THE INDIAN LAW REPORTS
(CUTTACK SERIES)

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

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

MAY - 2018

Pages : 859 to 1010

Edited By

BIKRAM KISHORE NAYAK, ADVOCATE
LAW REPORTER
HIGH COURT OF ORISSA, CUTTACK.

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

Annual Subscription : ₹ 300/-

ORISSA HIGH COURT, CUTTACK

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

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2018 (I) ILR - CUT- 859 (S.C.)

SUPREME COURT OF INDIA

ABHAY MANOHAR SAPRE, J. & S. ABDUL NAZEER, J.

CIVIL APPEAL NO. 6272 OF 2010

VIJAY ARJUN BHAGAT & ORS. ……..Appellant(s)

.Vrs.

NANA LAXMAN TAPKIRE & ORS. ……..Respondent(s)

CODE OF CIVIL PROCEDURE, 1908 – Section 100 – Second appeal – Six questions were framed during admission of the Second appeal – Judgment not on the basis of six questions of law originally framed – No additional questions framed during the hearing of the second appeal – HC allowed the appeal by framing two additional questions in judgement itself – Whether permissible, Held, no – The High Court, committed two jurisdictional errors while deciding the second appeal although it has the jurisdiction to decide the second appeal only on the six substantial questions of law framed at the time of admitting the appeal – In other words, the jurisdiction of the High Court to decide the second appeal was confined only to six questions framed and not beyond it – Secondly, the High Court though had the jurisdiction to frame additional question(s) by taking recourse to proviso to subsection (5) of Section 100 of the Code but it was subject to fulfilling the three conditions, first "such questions should arise in the appeal", second, "assign the reasons for framing the additional questions" and third, "frame the questions at the time of hearing the appeal".

"In this case, the High Court committed an error because it framed two additional questions in the judgment itself. The procedure adopted by the High Court while deciding the second appeal caused prejudice to the rights of the parties because the parties, especially the appellants herein, who suffered the adverse order, had no knowledge about framing of the two additional questions inasmuch as they were deprived of the opportunity to address the Court on the two additional questions on which the impugned judgment was founded."

(Paras 22 to 26)

For Appellant : Mr. Chandan Ramamurthi

For Respondent : Mr. Ravindra Keshavrao Adsure

JUDGMENT Date of Judgemnt : 11. 05.2018

ABHAY MANOHAR SAPRE, J.

1. This appeal is directed against the final judgment and order dated 19.07.2007 passed by the High Court of Judicature at Bombay, Bench at Aurangabad in Second Appeal No.274 of 2002 whereby the Single Judge of the High Court allowed the appeal filed by respondent Nos.1 & 2 herein and 1 set aside the judgment/order dated 16. 01.2002 passed by the District Judge, Ahmednagar in

R.C.A. No.21 of 2000 and confirmed the judgment dated 10.12.1999 passed by the Civil Judge, Junior Division, Ahmednagar in R.C.S. No.600 of 1982.

2. In order to appreciate the issues involved in the appeal, few relevant facts need to be mentioned herein below.

3. The appellants are the plaintiffs whereas the respondents are the defendants in a civil suit out of which this appeal arises.

4. The appellants filed a civil suit (R.C.S. No. 600/1982) against the respondents in the Court of Civil Judge, Junior Division, Ahmednagar for declaration that, (1) the suit properties described in detail in the schedule are ancestral properties of the plaintiffs (2) the plaintiffs are the owners of the suit properties, and (3) the suit property described in 2 schedule 1(A) is not a Trust property and be declared as the plaintiffs' private property.

5. Defendant No. 1 filed its written statement whereas defendant Nos. 3 and 4 filed their joint written statement. The defendants raised several objections about maintainability of the suit. They also denied plaintiffs' claim on merits.

6. The Trial Court framed issues. Parties adduced evidence in support of their case. By judgment and decree dated 10.12.1999, the Trial Judge though answered some issues in plaintiffs' favour but eventually dismissed the plaintiffs' suit on merits.

7. The plaintiffs felt aggrieved and filed First Appeal (R.C.A. No.21/2000) in the Court of District Judge, Ahmednagar. By order dated 16.01.2002,
the first Appellate Court allowed the appeal, set aside the judgment and decree of the Trial Court and decreed the plaintiffs' suit.

8. Against the said judgment, Defendant Nos. 3 & 4 (respondent Nos. 1 & 2 herein) filed appeal being Second Appeal No. 274/2002 in the High Court of Bombay (Bench at Aurangabad). The High Court on 30.11.2002 admitted the second appeal on the following substantial questions of law:

> **"(A) Whether the first appellate court has misread the document of partition deed(Exh.81) and therefore the finding in this behalf suffers from perversity.**
>
> **(B) Whether the first appellate Court has failed to consider the appropriate provisions of Order VII Rule 3 of C.P.C.**
>
> **(C) Whether the first appellate Court has erroneously relied upon Xerox copies of the mortgage deed which is not registered.**
>
> **(D) Whether the first appellate Court has erroneously that the suit properties are the private properties of original plaintiffs.**
>
> **(E) Whether the Civil Court has jurisdiction to decide the nature of the property which issue required to be dealt with by the Charity Commissioner.**
>
> **(F) Whether the suit is barred by limitation."**

9. By impugned judgment, the Single Judge of the High Court allowed the appeal and, in consequence, set aside the order passed by the District Judge in R.C.A. No.21 of 2000 and confirmed the judgment passed by the Civil Judge in R.C.S. No.600 of 1982 which has given rise to filing of the present appeal by way of special leave by the plaintiffs before this Court.

10. The short question, which arises for consideration in this appeal, is whether the High Court was justified in allowing the appeal.

11. Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal, set aside the impugned judgment and remand the case to the High Court for deciding the appeal afresh on merits in accordance with law.

12. In our considered view, the need to remand the case to the High Court has occasioned because the High Court while deciding and eventually allowing the second appeal did not follow the mandatory procedure prescribed under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code").

13. In other words, we find that the manner in which the High Court proceeded to decide the second appeal did not appear to be in conformity with the mandatory procedure prescribed under Section 100 of the Code. It is clear from our reasoning given infra.

14. Section 100 of the Code reads as under:

> **"100. Second appeal(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.**
>
> **(2) An appeal may lie under this section from an appellate decree passed ex parte.**
>
> **(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.**
>
> **(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.**
>
> **(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:**
>
> **Provided that nothing in this subsection shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."**

15. Subsection (1) of Section 100 says that the second appeal would be entertained by the High Court only if the High Court is "satisfied" that the case involves a "substantial question of law". Subsection (3) makes it obligatory upon the appellant to precisely state in memo of appeal the "substantial question of law"

involved in the appeal. Subsection (4) provides that where the High Court is satisfied that any substantial question of law is involved in the case, it shall formulate that question. In other words, once the High Court is satisfied after hearing the appellant or his counsel, as the case may be, that the appeal involves a substantial question of law, it has to formulate that question and then direct issuance of notice to the respondent of the memo of appeal along with the question of law framed by the High Court. Subsection (5) provides that the appeal shall be heard only on the question formulated by the High Court under subsection (4). In other words, the jurisdiction of the High Court to decide the second appeal is confined only to the question framed by the High Court under subsection(4). The respondent, however, at the time of hearing of the appeal is given a right under sub section (5) to raise an objection that the question framed by the High Court under subsection (4) does not involve in the appeal. The reason for giving this right to the respondent for raising such objection at the time of hearing is because the High Court frames the question at the admission stage which is prior to issuance of the notice of appeal to the respondent. In other words, the question is framed behind the back of the respondent and, therefore, subsection (5) enables him to raise such objection at the time of hearing that the question framed does not arise in the appeal. The proviso to subsection (5), however, also recognizes the power of the High Court to hear the appeal on any other substantial question of law which was not initially framed by the High Court under subsection (4). However, this power can be exercised by the High Court only after assigning the reasons for framing such additional question of law at the time of hearing of the appeal **(See C.A. Nos.91189119 of 2010 titled Surat Singh (Dead) vs. Siri Bhagwan & Ors. decided on 19.02.2018).**

16. Adverting to the facts of the case at hand, we find that the High Court on 30.11.2002 admitted the second appeal and framed six substantial questions of law quoted supra as required under Subsections (1) and (4) of Section 100 of the Code which, according to the High Court, arose in the second appeal.

17. The High Court was, therefore, required to decide the second appeal only on the six formulated substantial questions of law as provided under subsection (5) of Section 100 of the Code.

18. We, however, find that the High Court instead of deciding the second appeal on these six substantial questions of law framed at the time of admission allowed the appeal on two additional substantial questions of law (see Para 10 of the impugned judgment) which were neither framed by the High Court at the time of admission of the second appeal on 30.11.2002 and nor at the time of hearing the second appeal.

19. In other words, the High Court allowed the appeal on the two questions, which were framed in the impugned judgment only. These two questions read as under:

"In S.A. No.274/2002, following substantial questions of law arise:

(i) Whether the Civil Court has jurisdiction to decide the question whether a particular property is that of a Public Trust or that it is not a property of the Public Trust and belongs to individual claimant?

(ii) Whether the suit for declaration that the properties were not of the Public Trust was barred by limitation and, therefore, the impugned judgment of the first appellate Court deserves interference?"

20. In our considered opinion, the High Court, therefore, committed two jurisdictional errors while deciding the second appeal.

21. First, though it rightly framed six substantial questions of law at the time of admission of the appeal on 30.11.2002 as arising in the case but erred in not answering these questions.

22. As mentioned above, the High Court had the jurisdiction to decide the second appeal only on the six substantial questions of law framed at the time of admitting the appeal. In other words, the jurisdiction of the High Court to decide the second appeal was confined only to six questions framed and not beyond it.

23. Second, the High Court though had the jurisdiction to frame additional question(s) by taking recourse to proviso to subsection(5) of Section 100 of the Code but it was subject to fulfilling the three conditions, first "such questions should arise in the appeal", second, "assign the reasons for framing the additional questions" and third, "frame the questions at the time of hearing the appeal".

24. In this case, the High Court committed an error because it framed two additional questions in the judgment itself.

25. This procedure adopted by the High Court while deciding the second appeal caused prejudice to the rights of the parties because the parties, especially the appellants herein, who suffered the adverse order, had no knowledge about framing of the two additional questions inasmuch as they were deprived of the opportunity to address the Court on the two additional questions on which the impugned judgment was founded.

26. Learned counsel for the respondents, however, made sincere efforts to persuade the Court to uphold the impugned judgment on merits but in the light of what we have held above, it is not possible to accept the submissions of the learned counsel for the respondents much less the submissions urged on the merits of the controversy.

27. We, however, make it clear that having formed an opinion to remand the case, we have refrained from applying our mind to the merits of the case. It is now for the High Court to decide the appeal on merits.

28. In the light of the foregoing discussion, the appeal succeeds and is allowed. The impugned judgment is set aside. The case is remanded to the High Court for

deciding the appeal afresh on merits in accordance with law without being influenced by any of our observations.

29. Since the appeal is quite old, the same shall be decided expeditiously.

Appeal allowed.

2018 (I) ILR - CUT- 864

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

W.P.(C) NO. 26771 OF 2017

B. MANOJ KUMAR RAO. ……..Petitioner

.Vrs.

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

(A) Words and Phrases – Incentives – Meaning – Entitlement – Discussed. (Para 12)

(B) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Tender – Writ petition challenging rejection of the claim of incentives in lieu of early completion of work – DTCN contains the clause for incentives – Rejection on the ground that there was change in the nature of work and that the Contractor did not intimate about early completion of the work to the authority – Record shows otherwise – Held, the petitioner is entitled for incentives. (Para 14)

Case Laws Relied on and Referred to :-

1. (2007) 11 SCC 756 : Ghaziabad Zila Sahkari Bank Ltd. v. Labour Commissioner.
2. 2017 (I) OLR 41 : Bijay Kumar Mohapatra v. State of Orissa.

For Petitioner : M/s. Nilakantha Jujharsingh, M. Satpathy, R. Mohanty, A.K. Bisoi & D. Bal, Advocates

For Opp. Parties : Addl. Govt. Advocate

JUDGMENT Decided On : 20.04.2018

VINEET SARAN, CJ.

The petitioner had entered into an agreement dated 6.1.2015 with the opposite party no.5 for execution of work, namely, *"**Improvement to Luchapada PWD Road to Shaktinagar via-Srimanagar, Merasahi, Badasahi road in the District of Ganjam under NABARD Assistance, RIDF-XIX**"*.

2. The value of the work as per the agreement was Rs.13,25,16,680/-, the stipulated date of commencement of the work was 6.1.2015 and the date of completion of the work was 5.7.2016.

3. Clause 19 of the Detailed Tender Call Notice (DTCN) provides for incentive to the contractor for early completion of work, which reads as follows:-

> "*19. The work is to be completed in all respects within the period mentioned in column 6 of TCN in calendar months from the date of written order to commence the work. There will be provision of incentive @ 1% in case of completion of work ahead of one month (part of the month excluded) & the maximum amount payable will be fixed at 2% of the work is completed two months ahead of the scheduled time.*
>
> *Incentive should be paid in respect of individual project for new construction/substantial additional or improvement works, the minimum value of which is mentioned below :*
>
> | | ***Name of work*** | ***Minimum value*** |
> |---|---|---|
> | *1.* | *Building work/PH Work* | *Rs. 40.00 lakhs* |
> | *2.* | *Road work* | *Rs. 3.00 crores* |
> | *3.* | *Irrigation work* | *Rs. 10.00 crores* |
>
> *The claim for incentives shall be considered subject to the condition that the Executive Engineer in charge of the work shall intimate the actual date of completion to the concerned S.E., Chief Engineer and Govt. within three days of completion date.*
>
> *For availing incentive clause in any project which is completed before the stipulated date of completion subject to other stipulations it is mandatory on the part of the concerned EE to report the actual date of completion of the project as soon as possible through FAX or e-mail so that the report is received within 7 days of such completion by the concerned SE, CE & the Administrative Department. The incentive for timely completion should be on a graduated scale of one percentage to 10 percent of the contract value. Assessment of incentives may be worked out for earlier completion of work in all respect in the following scale.*
>
> *Before 30% of contract period = 10%*
> *Before 20 to 30% of contract period = 7.50% of contract value*
> *Before 10% to 20% of contract period = 5% of contract value*
> *Before 5% to 10% of contract period = 2.50% of contract value*
> *Before 5% of contract period = 1% of contract value"*

4. In the present case, the petitioner claims that he had completed the work on 19.12.2015, instead of 5.7.2016, which was 30% earlier than the contract period, being 199 days earlier than the scheduled time. According to the petitioner, he would be entitled to incentive of 10% of the contract value for such early completion of work. Since the petitioner was not granted the benefit, he filed Writ Petition No. 19518 of 2017, which was disposed of on 14.9.2017 with the direction to the Chief Engineer-opposite party no.3 to consider and decide the claim of the petitioner for payment of incentive, on the representation which may be filed by the petitioner. Pursuant thereto, the petitioner filed a representation on 18.9.2017 which was rejected by the opposite party no.3-Chief Engineer on 2.11.2017. Aggrieved by the same, this writ petition has been filed.

5. We have heard Sri N.Jujharsingh, learned counsel for the petitioner as well as learned Addl. Government Advocate appearing for the State-opposite parties and have perused the record.Pleadings between the parties have been exchanged. With

the consent of the learned counsel for the parties, this petition is being disposed of at the admission stage.

6. The fact that the petitioner had completed the work in terms of the agreement dated 6.1.2015 on 19.12.2015, which was 199 days prior to the schedule date of completion and 30% before the contract period, is not disputed in the counter affidavit. In the order dated 2.11.2017 passed by the Chief Engineer on the representation filed by the petitioner, the opposite party no.3 has taken two grounds for rejection of the claim of the petitioner; firstly, that there was change in original scope of work; and secondly, there was delay in reporting the completion date by the concerned Superintending Engineer-opposite party no.4.

7. In the said order no details of change in the original scope of work have been given and a bald statement has been made that there was change in the scope of work. The Opposite party has tried to explain in the counter affidavit that some work was reduced and as such, the petitioner did not complete the original work as per the agreement before the original time schedule and thus, since there was change in original scope of work, the petitioner would not be entitled to the benefit of Clause 19 of the DTCN, read with para 3.5.5(V) Note-I of OPWD code Vol.I. The said provision of the OPWD Code relates to payment of incentive and provides that "incentive will be paid with approval of next higher authority of tender accepting authority on completion of original work before original time schedule".

8. The fact, that the petitioner had completed the work 199 days before the original time schedule, is not disputed by the opposite party. Admittedly, there was no change in the terms and conditions of the agreement dated 6.1.2015. The opposite parties have not brought on record any document in the counter affidavit also to show that the petitioner was ever intimated of the change in any terms of the agreement, or the scope of work as per the agreement. The order dated 2.11.2017 does not even specify any alleged change in original scope of work. The opposite parties have tried to justify the same in the counter affidavit by giving certain details, without supporting the same with any document to show that the change in scope of work was ever intimated to the petitioner, either during the pendency of the contract period, or even thereafter. As such, the said justification which the opposite parties have tried to give in the counter affidavit, cannot be accepted, especially when there was no intimation of any change of work given to the petitioner, nor details of the same had been given in the order dated 2.11.2017 which was passed in compliance of this Court's order while disposing of the earlier writ petition of the petitioner. As such, the first ground for rejection of the claim of the petitioner for grant of incentive for early completion of work cannot be accepted in law.

9. As regards the second ground, which relates to delay in reporting the completion date by the concerned Superintending Engineer-opposite party no.4 is concerned, we are of the opinion that once the petitioner had completed the work

and due intimation was given to the concerned Engineer, which fact is not disputed by the opposite parties, it was for the concerned Engineer to intimate to the next higher authority, and any delay caused by the concerned Engineer in giving such intimation cannot be held against, or to the detriment of the petitioner.

10. The fact that the petitioner had completed the work 199 days before the scheduled date of completion, which was 30% before the scheduled time, is not disputed by the opposite parties. Thus, any lapse on the part of the Superintending Engineer in intimating the next higher authority of such early completion of contract work so as to enable the petitioner to be given the benefit of Clause 19 of the DTCN, cannot be taken against the petitioner.

11. At this stage, it may be pertinent to note here that nothing has been brought on record to show that either the Executive Engineer, or the Superintending Engineer, had while intimating the Chief Engineer about completion of the work, had ever stated that there was change in the scope of work because of which the petitioner would not be entitled to any incentive. The ground of change in the scope of work has been taken by the opposite party at a very late stage, first at the stage of passing of the order dated 2.11.2017 without giving any details with regard to alleged change in the scope of work, and then in the counter affidavit by making such assertion, without supporting the same with any document.

12. The meaning of "incentive" attached to clause 19 of the DTCN is to be examined in the context of facts of the case in hand.

As per Chambers Dictionary, the meaning of "**Incentive** in-sent' iv, adj inciting, encouraging; igniting (*Milton*).-n that which incites to action, a stimulus.-n **incentiviza'tion** or-**s**-vi **incent'ivize** or-**ise** to have or be given an incentive, *esp* to work more efficiently, productively, etc.[L *incentivus* striking up a tune, from *incinere*, from *in* in, and *canere* to sing].

In Oxford Dictionaries "**incentive**" means a thing that motivates or encourages someone to do something

The meaning of "**incentive**" in Cambridge English Dictionary is something that encourages a person to do something.

In Business Dictionary.com "**incentive**" has been defined to mean inducement or supplemental reward that serves as a motivational device for a desired action or behavior.

As per WIKIPEDIA an "**incentive**" is something that motivates an individual to perform an action".

"**Incentive**" by Merriam-Webster means something that incites or has a tendency to incite to determination or action.

According to P Ramanatha Aiyar's Advanced Law Lexicon 4th Edition, "**incentive**" means something that arouses feeling or incites to action. Positive motive (sometimes artificially generated) for performing some task. It is not appropriate to limit the word '**incentive**' to the provision of incentives for employees only. An incentive scheme is a scheme which has the purpose of giving rewards in order to encourage performance of some description".

13. In ***Bijay Kumar Mohapatra v. State of Orissa***, 2017 (I) OLR 41, this Court, while considering the similar clause 2.4 of Detailed Tender Call Notice which prescribes 'bonus' for early completion of work, taking into account the meaning attached to word 'bonus' relying upon the law laid down by the apex Court in ***Ghaziabad Zila Sahkari Bank Ltd. v. Labour Commissioner***, (2007) 11 SCC 756 held that "bonus" is a boon or gift, over and above, what is normally due as remuneration to be received.

Similarly, the meaning attached to word "incentive" as per Clause 19 of the Detailed Tender Call Notice is a boon, over and above, what is normally due to the petitioner.

14. Incentive for early completion is provided in a contract to encourage the contractor to complete the agreed work early, which would go to the benefit of both parties. Denying the same on frivolous grounds would amount to breach of contract, as has been done in the present case where such incentive has been denied to the petitioner by raising the issue of change in nature of work as an afterthought, and that information was not given by the own officer of the opposite party, which was for no fault of the petitioner, when admittedly he had completed the contract work 199 days before the scheduled date.

15. In such view of the matter, we are of the firm opinion that the rejection of the claim of the petitioner for grant of incentive was not justified, and the order dated 2.11.2017 deserves to be quashed and is accordingly quashed.

16. The opposite parties are directed to pay the incentive amount to the petitioner in terms of Clause 19 of the DTCN for early completion of work, as expeditiously as possible, but not later than six weeks from the date of production of certified copy of this order before the Executive Engineer-opposite party no.5.

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

Writ petition allowed.

2018 (I) ILR - CUT- 869

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

WRIT APPEAL NO. 202 OF 2017

JYOTSHNA MOHAPATRA ……..Appellant

.Vrs.

STATE OF ODISHA ..…....Respondent

Letters Patent Appeal – Maintainability – Order travelled from the appeal filed before the District Judge arising out of a confiscation proceeding under the Orissa Forest Act – Learned Single Judge exercised jurisdiction under Article 227 of the Constitution of India – Held, the writ appeal not maintainable. (Paras 10 to 13)

Case Laws Relied on and Referred to :-

1. (2015) 9 SCC 1 : Jogendrasinhji Vijaysinghji v. State of Gujarat,
2. 2016 (II) OLR 3 : Saswati Patras v. Saraswati Biswal.
3. 2016 (II) ILR –CUT-28 : Rabindranath @ Rabindranath Jena v.Bijaya Kumar Bhuyan & ors.
4. (2015) 5 SCC 423 : Radhey Shyam v. Chhabi Nath.
5 2017 (I) ILR CUT 24 : Ananda Mohapatra v. Bijay Mohapatra.

For appellant : M/s. R.N. Nayak, N. Sen,C. Sethy and G.N. Rout,
For Respondent : Mr. B.P. Pradhan, Addl. Govt Adv.

JUDGMENT Decided on : 09.05.2018

DR. B.R.SARANGI, J.

The appellant is the owner of a furniture shop dealing with manufacturing of steel and wooden furniture and supply of sawn sizes wood. The appellant has also obtained registration certificate from the District Industries Centre, Cuttack, as well as licence from the State and Central Sales Tax Department. The appellant procured raw materials for wooden furniture from the local saw mills and from outside the State with genuine documents, such as, cash memo and timber transit permit. On 10.10.2001, the Vigilance and Forest staff conducted raid in the house premises of the appellant and seized wooden furniture and sawn sizes sal wood. Accordingly, a seizure list of furniture pertaining to O.R. Case No.50C of 2001-02 was prepared. Though the appellant was called upon, she could not produce documents in support of storage of sawn sizes wood, for which confiscation proceeding under Section 56 of the Orissa Forest Act, 1972 was initiated against her. the Authorized Officer, after completion of inquiry in the confiscation proceeding, vide order dated 13.06.2006, while directed that the furniture seized to be released in favour of the appellant, held that there was no supporting documents for keeping the seized timbers by the appellant in her house premises and, as such, there was violation of Rules-4, 12, 14 and 21 of the Orissa Timber and Other Forest Produce Transit Rules, 1980 and confiscated the seized timbers.

2. Being aggrieved by the order dated 13.06.2006 passed by the Authorized Officer under Section 56 of the Orissa Forest Act, 1972, the appellant preferred appeal registered as FAO No.119 of 2006 before the learned District Judge, Cuttack, who, by order dated 10.08.2007, confirmed the order of confiscation issued by the Authorized Officer, holding that the contention of the appellant that she had kept the seized timbers with T.T. permit was contrary to the materials on record and no convincing material was there in support of her contention.

3. Challenging the order dated 10.08.2007 passed by the learned District Judge, Cuttack in FAO No.119 of 2006, the appellant filed W.P.(C) No.9891 of 2008 and after due adjudication the learned Single Judge, vide order dated 10.03.2017, dismissed the writ petition conforming the order of confiscation passed by the Authorized Officer on 13.06.2006, which was also confirmed by the learned District Judge, Cuttack vide order dated 10.08.2007 in FAO No.119 of 2006.

4. Challenging the order dated 10.03.2017 passed by the learned Single Judge, this intra-Court appeal has been filed by the appellant seeking for interference of this Court.

5. Mr. R.N. Nayak, learned counsel for the appellant argued on merits of the case and contended that the order of confiscation passed by the Authorized Officer under Section 56 of the Orissa Forest Act, 1972 confirmed by the learned District Judge in appeal and affirmed by the learned Single Judge in the writ petition should be set aside and the seized timbers should be released in favour of the appellant.

6. Mr. B.P. Pradhan, learned Addl. Government Advocate at the outset raised preliminary objection with regard to maintainability of the writ appeal against the order passed by the learned Single Judge on 10.03.2017 and contended that since the learned Single Judge has passed the order in exercise of power under Article 227 of the Constitution of India, while confirming the order passed by the learned District Judge in FAO No.119 of 2006, the present appeal is not maintainable and, as such, the same is liable to be dismissed.

7. We have heard Mr. R.N. Nayak, learned counsel for the appellant, as well as Mr. B.P. Pradhan, learned Addl. Government Advocate and perused the record, and also considered the preliminary objection raised by learned Addl. Government Advocate with regard to maintainability of the writ appeal.

8. The question with regard to maintainability of the intra-Court appeal has been considered by the apex Court in ***Jogendrasinhji Vijaysinghji v. State of Gujarat*****,** (2015) 9 SCC 1 and the apex Court, relying upon the various judgments, held that Article 226 of the Constitution of India confers a power on a High Court to issue writs, orders, or directions mentioned therein for enforcement of any of the rights conferred by Part III or for any other purpose. This is neither an appellate nor a revisional jurisdiction of the High Court. The High Court in exercise of its power under Article 226 of the Constitution exercises original jurisdiction, though the said

jurisdiction shall not be confused with the ordinary civil jurisdiction of the High Court. This jurisdiction, though original in character as contrasted with its appellate and revisional jurisdictions, is exercisable throughout the territories in relation to which it exercises jurisdiction and may, for convenience, be described as extraordinary original jurisdiction. If that be so, it cannot be contended that a petition under Article 226 of the Constitution is a continuation of the proceedings under the Act concerned. The order passed by the Civil Court is only amenable to be scrutinized by the High Court in exercise of jurisdiction under Article 227 of the Constitution. Once it is exclusively assailable under Article 227 of the Constitution of India, no intra-Court appeal is maintainable. Jurisdiction under Article 227 is distinct from jurisdiction under Article 226 of the Constitution and, therefore, a letters patent appeal or an intra-Court appeal in respect of an order passed by the learned Single Judge dealing with an order arising out of a proceeding from a civil court would not lie before the Division Bench. No writ can be issued against the order passed by the civil court and, therefore, no letters patent appeal would be maintainable.

9. Where the facts justify a party in filing an application either under Article 226 or 227 of the Constitution, and the party chooses to file his application under both these Articles, in fairness and justice to such party and in order not to deprive him of the valuable right of appeal, the Court ought to treat the application as being made under Article 226, and if in deciding the matter, in the final order, the Court gives ancillary directions which may pertain to Article 227, this ought not to be held to deprive a party of the right of appeal under Clause 15 of the Letters Patent where the substantial part of the order sought to be appealed against is under Article 226. If the judgment under appeal falls squarely within four corners of Article 227, it goes without saying that intra-Court appeal from such judgment would not be maintainable. On the other hand, if the petitioner has invoked the jurisdiction of the High Court for issuance of certain writ under Article 226, although Article 227 is also mentioned, and principally the judgment appealed against falls under Article 226, the appeal would be maintainable. What is important to be ascertained is the true nature of order passed by the learned Single Judge and not what provision he mentions while exercising such powers. A statement by a learned Single Judge that he has exercised power under Article 227, cannot take away the right of appeal against such judgment if power is otherwise found to have been exercised under Article 226. The vital factor for determination of maintainability of intra Court appeal is the nature of jurisdiction invoked by the party and the true nature of principal order passed by the learned Single Judge.

