rule 27 of the Pension Rules should have examined the relevant provisions of the Code before axing down the criminal prosecution in respect of serious offences."*

With due regard to the aforesaid decision, it is clear that the provisions of the Code shall have an overriding effect and shall prevail notwithstanding any provisions in the Pension Rules framed by the State Government. That case also refers to similar Rule of the Pension Rules of Haryana Service Rules. Since the Hon'ble Supreme is of the view contrary to the view taken by this Court in the case of ***Prahallad Kar –V- State of Orissa; (Supra),*** the decision of the Hon'ble Supreme Court is being followed. Now analyzing the case of the both petitioners, provision of the O.C.S (Pension) Rules, 1992 won't give any relief to the petitioner-Fani Bhusan Das.

43. In terms of the above discussions, the Court is of the view that the order dated 2.12.2003 of taking cognizance by the learned Special Judge, Vigilance, Bhubaneswar in T.R.26 of 2003 and issuance of summon against the petitioner-Chitta Ranjan Pal in CRLMC No.2626 of 2007 is liable to be quashed and the Court do so. Similarly, the order dated 12.2.2004 of taking cognizance for the offence under Section 120-B of IPC against the other petitioner-Fani Bhusan Das in CRLMC No.696 of 2004, being without sanction, is liable to be quashed and the Court do so. But the order dated 2.12.2003 of taking cognizance of the offence under Sections 13(2) read with Section 13(1)(d) of the Act, 1988 and issuance of process thereby against petitioner-Fani Bhusan Das would continue and the Court direct so.

44. It is made clear that the learned Court in seisin over the matter, while disposing of the case against petitioner-Fani Bhusan Das, would not be influenced by any of the observations made hereinabove, but would decide the case on its own merit as per the material available before it. Leaned Court below is further directed to dispose of the case within a period of two months from the date of receipt of the L CR from this Court.

45. In the result, CRLMC Nos.696 of 2004 and 2626 of 2007 filed by Fani Bhusan Das and Chitta Ranjal Pal respectively are allowed and CRLMC No.258 of 2004 filed by Fani Bhusand Das is dismissed.

46. Registry of this Court is directed to send back the LCR along with a copy of this judgment to the Court below forthwith by Special Messenger. Necessary files and copy of the case diary submitted by Mr.Pani, learned Standing Counsel for the State Vigilance be returned to him on proper receipt.

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