10. Consequently, maintainability of the Letters Patent Appeal would depend upon the pleadings in the writ petition, the nature and character of the order passed by the learned Single Judge, and the type of directions issued, regard being had to the jurisdictional perspectives in the constitutional context. Whether a Letters Patent Appeal would lie against the order passed by the learned Single Judge that has

travelled to him from the other tribunals or authorities, would depend upon many a facet. It is clarified that 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. But how the jurisdiction under the letters patent appeal is to be exercised cannot exhaustively be stated. It will depend upon the Bench adjudicating the lis how it understands and appreciates the order passed by the learned Single Judge and as such, there cannot be a straitjacket formula for the same. But the High Court while exercising jurisdiction under Article 227 of the Constitution has to be guided by the parameters laid down by the Supreme Court. The apex Court in ***Jogendrasinhji Vijaysinghji*** (supra) summarised the guidelines in paragrtaph-45, which reads as follows:

> *"45. In view of the aforesaid analysis, we proceed to summarise our conclusions as follows:*
> *45.1. Whether a letters patent appeal would lie against the order passed by the learned Single Judge that has travelled to him from the other tribunals or authorities, would depend upon many a facet. The court fee payable on a petition to make it under Article 226 or Article 227 or both, would depend upon the rules framed by the High Court.*
>
> *45.2. The order passed by the civil court is only amenable to be scrutinised by the High Court in exercise of jurisdiction under Article 227 of the Constitution of India which is different from Article 226 of the Constitution and as per the pronouncement in* ***Radhey Shyam v. Chhabi Nath****, (2015) 5 SCC 423, no writ can be issued against the order passed by the civil court and, therefore, no letters patent appeal would be maintainable.*
>
> *45.3. The writ petition can be held to be not maintainable if a tribunal or authority that is required to defend the impugned order has not been arrayed as a party, as it is a necessary party.*
>
> *45.4. The tribunal being or not being party in a writ petition is not determinative of the maintainability of a letters patent appeal."*

11. This Court had got an occasion to deal with the similar question in ***Saswati Patras v. Saraswati Biswal*****,** 2016 (II) OLR 3, in which the election to a Member of Zilla Parishad, Puri was under challenge. The question was as to whether under Section 32 of the Zilla Parishad Act, the District Judge has got jurisdiction to try the election petition. While considering the same, this Court held that in an intra-Court appeal, order passed by the Civil Judge is only amenable to be scrutinized by the High Court in exercise of jurisdiction under Article 227 of the Constitution of India. Once it is exclusively assailable under Article 227 of the constitution of India, no intra-Court appeal is maintainable. As such, jurisdiction under Article 227 is distinct from the jurisdiction under Article 226 of the Constitution. A letters patent appeal or an intra-Court appeal in respect of an order passed by the learned Single Judge dealing with the order arising out of proceeding from the civil court would not lie before the Division Bench. No writ can be issued against the order passed by the civil court, and therefore, no letters patent appeal will be maintainable.

12. In ***Rabindranath @ Rabindranath Jena v. Bijaya Kumar Bhuyan & ors.*** 2016 (II) ILR –CUT-28, this Court has already taken into consideration the maintainability of the writ appeal, while considering the provisions contained under Section 31 of the Odisha Grama Panchayat Act, 1964, and this Court has taken similar view as has been held by the apex Court in ***Jogendrasinhji Vijaysinghji*** (supra) which has also taken note of judgment of the apex Court in ***Radhey Shyam v. Chhabi Nath***, (2015) 5 SCC 423. This Court has also taken similar view in ***Smt. Swarnaprava Pattnaik @ Das v. Dibakara Satpathy (Dead) through L.Rs. Lilly Satpathy @ Panda and others*** (Writ Appeal No.346 of 2012) dismissed on 08.12.2016 and ***Ananda Mohapatra v. Bijay Mohapatra,*** 2017 (I) ILR CUT 24, holding that since the order was passed by the learned Single Judge in exercise of power under Article 227 of Constitution of India, the writ appeal is not maintainable.

13. Considering the law laid down by the apex Court as well as this Court, as discussed above, we are of the considered view that as the learned Single Judge, while deciding W.P.(C) No. 9891 of 2008, has exercised the jurisdiction under Article 227 of the Constitution of India, the present writ appeal is not maintainable. The preliminary objection raised on behalf of State-respondent is thus answered in its favour. Since we have held that the writ appeal is not maintainable, we are not inclined to enter into the merits of the case.

14. The writ appeal is accordingly dismissed as not maintainable. No order as to cost.

Writ appeal dismissed.

2018 (I) ILR - CUT- 873

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

W.P.(C) NO. 457 OF 2018

JAGRUTI WELFARE ORGANIZATION ……..Petitioner

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Tender matter – Petitioner's bid found to be non-responsive as it violates the conditions stipulated in the tender documents in Clause 4.1.1(b) read with clause 4.3(d) relating to previous experience and pendency of criminal case – As per Clause 4.3(d), a bidder required to submit an affidavit with regard to pendency of any criminal case which the petitioner has not filed disclosing the criminal cases pending against it or its member – Non-joinder of parties – Challenge is made to the rejection of the tender and its conditions – Held, the petitioner, having participated in the process of bid, cannot turn around and challenge the terms and conditions of the tender by filing the present writ application – Writ Petition dismissed. (Paras 16 & 21)

Case Laws Relied on and Referred to :-

1. (1992 (Supp. I) SCC 222 : State of Bihar v. P.P. Sharma
2. (2013) 10 SCC 591 : Umesh Kumar v. State of Andhra Pradesh.

3. AIR, 1992 SC 604 : State of Haryana v. Ch. Bhajan Lal.
4. (2007) 14 SCC 517 : Jagdish Mandal v. State of Orissa.
5. 2017 (Supp.-II) OLR 830 : M/s GDCL – KRISHNA – TCPL JV v. State of Odisha.
6. AIR 1995 SC 1088 : Madan Lal v. State of Jammu and Kashnir.
7. AIR 2016 SC 4305 : 2016 Supreme (SC) 716 : Afcons Infracture Ltd. v. Nagpur Metro Rail Corporation Ltd.
8. 2016(8) SCALE 99 : Central Coalfields Lt. v. SLL-SML (Joint Venture Consortium)
9. AIR 1986 SC 1043 : Om Prakash Shukla v. Akhilesh Kumar Shukla.

For petitioner : Mr. Ashok Parija, Sr. Adv.
M/s. B.K. Sharma, A.U. Senapati, S. Palei, S.K. Singh & S. Das.

For opp. parties : Mr. B.P. Pradhan, Addl. Government Advocate
Mr. Milan Kanungo, Sr. Adv.
M/s.S. Mishra, S.R. Mohanty, A.K. Rout & S.K. Meherulla,
Mr. P.Acharya, Sr. Adv.
M/s.S. Mohanty, S.S. Mohapatra, A.K. Jena & P.K. Das,

JUDGMENT Date of Hearing : 07.05.2018 Date of Judgment: 11.05.2018

DR. B.R. SARANGI, J,

The Cuttack Municipal Corporation had floated a tender for "Integrated Municipal Solid Waste Management" in the year 2010. The quantity of the work to be undertaken by the successful bidder was as follows:-

- *Sweeping and collection of Municipal Solid*
- *Waste (MSW): 100-120 MT per day.*
- *Transportation of MSW: 150-200 MT per day.*
- *Collection and transportation of debris: 3000 cubic feet per day.*
- *Separation of MSW and operation of compost plant.*

In the said notice inviting tender, the financial eligibility criteria was as follows:-

- *Average annual turnover should be more than Rs.8 crores for last 3 years and net worth should be positive.*

2. In the year 2016, the Cuttack Municipal Corporation (hereinafter referred to as "CMC") floated a tender on 25.07.2016 primarily with the following scope of work:-

- *Sweeping and collection of MSW : 100-120 MT per day.*
- *Transportation of MSW: 150-200 MT per day.*
- *Collection and transportation of debris: 8000-10,000 cubit feet per day.*
- *Operation and maintenance of Compost Plant.*

The financial eligibility criteria at Clause 4.2 of the said notice inviting tender was unreasonably escalated to Rs.30 crores in place of Rs.8 crores, as required in 2010 bid. The technical bid was opened on 26.08.2016. Since a single bid was received from one M/s. Global Waste Management Cell Private Limited, Mumbai, the same was cancelled and a fresh notice inviting tender was floated within 24 hours, with the same scope of work as well as financial eligibility criteria, on 27.08.2016. The petitioner- Jagruti Welfare Organization, a society, registered under the Societies Registration Act, through its Secretary challenged the financial eligibility criteria of the tender conditions in W.P.(C) No. 15713 of 2016 on two grounds, namely:

(1) There is no reasonable nexus for increasing the eligibility criteria from Rs.8 cores to Rs.30 crores for the scope of work remaining almost similar.

(2) The financial eligibility criteria was increased from Rs.8 crores to Rs.30 crores to oust several intending bidders like the petitioner and to limit the competition to chosen few.

After the pleadings between the parties were exchanged, the said writ application was heard in extenso and this Court came to a conclusion that the CMC had miserably failed to establish a reasonable nexus between the escalation of the financial eligibility with the object to be achieved, i.e., the scope of work and held that the escalation of the financial eligibility criteria as per Clause-4.2(a) of the tender call notice was arbitrary, unreasonable, and discriminatory and deserved to be scraped and further held that there could be no second opinion that the CMC had fixed the financial eligibility criteria to eliminate potential bidders like the petitioner from the arena of competition and finally this Court allowed the said writ application vide its judgment dated 18.07.2017 with following observation and direction:

"35. In the case at hand, the tender condition of the financial eligibility criteria is so stringent that only four bidders could participate in the tender process. Out of four, two could not even deposit the EMD and became unsuccessful in their technical bids. Only two bidders, as referred to above, came out successful in their technical bid who have quoted exorbitantly inflated price. Had there been a reasonable 'financial eligibility criteria' a number of competitors as that of the petitioner could have participated and there would have been a fair competition. Hence, we have no hesitation to hold that the petitioner has locus standi to maintain the writ petition assailing the unreasonable, arbitrary and discriminatory action of the authorities in fixing the financial eligibility criteria.

36. In that view of the matter, we set aside the Clause 4.2(a) of the impugned tender condition as at Annexure-1 and consequently the entire tender process. The CMC is directed to issue fresh notice inviting tender fixing a reasonable financial eligibility criteria taking into consideration the nature and scope of work to be performed."

3. As this Court, vide judgment dated 18.07.2017, cancelled the Solid Waste Management (SWM) Tender of CMC, which was invited vide CMC Notice No. 9761 dated 27.08.2016, and directed to issue fresh notice inviting tender fixing reasonable financial eligibility criteria taking into consideration the nature and scope of work to be performed, accordingly an estimate of Rs. 147.26 crore was prepared for Integrated Municipal Solid Waste Management of Cuttack City for a period of five years basing on Swachha Bharat Mission (SBM) Norms and Guidelines, i.e. Solid Waste Generated - 300 gram per capita per day & Minimum Number of Sweepers and Door to Door Collectors – 28 nos. per 10,000 Population and Government of Odisha Schedule of Rates 2014. The CMC in its meeting held on 18.08.2017 approved the same for calling fresh tender considering the above estimated value of Rs. 147.26 crore and reduced the financial eligibility criteria of bidder to Rs. 25.5 crore. The Solid Waste Management (SWM) work was grouped into five categories, i.e., Part-A, B, C, D and E. Part-A is Sweeping, Part-B is House to House Collection, Part-C is Composting, Part-D is Transportation of garbage, Part-E is Collection and Transportation of debris. Besides the above scope of work, other activities were included in the said project. These are IEC Activities, CSR

Activities, Bio Metric Attendance System, Wall Painting VTS etc. The garbage which will be generated by sweeping, house to house collection etc. will be measured and payment will be made to the operator on Metric Ton (MT) Basis (Weight Basis). However, for collection and transportation of debris, distilled materials, road sweeping sand etc. will be measured and accordingly payment will be made on Cubic Meter (Volumetric Basis). Accordingly, the Integrated Municipal Solid Waste Management Project of Cuttack Municipal Corporation was prepared as per MSW Rules, 2016.

4. To give effect to the aforesaid project, the CMC floated tender call notice no. 1673/ CHO dated 01.09.2017 in respect of "Integrated Municipal Solid Waste Management Project of Cuttack Municipal Corporation" with estimated cost (approximate) Rs. 147.26 crore, for which Rs. 1,48,00,000/- was to be deposited as EMD and period of contract was for five years. The date of commencement for downloading the bid document was fixed to 05.09.2017 from 4.00 P.M. The last date and time of downloading the bid document was 07.10.2017 up to 5.00 P.M. The last date and time of seeking clarification (if any)/ date of pre-bid meeting was 15.09.2017 from 11.00 A.M. The last date and time of receipt of filled up bid document was 09.10.2017 up to 5.00 P.M. The date and time of opening of technical bid received through registered post/speed post was 10.10.2017 at 11.00 A.M. The expected date and time of implementation of the work was December, 2017. The tender contained two bid system; Part-I, Techno Commercial Bid, and Part-II, Price Bid basing on CVC Guideline and reduced financial eligibility criteria as approved in the council.

5. As per Clause-16.5 of the CPWD Manual, 2014, the pre-bid conference was held on 15.09.2017, in which the doubts of intending tenderers were clarified, and therein the following agencies attended:-

"1. M/s Jagruti Welfare Organisation
2. M/s. Delhi MSW Solutions Ltd. (A Ramky Group Ventures)
3. M/s Global Waste Management Sale PVT. Ltd.
4. Sri Gurpal S. Dhamija
5. M/s. Jyoti Enviro-Tech Pvt. Ltd., Lucknow
6. M/s. Kaviraj MBB Waste Management Pvt. Ltd. Mumbai"

After the pre-bid meeting, the CMC issued first corrigendum notice on 26.09.2017. Clause-4.1.1. of the aforesaid tender call notice prescribes technical eligibility criteria. In response to the same, the petitioner had offered its bid on 05.10.2017, wherein the petitioner has indicated the 3 projects which the petitioner has undertaken. But the bid of the petitioner was rejected on the ground that the petitioner has 3 years of experience of Integrated SWM in Bhubaneswar Municipal Corporation in 2 packages of agreement. The minimum requirement for two similar completed work as per DTCN is 2 x Rs. 14.72 crores (50% of the estimated cost of 1 years) = 29.44 crores. The maximum annual value of two projects of the petitioner

has been considered i.e. 10.28 crore + 16.71 crores = 26.99 crores. Therefore, it was decided not to evaluate the offer of the petitioner as per Clause 4.5 of the DTCN and the petitioner was declared to be unresponsive. The authorities of CMC further held the bid of the petitioner to be unresponsive, in view of the vigilance case vide SVP (V) P.S. Case No. 22/2014, BBSR (V) P.S. Case No. 11 of 2012 instituted against the Secretary of the petitioner's society and therefore, the petitioner society is not fulfilling the eligibility criteria as per Clause 4.3(d) of the tender condition. After the evaluation of technical bid of all the 6 bidders, 4 were declared to be unresponsive and 2 firms, namely, M/s. A.G. Enviro Infra Projects Ltd. and the opposite party no.3 remained in the fray and ultimately the rate of opposite party no.3 at Rs.6309/- per MT was held to be L-1 and it was recommended by the CMC to State Government for its approval, hence this application.

6. Mr. A.K. Parija, learned Senior Counsel appearing along with Mr. B.K. Sharma, learned counsel for the petitioner contended that if the lowest bid of Rs.6309/- is accepted for the present tender, the expenditure to be incurred by CMC would be Rs. 46,05,57,000/- per annum. Pursuant to the previous tender, which was the subject matter of challenge in W.P.(C) No. 15713/2016, SRP Clean Enviro Engineers, Bangalore had quoted Rs. 5640/- per MT and the expenditure to be incurred by opposite party no.2 would have been Rs. 41,17,20,000/- per annum. Therefore, there is likelihood of huge loss of public exchequer which is certainly opposed to public interest and public policy. Therefore, the reason, for which this Court set aside the earlier tender, still persists and, as such, interference of this Court in the present proceeding is inevitable.

It is further contended that the CMC authority did not consider the 3rd project, i.e., lifting and carriage of MSW from TTS to final disposal site at Bhuasuni. They only took cognizance of two packages of agreement entered into between the petitioner and the Bhubaneswar Municipal Corporation. As per the tender condition, it is mentioned in Clasue-4.1.1(b) that the tenderer must have experience of having successfully completed two similar works costing not less than the amount equal to 50% of the estimated cost. If the two similar completed work is taken to be A and B, then the interpretation should be A + B = 50% of the estimated cost, i.e., 147.26 crores in five years. 50% of the estimated cost would be Rs.73.63 crores in five years, as the estimated cost has been fixed at approximately Rs.147.26 crores and the period contract is five years. Therefore, for a single year the estimated cost will be 73.63 divided by 5, i.e., Rs.14.72 crores. The CMC has interpreted the said clause by taking consideration Rs.14.72 x 2 = Rs.29.44 crores, as the 50% of the estimated cost of 1 year and thereby rejected the bid of the petitioner, which is not justified. It is thus contended that if such fallacy of the CMC is accepted, then the same is contradicting the criteria stipulated for annual average turnover of Rs.25.5 crores, which has been fixed in the tender condition and as per the judgment delivered by this Court in W.P.(C) No. 15713 of 2016. In that view of the matter, no

bidder can achieve the completion certificate amounting to Rs.29.44 crores with an annual average turnover of Rs.25.5 crore, as provided in the tender.

It is further contended that the CMC has not taken into account the 3rd project of the petitioner, i.e., lifting and carriage of MSW from TTS to final disposal site at Bhuasuni, which is the integral part of solid waste management. If the said work is taken into account, then the maximum annual value of 3 projects would be Rs.10.28 crores + Rs.16.71 crores + Rs.11.65 crores = Rs.38.64 crores. In that event, the sub-clause 'b' of Clause 4.1.1 would be attracted and the opposite party no.2 will have to take into account the three similar completed works costing not less than the amount equal to 40% of the estimated cost.

It is further contended that the rejection of the bid of the petitioner being unresponsive on the ground that it does not fulfill the eligibility criteria as per clause 4.3(d) of the tender condition is erroneous and fallacious. Sub-clause (d) of the aforesaid clause provides that bidder should submit an affidavit to the effect that the company has not been blacklisted or barred or terminated by any Central and State Government/Government Undertakings/ULB during last 5 years in similar work. If any criminal cases are pending against the bidder or member at the time of submitting the bid, then the bid shall be summarily rejected. It is contended that mere pendency of some cases cannot debar the petitioner from participating in the tender, because no charge sheet has been submitted till date. It is further contended that pursuant to tender call notice for the year 2010, one agency, called M/s. Ramky Enviro Engineers Pvt. Ltd., which had quoted price of Rs.1764/- per MT for sweeping, collection, lifting and transportation of garbage and 5% annual escalation was allowed for the year 2011 to 2016 and accordingly, the rate in the year 2016 was arrived at Rs.2141/- per MT. Taking into consideration volume of work being executed by M/s. Ramky Enviro Engineers Pvt. Ltd, opposite party no.2 has paid Rs. 18 crores at the present rate of Rs.2141/- per MT. The requirement of average turnover per annum was Rs.8 crore in the year 2010, which has already gone up to Rs.18 crore in the current year 2016-17. In the present tender, one M/s. AG Enviro Infra Project Pvt. Ltd, has quoted Rs. 7,000/- per MT whereas opposite party no.3 has quoted Rs.6309/- per MT, which is much more than what is being paid to M/s. Ramky Enviro Engineers Pvt. Ltd. Therefore, the observation and direction made in paragraph-23 of the judgment rendered in W.P.(C) No. 15713 of 2016 are being essentially circumvented by the CMC, therefore, interference of this Court is called for.

To substantiate his argument, learned counsel for the petitioner has relied upon the judgment of this Court rendered in W.P.(C) No. 15713 of 2016 (***Jagruti Welfare Organization v. State of Odisha and another***) disposed of on 18.07.2017; ***State of Bihar v. P.P. Sharma*** (1992 (Supp. I) SCC 222; and ***Umesh Kumar v. State of Andhra Pradesh,*** (2013) 10 SCC 591.

7. Mr. Milan Kanungo, learned Senor Counsel appearing along with Mr. S.R. Mohanty, learned counsel for opposite party no.-2, CMC states that none of the bidders/participants challenged the terms and conditions of eligibility criteria of

Solid Waste Management (SWM) tender, as mentioned in clause 4.1.1(b) and 4.3 (d) of the DTCN, and as such, no objection whatsoever by any of the bidders was raised at any point of time. Pursuant to the corrigendum issued on 26.09.2017, the petitioner and two other bidders participated in the tender process. Consequentially, the technical bids of the three bidders were opened on 10.10.2017 in presence of the members of the Evaluation Committee and bidders. On the basis of the complaint received, a letter was issued to Deputy Secretary to Government, G.A. (Vigilance) Department, Cuttack for furnishing of Vigilance Clearance in favour of the petitioner, vide letter no.1981/CHO dated 21.10.2017. In the Evaluation Committee Meeting held on 27.10.2017, it was decided to wait for reply of vigilance department and South Delhi Municipal Corporation. Accordingly, the Vigilance Department furnished information on 16.11.2017. Therefore, 2nd Evaluation Committee Meeting was held on 17.10.2017 and, after detailed evaluation, the evaluation committee found the tender of the petitioner to be unresponsive as per Clause 4.1.1(b) and 4.3(d). As a result, the tender submitted by the petitioner was rejected and suggestion was given to open the Part-II price bid of remaining two bidders after evaluation of technical score basing on presentation by the bidder regarding proposed methodology and planning, policy and practice relating to environment, health safety measures to be adopted in the project.

It is further contended that the petitioner, having participated in the process of bidding and after becoming unsuccessful, cannot turn around and challenge the same by way of present application and, as such, the writ application is liable to be rejected on that score only.

To substantiate his contention, he has relied upon the judgment and order dated 19.07.2016 passed in W.P.(C) No. 5529 of 2016 (***Manas Kumar Sahu v. State of Orissa***); ***Jagdish Mandal v. State of Orissa.*** (2007) 14 SCC 517; judgment dated 27.03.2018 rendered in Civil Appeal No. 3331 of 2018 (***Municipal Corporation, Ujjain v. BVG India Limited***); and ***State of Haryana v. Ch. Bhajan Lal,*** AIR, 1992 SC 604.

8. Mr. Pitambar Acharya, learned Senior Counsel appearing along with Mr. S. Mohanty, learned counsel for opposite party no.3 supported the contention raised by Mr. Milan Kanungo, learned Senior Counsel appearing for opposite party no.2 and stated that since the petitioner has incurred a disqualification, in view of Clause 4.1.1.(b) of SWM tender notice 2017 read with Clause 4.3(b) of the said tender notice and the criminal cases are pending against the petitioner, the tender evaluation committee is justified in their action stating that the bid submitted by the petitioner is unresponsive. Consequentially, no illegality or irregularity has been committed by the authorities to warrant interference of this Court in the present proceeding. To substantiate his contention, he has relied upon the judgment of the apex Court in ***Krishnamoorthy v. Sivakumar****,* (2015) 3 SCC 467**.**

9. We have heard Mr. Ashok Parija, learned Senior Counsel appearing along with Mr. Bigyan Kumar Sharma, learned counsel for the petitioner; Mr. B.P. Pradhan, learned Addl. Government Advocate for the State opposite party no.1; Mr. Milan Kanungo, learned Senior Counsel appearing along with Mr. S.R. Mohanty, learned counsel for opposite party no.2; and Mr. Pitambar Acharya, learned Senior Counsel appearing along with Mr. S. Mohanty, learned counsel for opposite party no.3. Pleadings between the parties having been exchanged, with their consent the writ petition is being disposed of finally at the stage of admission.

10. For just and proper adjudication of the case in hand, a reference is made to Integrated Municipal Solid Waste Management Project of Cuttack Municipal Corporation prepared as per MSW (Municipal Solid Waste) Rules, 2016, on the basis of which tender call notice dated 01.07.2017 has been floated. The relevant clauses of Chapter-4 thereof, which deals with conditions of eligibility of applicants, are extracted hereunder:-

"4.1.1Technical Eligibility Criteria

a) Bidders should be a Company/Trust/Society registered under Indian Company Act-1956/Trust Act/Societies Act, at least for a period of 5 years. Valid Memorandum of Association and Article of Association along with Incorporation Certificate shall be submitted as proof.

b) Experience of having successfully completed similar works during last 7 years ending last day of month previous to the one in which applications are invited should be either of the following.

Three similar completed works costing not less than the amount equal to 40% of the estimated cost.

Or

Two similar completed works costing not less than the amount equal to 50% of the estimated cost.

Or

One similar completed works costing not less than the amount equal to 80% of the estimated cost.

***SIMILAR Work** shall mean any Minicipal Solid Waste Management project undertaken in any Urban Local Bodies/Public Sector undertaking.*

To arrive at the value of completed works, Value of multiple contracts executed in a financial year shall be considered. For this purpose, the Completion certificates given by the authorities for any one financial year shall be considered. In case value of works executed in any one financial year is not available in the Certificates, the same shall be calculated on a pro-rata basis, considering that the total completed value and the time schedule in days.

xx xx xx

4.2 Financial Eligibility Criteria:

(a) The average Annual turnover should be more than 25.5 Crores for last 3 years and net worth should be positive. The turnover and the net worth should be supported by documents from competent authority. The Bidders should provide audited annual account statement in support of the claim. In case the bidders fail to provide such audited financial statements, the bid will be rejected. The Bid document must be accompanied by the Audited Balance Sheet, Profit and Loss Account and income tax return of last 3 (three) financial years, ending

March 31st 2017, duly attested by the Charted Accountant. Self attested Photo copy is to be submitted.

4.3 Technical (Part-I) – (The following documents are to be submitted)

The following eligibility criteria will form the Technical (Part I) of the bid : (photocopies duly self attested to be enclosed).

a) Bidder should have valid Registration Certificate under Company/Trust/Society registered under Indian Company Act-1956/Trust Act/Societies Act, at least for a period of 5 years. Memorandum of Article & incorporation certificate is to be submitted along with the technical bid document.

b) Bidders should have experience of mechanical Sweeping, manual sweeping, Drain cleaning, Door to Door collection and transportation of municipal solid waste as per the eligibility criteria, for a period of not less than 3 years. Certificate in support of the experience is to be submitted.

c) Bbidders should have experience of Handling and transportation of at least 200 Metric Tons per day of MSW for at least 3 years in any City or part of the city having more than 5 Lakh populations during last 10 years. Certificate in support of the experience is to be submitted.

d) Bidder should submit an affidavit to the effect that, the Company has not been Black listed or Barred or terminated by any Central or State Govt./Govt. Undertakings/ULB during last 5 years in similar work. If any criminal cases are pending against the bidder or member at the time of submitting the bid, then the bid shall be summarily rejected. The bidder shall also submit an affidavit in negation of the above. In case it is detected at any stage that the affidavit is false, he will abide by the action taken by the employer without approaching any court whatsoever for redress."

11. In view of Clause 4.1.1.(b), which provides the experience of having successfully completed similar work, shall mean the Municipal Solid Waste Management Project undertaken in any Urban Local Bodies/Public Sector Undertakings. Such stipulation was suggested by Central Vigilance Commission (CVC), (CTE'S Organisation), vide CVC Office Memorandum No.12-02-01-CTE-6 dated 17.12.2002. The interpretation of above provision is that if the bidder has one similar work, value of that should be more than 80% of the estimated cost. However, for two similar works, the value of each work should be more than 50% of the estimated cost. Accordingly, for three similar works, the value of each work should be more than 40% of the estimated cost. The estimated cost in the present tender for five years is Rs.147.26 crores. So, the only estimated value is Rs.29.45 crores. The petitioner in the year 2016-17 executed similar work; Package-II for Rs.10.22 crores and Package-III for Rs.76.00 crores and the said fact was furnished by the Bhubaneswar Municipal Corporation (BMC). In the said letter, the BMC has indicated amount of transport contract for MSW for 2013-14, 2014-15, 2015-16 and 2016-17 and the amount mentioned are Rs.2.89 crores, Rs.1.38 crores, Rs.1.03 crores and Rs.0.86 crores respectively. Therefore, the value of similar work, as percentage of estimated cost, works out to (i) Package-II - Rs.10.22 crores (34.70%), (ii) Package-III - Rs.16.71 crores (56.74%), (iii) transport contract of Rs.2.89 crores (9.81%). Therefore, on the basis of the materials available, it is event that the value

of the similar work, as claimed to be done by the petitioner, is above 50% only in one contract and in others not meeting the eligibility criteria as per the DTCN. Therefore, the contention of the petitioner, that the stipulation in tender means two similar works value total to be more than 50% of the estimated cost, is not correct, even considering two similar works valued together to be more than 100% of the estimated cost is also not a right approach. The contention raised, that Rs.11.65 crores claimed to be the transportation contract value was not taken into consideration, that could not be found in the documents submitted along with the bid by the petitioner. Further, out of three similar works claimed in the petition, only one work value being more than 40% of the estimated cost and the other two being less than 40% of the estimated cost, cannot be considered for reasons as mentioned above. If the petitioner had any doubt with regard to meaning of stipulation, it had liberty to raise the same in the pre-bid meeting and having not done so, the petitioner is estopped from challenging the same and also cannot adopt an interpretation of eligibility clause different than that has been specified in the clause itself.

12. In paragraph 5.31 of the counter affidavit, the opposite party no.2 has justified the acceptance of higher rates quoted by opposite party no.3, which reads as follows:-

> ***"5.31.*** *With regard to the allegation of acceptance of higher rates quoted rates by the Opp. Party No.-3, it is humbly submitted that the negotiated rates offer has been accepted by the corporation as well as the Opp. Party No.1, but, the same is now pending approval before the Finance Departrment, Govt. of Odisha. As a matter of fact, the schedule of rates (SOR) on the basis of which the estimates were last prepared in the year, 2014. Admittedly, in the meantime there has been inflation in every commodity and the prices have gone up, which makes the schedule of rates (SOR), 2014 impracticable. The detailed claculation/justification sheet is annexed herewith and marked as* ***Annexure-H/2***
>
> *At this juncture, it is necessary to State herer that the rates quoted by the Opp. Party No.3 is less than what the petitioner i.e. M/s Jagruti Welfare Organisation is making by executign work of the adjacent city i.e. Bhubaneswar Municipal Corporation, rate in comparative with Swachha Bharat Mission (SBM) Norm & guideline:-*
>
> - *M/S. Jagruti Welfare Organisation has signed agreement for Collection & Transportation of Solid Waste of 26(Twenty Six) wards upto Secondary Station near Sainik School in two packages on 6th November, 2013 vide Agreemetn No. 269 & 270.*
> - *Population of Bhubaneswar Municipal Corporation as per 2011 Census = 8,40,683 and the total no. of wards of BMC comes to 67.*
> - *Hence, Approximate Population of BMC in the year 2017 = 9,90,000 and the average Population of each ward = 9,90,000/67 = 14,776.*
> - *As per SBM Norm and Guideline, maximum quantity of solid waster Generated in 26 wards of BMC in a year = 26 X 365 X 14776 X 0.300 kg/1000 = 42067 Metric Ton.*
> - *In the year 2016-17, BMC has made payment of (Rs. 10.22 Crore + Rs. 16.71 Crore) = Rs. 26.93 Crores for Collection and Transportation of Municipal Solid waste for 26 Nos. of wards of BMC to Secondary Station near Sainik School.*
> - *It is evident that BMC has Paid in the year 2016-17 to the present petitioner= Rs. 26.93 Crore/42067 = Rs. 6401.69 per Metric Ton which is much higher than present tender Rate of Opp. Party No.3."*

Though the copy of the counter affidavit was served on learned counsel for the petitioner, but no dispute has been raised in the rejoinder affidavit to the aforementioned contention raised in the counter affidavit by opposite party no.2. In this view of the matter, the contention raised that to circumvent the judgment passed by this Court in earlier writ petition, i.e., W.P.(C) No. 153713 of 2016 disposed of on 18.07.2017 cannot have any justification, in view of the reasons discussed above.

13. Clause 4.3 (d) of the tender condition clearly specifies that if any criminal cases are pending against the bidder or member at the time of submitting the bid, then the bid shall be summarily rejected. In paragraph 5.23 of the counter affidavit the opposite parties have clearly indicated the status of the criminal cases pending before various courts, which reads as follows:-

> *"5.23 In due diligence of this clause CMC asked for givilance clearance from the vigilance department and the Vig. Department vide letter dated 16.11.2017 furnished the details wherein it was stated that :-*
>
> - *Vigilance case vide SBP(V) P.S. Case No. 22/14, BBSR (V) P.S Case No. 11/12 has been registered against Sri Smruti Ranjan Parida, Secretary, M/s Jagruti Welfare Organization, BBSR in Sanitation work of Sambalpur Municipality & SWM work of BMC respectively which has communicated vide letter No. 4568/VCO(B) dated 16-11-2017 by G.A. (Vigilance) Department, Govt. of Odisha. Commissioner, Sambalpur Municipal Corporation has been moved to recovery of loss amount of Rs. 8,41,500/- from the firm M/s. Jagruti Welfare Organisation vide letter No. 1120/Cr(V) SBP dated 18.04.2015. Order has been passed for submission of charge sheet against Sri Smruti Ranjan Parida, Secretary, M/s. Jagruti Welfare Organisation, Bhubaneswar.*
>
> - *BBSR(V) P.S Case No. 11/12 was registered agaisnt the officials of Bhubaneswar Municipal Corporation, Bhubaneswar and M/s Jagruti Welfare Organisation, Bhubaneswar represented by its Secretary Sri Smruti Ranjan Parida on the allegation of submission of false bills during transportation of garbage under Solid Waste Management System. Investigation of the case is in progress.*
>
> - *SBP(V) File No. 30/11 was initiated agaisnt the staff of Sambalpur Municipality for irregularities in purchase of uniform for Scavenging staff of Sambalpur Municipality by violating tender procedure. On completion of enquiry, the Dist. Labour Officer, Sambalpur has been moved vide letter No. 2510/VSS-SBP dtd. 17.6.14 to take action as per Section 7,12 of Contract Labour (Regulation and Abolition Act) agaisnt Sri Smruti Ranjan Parida, Secretary, M/s. Jagruti Welfare Organisation, Bhubaneswar and other officials of Sambalpur Municipality."*

The petitioner has not disclosed this fact, thereby acted contrary to the provisions contained in Clause 4.3(d). Rather, this amounts to suppression of fact at the time of submission of bid and, more so, by non-disclosure of such pending criminal cases, the petitioner has tried to misrepresent opposite party no.2, thereby it has violated the condition stipulated in the said clause.

14. Much reliance has been placed on the earlier judgment of this Court filed by the petitioner in W.P.(C) No. 15713 of 2016 disposed of on 18.07.2017. The said judgment had been rendered in a petition which was filed challenging the Clause 4.2 of the financial eligibility criteria of the tender condition where the petitioner had

not participated in the proceeding itself and after considering the same this Court quashed the said condition stipulated in Clause 4.2(a) of the tender conditions and consequentially set aside the entire tender process and directed for issuing fresh notice inviting tender fixing reasonable financial eligibility criteria taking into consideration the nature and scope of the work to be performed. But in the present case, though argument has been advanced that Clause 4.1.1 (b), the technical eligibility criteria, read with clause 4.3(d), but none have challenged the said criteria including the petitioner. Rather, with eyes wide open and knowing the conditions stipulated in the tender call notice itself, the petitioner participated in the process of tender and having become unsuccessful, challenged the said conditions in the present writ application, which is not permissible in law, as has been held by this Court in ***Manas Kumar Sahu*** mentioned supra.

Similar question had come up for consideration in a service matter before the apex Court in ***Om Prakash Shukla v. Akhilesh Kumar Shukla,*** AIR 1986 SC 1043 and it has been clearly laid down by a Bench of three learned Judges of apex Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.

In ***Madan Lal v. State of Jammu and Kashnir***, AIR 1995 SC 1088 the apex Court held that if a candidate takes a calculated chance and appears at the interview then, only because the result of the interview is not palatable to him he cannot turn round and subsequently contend that the process of interview was not fair. In view of the law laid down by the apex Court, it is no more res integra that if the petitioner had participated in the tender process, without any objection to the eligibility criteria mentioned in the tender call notice, after become unsuccessful in the tender process, he cannot turn around and challenge the same in this writ application. Therefore, at the behest of the petitioner the writ application is not maintainable.

15. On perusal of the writ application it is evident that the petitioner has not impleaded other tenderers, who had participated in the tender process. As per the tender conditions and PWD Manual, 2014, pre bid meeting was held on 15.09.2017 in presence of the prospective bidders and members of the evaluation committee. In the said meeting, six intending bidders named below were participated:-

1. *M/s Jagruti Welfare Organisation*
2. *M/s. DELHI MSW SOLUTIONS Limited, DELHI*
3. *M/s GLOBAL WASTE MANAGEMENT CELL PVT. LTD*
4. *Sri Gurpal S Dhamija*
5. *M/s Jyoti Enviro-Tech Pvt. Ltd., Lucknow*
6. *M/s. Kaviraj MBB Waste Management Pvt. Ltd. Mumbai*

But after issuance of first corrigendum notice on 26.09.2017 with modified decision taken, three bidders participated in the tender process, namely, the petitioner, the

opposite party no.3 and one M/s AG Enviro Infra Projects Pvt. Ltd. The petitioner has not impleaded all the participants in the tender process.

The apex Court in ***Afcons Infracture Ltd. v. Nagpur Metro Rail Corporation Ltd***., AIR 2016 SC 4305 : 2016 Supreme (SC) 716; ***Central Coalfields Lt. v. SLL-SML (Joint Venture Consortium***), 2016(8) SCALE 99 held that the view of the High Court, that the eligible bidders were not entitled to be either impleaded in the petition filed in the High Court by the ineligible bidder or were not entitled to be heard, was negated by the apex Court and it was held that in order to avoid such situation that it would be more appropriate for the constitutional Courts to insist on all eligible bidders being made parties to the proceedings filed by an unsuccessful or ineligible bidder. In view of such finding arrived at by the apex Court, due to non-impletion of the other bidders, the writ petition suffers from non-joinder of parties. This Court has also, taking into consideration the judgment of the apex Court, dismissed the writ petition in ***M/s GDCL – KRISHNA – TCPL JV v. State of Odisha***, 2017 (Supp.-II) OLR 830.

16. As per Clause 4.3(d), a bidder is required to submit an affidavit with regard to pendency of any criminal case against its member at the time of submitting the bid. Admittedly, on the basis of the materials available on record, the petitioner has not filed affidavit disclosing the criminal cases pending against it or its member. It is contended that criminal cases starts from the date of filing of the charge sheet and, as such, whatever information the opposite party no.2 had received and on that basis the rejection had been made that could not have been done because in no case charge-sheet has been submitted till date. But there is no dispute with regard to pendency of the criminal cases against the petitioner, as mentioned in the counter affidavit filed by opposite party no.2. Whether the charge-sheet has been submitted or not is not a matter to be considered at this stage, the reason being only to see the bona fides of the person concerned and its antecedent such affidavit is required in terms of clause 4.3(d) of the tender call notice.

17. Reliance has been placed by learned counsel for the petitioner on ***P.P. Sharma*** mentioned supra, wherein the issue was that whether an application under Section 482, Cr.P.C. for quashing the charge-sheet should be entertained before cognizance taken by a criminal Court. The apex Court held that entertaining the writ petitions against charge-sheet and considering the matter on merit in the guise of prima facie evidence to stand an accused for trial amounts to pre-trail of a criminal trial. Therefore, under no circumstance a writ petition should be entertained. The said judgment has been relied upon in ***Umesh Kumar*** (supra), where it has been held that the scheme for enquiry/trial provided under Cr.P.C. is quite clear. After investigation, report under Section 173(2) Cr.P.C. is to be submitted before the competent Court, i.e., the Magistrate having jurisdiction in the matter and the Magistrate may take cognizance under Section 190 Cr.P.C. However, it is still open to the Magistrate to direct further investigation under the provisions of Section

173(8) Cr.P.C. But in the above mentioned judgments of the apex Court, on which reliance has been placed by learned counsel for the petitioner, law has been settled on the factual matrix of the said cases, which were under consideration in those judgments, but the said judgments have no application to the present context and the same are distinguishable.

18. In ***Krishnamoorthy*** (supra), while considering a case under the Representation of People Act, 1951, the apex Court held that the candidate has to make a declaration in the prescribed Form-26 under Rule 4A of the Conduct of Elections Rules, 1961 the candidate has to give full information with regard to case/First Information Report, number/numbers together with the complete details of the Police Station/District/State concerned. But such information is required in view of the fact that the criminalistion of politics being anathema to sanctity of democracy, voters have fundamental right to know in entirety and in full detail, the antecedents of candidates and concealment, suppression or misinformation about their criminal antecedents deprives voters of making informed choice of candidate which eventually promotes criminalization of politics. For non-disclosure of pendency of criminal case, the election was declared to be null and void. Applying the said analogy to the present context, since the condition stipulated in the tender documents Clause 4.3(d) requires that the petitioner has to make a disclosure of criminal cases pending against it or its member, the non-disclosure of the same amounts to rejection of the bid itself summarily.

19. In ***Ch. Bhajan Lal*** (supra), the apex Court had taken into consideration quashing of FIR and investigation in exercise of inherent powers under Article 226 of the Constitution of India or under Section 482, Cr.P.C. and also fixed guidelines for the said purpose. If the allegations in the complaint do not clearly constitute a cognizable offence then, the apex Court held that it is not justified to quash the FIR, but the same has been considered in a different context altogether, which has no relevance to the present context.

20. The oft quoted judgment of the apex Court in ***Jagdish Mandal*** (supra) with regard to power of the Court to interfere with the tender matters in exercise of power under judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. This question no more remains res integra, which has also been considered in ***Municipal Corporation, Ujjain*** mentioned supra.

21. In view of the aforesaid facts and circumstances of the case, we are of the considered view that the reason assigned in the impugned proceedings of meeting of 60th Contract Standing Committee dated 21.11.2017 in Annexure-4 rejecting the tender of the petitioner as unresponsive, as it violates the conditions stipulated in the tender documents in Clause 4.1.1(b) read with clause 4.3(d), is justified. Apart from the same, the petitioner, having participated in the process of bid, cannot turn around and challenge the same b y filing the present writ application. More so, the writ

application also suffers from non-joinder of proper parties. On all these counts, the writ application is liable to be dismissed and the same is hereby dismissed. No order as to costs.

Writ petition dismissed.

2018 (I) ILR - CUT- 887

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

CRIMINAL APPEAL NO. 124 OF 1999

PITAMBER MOHANTA & ORS. ……...Appellants

.Vrs.

STATE OF ORISSA ……Respondent

(A) INDIAN PENAL CODE, 1860 – Sections 148, 302 and 323 – Offence under – Conviction – P.W. 16, the I.O. deposed regarding the counter case wherein he has submitted charge sheet – Forwarded the statements of P.Ws. 4 and 8 to the Court along with the accused persons on 10.06.1997, however, the statements of P.Ws. 1, 2, 3 and 6, who are eye witnesses were placed before the Court three months after the occurrence – Effect of – Discussed. (Para 16)

(B) Criminal Trial – Sections 167 and 172 of Code of Criminal Procedure – Object of the provision – Held,

"The object of enacting sections 167 and 172 of Cr.P.C. is to transmit the copy of the entries in the case diary relating to crime to the Magistrate upon which he can decide whether or not the detention of the accused person in custody should be authorized and also to enable him to form an opinion as to whether any further detention is necessary. The object of enacting this section is that the entries in the diary afford to the Magistrate's information. By not complying with the said requirement, the investigating officers render that part of the section which requires the transmission of entries in the case diary otiose. Due to non compliance of the said provision, it may reasonably be inferred that the entries in the case diary had not come into existence by that time." (Para 16)

(C) Criminal Trial – Injuries sustained by the accused in course of occurrence – Whether it is obligatory on the part of the prosecution to explain, held, yes – Whether the accused persons (appellants) are entitled for right of private defence? – Indicated.

"*Here in the present case, since the prosecution parties are aggressive and they assaulted the appellant No.3 on his head, the appellants are reasonable danger of losing their property and life and accordingly exercised the right to protect their property and life by causing assault on the prosecution party. The exercise of such right of private defence is not vindictive or malicious so far as the assailants are concerned and their action is also coming within the reasonable limit. It is also not clear who gave the fatal blow and in consequence of tussle between the accused Sumanta with Paresh and the deceased, when Paresh wanted to*

assault by a spade in such process any injury could have been caused either to Paresh or deceased. P.W.1 did not disclose about the spade. However in cross examination he has admitted that they had taken the spade with them. The presence of spade at the spot and use of the same by the prosecution parties to assault the accused persons was not in dispute. There was every apprehension of danger to the lives of the accused persons and under such circumstances the appellants have the right of private defense when one of the appellants was assaulted first with a cycle chain by P.W.4 on his head. If any injury was caused to P.Ws. 1, 2, 4 and the deceased, it cannot be said that they exceeded the right of private defence."

(Para 18)

Case Laws Relied on and Referred to :-

1. AIR 1976 SC 2263 : Lakshmi Singh and others v. State of Bihar.
2. AIR 1963 SC 612 : Jai Dev and another v. State of Punjab.
3. (2010) 2 SCC 333 : Darshan Singh v. State of Punjab

For Appellants : M/s. D.P. Dhal, A.K Acharya, K. Rath
For Respondent : Additional Standing Counsel.

JUDGMENT Date of Judgment- 18.04.2018

S. PANDA, J.

This Criminal Appeal is directed against the judgment dated 03.05.1999 passed by the learned Addl. District & Sessions Judge, Rairangpur, in S.T. Case No. 11/98 of 1998 in convicting the present appellants for commission of offence under Sections 148/302/323 read with Section 149 I.P.C. and sentencing each of the appellant to undergo for imprisonment of life under Section 302 I.P.C. and to undergo R.I. for two months under section 148/323 I.P.C on each count. It was also directed that the substantive sentences are to run concurrently.

2. The prosecution case as reveals in brief from the FIR story is that on 09.06.1997, the informant Sarbeswar Mohanta (P.W.1), his son Thakurdas Mohanta (P.W.2), Paresh Mohanta (P.W.4), Umesh Mohanta, the deceased and his labourer Arup Sardar went to plough the disputed land situated at village Bhursa. After reaching there when they were preparing to plough the land, accused Pitambar (appellant no.1) and his two sons, Sushil (appellant no.3) and Sumanta (appellant no.2) along with 6 to 8 persons being armed with *lathis* and *Thengas* assaulted the son and brother-in-law of the informant in the field, as a result of which Umesh Mohanta died and Thakurdas was seriously injured. The accused persons also assaulted the informant by means of lathi on his leg and when they chased to assault further, the informant fled away and reported the matter at Bahalda Police Station.

3. The O.I.C. Bahalda Police Station registered Bahalda P.S. Case No. 34/97 and took up the investigation. He went to the spot, issued injury requisition in respect of the injured, held inquest over the dead body and forwarded the same for post-mortem examination. He seized some Hawai chappals, plough weapon, wood on handle yoke, bamboo stick and also seized the blood stained earth and blood stained wearing apparels of the deceased. After completion of the investigation charge sheet was submitted against the appellants along with some others.

4. The plea of the appellants was that there was dispute over the land, which was claimed to be of the accused. When the informant, deceased along with others were ploughing the land, appellants 1 to 3 obstructed them. At that time, P.W.4 gave a cycle chain blow on the head of appellant no.3. Thereafter when appellant no.1 and 2 intervened into the matter, the deceased gave a spade blow to appellant no.2. Accordingly there was a tussle between appellant no.2 and the deceased by means of spade. Accordingly they took the plea of right of private defence. Bahalda P.S. Case No. 35 of 1997 is the counter case and the said FIR was marked as Ext-D. On police requisition under Ext-A/2 the injured was medically examined and Ext-B is the query regarding weapon of offence.

5. In order to bring home the charge, during trial the prosecution had examined as many as 16 witnesses, which includes P.W.1 the informant, P.Ws. 2, 4 and 7 who are the injured eye witness to the occurrence, P.W.3, the post occurrence witness, before whom the deceased narrated the assault, P.W.16-the Investigating Officer, P.W.11-the Doctor, who conducted post-mortem over the dead body and P.Ws.12 to 14 are the Doctors who examined the injured persons. The Prosecution also exhibited many documents including the FIR under Ext.1 and Post Mortem Report under Ext.6. On the other hand the defence had examined two witnesses, which includes one Dandu Majhi (D.W.1), who stated that appellant no.1 was possessing the disputed land since long and appellant no.3 was examined himself as D.W.2. Defence had also exhibited many documents, which includes medical report of appellant no.3 and the copy of the F.I.R. in the counter case.

6. The learned Addl. Sessions Judge, came to a conclusion that there was an unlawful assembly with a common object and being a member of an unlawful assembly the accused persons assaulted the prosecution witnesses by which Umesh died. So it is clear that there was pre-arranged plan to achieve the commonly intended object. Accordingly the Court below held the present appellants guilty for commission of the offence under Sections 148/302/323/149 IPC and passed the sentence as indicated above .

7. Learned counsel for the appellant submitted that the impugned judgment is against the weight of evidence on record. The Court below did not discuss about the injuries sustained by the accused persons in their vital parts of the body. According to him law in this regard is very clear that the prosecution is bound to explain the injuries sustained by the injured if the same caused during the course of same transaction. The Court blow should have taken into consideration the rights exercised by the appellant, i.e. the right of private defence to defend the property and body. The Court below also did not discuss about the counter case filed by the appellants. Therefore, according to him, the impugned judgment of conviction and order of sentence are unsustainable and liable to be interfered with.

8. Per contra, the learned Additional Standing counsel submitted that the Court below had arrived at the finding basing on the evidence of the eye witness to the

occurrence and also the Post Mortem Report. He further submitted that the statement made in the FIR and as well as the evidences of P.Ws. 1, 2, 4 & 7 corroborates with each other and further the same also corroborates with the Post-Mortem Report. Thus, the impugned judgment of conviction and order of sentence warrant no interference in this appeal. This criminal appeal, therefore, being devoid of merit, is liable to be dismissed.

9. Perused the L.C.R. and went through the evidence on record carefully.

The informant-P.W.1 in his examination-in-chief stated that on 09.06.1997, he along with P.W.2, P.W.4 the deceased and P.W.7 had been to cultivate the land. While they were so going, appellants 1 and 3 assaulted his leg. Thereafter appellant no.3 gave lathi blow on P.W.2. Others appellants assaulted by means of lathis on his son. Appellant no.3 also assaulted P.W.4 by means of lathi. P.W.2 assaulted the deceased by sword, Ramakanta with Gachia, Jainath by means of iron rod, Pitambar, Sushil, Hundra assaulted by means of lathis to the deceased. Therefore, he sustained injuries on his body. The therefore, came to the Police Station along with P.W.4 and reported the matter to the Police.

10. P.W.2, who is the injured eye witness to the occurrence in his examination in chief had stated that while they were at a little bit distance from the disputed land, suddenly his father, P.W.1 was assaulted and when P.W.1 wanted to go, at that time, the accused persons assaulted him. Seeing the assault, when P.W.4 and Umesh intervened the matter, P.W.4 was assaulted by appellant no.2 on lathi and other accused persons also assaulted P.W.4. However, P.W.4 went to the informant P.W.1 sustaining injury. Thereafter, all the appellants assaulted Umesh holding lathis. Umesh was lying with injury. Therefore his wife and daughter went to the spot. The deceased talked with his wife. The wife of Umesh went to bring vehicle. Thereafter Police Vehicle came and they were shifted to the hospital.

11. P.W. 3 is the son of the informant-P.W.1. He went to the disputed land by taking paddy at about 8.00 A.M. P.W.2 asked him water. Thereafter he gave water to deceased and P.W.2. He found the deceased sustained bleeding injury on his head and leg. In cross examination he has specifically stated except him no other witnesses were present after the occurrence at the spot. At first he went to Umesh, when he died, he went to P.w.2. He found the deceased unconscious and his respiration was not going and coming. When he raised the deceased, he told him that he will not survive and so saying he died.

12. P.W.6 is the wife of the deceased and she heard about the assault on the deceased from P.W.4. Thereafter she went to the spot with her daughter and found the deceased had bleeding injury on his head, face and nose. She gave him water to drink. The deceased told her that he will not survive as because persons have assaulted him. Thereafter she had come back to the village for a vehicle. In the cross examination she has stated that she reached the spot at about 9.00 A.M. and found

P.W.3 was present at the spot. It was also specifically put to her that when she reached the spot the deceased died, he had not disclosed anything to her before his death.

13. It appears from the evidence of P.Ws. 3 and 6 that there are major discrepancies regarding the time they reached the spot and condition of deceased at the time the P.W.3 reached the spot and died immediately. Thereafter the time when P.W.6 reached the spot, disclosure of the names of the assailants by the deceased to P.W.6.

14. P.W. 4 another injured eye-witness to the occurrence had corroborated the statement made by P.W.1 and 2. He also narrated the manner of assault as has been stated by the said witnesses.

15. P.W.11 is the Doctor who conducted post mortem over the dead body and according to him all the injuries were anti mortem in nature and cause of death is due to intra cranial hemorrhage and shock.

16. P.W.16, who is the I.O. of the case. He has deposed regarding the counter case bearing Bahalda P.S. Case No. 35 of 1997, wherein he has submitted the charge sheet under Sections 147/148/447/323/149 IPC. He had forwarded the statements of P.Ws. 4 and 8 to the Court along with the accused persons on 10.06.1997, however, the statements of P.Ws. 1, 2, 3 and 6 were placed before the Court on 14.08.1997, i.e. three months after the occurrence and as per the prosecution case, they are the eye witnesses to the occurrence. The object of enacting sections 167 and 172 of Cr.P.C. is to transmit the copy of the entries in the case diary relating to crime to the Magistrate upon which he can decide whether or not the detention of the accused person in custody should be authorized and also to enable him to form an opinion as to whether any further detention is necessary. The object of enacting this section is that the entries in the diary afford to the Magistrate information. By not complying with the said requirement, the investigating officers render that part of the section which requires the transmission of entries in the case diary otiose. Due to non compliance of the said provision, it may reasonably be inferred that the entries in the case diary had not come into existence by that time. If the material witnesses were examined by that time and they had given him information consistent with the story put forward by the prosecution substantially available and the remand report was placed before the magistrate for information regarding those facts without any addition or substraction.

17. On going through the evidence of the witnesses we have to consider the following points.

(i) Whether the appellants have committed the alleged crime being aggressor.

(ii) Whether as per the F.I.R. story, the statements of the witnesses before the Police and the statement before the Court are consistent, trust-worthy and cogent to bring home the charge against the appellants.

(iii) Whether it is obligatory on the part of the prosecution to explain the injuries sustained by the accused in course of occurrence.

(iv) Whether the appellants are entitled to the right of private defence.

(v) Whether the prosecution has proved the case beyond all reasonable doubt.

Considering all the aspects it can be said that P.W. 4 assaulted the appellant no.3 by cycle chain. Such injuries cannot termed as minor injuries as lacerated wounds were there over the vital part of the body, i.e. head. The doctor has opined that if the blow might have been in force, then there would have been death. In such situation the right of defence can be exercised by the accused persons to protect self and the property as P.Ws. 1, 2, 4, 7 and deceased entered into the disputed land with intention to disposes the appellants and wanted to plough the land. On being resisted the occurrence took place. It cannot be said that the right of private defence exceeded to the extent of killing a person. In the case ***Darshan Singh v. State of Punjab*** reported in ***(2010) 2 SCC 333***, the apex Court considered the principles regarding right of private defence.

(i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is co-terminus with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Indian Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened.

In the case of ***Jai Dev and another v. State of Punjab*** reported in ***AIR 1963 SC 612***, it has been observed as follows:-

> *"Section 100 provides, inter alia, that the right of private defence of the body extends under the restrictions mentioned in S. 99, to the voluntary causing of death if the offence which occasions the exercise of the right be an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault. In other words, if the person claiming the right of private defence has to face assailants who can be reasonably apprehended to cause grievous hurt to him, it would be open to him to defend himself by causing the death of the assailant.*
>
> *In appreciating the validity of the appellants' argument, it would be necessary to recall the basic assumptions underlying the law of self-defence, In a well-ordered civilised society it is generally assumed that the State would take care of the persons and properties of individual citizens and that normally it is the function of the State to afford protection to such persons and their properties. This, however, does not mean that a person suddenly called upon to face an assault must run away and thus protect himself, He is entitled to resist the attack and defend himself. The same is the position if he has to meet an attack on his property, In other words, where an individual citizen or his property is faced with a danger and immediate aid from the State machinery is not readily available, the individual citizen is entitled to protect himself and his property. That being so, it is a. necessary corollary to the doctrine of private defence that the violence which the citizen predefining himself or his property is entitled to use must not be unduly disproportionate to the injury which is to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. The exercise of the right of private defence must never be vindictive or malicious".*

18. Here in the present case, since the prosecution parties are aggressive and they assaulted the appellant No.3 on his head, the appellants are reasonable danger of losing their property and life and accordingly exercised the right to protect their property and life by causing assault on the prosecution party. The exercise of such right of private defence is not vindictive or malicious so far as the assailants are concerned and their action is also coming within the reasonable limit.

It is also not clear who gave the fatal blow and in consequence of tussle between the accused Sumanta with Paresh and the deceased, when Paresh wanted to assault by a spade in such process any injury could have been caused either to Paresh or deceased. P.W.1 did not disclose about the spade. However in cross examination he has admitted that they had taken the spade with them. The presence of spade at the spot and use of the same by the prosecution parties to assault the accused persons was not in dispute. There was every apprehension of danger to the lives of the accused persons and under such circumstances the appellants have the right of private defence when one of the appellants was assaulted first with a cycle chain by P.W.4 on his head. If any injury was caused to P.Ws. 1, 2, 4 and the deceased, it cannot be said that they exceeded the right of private defence.

In the case of ***Lakshmi Singh and others v. State of Bihar,*** reported in ***AIR 1976 SC 2263***, it has been held that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation of words, is very important circumstance, from which the court and draw the following inference:

1. *That the prosecution has suppressed the genesis of occurrence and does not present the true version,*
2. *That the witnesses, who have denied the presence of the injuries on the person of the accused, are lying on the most material point and therefore, their evidence is unreliable.*
3. *That in case there is a defence version which explains the injuries on the person of the accused, it renders probable so as to throw doubt on the prosecution case.*

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or whether the defence gives a version which competes in any probability with that of the prosecution.

The benefit also goes to the appellants in view of the doubt about the genesis of the case and nature of evidence depicted by the prosecution witnesses concealing the injury on the appellant Sushil in toto. As such the prosecution has failed to prove its case beyond reasonable doubt as they suppressed the real and true facts and genesis of the case.

19. The evidence and discrepancies as analyzed hereinabove paragraphs and taking into consideration all the above, we are of the opinion that the prosecution has failed to prove the case beyond reasonable doubt. Hence, this Court sets aside the impugned order of conviction and sentence passed by the learned Additional District & Sessions Judge, Rairangpur in S.T. Case No.11/98 of 1998, so far as the present appellants are concerned and acquits them from the charges accordingly under sections 302, 323 and 148 of the I.P.C.

The appellants who are on bail, let their bail bonds be cancelled and they be set at liberty, in case not required to be under custody in connection with other cases. The Lower Court Records along with copy of judgment be sent forthwith to the Trial Court for necessary action. The Criminal Appeal is accordingly allowed.

Appeal allowed.

2018 (I) ILR - CUT- 895

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

W.P.(C) NO.17961 OF 2016

SMT. CHANDRABATI DAS .....Petitioner

.Vrs.

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

(A) ORISSA CIVIL SERVICE (Classification, Control and Appeal) Rules, 1962 – Rule - 2 (d) – Disciplinary Authority – Definition – Who can be the Disciplinary Authority – Delinquent transferred from Sambalpur to Kendrapara and joined there – Whether the authority at Sambalpur can be the DA – Held, No, in such event the appointing authority of old post is not the disciplinary authority for delinquencies there – Since the petitioner joined at Kendrapara on 25.02.2012 and the charge was framed in September, 2014 by the Superintending Engineer, RWSS, Circle, Sambalpur, the same is not sustainable.

(Para 13)

(B) SERVICE – Disciplinary Proceeding – Numbers of procedural irregularities in conducting the disciplinary proceeding – Circumstances show the proceeding is intended to harass the petitioner – Proceeding quashed.

"The Chief Engineer, considering the grievance of the petitioner transferred her to Kendrapara and while continuing at Kendrapara, the so called departmental proceeding, i.e. after two years of her continuance at Kendrapara, appears to have been initiated by the Sambalpur Circle as a counterblast to the contempt petition initiated by her against the authorities to get her arrear salary pursuant to the Tribunal's order. Accordingly, the initiation of the Departmental Proceeding is afterthought and purported to harass the petitioner. That apart the authorities have proceeded with the Departmental Proceeding during the interim stay order of the Tribunal, while the applicant could not participate in the said proceeding to defend herself properly. Thus it is tell tale that the punishment was imposed on her without giving opportunity to participate in the proceeding. As such the natural justice has not been complied with while concluding the proceeding behind her back. Therefore, the order passed by the Disciplinary Proceeding is nonest in the eye of law. Accordingly we quash the impugned order dated 16.09.2016 passed by the Tribunal and also quash the Disciplinary Proceeding bearing No. 2071 dated 04.09.2014 and the order of removal passed there under, in exercising the jurisdiction conferred under Article 227 of the Constitution of India. This Court directs the opposite parties to reinstate the petitioner within a period of eight weeks hence." *(Para 17 & 18)*

Case Laws Relied on and Referred to :-

1. AIR 1997 SC 3011 : Vishaka & Ors v. State of Rajashtan and Ors.
2. AIR 1994 SC 2254 : State of U.P. and others v. Smt. Jaya Quddusi.
3. (1977) ILR Cuttack 337 : Pranabandhu Pradhan v. Collector, Cuttack and another.
4. OJC No. 1421 of 1996 : Kanhu Charan Sethy & others v. State of Orissa and others
5. AIR 1989 SC 149 : Scooter India Limited, Lucknow vs. Labour Court.
6. (1973) ILR Cuttack 1068 : (Dr.) Sachidananda Nayak v. State of Orissa and anr.

For Petitioner : M/s. Bhabani Sankar Mishra & Mr. A.R. Mishra
For Opp. Partie : Addl. Government Adv.

JUDGMENT Date of Judgment:09.05.2018

S. PANDA, J.

The petitioner in this writ petition has assailed the order dated 16.09.2016 passed by the Orissa Administrative Tribunal, Bhubaneswar in O.A No. 2180 of 2014 as the same is illegal, arbitrary and perverse in rejecting the relief claimed by the petitioner to quash the memorandum of charges. However the Tribunal by a common order disposed of O.A No.1076 of 2014 also wherein a contempt application was filed bearing C.P. No.425 of 2014 to pay her arrear dues, which was directed to be paid within a period of six weeks, as an interim measure, in the Original Application by the Tribunal.

2. Learned counsel for the petitioner, Mr. Bhabani Sankar Mishra, contended that the petitioner was appointed by the Superintending Engineer, P.H. Circle, Sambalpur by order dated 19.07.1997 under Rehabilitation Assistance Scheme in regular establishment. In the said appointment order, it was specifically mentioned that the same was issued with reference to the letter of the Superintending Engineer R.W.S & S Circle, Sambalpur bearing No.2918 dated 02.07.1997 and letter No. 3403 dated 26.06.1997 of the Collector, Bolangir. Her service was under the disposal of the Superintending Engineer R.W.S & S Circle, Sambalpur for posting her against the vacant post lying under him. However, the Superintending Engineer R.W.S & S Circle, Sambalpur is not her appointing authority as stated above. While the petitioner was continuing as such, she faced harassment at the working place by the Head Clerk. As a result of which, she suffered mental illness and subsequently a decree of divorce was also passed. Due to such mental illness, she submitted a leave application in March, 2002, which was also extended from time to time till November 2002. However, due to her mental illness, she could not make any further communication. After the treatment and recovery from her ailment, she filed a representation to the Chief Engineer R.W.S & S, Odisha, Bhubaneswar for her transfer. Considering her representation, the Chief Engineer R.W.S & S, Odisha, Bhubaneswar issued an order of transfer on 26.11.2011 and transferred the petitioner from the office of the Executive Engineer R.W.S & S, Division, Bargarh to the Office of the Executive Engineer R.W.S & S, Division, Kendrapara as per her representation and it was indicated that she cannot claim her seniority if joined at Kendrapara and her transfer is made on private ground after careful consideration of her representation. It was also directed in the order of the transfer that the petitioner is to submit her fitness certificate as she was on leave for a long time on medical ground at the time of her joining, failing which the joining will not be accepted. Pursuant to the said order, the petitioner joined at Kendrapara after being duly relieved from her post w.e.f. 25.02.2012 from Bargarh by the Executive Engineer, RWSS.

3. As her salary was not released due to non-submission of papers by Sambalpur Circle and her leave period was not regularized, she approached the Tribunal in O.A. No.1076 of 2014 wherein an interim order was passed to pay the salary of the petitioner within a particular time. However, since the same was not complied with, the petitioner filed C.P. No.425 of 2014.

4. As a counter blast to the same, a disciplinary proceeding was initiated against her by the Superintending Engineer R.W.S & S, Sambalpur.

5. It is submitted by the learned counsel for the petitioner that in enquiry report the Enquiring Officer without examining the documents and only on surmises held that the petitioner remained willfully and unauthorizedly absent from 06.03.2002 to 24.02.2012. She had reported on duty on 24.02.2012 in RWS&S, Division, Bargarh where she was relieved form duty on the succeeding day to enable her to join under RWS&S Division, Kendrapara on transfer.

6. Challenging those illegality and irregularity committed in the disciplinary proceeding, she approached the Tribunal in O.A. No.2180 of 2014 wherein an interim order was passed not to proceed with the disciplinary proceeding. However, violating the said order, the disciplinary proceeding went on and a report was filed by the Enquiry Officer along with two other persons. The Tribunal however passed the impugned order on 16.09.2016 without considering the irregularities raised by the applicant before it. According to the petitioner, even though as per the office order dated 29.09.2013, wherein the categories of cases to be heard by Division Bench has been fixed and at Sl.No.13 the cases relating to Disciplinary Proceeding is coming under the Division Bench Cases, the same was heard and disposed of by the Single Bench. The petitioner challenged the said order in the present writ petition on the aforementioned grounds on 07.10.2016.

7. Learned counsel for the petitioner further submitted that Rule-72 of the Orissa Service Code is not applicable to the petitioner, as the petitioner is continuing as a temporary employee The said rule has application for permanent employees. In support of his stand, learned counsel relied on the decision of this Court in the case of ***(Dr.) Sachidananda Nayak v. State of Orissa and another*** reported in ***(1973) ILR Cuttack 1068***.

With regard to the stand that the since the petitioner was continuing at Kendrapara at the time of framing of the charges, the Superintending Engineer, RWSS Circle, Sambalpur cannot initiate the disciplinary proceeding. In support of his such stand, learned counsel for the petitioner relied on the decision of this Court in the case of ***Pranabandhu Pradhan v. Collector, Cuttack and another,*** reported in **(*1977) ILR Cuttack 337***.

The petitioner also relied a decision of this Court in the case of ***Kanhu Charan Sethy & others v. State of Orissa and others in OJC No. 1421 of 1996***,

wherein it has been held that once the authorities were aware of the interim order passed by the Tribunal, the so called order of dismissal is void.

He further relied on the decision of the Apex Court in the case of ***Scooter India Limited, Lucknow vs. Labour Court, reported in AIR 1989 SC 149***, where the disciplinary enquiry was found fair and lawful and its finding is not vitiated in any manner, the same could not be a ground for interference with the order of termination of service by Labour Court, rather, the direction of the labour court for reinstatement of employee with 75% back wages on the ground that erring workman should be given opportunity to reform himself and prove to be loyal and disciplined employee of the company, is not illegal and arbitrary.

Reliance was also placed in the case of ***State of U.P. and others v. Smt. Jaya Quddusi*** reported in ***AIR 1994 SC 2254***, where the Apex Court has considered that before service of termination of ad hoc employee, maternity leave was sanctioned to the said ad hoc employee and she was allowed to join the duty. The salary for the entire leave period was also sanctioned. In such a situation, the apex Court held that as the maternity leave was duly sanctioned, it would have to be presumed that she had continued in service from her initial appointment. The Government had by its own action sanctioned the leave and treated the respondent as being in continuous service from the date of her initial appointment.

8. Counter affidavit has been filed by the State supporting the impugned order and indicating therein that the petitioner was removed from service on completion of Disciplinary Proceeding and the said order was passed on 18.11.2016 which was communicated to the petitioner on 22.11.2016.

9. As it appears, on 04.09.2014 a memorandum was issued enclosing the Articles of Charges to the following extent:-

1. Willful and un-authorized absence from Govt. duty.
2. Negligence and dereliction of Govt. duty.

The said charges were framed against the petitioner for violation of Rule 3 and 4 of Odisha Govt. Servants Conduct Rules' 1959 read with Rules-71(1) & (2) of the Orissa Service Code. Statement of imputations of misconduct was also enclosed along with the memorandum in support of the Articles of Charges. With regard to willful and un-authorized prolong absence from Govt. duty, in the Statement of Imputations of Misconduct, it has been indicated that the petitioner applied for leave of one month i.e. 06.03.2002 to 06.04.2002 due to her illness with head quarters leaving permission.The said leave was extended by her from 07.04.2002 to 30.10.2002. She remained absent from 01.11.2002 to 24.02.2012, i.e. the date of reporting the duty on 24.02.2012 afternoon in the office of Executive Engineers' RWS&S Division, Bargarh, unauthorizedly. In spite of refusal of leave and issue of repeated instruction to join in duty by the Executive Engineer, RWS&S Division,

Bargarh, she has failed to do so. With regard to negligence and dereliction of Govt. duty, it has been indicated that she remained prolong absence from Govt. duty as indicated above, which violates Rule 13(2) of the Odisha Leave Rule, 1966 and the said un-authorized absence from Govt. duty causing dislocation of Govt. Work has violated Rule 3 and 4 of Odisha Govt. Servants Conduct Rules, 1959 read with Rules 72(1) & (2) of the Orissa Service Code.

10. Petitioner however filed her show cause to the same categorically denying the charges of unauthorized absence from duty and explained the facts and circumstances and also the facts of harassment at the work place by the head clerk on 01.01.2002, which resulted her mental illness, for which the petitioner could not able to continue in her duty, considering which the Chief Engineer had transferred her from Sambalpur to Kendrapara in the year 2012. She has also joined in the said post at Kendrapara and received the salary for some period. She has also stated in the show cause that she had approached the Tribunal in O.A No.1076 of 2014 claiming the relief of duty pay in the initial scale and filed a contempt petition when the initial pay which was being given to her in absence of her L.P.C received from her previous station, i.e. Bargarh Division, therefore, a disciplinary proceeding was initiated against her. She also stated the willful unauthorized absent from duty and gross duty negligence brought against her under Rule 15 of OCS (C.C.A) Rules, 1959 read with Rule 72(i) and 72(ii) of Odisha Service Code inviting major penalty like removal from service which has been brought against her was afterthought and she may be exonerated from the said charges. Her prolong medical leave period be regularized and the pay may be fixed as per ORSP Rule, 2006 etc. She reiterated that since she was staying at Kendrapara, the enquiry may not be held at Bargarh / Sambalpur Circle due to threat to her life from her Ex-husband and Ex-Head clerk, who caused harassment to her in the working place and the consequential suffering she had undergone. In the said show cause she had brought to the notice that relevant documents along with the memorandum of chargers have not been supplied to her, for which she had prayed for supplying the necessary documents. However, nothing was supplied to her nor she was allowed to defend herself by examining the witnesses or cross-examining the witnesses of the Department.

11. The Executive Engineer, RSS&S Division, Sambalpur was appointed as the Enquiring Officer. He submitted the enquiry report, a copy of which was filed before the Tribunal as Annexure-6. Interrogation of Smt. Das, J.C has been recorded which proves that the fact of her willful and unauthorized absence from duty. Her unauthorized leave from 06.03.2002 to 23.02.2012 proves the gross misconduct against her causing grave dislocation in Govt. work, even though in the Articles of Charges gross misconduct was not there. The enquiry report supposed to be submitted by the enquiring officer to the disciplinary authority, however the same was submitted by the Enquiring Officer along with one Alekha Ranjan Mahakud, Senior Clerk and one Smt. Nalini Satapathy, Junior Engineer.

12. This Court called for the original records of the Departmental Proceeding, wherein no order sheet was maintained regarding the communication of removal order. There was no direction also in the order sheet to communicate the order to the petitioner. However, a copy of the order dated 18.11.2016 was annexed in the counter affidavit and in the front page of the said copy, it has been endorsed that the same was served to the petitioner on 22.11.2016. The signature of the petitioner in the said endorsement reveals that her surname has been put as 'Dash'. In all the records be it Govt. record or the documents filed by the petitioner such as Vakalatnama, affidavit in the writ petition, appointment order, transfer order etc. the name of the petitioner as been mentioned with surname 'Das' and the petitioner also put his signature with the surname 'Das'. So the service of such communication upon the petitioner creates a doubt.

13. This Court in the case of Pranabandhu (supra) held that as per Rule-2 (d) of the Orissa Civil Service (Classification, Control and Appeal) Rules, 1962, the Disciplinary Authority has been defined for the purpose of initiation of disciplinary proceeding in regard to any delinquent, delinquency in old post and joined another post where confirmed before the charge framed. In such event the appointing authority of old post is not the disciplinary authority for delinquencies there. Thus, since the petitioner joined at Kendrapara on 25.02.2012 and the charge was framed in September, 2014 by the Superintending Engineer, RWSS, Circle, Sambalpur, is not sustainable as per the aforesaid ratio.

14. In the case of Dr. Sachidananda Nayak this Court observed as follows:-

> *"There is a clear distinction between a temporary and a permanent Government servant. The legal position was examined at length by the learned Chief Justice of the Supreme Court in Dhingra's case. Jai Shankar's case obviously was on the footing that the order was one of removal from service of a permanent servant before he superannuated and, therefore, per se, was a penalty. The order before us by asking a temporary servant to be relieved did not impose any penalty and Article 311 (2) cannot be invoked. We are of the view that the rule in Jai Shankar's case is applicable only to the case of a permanent servant. We accordingly agree with Dhavan, J., (A.I.R. 1968 Allahabad 14) in his analysis of Jai Shankar's case. We are of the opinion that the Tripura, Andhra Pradesh and Allahabad (1971) cases have not been correctly decided to the extent they have held that Jai Shankar's case applies to a temporary servant also.*
>
> *Rule-72 of the Service Code in its own terms, therefore, applies to a permanent Government servant while Rule-13 (4) of the Leave Rules, covers the case of a temporary Government servant. The Service Code was framed under Section 240 of the Government of India Act and has been continued under Article 309 of the Constitution. The Leave Rules have been framed under Article 309. Rule 72 and 13 (4) cover different fields- the former relates to permanent servants and the later to temporary servants. They belong to two acknowledged classes of Government employees. There is no question of any discrimination. The contentions on the footing of Article 14 of the Constitution is misconceived. We accordingly hold that there is no merit in the writ application."*

15. Once the petitioner filed the show cause bringing to the notice of the authorities about the harassment caused to her by the Head clerk in the working place and consequent thereof she suffered mental imbalance and also divorce from her husband, the same was neither investigated nor was any mention made in the inquiry report.

16. The petitioner in her show cause to the Article of Charges, at paragraph-5, specifically pleaded before the employer regarding the harassment in work place and threat of life by the Ex-Head clerk, Shri Panchanan Das, under the influence of the liquor on 1.1.2002, which lead to her divorce and prolong mental depression. However, the employer, after receiving such fact has not taken any step as per the guideline fixed by the apex Court in the case of ***Vishaka & Ors v. State of Rajashtan and Ors***, reported in ***AIR 1997 SC 3011***, nor made any enquiry thereto, rather proceeded with the departmental proceeding, in spite of the interim order passed by the Tribunal. In the case of Vishaka (supra), it was held that sexual harassment of working women amounts to violation of right to gender equality and right to life and liberty and such an incident is also violation of the victim's fundamental right to practice any profession or to carry out any occupation, trade or business. The victim is therefore entitled to remedy against such harassment for enforcement of fundamental rights. A writ of mandamus in such a situation, if it is to be effective, needs to be accompanied by directions for prevention; as the violation of fundamental rights of this kind is a recurring phenomenon. In the said decision, at paragraph-16, the apex Court laid down the guidelines for due observance at all work places or other institutions, until a legislation is enacted for the purpose.

At Point No.4, and Point No.5, the apex Court has dealt with regard to Criminal Proceeding and Disciplinary Action to the following extent:-

> 4. Criminal Proceedings:
>
> Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.
>
> In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer. (*emphasis supplied*)
>
> 4. Disciplinary Action:
>
> Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

Taking into consideration the same, the Chief Engineer, after receiving the representation of the petitioner has transferred her from Bargarh to Kendrapara. The Disciplinary Authority has not considered all those facts nor enquired into such complaint even if the higher authority has accepted such incident which had occurred at the work place and the petitioner was the victim of such offence.

17. As discussed in the above paragraphs, numbers of procedural irregularities were there in conducting the disciplinary proceeding, such as, once there is no allegation of misconduct, the enquiry office submitted the report proving the allegation of misconduct. Similarly, the order of removal as contended by the opposite party served on her, casts serious doubt. The 'surname' in the signature of the petitioner so also non-mention of anything in the order sheet about the service of the same upon the petitioner, it cannot be concluded that the same was served on the petitioner.

18. The Chief Engineer, considering the grievance of the petitioner transferred her to Kendrapara and while continuing at Kendrapara, the so called departmental proceeding, i.e. after two years of her continuance at Kendrapara, appears to have been initiated by the Sambalpur Circle as a counterblast to the contempt petition initiated by her against the authorities to get her arrear salary pursuant to the Tribunal's order. Accordingly, the initiation of the Departmental Proceeding is afterthought and purported to harass the petitioner. That apart the authorities have proceeded with the Departmental Proceeding during the interim stay order of the Tribunal, while the applicant could not participate in the said proceeding to defend herself properly. Thus it is tell tale that the punishment was imposed on her without giving opportunity to participate in the proceeding. As such the natural justice has not been complied with while concluding the proceeding behind her back. Therefore, the order passed by the Disciplinary Proceeding is nonest in the eye of law.

19. In view of the discussions made hereinabove, we are of the opinion that there is error apparent on the face of the impugned order passed by the Tribunal in not considering the statutory rules while directing the authority to proceed with the Disciplinary Proceeding, instead of quashing the said charges as prayed for. Accordingly we quash the impugned order dated 16.09.2016 passed by the Tribunal and also quash the Disciplinary Proceeding bearing No. 2071 dated 04.09.2014 and the order of removal passed there under, in exercising the jurisdiction conferred under Article 227 of the Constitution of India. This Court directs the opposite parties to reinstate the petitioner within a period of eight weeks hence. The Writ Petition stands disposed of accordingly.

Writ petition disposed of.

2018 (I) ILR - CUT- 902

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

W.P.(C) NO.580 OF 2018

AJIT KUMR BARIK .....Petitioner

.Vrs.

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

ORISSA CIVIL SERVICE (Rehabilitation Assistance) RULES, 1990 – Rule-9(6) and 9(7) – Provisions under – Petitioner being the second son claiming compassionate appointment upon death of his father – Father, while in service died in 2002 – Mother made application for compassionate appointment under Rehabilitation Assistance Scheme within one year – Authority forwarded the application form to Collector-cum-Dist. Magistrate to enquire and to furnish a distress certificate – No report was received for long time – Reminder issued in 2015 – In the meantime the wife of deceased suffered from chronic disease and the elder brother of the petitioner being a mentally disabled person, she made representation to engage her 2nd son i.e. the present petitioner – Not considered – However appointment order was issued in favour of ailing mother in 2016 who was not fit to perform the Govt. duty – Petitioner filed OA seeking consideration of appointment in his favour – Rejected – Effect of – Held, the order of rejection is an error apparent on the face of record.

"In the present case due to delay and laches on the part of the Collector to issue distress certificate after 13 years from the date of when the Registrar, Orissa Administrative Tribunal vide his letter dated 26.12.2002 forwarded the application for enquiry into the distress condition of the family as required under Rule, 8(1)(b) of the Rules. The appointment letter was issued in favour of widow of the deceased employee in the year 2016. However she was not fit to discharge the duties which was not disputed by the parties. As such the impugned order is an error apparent on the face of record. Accordingly, we set aside the impugned order dated 17.11.2017 passed by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 375(C) of 2016 and direct the opposite party No.2 to issue appointment order in favour of the petitioner within a period of two months from today."

(Paras 6,7,& 8)

For Petitioner : M/s. B.K.Routrary, L.Bhoi, K.C.Sahoo, R.K.Bhoi.

For Opp. Party : Addl. Government

JUDGMENT Judgment : 11.05.2018

S.PANDA, J.

Petitioner in this writ petition assails the order dated 17.11.2017 passed by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 375(C) of 2016 wherein the Tribunal rejected the prayer of the applicant for engagement under Rehabilitation Assistance Rules by dismissing the original application.

2. Mr.B.K.Routray, learned counsel for the petitioner submits that after the death of the father of the applicant who was a Government employee in the year 2002, the widow filed an application for appointment under the Rehabilitation Assistance Rules (hereinafter referred to as Rules). The family was in a distress condition due to sudden death of the sole bread earner. The said application was kept pending for want of distress certificate from the competent authority which was issued in the year 2015 only. The widow in the meantime has suffered from serious

ailment due to poverty and became unfit for any job. Thus, she made a representation to the appointing authority to consider engagement of her son in her place under the aforesaid scheme. However the appointing authority did not consider such representation. Due to such inaction the petitioner had approached this Court in W.P.(C) No. 403 of 2016 which was withdrawn with a liberty to approach the appropriate forum. Accordingly the petitioner has filed the aforesaid original application before the Odisha Administrative Tribunal, Cuttack Bench, Cuttack as under such circumstances there is no bar to consider the claim of the person who is at serial No. (ii) as preference No.(i) is unfit. However the Tribunal has rejected the prayer of the applicant without considering the aforesaid facts on its proper perspective and passed the impugned order. Hence the same is liable to be set aside.

3. The learned Addl. Government Advocate submits that since the appointment letter was issued in favour of the mother of the applicant and without joining the Class-IV post she has sworn an affidavit in favour of the present applicant showing her illness. Her appointment under Rehabilitation Assistance Rules was rightly rejected by the Tribunal by impugned order considering the provision of Rule-9(6) and 9(7) of Orissa Civil Service (Rehabilitation Assistance) Rules, 1990. Hence the same need not be interfered with. He has further submitted that the Government in G.A. Department approved for appointment of the widow under the Rehabilitation Assistance Rules and accordingly appointment letter was issued vide letter dated 7.6.2016. Since she has not come forward to join the post, claim of the applicant has no merit.

4. The brief fact of the case is that one Biranchi Narayan Barik, the father of the applicant was appointed as a 'Mali' in the Odisha Administrative Tribunal, Principal Bench, Bhubaneswar w.e.f. 4.3.1987. He died in harness on 5.8.2002 leaving behind his widow, two sons and one daughter. Thereafter the widow had applied for appointment under the Rehabilitation Assistance Rules before the authority. The Registrar, Orissa Administrative Tribunal vide his letter dated 26.12.2002 had forwarded the application form and the copy of annexures to the Collector-cum-Dist. Magistrate, Cuttack to enquire into the matter and to furnish a distress certificate of the family members of the deceased Government employee. As no report was received from the Collector, Cuttack, the Registrar, Orissa Administrative Tribunal again issued another reminder vide letter dated 17.1.2015 to the Collector, Cuttack to furnish the report of finance distress condition of the family members of the deceased Government employee. In the meantime the mother of the applicant is suffering from chronic disease and the elder brother of the applicant is a mentally disabled person, she has made a representation to the Registrar, OAT to engage her 2nd son i.e. the present applicant in her place under the Rehabilitation Assistance Rules. The widow had filed an affidavit to the effect that her eldest son is mentally disabled and her younger son be considered for

appointment under the Rules. The Registrar, Orissa Administrative Tribunal did not consider the case of applicant for appointment under Rehabilitation Assistance Rules for which the applicant approached this Court in W.P.(C) No. 403 of 2016. The same was withdrawn on 19.1.2016 with liberty to the petitioner to approach the appropriate forum and accordingly the applicant approached the Tribunal in the present original application with a prayer to direct the opposite party No.2 to consider his application for appointment under the Rehabilitation Assistance Scheme.

5. The Tribunal while passing the impugned order taken note of aforesaid facts i.e. regarding application filed by the widow of the deceased Government employee within the time which was received by the appointing authority and forwarded the same on 26.12.2002 to the Collector-cum-District Magistrate, Cuttack for enquiry and to furnish the distress certificate of the family members of the deceased Government employee. Due to delay and laches on the part of the Collector to furnish such distress certificate and the illness of the widow developed in the meantime due to poverty which lead to her incapacity to discharge the duties and responsibilities of a Government service even though the appointment letter was issued in her favour.

6. The Rules as contended in the above paragraph nowhere restricted the jurisdiction of the appointing authority to consider the application for appointment in a suitable available vacancy under his control. The Rules also define "Family Members" means include the following members in order of preference-

(i) Wife/Husband;

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

(iii) Unmarried daughters and unmarried step daughters;

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

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

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

7. Of course the first preference is to be given wife/husband of the deceased employee then son and unmarried daughter. However no where it was stated that in case a family member in order of preference in the hierarchy is unfit and a medical certificate furnished to that effect, claim shall not be considered for engagement of the other eligible members in case of distress condition of the family. Therefore, the finding given by the Tribunal in the impugned order that she is not prepared to accept Group-'D' post and offered it to her son in ignoring the material on records is not sustainable.

8. Rule, 9(7) of the Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 referred to a ward who is minor at the time of death of a Government servant. The case of the applicant is not covered under the said provision. In the present case due to delay and laches on the part of the Collector to issue distress certificate after 13 years from the date of when the Registrar, Orissa Administrative Tribunal vide his letter dated 26.12.2002 forwarded the application for enquiry into the distress condition of the family as required under Rule, 8(1)(b) of the Rules. The appointment letter was issued in favour of widow of the deceased employee in the year 2016. However she was not fit to discharge the duties which was not disputed by the parties. As such the impugned order is an error apparent on the face of record. Accordingly, we set aside the impugned order dated 17.11.2017 passed by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 375(C) of 2016 and direct the opposite party No.2 to issue appointment order in favour of the petitioner within a period of two months from today. No cost. A free copy of the judgment be handed over to learned Addl. Government Advocate for compliance.

Writ petition allowed.

2018 (I) ILR - CUT- 906

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

W.P.(C) NO. 23299 OF 2016

KISHOR CHANDRA PRADHANI ……..Petitioner

.Vrs.

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

SERVICE – Departmental Proceeding – Removal – Charge against the petitioner was submission of false information regarding his caste at the time of recruitment – Petitioner has already completed 26 years of service – No documents supplied by the authority on the plea that the documents asked for have already been destroyed – No materials available on record that he has furnished such information rather the record reveals that the Verification Roll as well as the Service Book was prepared by one handwriting and the petitioner has put his signature – Held, the removal from service is disproportionate to the charges leveled and the order of removal converted to compulsory retirement with benefits.

"*Since the petitioner is more than 55 years and the punishment of removal from service is disproportionate to the charges levelled, in exercise of the jurisdiction under Article 227 of the Constitution of India this Court while setting aside the impugned order dated 03.11.2016 passed by the Tribunal directs the authorities to treat the order of removal from service dated 05.09.2011 passed by the Commandant, O.S.A.P. 3rd Battalion, Koraput as an order of compulsory retirement and pay all consequential service benefits to the petitioner.*"

(Paras 15 to 17)

For Petitioner : M/s Prafulla Kumar Rath, R.N.Parija, A.K.Rout, S.K.Pattnaik, A.Behera, P.K.Sahoo

For Opp. Parties : Addl. Govt. Adv.

JUDGMENT Date of Judgment : 18.05.2018

S.PANDA, J.

This Writ Petition has been filed by the petitioner challenging the order dated 03.11.2016 passed by the Odisha Administrative Tribunal, Principal Bench, Bhubaneswar in O.A. No.913 of 2012 rejecting the prayer of the petitioner to quash the penalty order as well as the order of the appellate authority as the same is illegal, arbitrary and contrary to the materials available on record.

2. Learned counsel appearing for the petitioner submitted that the Disciplinary Proceeding was initiated against the petitioner after 26 years of service and necessary documents basing on which charges were framed was not supplied to him. Neither he has filed the application seeking appointment under reserved category nor has he submitted any document showing his caste at the time of appointment. As such the charges framed against him are not sustainable. In the Departmental Proceeding as well as before the Tribunal the Department has relied mainly on the Service Book, which was maintained by the Department wherein the caste of the petitioner was reflected as *'Kandha'*. However, the petitioner has only put his signature so far as Verification Roll is concerned. He has explained that it was filled up by the authority and he has only put his signature in English without any knowledge of reading English. Thus charges cannot be held to be proved against him and consequently imposition of penalty by the appointing authority confirmed by the appellate authority as well as the order of the Tribunal are not sustainable being perverse without any materials. In the alternative he has submitted that the case of the petitioner may be considered for grant of pension as he has rendered an unblemished service career of 26 years. In support of his submission he has relied on the decisions reported in *AIR 2018 SC 566* and (*2014) 4 SCC 434.*

3. Learned Addl. Government Advocate however, contended that as per the prescribed procedure the Departmental Proceeding was concluded and in the Verification Roll it was clearly stated the caste of the petitioner as '*Kandha',* as such he was appointed under reserved category and got promotion subsequently. The petitioner has got all the benefits as a candidate of reserved category, as such his plea that the record was maintained by the Department and he is no way concerned with all those records cannot be accepted. Since the Tribunal has passed the impugned order after going through the original records, the same need not be interfered with.

4. The petitioner in the Original Application has contended before the Tribunal that he being a matriculate applied for the post of Sepoy in pursuance of the advertisement published by the authorities and on being duly selected by the

Selection Committee, he was appointed as a Sepoy in 3rd Battalion, O.S.A.P., Koraput by order dated 04.05.1984 issued by the appointing authority, the Commandant. He joined in the said post on 15.05.1984. He was discharging his duties to the utmost satisfaction of the authorities. While continuing as such he was promoted to the post of Driver Havildar.

5. Thereafter a Departmental Proceeding was initiated against him on 20.09.2010 and show cause notice was issued to him with the charge that he was appointed under Scheduled Tribe Category by submitting false information as follows:-

> *As per Candidate Register of Sepoy for the year 1984 the height of candidate in Scheduled Tribe category was mentioned in Column No.4. Sri K.Ch. Pradhani height mentioned in the said column was 164.5 cm as well as the 100 point Roster Register maintained in the said order was reflected under the Scheduled Tribe category. In the original Service Book, his caste was mentioned as 'Kandha' which is coming under Scheduled Tribe category. However, over and above he had submitted false information in the verification Roll mentioning his caste as 'Kandha' against the column meant for caste. However, he has admitted in clear tone that he is 'Khandayat' by caste. Accordingly, he was directed to show cause by 10.10.2010 as to why suitable disciplinary action as deemed proper shall not be taken against him.*

6. In pursuance of the said show cause notice, the petitioner filed an application on 22.09.2010 before the authorities with a prayer to supply the documents i.e. (i) copy of the plain paper application submitted as alleged, for enrollment, that he belongs to Scheduled Tribe Category, (ii) copy of the application form submitted by him during recruitment mentioning himself as Scheduled Tribe Candidate, (iii) copy of the letter in which concerned employment exchange was informed that he was appointed under the Scheduled Tribe Category, and (iv) copy of the Caste Certificate submitted by him claiming that he belongs to Scheduled Tribe Category.

7. The Commandant, O.S.A.P, 3rd Battalion, Koraput – opposite party No.4 by his letter dated 28.09.2010 replied that the documents at Sl. Nos.1 to 3 have already been destroyed as those are not permanent record. As regards to Cast Certificate, it was stated that while the petitioner was asked to submit his Caste Certificate to be kept in Service Book as per instruction of I.G. of Police, S.A.P, Odisha, Cuttack he has failed to prove the same. So far as supply of copy of nomination roll submitted to higher authority for promotion is concerned, the same was supplied. It was also stated in the said letter that the petitioner has submitted false information regarding his caste at the time of recruitment, which is evident from the verification roll filed by the petitioner in his own hand as well as in the front page of original Service Book the signature of the petitioner is also available.

8. After receiving the said reply from the Commandant – opposite party No.4, the petitioner has filed his show cause stating therein as follows:-

During the year 1984 he applied for the post of Sepoy having requisite qualification and fitness as a General Category candidate. His name was registered in Balliguda Employment Exchange. In the copy of the transfer certificate issued by the Headmaster of Government High School Balliguda no where it has been mentioned that he belong to Scheduled Tribe Category. He never furnished any false information with regard to his height or other physical fitness. It is the sole responsibility of the recruitment Board to take measurement of the candidates and he was not responsible as to under what category he was treated by the said recruitment Board. He has also specifically stated that he has prayed for the relevant documents, which was not supplied to him as the same are not available i.e. application form which he has submitted in the recruitment giving information regarding his caste. In case the documents were supplied to him he would have proved his genuineness beyond any doubt. So far as Charge No.2 is concerned, he has stated that he belongs to 'Khandayat' by caste which comes under General Category. Neither he has mentioned in his application nor he has furnished Caste Certificate claiming that he belongs to Scheduled Tribe Category, as such in no way he is at fault for such erroneous endorsement in the official record, which was maintained by the Department, without verifying such Caste Certificate in the interview or otherwise. So far as his signature available in the official record, he has categorically stated that entry in such record was made by the Department itself and he was asked to put his signature in the Service Book on 08.06.1984 and the Attesting Officer has attested the entries on11.05.1985. As such the entries were made subsequently and not in his presence and his signature was attested without proper verification. He has categorically stated that the mistake committed by the Department in maintaining the records could have been detected on the spot and could have been brought to the notice of the competent authority for immediate rectification to avoid future complicacies. However, he has continued in service for more than 26 years and discharged his duties to the utmost satisfaction of his authorities. He was subjected to such unnecessary stigma on his spotless long service career. He has explained accordingly so far as verification in Form No.101 is concerned. He appeared in the interview held in the year 1984 as a General Candidate. He has furnished the required information correctly but due to his misfortune the official entrusted to fill up the Verification Roll due to disturbed hearing or otherwise. He was asked to put his signature at the fag end of the day. Being novice, he contributed his signature without going through the contents mentioned therein as least scope was made available to go through the contents. He has also contended that be belongs to 'Khandayat' by cast and inherited ancestral property as such wherein his caste was reflected as 'Khandayat' and at no point of time he has misrepresented.

9. The Enquiry Officer submitted his report with a finding that as regards to Identity Card submitted by the petitioner in the column meant for category, no category either SC, ST or UR has been mentioned. So the claim of the petitioner that he appeared the recruitment under General Category is not a fact at all. As regards to

the plea taken by the petitioner that his educational certificate it has not been mentioned that he belongs to ST category or otherwise there is no provision to mention the category in educational qualification certificate. In so far as measurement of candidate recorded in Candidate Register is concerned, on the basis of information furnished by Candidates and also taking re-measurement after selection, the appointing authority recorded the facts in Candidate Register. It may be a fact that during re-measurement the petitioner told that he belongs to S.T Category for which the height 164.5 cm. was accepted, unless his candidature would not be accepted. As regards the word innocence of charge, he has furnished the Caste Certificate issued from the Office of the Tahasildar, Baliguda vide SEBC Certificate Case No.581/2011 dated 23.03.2011. It goes without saying that to hide the guilt of the charged officer he has furnished the document which is issued after 26 years of recruitment. Had he been produced the Caste Certificate of SEBC at the time of interview, it would be better to supply a copy of that Caste Certificate as the category of SEBC was not prevailing. As he was appointed under Scheduled Tribe category as per the result declared by recruitment Board by submitting false information, his name in 100 point roaster register was recorded against Scheduled Tribe Category. In the P.M. Form No.101 (Verification Roll) it has been filled up in black and white that be belongs to *'Kandha'* under sub-caste and his signature is available in the verification roll. It was his duty to put up the signature after going through verification of information filled up in PM Form No.101. He got promotion to the rank of Driver Havildar from Asst. Driver under Scheduled Tribe Category not in General Category. He could have informed to the authority at the time about the facts. Thus the charge is well proved against the petitioner. With such finding, the Enquiry Officer furnished the report on 21.05.2011.

10. Pursuant to the aforesaid finding, the petitioner has filed his second show cause reply reiterating his defence. He has categorically stated in the second show cause reply that necessary documents were not furnished to him basing upon which the charges were framed and at no point of time he has submitted any document that he belongs to Scheduled Tribe Category. The nomination roll submitted to the Departmental Promotion Committee without verifying the veracity of the caste and category, which was accepted and before such submission had the authorities insisted the documentary evidence from the petitioner the fact could have been come to notice. He has furnished the Caste Certificate after long lapse of 26 years during pendency of the Departmental Proceeding that he belongs to General Category and at no point of time he has furnished any information that he belongs to Scheduled Tribe Category. Being a Class-IV employee he has put his signature in English only. From his service career he has received several rewards against no punishment nor displayed any misconduct, which may be taken into consideration.

11. Considering the aforesaid show cause reply of the petitioner, the appointing authority by order dated 05.09.2011 imposed major punishment on the petitioner and

removed him from service as he has submitted false information in the Verification Roll in P.M. Form No.101.

12. Being aggrieved the petitioner preferred appeal before the D.I.G. of Police, SAP, Odisha, Cuttack. The appellate authority also rejected the appeal by saying that the appellant has raised several points in his defence which have no merit. The enquiry in the Disciplinary Proceeding was conducted properly and fairly in terms of PM Appendix–49. The petitioner was given adequate opportunity to defend himself. The appellate authority after application of judicial mind, agreed with the punishment awarded by the disciplinary authority.

13. Challenging the order of the Appellate Authority, the petitioner approached the Tribunal in O.A. No.913 of 2012. The Tribunal after considering the respective pleas of the parties recorded a finding that the document, which was called for by the petitioner being not a permanent register, it has been destroyed. Hence supply of that document and other similar documents could not have been possible and non supply of such documents in no way prejudice the petitioner as he has been given adequate opportunities to defend himself. The petitioner could not have been appointed as a Constable at the first instance and subsequently promoted to the rank of Driver Havildar against a Scheduled Tribe vacancy, if he would have belonged to U.R category. The required height for U.R Category was 168.00 Cms. and his height was 164.5 Cms. Further he was promoted to Driver Havildar against roster point vacancy meant for Scheduled Tribe Category. From the documents submitted by the Department, the Enquiry Report and all other concerned documents, it has been ably brought out that the petitioner was recruited against the reserved category vacancy of Scheduled Tribe. He could not have been recruited against a U.R. vacancy as his height is 164.5 Cms besides he also got promotion to the rank of Driver Havildar against a roster point vacancy meant for Scheduled Tribe. The Verification Roll and the Service Book clearly indicates that the petitioner has written his caste as *'Kandha'* which comes under Scheduled Tribe category. Hence nothing wrong in issuance of the enquiry report along with the show cause notice for penalty. Keeping in view the principle of preponderance of probabilities, the charge of securing appointment and promotion by submitting false and misleading information has been proved. With the aforesaid finding, the Tribunal by the impugned order dismissed the Original Application.

14. Considering the above facts and circumstances and after going through the copy of the documents which are filed along with the Writ Petition as well as the Original Application, it appears that the petitioner was appointed in the year 1984. He has discharged his duties for continuous period of 26 years after which the Disciplinary Proceeding was initiated against him with the charge that he has furnished false information at the time of recruitment. However, no materials are available on record that he has furnished such information rather the record reveals that the Verification Roll as well as the Service Book was prepared by one

handwriting and the petitioner has put his signature, which is not same and one. In all the reported cases, it appears that either the employee has produced the Caste Certificate himself or Record of Rights in support of his claim to be recruited against a reserve category vacancy.

15. However, in the present case the petitioner himself has not given any such document in support of his claim that he belongs to reserve category and the appointing authority at the time of recruitment as well as at the time of joining in the post has not verified any document regarding the claim of the petitioner that he belongs to reserve category as contended by the Department in the Departmental Proceeding. Since the Departmental Proceeding was initiated after 26 years of service of the petitioner, the Department should have framed charges definitely and it should not have imposed major punishment on the petitioner without such definite materials that he has got the advantage by fraudulent means rather the appointing authority as well as the Department have failed to prove regarding non verification of the Caste Certificate or Record of Rights with regard to claim of reserve category by the petitioner.

16. As discussed hereinabove neither the authorities have supplied the documents in respect of the charges framed against the petitioner that he has submitted application for enrolment mentioning therein that he belongs to Scheduled Tribe category nor any document was produced so far as the employment exchange is concerned that he belongs to Scheduled Tribe category and produced any Caste Certificate or enrolled his name as such. During recruitment also the delinquent has not produced any document nor after joining in the service that he belongs to Scheduled Caste. He has only able to put his signature in English without being able to read and write the same. The Verification Roll in P.M. Form No.101 as well as the Service Book reveal that it was filled up by some other persons and the delinquent has only put his signature in those records. Further the authority, who has appointed him in 1984 neither verified his Caste Certificate nor asked him to produce any document in support of his Caste Certificate. Subsequently when show cause notice was issued to him, he has requested by filing application to supply those documents on the basis of which charges have been framed. However, the Commandant, O.S.A.P., 3rd Battalion, Koraput has given a reply that such documents are destroyed as those are not permanent record. Then how on the basis of those documents charges are framed as alleged in the Departmental Proceeding specially when the documents are not available. The caste verification was taken up by the Department as per the instruction of I.G. of Police, S.A.P, Odisha, Cuttack at a belated stage after completion of his 26 years of service without any document specifically that the petitioner has applied to get benefit under reserved category. In view of the above irregularities the findings of the Disciplinary Authority as well as the Tribunal are error apparent on the face of the record and have no basis to sustain the charges.

17. In view of the discussions made hereinabove, since the petitioner is more than 55 years and the punishment of removal from service is disproportionate to the charges levelled, in exercise of the jurisdiction under Article 227 of the Constitution of India this Court while setting aside the impugned order dated 03.11.2016 passed by the Tribunal directs the authorities to treat the order of removal from service dated 05.09.2011 passed by the Commandant, O.S.A.P. 3rd Battalion, Koraput as an order of compulsory retirement and pay all consequential service benefits to the petitioner. The above exercise shall be completed within a period of two months from the date of production of a copy of this judgment. The Writ Petition is accordingly disposed of.

Writ petition disposed of.

2018 (I) ILR - CUT- 913

S.K. MISHRA, J.

W. P (C) NO.11433 OF 2003

TARACHAND AGRAWAL .....Petitioner

.Vrs.

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

(A) ORISSA CONSOLIDATION OF HOLDINGS AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Section 36 – Revision application – Delay in filing – Condonation – Principles – Indicated.

"*Thus, it is apparent from the aforesaid judgment that a litigant does not prefer an appeal or revision late deliberately. Hence, refusing to condone delay may result nipping a meritorious matter at the bud, which is against the General conscience of the Courts in India. The expression sufficient cause receives a liberal construction so as to advance the cause of substantive justice. If refusal to condone the delay results in grave miscarriage of justice, it would be ground to condone the delay and unless it is seen that the party seeking condonation of delay have acted with mala fide. Then the presumption of bona fide should be raised and delay should be condoned. The learned Joint Commissioner was very much alive to the case of the parties and having heard learned counsel for the present petitioner and the contesting opposite parties has used his discretion to come to the conclusion that delay should be condoned. It is a finding of fact, which is normally not disturbed in a writ in exercise of certiorari jurisdiction. So, this Court is of the opinion that no illegality has been committed by the Joint Commissioner while condoning delay in filing the revision under Section 36 of the Act.*" *(Paras 3, 4 and 5)*

(B) ORISSA CONSOLIDATION OF HOLDINGS AND PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 – Section 12 read with Order 23 Rule 3 of CPC – Appeal – An affidavit was filed by the appellant stated to be an admission by the original land owner for recording the case land in the name of the petitioner for long possession of the same – Appellate authority allowed the appeal on the basis of the said affidavit and declared the title over the suit

land in favour the petitioner under the colour of agreement/compromise – Whether such an affidavit can be accepted as an evidence of admission in absence of pleading in the appeal and in absence of signature of parties – Held, No.

"Thus, a plain reading of the Order 23 Rule 3, this Court comes to the conclusion that essentially three things need to be complied under this provision. Firstly, there should be a lawfully agreement or compromise between the parties. Secondly, there should be a signed compromise by the parties. Thirdly, the Court on being satisfied comes to the conclusion that compromise or agreement is to his satisfaction and he records the same. In this case, while examining the order passed by the learned Deputy Director, Sambalpur, this Court is of the opinion that the affidavit filed before him does not contain signature of both the parties. Only late Narasingha Mishra filed the affidavit. There is no finding by the Deputy Director, Consolidation that he was satisfied that the parties have compromised. So by resorting to Order XXIII also, the petitioner cannot wriggle out the rigorous of judgment passed by the learned Commissioner. So, this Court is of the opinion that on the basis of the aforesaid discussion and judgment cited, the affidavit is neither a pleading nor a piece of evidence and it cannot be the sole foundation for declaring right of any kind of civil or quasi-judicial or quasi-civil proceeding unless the Order XIX or Order XXIII is attracted. So, this question is answered in favour of the contesting opposite parties and against the petitioner."

(Para 18)

(C) ADVERSE POSSESSION – Claim of – Ingredients thereof – Held, in order to prove adverse possession, a party must establish that his possession for the statutory period was nec vi, nec clam, nec precario – In simple language, the petitioner, in order, to establish that he has perfected title by way of prescription must establish by pleadings and proof the date from which his possession become adverse to the title of the true owner – He is required to plead and prove that he was in open and continuous and peaceful possession of the said land for a period of twelve years, without any disturbance and with a hostile animus to the title of the real owner. (Para 19)

Case Laws Relied on and Referred to :-

1. AIR 1995 Orissa 239 : Trilochan Dandsena and another vs. State of Orissa & Ors.
2. 1997 (II) OLR 478 : Prakash Chandra Das & Ors. vs. Labour Commissioner & Anr.
3. AIR 1996 SC 1623 : State of Haryana vs. Chandra Mani & Ors.
4. AIR 1997 Rasjasthan 134 : Trust vs. Poonam Chand.
5. Smt. Sudha Devi vs. M.P. Narayanan & Ors. AIR 1988 Supreme Court 1381
6. AIR 1977 Delhi 73 : Prakash Rai v. J.N. Dhar.
7. AIR 1957 Allahabad 1. : Ajodhya Prasad Bhargava v. Bhawani Shanker Bhargava.
8. AIR 1974, SC 471 : Nagindas Ramdas vs. Dalpatram Ichharam alias Brijram & Ors.
9. AIR 1987 SC 1353 : Collector Land Acquisition Anantnag vs. Mst. Katiji

For petitioner : M/s. Abhaya Ku. Mahakud,N.C. Pati,
S. Mishra, N. Singh, A Das, S. Mantry,
A.K. Sharma, S.K. Acharya,M.K. Panda & N.K. Das

For Opp. parties : Mr. S.Ghosh & S.N. Mohapatra, Mr. S. Dash (A.S.C.)

JUDGMENT Date of Hearing 16.01.2018 Date of Judgment: 18.05.2018

S.K.MISHRA, J.

The following questions arise for determination in this case:- (I) Whether the order passed by the learned Joint Commissioner, Consolidation and Settlement, Sambalpur was wrong in condoning the delay in filing the revision application under Section 36 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972, hereinafter referred to as the 'OCH & PFL Act' for the brevity? (II) Whether the learned Joint Commissioner was wrong in not accepting the affidavit filed by the predecessor of interest of opposite party nos.5 to 10 before the Appellate Authority i.e. the learned Deputy Director, Consolidation, Sambalpur as the said document is not in the light of a compromise petition or an agreement to the parties and further holding that it cannot be used as an evidence unless court has directed so, under the provisions of the Code of Civil Procedure, 1906? (III) Whether the petitioner has perfected the title over the land in question by way of adverse possession? (IV)Whether the essential ingredients constituting prescription of title by way of adverse possession has been adequately pleaded and proved in this case? (V) Whether the Deputy Director, Sambalpur being the Appellate Authority sitting in appeal over a matter decided by the Consolidation Officer can in exercise of powers under Section 49 of the Act decide the matter as if he is disposing the case by the Asst. Consolidation Officer, which empowers the Asst. Consolidation Officer to dispose objection on consent under Section 10 of the O.C.H. & P.F.L. Act? (VI) Whether the petitioner is at liberty to take a fresh plea in a writ petition though on the face of the record, there is no such plea at the court of first instance or at the appellate stage or the revisional stage that the land originally was recorded in the sabik settlement in the name of predecessor of interest of the petitioner and if at all such plea is allowed to be taken what is consequence of such plea?

2. The petitioner, being the appellant in Appeal Case No.87/83 of the court of the Deputy Director, Consolidation, Sambalpur has assailed the order passed by the learned Joint Commissioner Settlement and Consolidation, Sambalpur in Consolidation Revision Case No.31/1990 decided on 07.08.2003 whereby the learned Joint Commissioner set-aside the reversing order passed by the learned Deputy Director, Consolidation, Sambalpur. The Deputy Director, Consolidation has directed on the basis of an affidavit filed by the predecessor of interest of the contesting opposite parties before him to record the land in question in the name of the present petitioner. The subject matter of the dispute is L.R. plot no.3656 measuring Ac.0.04 dec. appertaining to L.R. holding No.339 of village Attabira in the district of Bargarh. It corresponds to a portion of plot no.3456 under the major settlement holding No.706. The land was recorded in the sabik measure settlement in the name of Narasingha Mishra. It is the case of revision petitioner before the learned Commissioner that in the year, 1973 he permitted the O.Ps. and his brother Sajan Kumar, on their request, for construction of one shop room to operate a medical store. The said lease was to determine after a lapse of ten years i.e. by the year 1983. The consolidation operation started and the notification under Section

3(1) of the Act was published in the year 1978-79. In the said consolidation operation, the Land Registered was published under Section 9(1) of the Act. Though, the suit land was recorded in the name of late Narasingha Mishra there was a note of forcible possession in favour of the petitioner in the remarks column. Therefore, Narasingha Mishra filed objection case bearing No.1737/321 to delete the remarks of possessions of the petitioner from the record. The objection case was disposed of by the Consolidation Officer. Though, the Consolidation Officer found that Narasingha Mishra has title and ownership with respect to the land in question, he did not pass any order for deletion of the note of forcible possession from the record of rights. No objection case was initiated by the present petitioner before the Consolidation Authority but he being aggrieved by order passed by the Consolidation Officer recording the suit land in the name of the late Narasingha Mishra and not deleting the name of the present petitioner from the remarks column, has filed an appeal before the Deputy Director, Consolidation, Sambalpur. It is argued before the Commissioner that during pendency of the said appeal an affidavit was fraudulently obtained and it was produced before the Appellate Authority and on the basis of the said affidavit, the appellate court allowed the appeal and declared the title over the suit land in favour the petitioner, under the colour of agreement/compromise. This order passed by the learned Deputy Director, Consolidation, Sambalpur on 27.10.1984 was challenged before the Joint Commissioner, Settlement Consolidation, Sambalpur in the year, 1990 i.e. approximately after five years of pronouncing of judgment. The first issue that comes to be decided in this case is whether learned Joint Commissioner was correct in condoning the delay of five years in filing the revision application before the learned Commissioner. Firstly, this Court takes note of the judgment pronounced by the Hon'ble High Court in the case of ***Collector Land Acquisition Anantnag vs. Mst. Katiji,*** AIR 1987 Supreme Court 1353, wherein the Supreme Court has given the following directions to the lower court for deciding the issue of condonation of delay:

> 1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
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> 2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
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> 3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.
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> 4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
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> 5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

> 6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

3. The learned counsel for the contesting opposite parties also relies upon the judgment rendered by the Single Bench of this Court in the Case of ***Prakash Chandra Das and others vs. Labour Commissioner and Another***, 1997 (II) OLR 478, wherein, this Court took into consideration the judgments of the Hon'ble Supreme Court in the cases of ***State of Haryana vs. Chandra Mani and others***, AIR 1996 SC 1623 and ***Urban Improvement Trust vs. Poonam Chand***, AIR 1997 Rasjasthan 134 and laid down the following principles :

> (i) It is not necessary that the applicant has to explain whole of the period between the date of the judgment till the date of filing the appeal. It is sufficient that the applicant would explain the delay caused by the period between the last of the dates of limitation and the date on which the appeal is actually filed.
>
> (ii) What constitute sufficient cause cannot be laid down by hard and fase rules and would depend upon the fact and circumstance of each case.
>
> (iii) The expression "sufficient cause" should receive a liberal construction so as to advance the cause of substantial justice. If the refusal to condone the delay results in grave miscarriage of justice, it would be ground to condone the delay.
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> (iv) A party should not be deprived of the protection of Section 5 unless there is want of *bona fides*.
>
> (v) There is no presumption that delay is occasioned deliberately or on account of culpable negligence or *mala fides*.

4. Thus, it is apparent from the aforesaid judgment that a litigant does not prefer an appeal or revision late deliberately. Hence, refusing to condone delay may resulting nipping a meritorious matter at the bud, which is against the General conscience of the Courts in India. The expression sufficient cause receives a liberal construction so as to advance the cause of substantive justice. If refusal to condone the delay results in grave miscarriage of justice, it would be ground to condone the delay and unless it is seen that the party seeking condonation of delay have acted with *mala fide.* Then the presumption of *bona fide* should be raised and delay should be condoned.

5. The learned Joint Commissioner was very much alive to the case of the parties and having heard learned counsel for the present petitioner and the contesting opposite parties has used his discretion to come to the conclusion that delay should be condoned. It is a finding of fact, which is normally not disturbed in a writ in exercise of certiorari jurisdiction. So, this Court is of the opinion that no illegality has been committed by the Joint Commissioner while condoning delay in filing the revision under Section 36 of the Act.

6. The next aspect of the case is the most vital in this case. It is apparent from the record that an appeal was filed by the present petitioner before the Deputy Director, Consolidation, Sambalpur, wherein the late Narasingha Mishra filed an

affidavit *inter alia* stating that the present petitioner was in possession of land in question continuously for a period of twelve years and have duly perfected adverse possession over the suit plot and that he does not claim or shall raise any objection, if any order is made by the Deputy Director, Consolidation, Sambalpur in the aforesaid appeal case to record the title of the said plot in the name of Tarachand Agrawal. Now, the question arises whether such an affidavit is admissible and can be formed basis for deciding a lis. At the outset, learned counsel for the opposite parties contended that affidavit is not a part of pleadings. He also contended that it is not a part of evidence. He drew attention of the Court to Section 1 of the Evidence Act, 1872 and contended that by virtue of Section 1, this Act does not apply to affidavits presented to any court or officer. Hence, it is contended that such affidavit on the basis of which decision was taken by the Deputy Director is not at all admissible as evidence. He also relies upon the two judgments, one of the Supreme Court, another of the Delhi High Court. In the case of ***Smt. Sudha Devi vs. M.P. Narayanan and others***, AIR 1988 Supreme Court 1381, the Hon'ble Supreme Court has held that the affidavits are not included in the definition of evidence in Section 3 of the Evidence Act and can be used as evidence only for sufficient reason court passes an order under Order XIX Rule 1 or 2 of the Code of Civil Procedure. The Hon'ble Supreme Court was in seisin of the matter while considering the admissibility of the statement and rejection thereof on the ground that the witness has not disclosed his concern with the suit property or his relationship with the parties. A document was filed in the shape of an affidavit which shows some relationship of the plaintiff with the witness. The said affidavit was refused to be taken into consideration by the Hon'ble Supreme Court.

7. In another case, the Delhi High Court in the case of ***Prakash Rai v. J.N. Dhar***, AIR 1977 Delhi 73 has taken into consideration the definition of evidence as appearing in Section 3 of the Evidence Act. It is appropriate on my part also to take note of the definition of evidence. It read as follows:

> Definition of 'evidence' has been given in Section 3 of the Indian Evidence Act in the following words:-
>
> (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;
>
> Such statements are called oral evidence:
>
> (2) all documents produced for the inspection of the Court;
> Such documents are called documentary evidence".

8. Interpreting this provision, the Delhi High Court in ***Prakash Rai v. J.N. Dhar*** (supra) has held that as regards the affidavit, copies of such document cannot be taken in evidence. Affidavits are not included in its definition of appearing Section 3 of the Indian Evidence Act. The Delhi High Court further held that on the contrary, affidavit has been excluded by virtue of Section 1 of the Indian Evidence Act. Therefore, affidavit can be taken in evidence under any provisions of this statute. However, there are some exceptions of the aforesaid rule as argued by Mr.

Mahakuda, the learned counsel for the petitioner. He places a lot of reliance on the Full Bench judgment of the Allahabad High Court in the case of ***Ajodhya Prasad Bhargava v. Bhawani Shanker Bhargava***, AIR 1957 Allahabad 1. Considering the two questions, the Full Bench has referred it to the Bench of lesser forum. The two questions are re-produced as follows:

> (1) Where in a civil suit a party produces documents containing admissions by his opponent, which documents are admitted by the opponent's counsel, and the opponent enters the witness-box, is it obligatory on the party who produced those documents to draw in cross-examination the attention of the opponent to the said admissions before he can be permitted to use them for the purpose of contradicting the opponent?
>
> (2) Can be party producing these documents be permitted under Section 21, Evidence Act, to use them as substantive evidence in the case without drawing in cross-examination the attention of the opponent to those admissions?

9. Relying on the paragraph 57 of the said judgment, the learned counsel for the petitioner submits that an admission is concession or voluntary acknowledgment made by a party or someone identified with him in legal interest of the existence of certain facts which are in issue or relevant to an issue in the case. The pre-dominate characteristic of this type of evidence consists in its binding character. Having said thusly Hon'ble Allahabad High Court further said that admissions are broadly classified into two categories: (a) judicial admission (b) extra-judicial admission. Judicial admissions are formal admissions made by a party during the proceedings of the case. Extra-judicial admissions are informal admission not appearing on the record of the case. Judicial admissions being made in the case are fully binding on the party that makes them. They constitute a waiver of proof. They can be made foundation of the right of the parties. However, the Full Bench of Allahabad High Court further held that they are concerned with the extra-judicial or informal admissions. They are also, in the opinion that of the Full Bench of Allahabad High Court, binding on the party against whom they are set up. Unlike judicial admissions, however, they are binding only partially and not fully, except in cases where they operate as or have the effect of estoppels in which case again they are fully binding and may constitute the foundation of the rights of the parties. So, the judgment relied upon by Mr. Mahakud is also not supporting his case at hand. Moreover, the question that has referred to the Full Bench is not regarding the extra-judicial admission and whether the same can be made foundation for giving a particular finding by judicial authority. The questions were regarding confronting the same of the witness, who enters the witness-box before proving the same and that has been answered by the Full Bench as follows:

> Question No.1: Where in a civil suit of party produces documents containing admissions by his opponent, which documents are admitted by the opponent's counsel, and the opponent enters the witness box, it is not obligatory on the party who produces those documents to draw in cross-examination the attention of the opponent to the said admissions before he can be permitted to use them for the purpose of contradicting the opponent provided that the admissions are clear & unambiguous but where the statements relied on as admissions are

ambiguous or vague it is obligatory on the party who relies on them to draw in cross-examination the attention of the opponent to the said statements before he can be permitted to use them for the purposes of contradicting the evidence on oath of the opponent.

Question No.2: The party producing these documents can be permitted under Section 21, Evidence Act to use them as substantive evidence in the case without drawing in cross-examination the attention of the opponent to those admissions.

10. In course of argument, different provisions were referred. This Court is inclined to take the relevant provision of Order XIX of the Code. XIX of the Code provides for affidavit, rule 1 provides for power to order any point to be prove by affidavit and rule 2 refers to the power of the court to order attendance of deponent for cross-examination, rule 3 provides for matters, to which affidavit are to be confined. This Court finds it is appropriate to take note of the exact words used in the statute and the same was quoted below:

1. Power to order any point to be proved by affidavit.- Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable:

Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

2. Power to order attendance of deponent for cross-examination.- 2. Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(1) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.

3. Matters to which affidavits shall be confined.- (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted:

Provided that the grounds thereof are stated.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.

11. Thus, a plain reading of Rule 1 under Order XIX of the Code reveals that any court may any time for sufficient reason order that a particular facts or facts may be proved by an affidavit or that the affidavit of any witness may be read at a hearing, on conditions as the court thinks reasonable. So, in order to attract Order XIX and to proof any facts by way of affidavit, two things are required to be satisfied. First is, there must be order to that effect by the court in seisin of the matter and there must be sufficient reasons recorded for that kind of any order. In this case, there is no order by the Deputy Director, Consolidation, Sambalpur to the prove this fact by way of an affidavit. There are no sufficient reasons recorded by the Deputy Director why this fact should be proved by way of an affidavit.

12. So this Order XIX of the Code will not be applicable to the present case and will not come to the rescue of the present petitioner. The learned counsel for the petitioner relies upon the Sections 17, 21 and 58 of the Indian Evidence Act and argues that the affidavit is in fact admission and the fact admitted in this affidavit constitute the best proof of the facts admitted and, therefore, the Deputy Director was correct in upholding the right of the present petitioner and the learned Joint Commissioner was wrong in setting aside the order passed by the Deputy Director. The Section 17 of the aforesaid Act reads as follows:

> "Admission defined.- An admission as a statement, oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned".

13. Thus, this section defines that an admission as a statement oral or documentary or contained in electric form, which suggests any inference as to any fact in issue or relevant fact, which may be made by any person and under the circumstances, thereinafter mentioned.

Section 18 of the aforesaid Act provides for admission made by party to proceeding or his agent.- The statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

Section 21 of the aforesaid Act provides that for proof of admissions against persons making them, and by or on their behalf.- Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:-

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Section 58 of the aforesaid Act provides that facts admitted need not be proof. It read as follows:

> "No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:
>
> Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions".

14. A joint reading of these three sections leads this Court to come to the conclusion that facts which are admitted need not be proved by the opposite party as facts admitted are best proof of the facts in issue. In the case of ***Nagindas Ramdas vs. Dalpatram Ichharam alias Brijram and others*** AIR 1974, SC 471, at paragraph-26, the Hon'ble Apex Court has held that as follows:-

> XXX "Admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong".

15. The Hon'ble Supreme Court has come to conclusion that admissions, if true and clear, are by far the best proof of facts admitted. Admissions in pleading or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiving of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong.

16. Thus, the Hon'ble Supreme Court in the aforesaid case has clearly distinguished the two types of admissions, i.e. judicial admissions and evidentiary admissions. Judicial admissions are made in the pleadings. Evidentiary admissions are made in course of taking of evidence by the Court. While the former is conclusive and binding, the second is not conclusive and binding can be shown to be wrong. In this case, the affidavit filed by the late Narasingha Mishra before the Deputy Director is neither a part of the pleadings nor it is a part of evidence. So by no stretch of imagination by resorting to Sections 17, 21 and 58 of the Evidence Act, a Court can take into consideration affidavit as a pleading or piece of evidence and pronounce of judgment on the basis of the same.

17. Moreover, it is seen that the judgment impugned before the Commissioner passed by the Deputy Director shows that the appeal was allowed on the basis of agreement between the parties. The Order XXIII of the Code provides for withdrawal and adjustment of suit. Rule 1 provides for withdrawal of suit. Rule 1-A provides for transposition of dependants as plaintiff, rule 2 provides for limitation, rule 3 provides for compromise of suit. Rule 3 read as follows:

> **Compromise of suit**.-Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to

> be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit:
>
> Provided that where it is allegedly by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.

18. Thus, a plain reading of the aforesaid provisions, this Court comes to the conclusion that essentially three things need to be complied under this provision. Firstly, there should be a lawfully agreement or compromise between the parties. Secondly, there should be a signed compromise by the parties. Thirdly, the Court on being satisfied comes to the conclusion that compromise or agreement is to his satisfaction and he records the same. In this case, while examining the order passed by the learned Deputy Director, Sambalpur, this Court is of the opinion that the affidavit filed before him does not contain signature of both the parties. Only late Narasingha Mishra filed the affidavit. There is no finding by the Deputy Director, Consolidation that he was satisfied that the parties has compromised. So by resorting to Order XXIII also, the petitioner cannot wriggle out the rigorous of judgment passed by the learned Commissioner. So, this Court is of the opinion that on the basis of the aforesaid discussion and judgment cited, the affidavit is neither a pleading nor a piece of evidence and it cannot be the sole foundation for declaring right of any kind of civil or quasi-judicial or quasi-civil proceeding unless the Order XIX or Order XXIII is attracted. So, this question is answered in favour of the contesting opposite parties and against the petitioner.

19. Now, the question arises whether the petitioner has perfected his title by way of adverse possession. The law relating to adverse possession is no more *res integra*. In order to prove adverse possession, a party must establish that his possession for the statutory period was *nec vi, nec clam, nec precario.* In simple language, the petitioner, in order, to establish that he has perfected title by way of prescription must establish by pleadings and proof the date from which his possession become adverse to the title of the true owner. He is required to plead and prove that he was in open and continuous and peaceful possession of the said land for a period of twelve years, without any disturbance and with a hostile animus to the title of the real owner. Only then, he will succeed, in proving or establishing his title by way of adverse possession. The learned counsels appearing at the bar relies upon the Full Bench judgment of ***Trilochan Dandsena and another vs. State of Orissa and others***, AIR 1995 Orissa 239, wherein the Full Bench of this Court in answering a reference has said that reference to the claim only by using adverse possession without specifying anything more is not sufficient. In this case, the petitioner has not filed any objection before the Consolidation Officer to record his name on the basis of adverse possession. He has not filed any objection to the objection raised by the late Narasingha Mishra to delete the name of the petitioner

from the remarks column having illegal possession over the suit land. For the first time, he raised the plea of adverse possession before the appellate court. That too there is no specific pleading regarding the exact beginning of the adverse possession and other three conditions required for the purpose of determining the case. Moreover, there is absolutely no evidence. The only piece of material that is heavily relied upon by the learned counsel for the petitioner is the affidavit filed by the late Narasingha Mishra, which this Court does not accept as judicial admissions or having any evidentiary evidence. So, this Court is of the opinion that the petitioner has not perfected his title over the property in question by way of adverse possession.

20. Mr. Mahakuda, learned counsel for the petitioner drew the attention of the Court to Section 49 of the O.C.H. & P.F.L. Act, which reads as follows:

> 49. **Powers of subordinate authority to be exercised by a superior**- Where powers are to be exercised or duties are to be performed by any authority under this Act or the rules made thereunder, such powers or duties may also be exercised or performed by any authority superior to it.

21. It is argued by the learned counsel for the petitioner that the Deputy Director while sitting in appeal can exercise the power conferred upon the Asst. Consolidation Officer under Section 10. Sub-section (1) of Section 10 of the Act provides that if such objection relates to right, title, interest in land and is in conformity with law in force dispose of by conciliation among the party shall be disposed of by the Asst. Settlement Officer. Therefore, it was argued that the Deputy Director in purported exercise of power conferred upon the Asst. Consolidation Officer under Section 10 (1) by virtue of Section 49 can pass an order as if there was a compromise between the parties. The law is well settled, when both the parties to an objection case agree to a particular issue, then the Asst. Consolidation Officer has jurisdiction to decide the matter. If the parties do not agree, then the matter is to be referred to the Consolidation Officer for disposal. In this case, Consolidation Officer has decided the matter and matter was carried by the petitioner to the appellate court. So, by no stretch of imagination it can be said by virtue of section 49 of the Act that the Deputy Director while sitting in appeal over an order passed by the Consolidation Officer shall consider a matter and exercise the power conferred by Sub-section (1) of Section 10 of the Act on the Asst. Consolidation Officer. This argument does not appear to be reasonable to me. So I do not accept to the same.

22. The last argument advanced by the learned counsel for the petitioner is that originally the record of right with respect to the land in question was in favour of the predecessor of interest of the present petitioner. In other words, he says that the land was recorded in the name of the predecessor of interest of the present petitioner in the settlement that took place prior to the last major settlement, which is also known as Hamid settlement. But such a plea has neither been taken before the Consolidation Officer nor has been taken before the Deputy Director, nor has been

taken before the Consolidation Commissioner. So, the petitioner cannot take such a plea in a writ before the High Court in exercise of certiorari jurisdiction.

23. For all the reasons discussed above with detail, I do not find any merit in the writ petition. I come to the conclusion that the order passed by the learned Commissioner does not suffer from any illegality requiring interference of this Court.

24. Hence, the writ petition is dismissed being devoid of merit. The findings recorded by the learned Joint Commissioner, Consolidation and Settlement, Sambalpur in Consolidation Revision No.31/90 on dated 07.08.2003 are hereby confirmed. There shall be no orders as to costs.

Writ petition dismissed.

2018 (I) ILR - CUT- 925

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

W. P (C) NO.16255 OF 2017

JENAPUR PRIMARY FISHERMEN CO-OPERATIVE SOCIETY LTD. ……..Petitioner

.Vrs.

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

ODISHA CO-OPERATIVE SOCIETIES RULES, 1965 – Rule 37 – Provisions under – Dispute relates to lease of fishery Sairat source – Writ petition filed by the President of the Society – Whether maintainable – Held, No, Chief Executive of the society is the only officer to sue or to be sued on behalf of the society.

"The provision has been added on 23.04.1997. According to this Rule, the Chief Executive of the society is the only officer to sue or to be sued on behalf of the society. In the instant case, admittedly the President of the Society has filed the present writ petition. There is nothing found from the writ petition that the President has been authorized by the Committee to file this case. The bye-law of the society has been filed and at sub-clause (c) of Clause-27 of the same shows that it is only the Secretary to sue or to be sued. Reading of both resolution, bye-law and the Rules, it is clear that the secretary or now the Chief Executive under the Rules is only authorized to sue or to be sued. None of the provisions of bye-law authorizes the President or the General Body under bye-law or the Rules has even authorized the President to file the present case. It is rather clear that in absence of Secretary, the Assistant Secretary can sue or to be sued." *(Paras 12 & 13)*

Case Laws Relied on and Referred to :-

1. 1997 (II) OLR 106 : Road Transport Organization of India –V- Barunai Powerloom Weavers' Co-operative Society Ltd & Anr.

For Petitioner : Mr.Jatindra Ku. Mohapatra

For Opp. Parties : Miss.S.Ratho, Additional Government Advocate
M/s.Asim Amitav Das, B.K.Parida.
Mr. A.N.Pattanayak, S.APattnaik & M.Panda.

JUDGMENT Date of Hearing:21.03.2018 Date of Judgment:18.05.2018

DR. D.P.CHOUDHURY, J.

Challenge has been made to the order dated 27.07.2017 passed by the Tahasildar, Chandbali, opposite party no.3 and a further prayer has been made in the writ petition to direct the opposite party no.3 to lease out the fishery sairat, namely, "Galia Nadi Bhasani" in favour of the petitioner.

2. The factual matrix leading to filing of the writ petition is that the petitioner-society, being represented by its President, has filed this writ petition stating that the petitioner-society is in possession of the Sairat in question since last fifteen years and always it is being leased out to the society as the members of the society, being fishermen, are benefited from fishery business.

3. Be it stated that, during the current year of 2017-2018, the sairat was placed before the Collector, Bhadrak, opposite party no.1, to fix up the up-set price of the source and the opposite party no.1 has fixed the up-set price of the source at Rs.99,500/-. While the said sairat was being leased out in presence of local officers including the District Fisheries Officer-cum-CEO, FFDA and BFDA, Bhadrak, opposite party no.2, on the recommendation dated 9.3.2017 of the opposite party no.2 to the opposite party no.3, it was decided to lease out the sairat in favour of the petitioner-society and accordingly, a letter was issued on 19.5.2017 by the opposite party no.3.

4. But, later on under the instruction of the opposite party no.4, the opposite party no.2 informed on 21.4.2017 to lease out the sairat in favour of the petitioner and opposite party no.4 by dividing the same into two parts, which is challenged in this writ petition. Since the petitioner-society has already been leased out the sairat vide order dated 19.5.2017 passed by the opposite party no.3, any subsequent decision is not only illegal but also arbitrary and mala fide. So, the writ petition is filed to quash the order dated 27.07.2017 passed by the opposite party no.3 under which final decision was taken to lease the sairat in question in favour of the petitioner and the opposite party no.4 by dividing it into two parts with a further direction to consider the earlier decision of the opposite party no.3 by leasing out the sairat in favour of the petitioner-society for the year 2017-2018.

SUBMISSIONS

5. Mr.Mohapatra, learned counsel for the petitioner submitted that the members of the petitioner-society depend only on the fishery sairat in question and they have been getting the lease of the same for the last fifteen years and doing the prawn culture there. Since the fishermen of the petitioner-society are maintaining

their livelihood basing on the lease and opposite party no.4 was never in possession of the same, the impugned decision for leasing out the same in favour of the petitioner-society and opposite party no.4 by dividing it into two parts is illegal.

6. Mr.Mohapatra, learned counsel for the petitioner further submitted that when the decision was taken in the statutory meeting to lease out the sairat in favour of the petitioner and accordingly action was taken, the suggestion by the opposite party no.2 to bifurcate the sairat into two parts in favour of the petitioner and opposite party no.4 would amount to review of the earlier decision without the knowledge of the petitioner. Without cancellation of the earlier decision, the decision taken later on suffers from the principles of natural justice of the petitioner.

7. Mr.Mohapatra, learned counsel for the petitioner further contended that if the fishery sairat is bifurcated between the petitioner and the opposite party no.4, it would create law and order problem because the opposite party no.4 was never in possession of the fishery sairat. So, he submitted to quash the impugned order dated 27.7.2017 and to affirm the lease of the fishry sairat in favour of the petitioner-society basing on the recommendation of the opposite party no.2 made on 9.3.2017 and the order passed by the opposite party no.3 on 19.5.2017.

8. Mr.Das, learned counsel for the opposite party no.4, relying on the counter affidavit dated 18.8.2017, submitted that the petitioner has no locus standi to file the present writ petition and the same is not maintainable as the petitioner is not authorized to file the writ petition on behalf of the petitioner-society. The petitioner has no any absolute right of the fishery sairat in question because the creation of lease over the same in favour of the petitioner in every year does not create any legal right over the same. He further submitted that only on 28.03.2017, notice was issued to hold a Tahasil Level Committee meeting for settlement of Sairat source and on the same day, there was a meeting and the name of the present opposite party no.4 was recommended for carrying out business in the Sairat in question. So, after the necessary formalities are over, the decision was taken on 27.7.2017 to lease out the Sairat in favour of the petitioner for a bigger portion of the river to the extent of 4.5 Kms (from Dakeswari Jora Muhan to Nadi Muhan) and the opposite party no.4 was leased out over an area of 1.5 Kms (Routray Kuro Khola Joro Muhan to Dakeswari Joro) of the river. So, such lease of the Sairat is neither illegal nor improper.

9. Miss.Ratho, learned Additional Government Advocate, relying on the counter affidavit filed by the opposite parties 1 and 3, submitted that on 9.3.2017, the opposite party no.3 recommended for settlement of the Sairat in favour of the petitioner-society but later on, a joint meeting between the opposite party no.2 and 3 in presence of members of different PFCs conducted on 19.4.2017 and all the recommendations were finalized. Thereafter, the petitioner was asked to deposit a sum of Rs.1,09,450/- but the same was not deposited. In the meantime, the opposite party no.2 again recommended for leasing out 4.5 Kms in favour of the petitioner and 1.5 Kms in favour of the opposite party no.4 from the Sairat in question as the

petitioner did not deposit the money whereas the opposite party no.4 deposited the money and took-over the possession of the Sairat between Dakeswari Jora to Nadi Muhan. Relying on the counter affidavit of opposite party no.2 dated 28.11.2017, she further submitted that the petitioner and the opposite party no.4 had applied for grant of right to catch fish from the Sairat but in view of the fact that the Sairat is a very long one, in the joint meeting, it was decided to share the Sairat between the petitioner and the opposite party no.4. Accordingly, the decision was taken on 27.7.2017 and the same was very open, transparent, legal and valid. Hence, the petitioner has no locus standi to challenge the same.

POINT FOR DETERMINATION

10. The point for determination is as to whether the petitioner being President of said society has locus standi to file the present writ petition?

DISCUSSIONS

11. Learned counsel for the opposite parties have very much challenged that the petitioner has no locus standi to file the present writ petition as the Chief Executive Officer of the society can only file the writ petition under Rule 37 of the Odisha Co-operative Societies Rules, 1965 (hereinafter called as "the Rules"). It is brought to the notice of this Court to the definition of "Chief Executive" defined under sub-rule (n) of Rule-2 of the Rules. So, the President being not statutorily empowered to file the writ petition, the same is not maintainable. Making rival submissions, learned counsel for the petitioner submitted that the General Body meeting of the society has authorized the petitioner, being the President of the society to file the present writ petition before this Court as there was no Chief Executive available.

12. In order to solve the first dispute, Rule 37 of the Rules is quoted below for reference:

> *"37. The Chief Executive. - The Chief Executive of the Society shall be the officer to sue or to be sued on behalf of the Society and all bonds in favour of the Society shall be in the name of the Chief Executive."*

This provision has been added on 23.04.1997. According to this Rule, the Chief Executive of the society is the only officer to sue or to be sued on behalf of the society. In the instant case, admittedly the President of the Society has filed the present writ petition. There is nothing found from the writ petition that the President has been authorized by the Committee to file this case. In course of hearing of the case, the petitioner filed the copy of the resolution of the General Body Meeting of the society vide Annexure-6 series and on going through the same, it appears that a meeting was held on 21.04.2017 under the presidentship of the present petitioner. It further appears that the Secretary, who is the Chief Executive of the society since has not been cooperating in the day-to-day administration of the society, the General Body authorized the Assistant Secretary-Prafulla Pradhan to exercise the duty of secretary under the orders of presidentship of the society. There is another meeting

held on 21.5.2017 where the meeting was presided over by the President of the society and the cooperative society expressed its dissatisfaction upon the suspended secretary and finally on 30.05.2017, in absence of Secretary, the Assistant Secretary-Prafulla Pradhan was allowed to work as Secretary. The present writ petition was filed on 8.8.2017.

13. The bye-law of the society has been filed and at sub-clause (c) of Clause-27 of the same shows that it is only the Secretary to sue or to be sued. Reading of both resolution, bye-law and the Rules, it is clear that the secretary or now the Chief Executive under the Rules is only authorized to sue or to be sued. None of the provisions of bye-law authorizes the President or the General Body under bye-law or the Rules has even authorized the President to file the present case. It is rather clear that in absence of secretary, the Assistant Secretary can sue or to be sued. This view has been taken by this Court in the decision reported in the case of ***Road Transport Organization of India –V- Barunai Powerloom Weavers' Co-operative Society Limited and another;*** **1997 (II) OLR 106** where His Lordship, at paragraph-16, has observed in the following manner:

> *"16. The last limb of submission of defendant No. 1 is that the suit was not maintainable since it was filed by the Assistant Secretary of the plaintiff-society and not the Secretary. Rule 37 of the Orissa Co-operative Societies Rules, 1965 says that Secretary shall be the officer to sue or to be sued on behalf of the society. The word "Secretary" defined under Rule 2(n) of the said Rules means a person who subject to the provision of the bye-laws, is entrusted with the management of the affairs of a society and includes a member of a committee or any other person discharging the duties of a Secretary by whatever name called. It is in the evidence of P.W.1 that since the post of Secretary was vacant at the relevant time, he as the Assistant Secretary filed the suit on being authorised by the Managing Director and the Board. In view of such evidence, the contention of defendant No. 1, as aforesaid merits no consideration."*

14. With due regard to the aforesaid decision, it appears this Court, in the aforesaid case, has observed that in view of the clause in bye-law, when the post of Secretary was vacant, the Assistant Secretary can file the suit.

15. Now, adverting to the present case, it appears that when the proceeding under the bye-law has authorized the assistant Secretary-Prafulla Pradhan to work as Secretary, who is authorized to perform his duty as Chief Executive and there is no specific direction by the General Body authorizing the present petitioner to represent the society to file the writ petition pertaining to the Sairat in question, the present President has no locus standi to file the writ petition. Hence, the same is not maintainable being filed by the President of the society. The point is answered accordingly.

CONCLUSION

16. In the writ petition, it has been prayed to quash the order dated 27.07.2017 passed in Sairat Case No.68/2017-18 and a further prayer has been made to direct

the opposite party no.3 to lease out the Sairat in question in favour of the petitioner as per order dated 19.05.2017.

17. In terms of the aforesaid discussion, when the petitioner has no locus standi to file the present writ petition, the relief to be granted in this case sans merit. On the other hand, the writ petition is dismissed to be not maintainable.

Writ petition dismissed.

2018 (I) ILR - CUT- 930

DR. A.K. RATH, J.

S.A. NO.142 OF 1998

RAGHULAL KARNANI .....Appellant

.Vrs.

M/s. CARRY CO., 26, ZAKARIA STREET, CALCUTTA & ANR. .....Respondents

(A) CARRIERS ACT, 1865 – Section 10 – Provision under – Notice of loss or injury before institution of suit, whether mandatory? – Held, yes. – No suit shall be instituted unless notice in writing of the loss or injury has been given to the carrier before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff. (Paras 8 & 9)

(B) CODE OF CIVIL PROCEDURE, 1908 – Order III Rules 1 and 2 – The question as to whether and when the Power of Attorney Holder can depose on behalf of the Principal? – Principles – Indicated.

(Para 12)

Case Laws Relied on and Referred to :-

1. AIR 2005 SC 439 : Janki Vashdeo Bhojwani & Anr. v. Indusind Bank Ltd. & Ors.

For Appellant : Mr. Budhiram Das, Advocate
For Respondents : None

JUDGMENT Date of Hearing :24.04.2018 Date of Judgment:02.05.2018

DR. A.K. RATH, J.

Plaintiff is the appellant against a confirming judgment in a suit for realization of Rs.10,148.04 paise towards non-delivery of certain articles by the defendant no.1-carrier.

02. The case of the plaintiff is that he is the authorized dealer of M/s.Mysore Sales International Ltd., Calcutta, defendant no.2. The defendant no.2 consigned certain articles amounting to Rs.7,659.04 paise through the defendant no.1 at

Cuttack. Thewaybill and invoice were sent in usual course delivered to the Bank of Baroda, Balasore with the instruction to delivery the same to the consignee-plaintiff at Balasore. Defendant no.1-carrier failed to deliver the goods to the plaintiff at Balasore. With this factual scenario, he instituted the suit for realization of the value of goods along with interest.

03. Defendant no.1 filed a written statement stating inter aliat that the plaintiff had received the consignment and in token thereof, he executed an indemnity bond. As a matter of practice, without submitting the consignee's copy of consignment, the consignee is to receive the goods from the carrier by executing an indemnity bond and subsequently they collect the bond submitting the consignment note. No notice under Sec.10 of the Carriers Act, 1865 had been issued before institution of the suit.

04. On the interse pleadings of the parties, learned trial court struck seven issues. Parties led evidence, oral and documentary, to substantiate their cases. Learned trial court dismissed the suit with the finding that notice under Sec.10 of the Carriers Act, 1865 had not been issued. The suit was not maintainable. Further the plaintiff had received the consignment. The unsuccessful plaintiffs filed S.J.Money Appeal No.8 of 1994 before the learned District Judge, Balasore-Bhadrak, Balasore, which was eventually dismissed.

05. The second appeal was admitted on the following substantial question of law.

> "Whether the suit is barred for non-issuance of notice under Section 10 of the Carriers Act and whether the court below erred in law in accepting documents not properly proved ?"

06. Heard Mr. Budhiram Das, learned counsel, on behalf of Mr. N.C. Pati, learned counsel for the appellant. None appeared for the respondents.

07. Mr. Das, learned counsel for the appellant, submitted that the courts below committed a manifest illegality in holding that notice under Sec.10 of the Carriers Act, 1865 had not been issued before filing of the suit. The notice had been exhibited as Ext.4. The plaintiff sustained a loss of Rs.10,148.04 paise towards non-delivery of certain articles.

08. Sec.10 of the Carriers Act, 1865, which is the hub of the issue, reads thus:

> "10. Notice of loss or injury to be given within six months.—No suit shall be instituted against a common carrier for the loss of, or injury to, [goods (including containers, pallets or similar article of transport used to consolidate goods) entrusted to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff."

09. On a bare perusal of Sec.10 of the Carriers Act, 1865, it is evident that no suit shall be instituted unless notice in writing of the loss or injury has been given to the carrier before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff. The same is mandatory

requirement. Notice under Sec.10 of the Carriers Act, 1865 is sine qua non for institution of the suit. For non-compliance of Sec.10 of the Carriers Act, 1865, the suit is bound to fail.

10. The plaintiff asserts that the articles were sent from Cuttack on 30.9.82 from the office of defendant no.2 at Cuttack. The suit was instituted on 23.9.1985. There is no pleading with regard to the time when the loss or injury first came to the knowledge of the plaintiff. The photostat copy of the alleged notice had been exhibited as Ext.4. Learned appellate court on a scrutiny of the Advocate's notice held that there is no date below the signature of the counsel. The date which is put on the upper portion of right side of the first page is apparently and visibly antedated.

Though the notice is a photostat copy, the date has been typed out. The inescapable conclusion is that no notice under Sec.10 of the Carriers Act, 1865 had been issued before institution of the suit.

11. Plaintiff had signed the indemnity bond. He had not been examined as a witness. P.W.1 was the power of attorney holder of the plaintiff.

12. The apex Court in the case of ***Janki Vashdeo Bhojwani and another v. Indusind Bank Ltd. and others*****, AIR 2005 SC 439**, held that Order III Rules 1 and 2 C.P.C. empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III Rules 1 and 2 C.P.C. confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined. The substantial question of law is answered accordingly.

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

Appeal dismissed.

2018 (I) ILR - CUT- 932

Dr. A.K. RATH, J.

S.A. NO. 304 OF 1987

JADUNATH BISWAL (DEAD) THROUGH HIS L .RS & ORS. ……..Appellants

.Vrs.

LAXMAN ALIAS DURGA BISWAL& ORS. ……Respondents

(A) SALE – Meaning and Definition – What are the ingredients to determine that the sale has been completed – Indicated.

"In order to constitute a sale, there must be a transfer of ownership from one person to another, i.e., transfer of all rights and interests in the properties which are possessed by that person are transferred by him to another person. The transferor cannot retain any part of his interest or right in that property or else it would not be a sale. The definition further says that the transfer of ownership has to be for a "price paid or promised or part-paid and part-promised". Price thus constitutes an essential ingredient of the transaction of sale. The words "price paid or promised or part-paid and part-promised" indicates that actual payment of whole of the price at the time of the execution of sale deed is not sine qua non to the completion of the sale. Even if the whole of the price is not paid but the document is executed and thereafter registered, if the property is of the value of more than Rs. 100/-, the sale would be complete. It is further held that the real test is the intention of the parties. In order to constitute a "sale", the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either in praesenti or in future. The intention is to be gathered from the recital in the sale deed, conduct of the parties and the evidence on record." "Vidhyadhar v. Mankikrao and another, AIR 1999 SC 1441 followed".

(Paras 9 & 11)

(B) CIVIL SUIT – Plaintiff prays for recovery of Possession and permanent injunction as against the suit land purchased by him – Defendants challenge the sale on the ground that consideration money has not been paid and that the contents of the deed were not read over and explained to the vendors – Vendors not parties to the suit – Held, defendants being not the vendors can not challenge the sale deeds. (Para 12)

Case Laws Relied on and Referred to :-

1. 1971 (2) C.W.R.992 : Suna Gaudani v. Maheswar Sabat
2. AIR 1999 SC 1441 : Vidhyadhar v. Mankikrao & Anr.
3. AIR 1986 Orissa 196 : Umakanta Das & Anr. v. Pradip Kumar Ray & Ors.

For Appellants : Mr.Amiya Kumar Mishra,
For Respondents : None

JUDGMENT Date of Hearing :19.04.2018 & Date of Judgment:4.05.2018

Dr. A.K. RATH, J.

This is a plaintiffs' appeal against a confirming judgment. The suit was for recovery of possession and permanent injunction.

2. The case of the plaintiffs is that M.S.plot no.323 corresponding to C.S.plot no.230 and a part of plot no.229 situate on the adjacent south of plot no.324. C.S.plot no.230 had been jointly recorded in the name of Kali Mohanty alias Kuli Mohanty and Panu Biswal, father of defendant nos.1 to 4. Kali had built up a residential house on the northern portion of plot no.230. After his death, his three daughters, namely, Buli, Kaushalya and Saranamani succeeded the property. They sold an area of Ac.0.01 dec. appertaining to plot no.230 in favour of the plaintiffs by

means of a registered sale deed dated 12.7.1966 and delivered possession. After purchase, the plaintiffs amalgamated the land with their homestead and constructed a cowshed thereon. In the year 1967, father of the defendants filed O.S.No.15/67-I, which was dismissed. Subsequently, Buli, one of the daughters of Kali, transferred ½ dec. of land from the said plot to the plaintiffs by means of a registered sale deed dated 24.8.1970 and delivered possession. Thereafter, the plaintiffs amalgamated the purchased land with their residential plot and mutated the same. On 9.11.77, the defendants disturbed the possession of the plaintiffs and removed the fences. With this factual scenario, they instituted suit seeking the reliefs mentioned supra.

3. The defendants filed written statement denying the assertions made in the plaint. According to the defendants, recording of plot no.320 in the name of Kali was wrong. He had no title over the same. Kali was not in possession of any portion of plot no.320. He had not constructed any house over that portion. The daughters of Kali were not in possession of any portion of plot no.230. The sale deeds executed in favour of the plaintiffs are illegal and inoperative. The suit land forms a part of defendants 'homestead'. They are in possession of the same since the time of their fore-fathers. They have denied the cutting of fences etc.

4. On the inter se pleadings of the parties, learned trial court framed eight issues. Parties led evidence, oral and documentary, to substantiate their cases. Learned trial court dismissed the suit with the finding that Kali and his daughters had no title and possession over the suit plot. No consideration was passed under Exts.1 & 2. The vendors were illiterate ladies. The plaintiffs had not satisfactorily discharged the onus lay on them. Due execution of deeds had not been proved by the plaintiffs. The sale deeds are not legal and valid. The plaintiffs had not acquired title over the suit land. Felt aggrieved, the plaintiffs filed M.A.No.36 of 1983-I/O.S.No.3 of 1984-I before the learned Subordinate Judge, Balasore. Learned appellate court held that Kali had title over the suit land. The suit property is the joint property of Kali and Panu. The defendants have right to challenge the passing of consideration because of existence of their title over the suit land. No consideration was passed. It concurred with the finding of the learned trial court that the plaintiffs had failed to prove due execution of sale deeds. Held so, it dismissed the appeal. It is apt to state here that during pendency of the appeal, appellants 1 and 3 died, whereafter their legal representatives have been brought on record. Respondent no.1 died and his name has been deleted.

5. The Second Appeal was admitted on the substantial question of law enumerated in ground no.1 of the appeal memo. The same is:-

> "1. For that Kali Mohanty and Panu Biswal not being coparceners but co-owners in respect of the suit plot the settle position of law is that there is no unity of title to the suit plot and as such on the death of Kali his three daughters being title holders in respect of the half of the suit plot are entitled to alienate the same under Exts.1 and 2 to the plaintiffs and the defendants being successors of late Panu are not entitled to challenge Exts.1 and 2."

6. Heard Mr.Amiya Kumar Mishra, learned Advocate for the appellants. None appeared for the respondents.

7. Mr.Mishra, learned Advocate for the appellants submitted that Buli, Kaushalya and Saranamani, the daughters of Kali, alienated Ac.0.01 dec. of land in favour of the plaintiffs by means of a registered sale deed dated 12.7.1966, Ext.1 for a valid consideration. Thereafter, Buli, one of the daughters of Kali, had alienated ½ dec. of land in favour of the plaintiffs by means of a registered sale deed dated 24.8.1970, Ext.2, for a valid consideration. Learned appellate court held that Kali had a title over the suit property, but then the court below committed a manifest illegality in holding that no consideration was passed and the sale deeds had not been duly executed. The defendants had no title over the suit property. They cannot assail the sale deeds. To buttress the submission, he placed reliance on a decision of this Court in the case of Suna Gaudani v. Maheswar Sabat, 1971 (2) C.W.R.992.

8. Learned appellate court held that Kali had title over the suit land. The plaintiffs assert that after death of Kali, her three daughters executed a sale deed in respect Ac.0.01 dec. of land in favour of the plaintiffs by means of a registered sale deed dated 12.7.66, Ext.1 for valid consideration and thereafter delivered possession. Buli, another daughter of Kali, sold ½ dec. of land to the plaintiffs by means of a registered sale deed dated 24.8.1970, Ext.2 for valid consideration. Thus, alienation made by the daughters of Kali is perfectly legal and valid. The daughters of Kali were not parties to the suit.

9. In Vidhyadhar v. Mankikrao and another, AIR 1999 SC 1441, the apex Court held that in order to constitute a sale, there must be a transfer of ownership from one person to another, i.e., transfer of all rights and interests in the properties which are possessed by that person are transferred by him to another person. The transferor cannot retain any part of his interest or right in that property or else it would not be a sale. The definition further says that the transfer of ownership has to be for a "price paid or promised or part-paid and part-promised".Price thus constitutes an essential ingredient of the transaction of sale. The words "price paid or promised or part-paid and part-promised" indicate that actual payment of whole of the price at the time of the execution of sale deed is not sine qua non to the completion of the sale. Even if the whole of the price is not paid but the document is executed and thereafter registered, if the property is of the value of more than Rs. 100/-, the sale would be complete. It is further held that the real test is the intention of the parties. In order to constitute a "sale", the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either in praesenti or in future. The intention is to be gathered from the recital in the sale deed, conduct of the parties and the evidence on record.

10. The question does arise as to whether the defendants can assail the sale deeds on the ground of non-passing of consideration? The Patna High Court in Mt.Akli v. Mt.Daho and others, A.I.R. 1928, Patna 44, held:

> "It is well established that the passing of consideration cannot be challenged except by parties to the transaction or by those who claim through those parties. It was, therefore, not open to the defendant to question the passing of consideration until the defendant established some sort of title."

The same view was reiterated by this Court in Sudhakar Sahu v. Achutananda Patel and others, I.L.R. 1966 Cuttack, 839 and Suna Gaudani (supra).

11. In Umakanta Das and another v. Pradip Kumar Ray and others, AIR 1986 Orissa 196, this Court held that if the term in the sale deed is not ambiguous then any external aid to find out the true intention of the parties cannot be availed of and the narration in the document would be the sole determining feature. If the intention of the parties is clear as found from the recitals, passing of title is in presenti and not kept in abeyance till full payment of consideration.

12. As held above, the vendors have not assailed the sale deeds. They are not parties to the suit. In view of the same, the defendants cannot challenge the sale deeds on the ground that the contents of the deeds were not read over and explained to the vendors. Moreover, the learned trial court in paragraph-6 of the judgment came to hold that "Of Course, Ext.1 reveals that there is endorsement of the scribe at the bottom of the sale deed to the effect that the Vendors executed the deed by expressing that the contents were correct being read over". The judgment suffers from internal inconsistencies. In view of the same, the conclusion of the courts below that there was no due execution of the sale deeds is per verse. The substantial question of law is answered accordingly.

13. A priori, the impugned judgments are set aside. Consequently, the suit is decreed. Appeal allowed.

2018 (I) ILR - CUT- 936

D. DASH, J.

C.M.P. NO. 301 OF 2018

GHANASHYAM PRADHAN & ORS. .....Petitioners.

.Vrs.

RAM PRATAP KHERIA .....Opp. party.

(A) CODE OF CIVIL PROCEDURE, 1908 – Section 36 – Execution proceeding – Suit filed in 1983 and decreed in 1998 – Execution proceeding filed in 1999 – Judgment debtors filed petition under section 47 of the Code questioning the execution of the decree – Failed – Judgment debtors thereafter have been filing several petitions one after another, before the executing court and approaching the next higher forum on some plea or other to thwart the execution of that decree which is not at all permissible in the eye of law – Held, a judgment

debtor is not allowed to raise pleas, in piecemeal in phase manner according to his own sweet will and desire in an execution proceeding in saying that the decree is not executable. (Paras 11 &12)

(B) EXECUTION PROCEEDING – Procedure – Procedural safeguard is an ingrained facet of fair play in action to sub serve the legal right but not to extinguish it – The litigation between the parties has been going on for more than three and half decades by now – The decree holder having levied the execution proceeding on 03.02.1999, is yet to receive the fruit of the decree through the court of law – Held, the diabolical plans of the judgment debtors to deny the decree holder the fruits of the decree is to be discouraged as those come to stand on the way of administration of justice and shake the confidence of the citizens on this institution.

"The faith of the people is the saviour and succour for the sustenance of the rule of law and any weakening link in this regard would reap apart the edifice of justice and cause disillusionment to the people in the efficacy of law. The time has come for the courts of law to be pragmatic but not pedantic or rigmarole. Under the guise of purely technical mistake which has nothing to do with any right of the judgment debtors, the diabolical plans of the judgment debtors to deny the decree holder the fruits of the decree obtained by him is to be discouraged as those come to stand on the way of administration of justice and shake the confidence of the citizens on this institution." *(Para 15)*

Case Laws Relied on and Referred to :-

1. AIR 2004 SC 904 : Rabinder Kaur Vrs. Ashok Kumar.
2. AIR 1988 Orissa 9 : Biswanth Vrs. Smt. Uttara Bewa.
3. AIR 1997 Orissa 135 : Chloride India Ltd. Vrs. District Judge, Puri .
4. AIR 1955 Orissa 94 : Dologobinda Sahu vrs. Chakradhar Mohapatra and Ors.
5. 70 (1990) CLR 749 : Tirthananda Jena vrs. Bairagi Tripathy.
6. 2013 (II) CLR (SC) 238 : Satyawati Vrs. Rajinder Singh.
7. AIR 1972 SC 1371 : Bhavan Vaja Vrs. Solanki Hanuji .

For the petitioners : M/s. Banshidhar Baug,M.R.Baug, G.R.Sahoo, P.C.P.Das, R.R. Baug,
For the opp. Party : M/s. Sandipani Misra, A.Kejriwal

JUDGMENT Date of hearing : 04.04.2018 Date of judgment: 02.05.2018

D.DASH, J.

The petitioners by filing this application have invoked the jurisdiction of this Court under Article 227 of the Constitution in impeaching the direction given by the learned Senior Civil Judge, Bhubaneswar to the salaried amin by correcting the name of the mouza of the land in question which is the subject matter of the Execution Case No. 109 of 1999.

2. The litigation between the parties has been going on for more than three and half decades by now. The opposite party as the plaintiff having filed the suit i.e. O.S. NO. 59 of 1983 on 20.02.1983, it stood decreed by judgment and decree dated

23.12.1998 and 23.01.1999 respectively. The decree holder who is the opposite party here having levied the execution proceeding on 03.02.1999, is yet to receive the fruit of the decree through the court of law. This shows that indeed the difficulties for the decree-holder in real and practical sense has commenced after getting a decree attaining finality being tested in first appeal and after withdrawal of the second appeal about nine years back.

3. At this juncture, it is felt apposite to have a quick run through the facts relating to the long journey that the lis has undertaken which would also throw light as to how and for what reason, the execution proceeding has not been culminated despite lapse of more than nineteen years, few months left to reach two decades, providing justification to the general impression of the litigant public that the miseries start after obtaining the decree and its only few fortunate decree holders who actually enjoy the real fruit of the decree during their life time.

The opposite party as the plaintiff filed a suit in the trial court i.e. O.S. No. 59 of 1983 for declaration of his right, title and interest over the suit schedule 'B' and 'C' property and for eviction of the petitioner-defendant nos. 1 to 3 from the property described in schedule-'B' with other ancillary reliefs. The petitioners defended the suit by asserting in the written statement that they have purchased the property described in Schedule-'B' for valuable consideration by registered sale deeds and as such are the owners of the same. An alternative plea had also been taken as regards acquisition of the title over the said suit property by way of adverse possession. The suit standing decreed; the opposite party as the decree holder shortly thereafter initiated the execution proceeding which was numbered as Execution Case no. 109 of 1999. Shortly thereafter, the petitioner-defendants (judgment debtors) being aggrieved by the judgment and decree passed by the trial court in favour of the opposite party, carried the first appeal under section 96 of the Code of Civil Procedure (for short, Code) before the court of District Judge, Khurda at Bhubaneswar which stood numbered as T.A. no. 8/7 of 2002/1999. In the said appeal the ground of questioning the judgment and decree was the non-consideration of the alternative case projected by the petitioner-defendants to have acquired the right, title and interest by way of adverse possession. They claimed that having remained in possession of the property for upward of the prescribed period exercising the rights as owners by denying the title of the true owner to the knowledge of all including the true owner, when they have acquired right, title and interest over the said suit property, that had not been duly considered by the trial court. The first appeal did yield no fruitful result to them. Then questioning the judgment and decree passed in the said first appeal confirming the judgment and decree passed by the trial court, the petitioners further approached this Court by filing an appeal under section 100 of the Code standing numbered as R.S.A. no. 118 of 2002. During pendency of the appeal, the opposite party-plaintiff filed a petition for appointment of receiver in respect of the properties involved in the suit. The court appointed petitioner no.1-defendant no.1 as the receiver in so far as the schedule-'B' property is concerned and he was accordingly, directed to deposit the

rent in the court. For making assessment of fair market rent, the local Tahasildar was directed to demarcate the said land under schedule-'B'. The Tahasildar then reported that he was not allowed by defendant nos. 1 to 3 to demarcate. So he was again directed to do so. But then also he could not do so because of attributing various causes posed by the defendant nos. 1 to 3 standing on the way and on 13.10.2009 he filed an affidavit to that effect.

4. When the matter stood thus, on the application of the defendant nos. 1 to 3 (appellants therein), the second appeal stood dismissed as withdrawn on 29.10.2009.

Thereafter, the petitioners as the judgment debtors objected to the execution of the decree on the ground of non-existence of the property involved in the suit and as has been decreed. In support of the contention, a report of the local Tahasildar was filed. The executing court overruled the said objection by recording a fact finding that the suit property described in schedule-'B' covered under the decree is well identifiable. So when the executing court declined to accept the objection of the petitioner-judgment debtors, they filed Civil Revision under section 115 of the Code in the court of District Judge, Khurda at Bhubaneswar. The revision being dismissed, the writ application was filed before this Court i.e. W.P.(C) no. 21538 of 2010 and that application was also dismissed by this Court by order dated 21.07.2011. The Court on that occasion directed the executing court to incorporate the boundary of the schedule-'B' property as given in the decree in consonance with what has been mentioned in the plaint schedule. The local police was also directed to provide necessary assistance for causing proper measurement of the suit property for delivery of the same to the opposite party-decree holder. Pursuant to the order, the decree was corrected by the executing court. However, the petitioner-judgment debtors without stopping there, after disposal of the writ application questioned the order passed therein by carrying writ appeal vide Writ Appeal No. 421 of 2011. This Court by order dated 10.04.2012 in that writ appeal while setting aside the order passed in the writ application to the extent that the executing court had been directed to correct the decree, further provided the decree holder an opportunity to file the appropriate application for correction of the same. In pursuance of that order, the opposite party-decree holder filed an application under section 152 read with section 151 of the Code. The petition was allowed on 16.08.2012. So again the petitioner-judgment debtors questioned that order by filing W.P. (C) no. 15717 of 2012. The writ application having been dismissed on 27.03.2014, again writ appeal was filed. In the writ appeal i.e. Writ Appeal no. 123 of 2014 the order of the learned Single Judge had been questioned. This appeal was dismissed on 08.05.2015. Thereafter, the petitioner-judgment debtors made another move for dropping the execution proceeding by filing an application under order 21, rule 11(2) read with section 151 of the Code contending therein that the petition for execution is wholly defective. The opposite party-decree holder filed his objection. In the meantime, the petitioner-judgment debtors also filed another application praying for similar relief. The executing court rejected both the applications by recording

specific findings that the defects pointed out by the opposite party-decree holder are trivial in nature which are to be simply ignored. That order was again challenged by the petitioner-judgment debtors by filing an application invoking the jurisdiction of this Court under Article 227 of the Constitution vide CMP no. 404 of 2016. The said application was dismissed and the order of the executing court stood confirmed with an observation that after disposal of the objection under section 47 of the Code, the petitioner-judgment debtors have no locus standie to raise further objection. However, this Court on that occasion directed the executing court to examine the execution petition and do all the needful in directing the decree holder to amend the execution petition.

This order being sought to be reviewed vide RVWPET no. 11 of 2016, beyond the prescribed period, it is stated to be lying without any progress being not further moved.

5. The executing court then examined the matter and concluded that there is no need for correction of the execution petition. It has been further stated that without even correction, the decree can be executed. This order was again challenged by the petitioner-judgment debtors in CMP no. 967 of 2016. Then the petitioner-judgment debtors filed petition before the executing court not to issue the writ of delivery of possession on the basis of the requisites filed by the decree holder in the year 2010 which is before correction of the description of the property in the decree. They also filed another application under section 47 and section 151 read with order 21, rule 97 and rule 101 of the Code vide I.A. No. 01 of 2016 again making prayer to drop the execution case. This petition met the same fate of rejection. While doing so, the executing court directed the opposite party-decree holder to submit requisites afresh. Pursuant to that, the requisites were filed on 25.07.2016. The petitioner-judgment debtors on 25.07.2016 filed another petition praying for dismissal of the execution case, as wholly barred by limitation. On that very day, they also filed a memo for scrutiny of the steps taken for issuance of delivery of possession of the property described under schedule-'B'. It be stated that the objection to the executability of the decree as made in the petition under section 47 and section 151 read with order 21, rule 97 and rule 101 of the Code in I. A. no. 01 of 2016 being overruled, the petitioner-judgment debtors filed FAO no. 148 of 2016 which had been continuing there on the board before the 4th Additional District Judge, Bhubaneswar. However, the above petition and the memo dated 25.07.2016 were rejected on 21.12.2016. So on 26.12.2016 these petitioner-judgment debtors sought for clarification of the said order of the executing court. They also filed an application before this Court vide CMP no. 1928 of 2016 assailing the said order. This Court directed the executing court to dispose of the petition of the petitioner-judgment debtors dated 26.12.2016 after giving opportunity of hearing to them before issuance of writ of delivery of possession. The petition of the petitioner-judgment debtors filed on 26.12.2016 was disposed of on 09.01.2016 with a finding that the requisites filed by the opposite party-

decree holder for issuance of writ of delivery of possession are wholly in conformity with the decree under execution and are in order, carrying no defect. On 12.01.2017, the petitioner-judgment debtors prayed for review of the order dated 09.01.2017 in the Review Petition no. 01 of 2017. That was dismissed reiterating the earlier finding as regards scrutiny of the requisites having no such defect. The next move by the petitioner-judgment debtors was on 20.04.2017 with an application that the learned counsel for the opposite party-decree holder has committed fraud upon the court by advancing submission that the revenue map had been filed, though in fact it was then not available on record. So a prayer was made before the executing court to stay its hands by not issuing the writ of delivery of possession till submission of the survey map by the opposite party-decree holder. The executing court then scrutinized the records and found the revenue map to have been filed and the requisites to be absolutely in order. This was challenged by the petitioner-judgment debtors before this Court by fling an application vide CMP no. 482 of 2017. This Court after hearing by order dated 21.07.2017 found the said petition to be devoid of merit and it was accordingly dismissed. This Court on that occasion has found the petition as laid by the petitioner-judgment debtors urging upon the court to direct the opposite party-decree holder to produce the village map to be a ruse. Prior to passing of this order in CMP no. 482 of 2017 and even prior to hearing of said petition before this Court, on 04.05.2017 the petitioner-judgment debtors had filed one more petition before the executing court to dismiss the execution case taking a plea that the opposite party-decree holder cannot proceed with the execution of the decree standing in his favour as he had filed affidavit in another proceeding during the suit stating to have been in possession of the suit property and to have so delivered to a third party after disposal of the CMP no. 482 of 2017. The executing court took up the petition dated 04.05.2017 for consideration. The petition stood dismissed on 02.08.2017 by giving observation that such move is sheer abuse of process of court. The opposite party-decree holder on the next date i.e. 03.08.2017 filed an objection that heavy cost be imposed upon the petitioner-judgment debtors for such abuse of process of court. The first one was dismissed and that of the decree holder was allowed. At this juncture, questioning the above order, the petitioner-judgment debtors filed a revision under section 115 of the Code before the District Judge, Bhubaneswar in C.R. P. no. 06 of 2017 which has been dismissed on merit on 28.11.2017. In the meantime on 26.09.2017, the FAO no. 148 of 2016 which was simultaneously moved while questioning the order before this Court, was also dismissed. However, the above revision having been dismissed, the review petition was again filed which was Review Petition no. 02 of 2017. This was also dismissed on 16.01.2018. It may be stated that said C.R.P.no. 06 of 2018 had been filed questioning re-issuance of writ of delivery of possession.

6. Now in this present petition before this Court, the petitioner-judgment debtors question only the correction of the name of the mouza in schedule-'B' in the writ of

delivery of possession of the land covered under the decree standing in favour of the opposite party-decree holder.

7. Before going to examine the sustainability of the challenge made by the petitioner-judgment debtors to the correction of the mouza as aforesaid; it is felt apposite to take note of the position of law enunciated by the Apex Court.

In case of ***Bhavan Vaja Vrs. Solanki Hanuji*** reported in AIR 1972 SC 1371 (para-19), the Apex Court has been pleased to observe thus:

> "It is true that an executing court cannot go behind the decree under execution. But that does not mean that it has no duty to find out the true effect of that decree. For construing a decree, it can and in appropriate cases, it ought to take into consideration the pleadings as well as the pleadings leading upto the decree. In order to find out the meaning of the words employed in a decree the court, often has to ascertain the circumstances under which those words came to be used. That is the plain duty of the execution court and if that court fails to discharge that duty it has plainly failed to exercise the jurisdiction vested in it".

8. And in case of ***Biswanth Vrs. Smt. Uttara Bewa***; AIR 1988 Orissa 9 (para - 6) and ***Chloride India Ltd. Vrs. District Judge, Puri***; AIR 1997 Orissa 135, it has been held as under:-

> "The principle is also well established that ordinarily the executing court cannot go behind the decree. But it is within the competence of the executing court to interpret the decree sought to be executed and for doing so the court can refer to reliefs sought for in the plaint and discussion in the judgment to ascertain the true import of the decree."

9. Mr. B.Baug, learned counsel for the petitioner-judgment debtors submitted that such correction of mouza at this highly belated stage without providing opportunity to the petitioner-judgment debtors to have their say is uncalled for and therefore the correction of the name of mouza from "Berana @ Gobindaprasad" as "Berana" without any legal basis is not permissible and it has to be quashed. He also submitted that the executing court could not have done so in the manner as has been done. In support of his contention, reliance has been placed in case of ***Dologobinda Sahu vrs. Chakradhar Mohapatra and others***, AIR 1955 Orissa 94 and ***Tirthananda Jena vrs. Bairagi Tripathy***; 70 (1990) CLR 749.

10. Mr. S.P.Mishra, learned Senior Counsel for the opposite party-decree holder submitted that no such illegality has been committed by the executing court in directing the salaried amin for change of name of mouza as "Berana" in place of "Berana @ Gobindaprasad" and to treat it as such. It is submitted that the mouza name is not totally changed from 'X' to 'Y' but here the addendum name to the original name of the mouza has been corrected so as to avoid confusion with which the petitioner-judgment debtors have nothing to do and have no concern at all. He strenuously argued that identity of the land in the execution proceeding is not at all in dispute and the petitioner-judgment debtors are in no way prejudiced by such correction. Referring to the written statement averments as well as the discussion of the courts below in their judgment in the original suit and first appeal, he contended

that the petitioner-judgment debtors having staked their claim of right, title, interest and possession over schedule-'B' land, the opposite party-decree holder has been found to be the rightful owner and thus entitled to possession. He submitted that the claim of these petitioner-judgment debtors to have acquired title over that land since has been negated, they have no further say in the matter of execution. He with vehemence contended that all these moves from the side of the petitioner-judgment debtors are just to stall the execution of a valid decree abusing the process of the court.

11. Indisputably, the judgment and decree under execution have attained their finality in all respects since long. These petitioner-judgment debtors having filed petition under section 47 of the Code questioning the execution of the decree have failed. As it appears, the petitioner-judgment debtors thereafter have been filing several petitions one after another, before the executing court and approaching the next higher forum on some plea or other to thwart the execution of that decree which is not at all permissible in the eye of law. A judgment debtor is not allowed to raise pleas, in piecemeal in phase manner according to his own sweet will and desire in an execution proceeding in saying that the decree is not executable which is seen to have been repeatedly done in the case and that to every time on failure, the doors of the higher forum are being knocked.

12. In case of ***Satyawati Vrs. Rajinder Singh***; 2013 (II) CLR (SC) 238 (para 13-17), the Hon'ble Supreme Court while referring with approval to its earlier decisions as well as that of the Privy Council and deprecating the practice of the judgment-debtors employing dilatory tactics to deny the fruits of the decree to the decree-holder has observed that the courts should be careful to see that the process of the court and law of procedure are not abused by the judgment-debtors in such a way as to make courts of law instrumental in defrauding creditors, who have obtained decrees. In accordance with that, it has been observed as under:-

> "As stated by us hereinabove, the position has not improved till today. We strongly feel that there should not be unreasonable delay in execution of a decree because if the decree holder is unable to enjoy the fruits of his success by getting the decree executed, the entire effort of successful litigant would be in vain."

13. In case of ***Rabinder Kaur Vrs. Ashok Kumar***, AIR 2004 SC 904 (para 22) the view is that:-

> "Therefore, raising a dispute in regard to the description or identity of the suit schedule property or a dispute in regard to the boundary of the suit schedule property is only a bogey to delay the eviction by the abuse of the process of Court Courts of law should be careful enough to see through such diabolical plans of the judgment debtor to deny the decree holders the fruits of the decree obtained by them. These types of error on the part of the judicial forum only encourage frivolous and cantankerous litigations causing laws delay and bringing bad name to the judicial system."

14. Learned counsel for the petitioner-judgment debtor has relied upon the decision in case of *Dolagobinda Sahu (supra)* where an amendment of a substantial

nature by way of substitution of property sought to be attached and sold in execution was held to be impermissible which is not the case here. The other case relied upon i.e. case of *Tirthananda Jena (supra)* also concerns with addition of new property at the stage of execution which is not in the case in hand. Thus these decisions do not come to the aid of the petitioner-judgment debtors so as to provide any such support to the present challenge.

15. Present is a case where after several rounds of challenge to the execution of decree and all those being overruled, the executing court has corrected the mouza's name by deleting the addendum name to it. Here, on perusal of the rival case, the findings of the trial court as well as the appellate court, it is quite clear that there is no dispute as to the identity of the property. The petitioner-judgment debtors' claim over the property in question both on the ground of purchase as well as acquisition of title by adverse possession has been conclusively negated and thus the present challenge to the deletion of the addendum name to the mouza of the property involved in the execution does not at all hold water and they can have no complain in the matter in view of failure to establish their claim over that specific property; furthermore, after so many challenges to the executabililty raised from time to time having been overruled, the present challenge has to be whittled down at the threshold. When in the first appeal, as against the finding of title of the decree holder they raised that their case of acquisition of title by adverse possession be considered on the basis of evidence, they now are not permitted to question the writ of delivery of possession by such correction with respect to the mouza's name that to by deletion of addendum name. They have absolutely nothing to say on that score. The executing court has all the authority to do so and the complain that these petitioners ought to have been allowed to have their say over the matter has absolutely no such significance as they do not have any say at all in the matter and this in no way touch upon their right which had already been negated.

A fortiori execution proceeding is purely a matter of procedure. Undoubtedly procedural safeguard is an ingrained facet of fair play in action to subserve the legal right but not to extinguish it. In the case in hand, the petitioner-judgment debtors after having failed in all their attempt to declare the decree as in-executable, they have no such further say in the matter of such formal and trivial correction in the writ of delivery of possession. Therefore, the challenge to the enforceability of the decree having failed on several occasion, present challenge to the correction of the name of mouza that to striking out one name is bound to bite dust.

The faith of the people is the saviour and succour for the sustenance of the rule of law and any weakening link in this regard would reap apart the edifice of justice and cause disillusionment to the people in the efficacy of law. The time has come for the courts of law to be pragmatic but not pedantic or rigmarole. Under the guise of purely technical mistake which has nothing to do with any right of the judgment debtors, the diabolical plans of the judgment debtors to deny the decree

holder the fruits of the decree obtained by him is to be discouraged as those come to stand on the way of administration of justice and shake the confidence of the citizens on this institution.

16. For the aforesaid discussion and reasons, the application stands dismissed. The executing court is directed to take all such effective steps as provided in law to see that the execution proceeding stands culminated with fruitful execution of the decree in accordance with law as expeditiously as possible preferably by the end of June, 2018 under a compliance report to this Court by the end of July, 2018.

Petition dismissed.

2018 (I) ILR - CUT- 945

BISWANATH RATH, J.

O.J.C. NO.8884 OF 2001

SUKANTA CHANDRA DASH & ANR. ……..Petitioners

.Vrs.

THE COLLECTOR, CUTTACK & ORS. ……..Opp. Parties

ESSENTIAL COMMODITIES ACT, 1955 – Section 6(A) – Proceeding under – Allegation of violation of the provisions of the Motor Sprit and High Speed Diesel (Prevention of Malpractices in Supply and Distribution) Order, 1990 and condition nos.4, 5 & 9 of the Orissa High Speed Diesel (Dealers licence) Order 1979 – Seizure of kerosene from the premises of a Petrol pump – Investigation followed by prosecution report – Direction by the Collector for sale of the confiscated articles and for initiating a proceeding under Section 7 of the Essential Commodities Act in appropriate Judicial Court for appropriate punishment and further directed the licensing authority to issue show cause for cancellation of the licence – Plea of the petitioner that there has been non-compliance of the statutory provisions of the Order 1990 and the schedule appended therein – Not considered by the Collector – Record proves that there is not only non-compliance of statutory provisions in sending the seized item for lab test, maintaining the required quantities to be seized & sealed but there is also gross delay in examining the materials seized – Held, since there has been serious violation of every provisions, the entire investigation is held to be defective – Order set aside. (Para 8)

For Petitioner : M/s. R.K. Rath, Sr. Adv., N.R. Rout
For Opp. Parties : Mr. K.K. Mishra, Addl. Govt. Adv.

JUDGMENT Date of hearing :26.04.2018 Date of Judgment : 04.05.2018

BISWANATH RATH, J.

This writ petition involves a challenge to the impugned order At Annexure-5 passed by the Collector, Cuttack involving Misc. Case No.13 of 1998 i.e. a proceeding under Section 6(A) of the Essential Commodities Act, 1955 read with The Motor Sprit and High Speed Diesel (Prevention of Malpractices in Supply and Distribution) Order, 1990.

2. Short background involved in the case is that the opposite party no.2 filed a prosecution report dated 31.03.1998 under Section 6(A) of the Act, 1955. Report involved indicated that on 28.03.1998, the opposite party no.2 along with other enforcement staffs visited the Petrol Pump premises of M/s. Ashok Service centre and noticing a tank lorry bearing registration No.OR-06-B-0424 in the campus of the said petrol pump, on inspection, they found 4 kilo liters of white kerosene in the said tank lorry. During investigation, the enforcement staff also noticed an excess of stock of 174 liters of High Speed Diesel and shortage of 118 liters of motor spirit (petrol). On official inspection, the inspecting staff suspected the samples of petrol and diesel in contravention of the clause (5) of The Motor Sprit and High Speed Diesel (Prevention of Malpractices in Supply and Distribution) Order, 1990 and condition nos.4, 5 & 9 of the Orissa High Speed Diesel (Dealers licence) Order 1979. On service of a copy and the prosecution report and the show cause, petitioners submitted their reply denying each and every allegation and particularly responding that there has been absolutely no contravention of any provision as alleged.

3. Considering the objection of the petitioner, after providing opportunity of contest to the respective parties and further taking into consideration the report etc. obtained in the meantime, the Collector, Cuttack in disposal of the Misc. Case No.13/1998 initiated at the instance of the competent authority appearing to be a proceeding under Section 6(A) (1 & 2) of the Essential Commodities Act, took into consideration the complaint of the competent authority, vide Annexure-5 and while accepting the complaint, on ascertainment of violations of the provisions directed for confiscation of the commodities nos.2 & 3 therein to the State. The Commodity no.1 since was detected not involving adulteration, was directed to be released in favour of the petitioner. Direction was also given for confiscation of the container no.1 as well as the carrier no.1. to the State. The Collector had also directed for sale of the confiscation articles and the receipt thereof, was also directed to be deposited in the Government Treasury. Besides above, the authority also directed for initiating a proceeding under Section 7 of the Essential Commodities Act in appropriate Judicial Court for appropriate punishment and further directing the licensing authority to issue show cause for cancellation of the licence granted in favour of the petitioners herein.

4. Assailing the aforesaid order, defending the petitioners Shri Rath, learned Senior Advocate being assisted by Shri Sumit Lal, learned counsel for the petitioners

on reiteration of the stand taken in show cause submitted by the petitioners in response to the complaint made and disposed of vide Annexure-5, taking this Court to the statutory provision involving the Order 8(2), Order 8(5) of the Order 1990 and the schedule appended therein, submitted that for the failure of following the statutory requirements in the aforesaid provisions in the investigation involving such seizure, the impugned order suffers. Further, taking this Court to the provisions at Order 8(2), Shri Rath, learned Senior Advocate contended that for the requirements under the provisions requiring seal of 3 samples of 750 mili liters to 1 liter each of the product, one given to the dealer or the concerned person under the acknowledgement with the instruction to preserve the sample in his safe custody till testing and investigation are completed, the second to be retained by the concerned oil company and that 3rd sample to be used for laboratories and taking this Court to the examination report referred to in the impugned order at page 46 of the brief contended that for there being sealing of 670 mili liters of High Speed Diesel find place at item no.2 therein contended that for no sealing of proper quantity of the sample items, examination of such items, if any, remains improper.

Further, taking this Court to Sub-order 5 of Order 8 of Order 1990, Shri Rath, learned Senior Advocate for the petitioners further, contended that for the provisions contended therein, the Authorized Officer is required to send the 3rd sample of the product under Sub-clause (2) within eighteen days to any of the Laboratories mentioned in schedule 3 appended to this order for analysis with a view to checking whether the density of the product is confirmed to the requirements indicated in schedule no.1 or not. taking this Court to the discussions made in the impugned order as well as the examination report vide Annexure-3, Shri Rath, further, contended that for the delayed examination of the sample taking place in the Month of April, 1999 involving a seizure on 31.3.1998 and further, for the admitted position that there has been no density test of the item seized and sealed, there is no following of any of the legal provisions, further the examination in the State Forensic Science Laboratory, Bhubaneswar also for being not in terms of the provision in the Order 1990, the entire exercise becomes illegal. Further, taking this Court to the schedule appended to the Order 1990 particularly the schedule no.3, Shri Rath, learned Senior Counsel submitted that for the clear prescription for testing in the particular laboratories, examination of the seized item through State Forensic Science Laboratory outside the schedule Labrotary also becomes bad. Shri Rath, here taking this Court to the document at Annexure-6 appended to the writ petition contended that for the specific direction given therein vide communication dated 16.04.1998, the testing whatever, should not have been conducted in the State Forensic Science Laboratory, which was not even having adequate manpower and infrastructure at that relevant point of time. For non-compliance of the statutory provisions in the matter of investigation into the allegations involved herein, further, for not having the density test before the sample are seized & sealed to the Lab and further for sending the seized items for Lab test to an unauthorized Lab and for not

sealing the particular quantity of the seized items, Shri Rath, contended that there has been absolutely no consideration of all these aspects by the Collector involving the impugned order resulting the impugned order not sustainable in the eye of law.

5. Shri K.K. Mishra, learned Additional Government Advocate though did not dispute the allegation on noncompliance of legal provisions raised by Shri Rath, but however, taking this Court to the records involving the case involved herein particularly to a correspondence dated 28.3.1998 submitted that the seizure not only was made on 28.3.1998 but the samples were also send to the Director, State Forensic Science Laboratory vide letter No.2941 dated 28.3.1998 itself. Shri K.K. Mishra, learned Additional Government Advocate therefore, submitted that there is absolutely no delay in sending the seized articles for examination to the State Forensic Science Laboratory. Shri Mishra also taking this Court to the report dated 28.3.1998 appearing from the case record contended that for the contents therein, it appears, there has been substantial compliance of the provisions contained in the Order, 1990 and thus, contended that even assuming that there are minor discrepancies here and their particularly non-compliance of some provisions, whole investigation and the test cannot be found to be faulted with. Answering to the objection raised by the Shri Rath, Shri Mishra referring to the counter affidavit admitted the allegations of not having the density test involving the seizure item, referring to the documents available admitted that there is no density test while seizure was made rather the seizure was made by ascertainment through smell.

6. Shri K.K. Mishra taking this Court to the discussions made in the impugned order and for the materials available on record submitted that there is no infirmity either in the investigation or in the testing of the articles or in the impugned order, therefore, the impugned orders does not require any interference of this Court.

7. Considering the rival contentions of the parties, this Court finds, the seizure was made on 28.3.1998 and looking to the circular at Annexure-2 issued by the Government of India, Ministry of, Petroleum & Natural Gas, this Court finds, there is a clear direction to all concerned that the authorities concerned are to ensure in the interest of natural justice that the inspective official will test the product for quality and density test at the retail outlet itself in the presence of the dealer with necessary equipment indicated therein. From the instructions, this Court finds, the above instruction has been issued to all concerned in order to avoid the harassment to dealers by the Officials manpower to take certain actions. For the admitted position here, this Court finds, there has been no density test on the seizure of the articles on 28.3.1998. Further, looking to the test report and the lab particular in the said Science Lab, looking to the provision contained in Order 8 of the Clauses 2 & 5, this Court finds, the provisions therein reads as hereunder:

> **"8. Sampling of products** – (1) The Officer authorized in Clause 7 shall draw the sample from the tank, nozzle, vehicle or receptacle, as the case may be to check whether density of the product conforms to requirements indicated in Schedule 1.

(2) The officer authorized in Clause 7 shall take, sign and seal three samples of 750 ml. to 1 litre each of the product one to be given to the dealer, transporter or concerned person under acknowledgment with instructions to preserve the sample in his safe custody till the testing/investigations are completed, the second sample to be kept by the concerned Oil Company or department and the third to be used for laboratory analysis.

(5) The authorized officer shall send the third sample of the product taken under Sub-clause (2) within 18 days to any of the laboratories mentioned in Schedule III appended to this Order for analysis with a view to checking whether the density of the product conforms to requirements indicated in Schedule I."

8. Particularly looking to the Sub-clause (5) of the Order/clause 8 of the Order 1990 to the extent that the authorized officer looking to the sub-clause (2) of the Order 8 of the Order 1990, this Court finds, there is mandatory requirement of sign and seal of three samples of 750 mili liter to 1 liter and the particular product to be kept in safe custody, out of which, one sample will be kept in safe custody till investigation is over, second sample to be kept by the concerned oil company or the department and the 3rd to be used for lab analysis. From the factual background, there is no material forthcoming as to whether the seal and sign of three sample packets of 750 mili liter to 1 liter was there or not. Perusal of the records rather makes it clear that, the sample quantity send to the State Forensic Science Laboratory for test is 670 mili liter as clearly appearing from the test report at Annexure-3 at page 37 of the brief. Furthermore, looking to the sub-clause (5) of the Order 8, this Court further finds, the 3rd sample as indicated hereinabove, is required to be send to the lab mentioned in schedule 3 for appropriate testing. From the scrutiny of the records, though this Court finds, the sample was sent for lab test on 28.3.1998 on the date of seizure itself but the report at Annexure-3 appears to be based on test in the lab on 9.4.1999, this Court here finds, there is substantial delay in testing the particular seized item. This Court, therefore, observes, there is not only noncompliance of statutory provisions in sending the seized item for lab test maintaining the required quantities to be seized & sealed but there is also gross delay in examining the materials also seized. Further, looking to the schedule 'III' of the Order 1990, this Court finds, the authority has already notified the Labs where the test of such Article should be undertaken. The list does not contain the State Forensic Science Laboratory, Bhubaneswar. Further, looking to the correspondence at Annexure-6, this Court finds, the testing etc. of the seized item since has been conducted by the State Forensic Science Laboratory, this Court finds, the test has been undertaken in a non-schedule establishment making the entire test report defective & ignorable. Correspondence filed rather makes it clear that the State Forensic Science Laboratory was not even having man power and necessary infrastructure at the relevant point of time making the Lab report wholly unreliable. This Court, thus, observes that there has been serious violation of every provisions required for the purpose, making the entire investigation defective.

9. Now coming to the discussions made in the impugned order at Annexure-5, this Court finds, even though all the above grounds have been raised by the

delinquent, the Collector has failed in appreciating the disputes raised by the delinquent and seriously failed in answering on each of the above aspects. For the discussions made hereinabove and particularly keeping in view the serious legal flaws, further for non-compliance of the mandatory requirements under the Order 1990, this Court finds, the order under Annexure-5 is not sustainable in the eye of law. Accordingly, while allowing the writ petition, this Court sets aside the order at Annexure-5, but in the circumstances, there is no order as to cost.

Writ petition allowed.

2018 (I) ILR - CUT- 950

BISWANATH RATH, J.

O.J.C. NO.5567 OF 1996

FAKIRA BEHERA & ORS. ……..Petitioner

.Vrs.

KRUSHNA CHANDRA THAKUR, MARFAT, HARIHAR BADAPANDA & ORS. ……Opp. Parties

ORISSA SURVEY & SETTLEMENT ACT, 1958 – Section 15 – Proceeding under – Revision petition – Landed properties – It is not in dispute that the civil suit was moved for declaring the petitioners to be the tenants and further for a declaration that the order passed in the Debottar Vesting Case as bad and further directing the Tahasildar for receipt of rent – Suit decreed – Whether the revisional authority is unjustified in ignoring the judgment and decree of the Civil Court? – Held, yes, so long as the judgment and decree in the Suit is not altered, the same is binding on the settlement authorities – Further the settlement authorities have no authority to declare the judgment and decree in Civil Suit as invalid. (Para 6)

For petitioners : M/s.S.Mantry, R.C.Rath & A.K.Sharma
For Opp.parties : Sri B.Behera, Addl.Standing Counsel

JUDGMENT Date of hearing : 17.04.2018 Date of Judgment : 04.05.2018

BISWANATH RATH, J.

This writ application involves a challenge to the order of the Settlement Authority passed in R.P. No.3557/1993, a proceeding under Section 15 of the Orissa Survey & Settlement Act, 1958.

2. Short background involved in the case that the suit lands belong to the Deity, Sri Krushna Chandra Thakur. The petitioners are hereditary marfatdars of the Deity and they are performing the sevapuja of the Deity. In this way they are also in

exclusive possession of the suit land. One Bhagabat Behera, father of the O.Ps.1 to 3 therein and Jaga Behera, father of O.Ps.4 & 7 and husband of O.P.6 therein, used to take the suit land on temporary lease for one year from the father of the petitioners therein. It is claimed that since 1958 no such lease was granted to them and the suit lands were brought back under the direct cultivation of the petitioners. The O.Ps. therein claimed that since they were bhag tenants, involving a dispute between the petitioners and the private O.Ps., they were declared as bhag tenants (Bhag Chasi), vide judgment and decree in T.S. No.13/1989. It on the premises, the Civil Court is debarred to decide the bhag tenancy status involving a note of possession in preparation of R.O.R. during Hal Settlement operation, the petitioners filing the 15(d) application sought to delete the note of possession in favour of the private O.Ps. from Hal R.O.R.198. The petitioners for the support of the decision to their case claimed that the note of possession in favour of the private O.Ps. should be deleted. The private O.Ps. on their appearance in the Revision proceeding submitted that the Deity involved there being the public Deity, the State should be impleaded as necessary party. As regards the merit involving the case, the private O.Ps. submitted that the suit land vested with the Government on 18.3.1974. The petitioners filed the Debottar Vesting Case No.41/85 before the O.E.A. Collector to settle the lands in favour of the Deity Marfatdar, Harihar Badapanda, petitioner no.1 therein and others illegally but however declaring the O.P.1 as Sikim tenant. O.P.1 filing a certified copy of the order dated 15.12.93 in T.S. No.13/89, the Full Bench decision of this Court in 57(1984) CLT 1 and another decision involving Second Appeal No.197/1973 published in 76(CLT Notes) claimed the support of the decision to their case. Considering the rival contentions of the parties, the revisional authority decided the Revision thereby directing deletion of the note of possession in favour of the O.Ps. in the Hal R.O.R. showing them as bhagsutre dakhal. Being aggrieved by the order passed by the revisional authority, the petitioners, the O.Ps. therein in the Revision preferred this writ application.

3. Assailing the impugned order, Sri S.Mantry, learned counsel for the petitioners contended that O.Ps.1 & 3 being the survivors of the original Sikim tenants, Bhagabat Behera and Jaga Behera under the Deity before merger of Narasinghpur Estate filed T.S. No.13/89 before the Additional Munsif, Narasinghpur for declaring the plaintiffs as tenants in respect of the suit land and also for directing the Tahasildar for collection of rent, which suit was decreed declaring the plaintiffs, i.e., petitioners no.1 & 3 as tenants in respect of the suit land under the State thereby also directing the Tahasildar to collect rent. Sri Mantry, learned counsel for the petitioners also contended that the Debottar Vesting Case No.41/1985 filed by the Deity, O.P.1 for settlement of the case land in accordance with the executive instruction of the State Government and the order involving the Vesting Case claimed to be a misconceived one but however the order of the Debottar Vesting Case has been declared to be bad in disposal of the Civil Suit with further declaration in favour of the petitioners declaring them to be the tenants even though

an appeal, vide T.A No.7/94 was filed, the appeal was dismissed by the appellate authority by judgment dated 21.11.2000. It is under the premises, Sri Mantry, learned counsel for the petitioners claimed that the decision of the revisional authority on the premises that the Civil Court has no such jurisdiction is not only bad but the revisional order is also involved error on the face of record. It is in the above background of the case, Sri Mantry, learned counsel for the petitioners prayed this Court for interference in the impugned order and setting aside the same.

4. Though notice involving the private O.Ps.1 to 3 was sufficient and a Counsel was appearing for O.Ps.1 to 3 but nobody is present during hearing.

5. Sri Behera, learned Additional Standing Counsel appearing for the O.Ps.4 & 5 taking this Court to the stand of O.Ps.1 to 3 in the court below and to the observation of the original authority submitted that there is no infirmity in the impugned order requiring this Court to interfere in the matter.

6. Hearing the rival contentions of the parties, this Court before entering into any other aspect as the first step likes to decide whether the revisional authority is justified in ignoring the judgment and decree of the Civil Court involved therein and as a consequence, whether the impugned order is sustainable in the eye of law. It is at this stage, considering the rival contentions of the parties, this Court finds, admittedly, there is vesting of the disputed land. There is also no dispute that the civil suit was moved declaring the petitioners to be the tenants and further for a declaration that the order passed in the Debottar Vesting Case No.41/85 as bad and further directing the Tahasildar for receipt of rent. For vesting of the land with the State and for no application for settlement of land under Section 8-A(1) of the O.E.A. Act within statutory period of six months, the land as a natural consequence vested in the State. For the petitioners' continuing in possession on the basis of bhagchasi lease may be for some time as appearing from the case record, this Court finds, the civil suit for declaring the petitioners as occupancy tenants applying the provision under Section 8-A(1) of the O.E.A. Act was very much maintainable. It is in the above circumstance, this Court finds, so long as the judgment and decree involving the Title Suit No.13/89 is not altered, the judgment and decree therein is binding on the settlement authorities. Further the settlement authorities have no authority to declare the judgment and decree involving the Civil Suit as invalid.

7. In the circumstances, this Court finds, the revisional authority's proceeding in the Revision on the noting that the judgment and decree in the civil suit are void becomes bad resulting the impugned order not sustainable. However, as the matter needs re-adjudication, this Court interfering in the impugned order at Annexure-2 remands the proceeding to the revisional authority for a fresh decision with direction to re-adjudicate the revision proceeding from within the materials already available within a period of six months from the date of communication of this order. The petitioners are directed to appear before the revisional authority along with a copy of

this judgment within a period of two weeks hence. As directed, the Revision Petition No.3557/93 will be heard afresh after serving notice on the contesting O.Ps.

8. The writ application succeeds setting aside the impugned order, vide Annexure-2 but however with an order of remand. In the circumstance, there is no order as to cost.

Writ petition disposed of.

2018 (I) ILR - CUT- 953

BISWANATH RATH, J.

W.P.(C) No.12253 OF 2009

BIJAY KUMAR BAL ……..Petitioner

.Vrs.

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

(A) ORISSA ESTATE ABOLITION ACT, 1951 – Section 8(1) – Provisions under – Continuity of the tenure of Tenant – Declaration by the Tahsildar as tenant in respect of Anabadi land on the basis of hatta patta of Ex intermediary –The nature of land being Anabadi could not have been given on lease – The question arose as to whether applications from the tenants in respect of Anabadi Land and to declare them as tenant can be accepted – Held, No.

"Court looking to the provision at Section 8 (1) of the Orissa Estate Abolition Act finds it becomes automatic to treat a person, who immediately before the date of vesting of an estate in the State Government was in possession of any holding as a tenant, shall be deemed to be a tenant under the State. This Court makes it clear that there cannot be a tenant in respect of an Anabadi Land. There is no provision under Section 8(1) of the Orissa Estate Abolition Act to accept applications from the tenants in respect of Anabadi Land and declare them as tenant. For the clear material available that neither the ex-Intermediary submitted any ekpadia nor there was seizure of any such document by the Tahasildar under the Orissa Estate Abolition Act and for the nature of land involved herein, this Court finds decision declaring the petitioner as a tenant by the Tahasildar becomes bad and without competency." *(Para 7)*

(B) ORISSA SURVEY & SETTLEMENT ACT, 1958 – Section 32 – Revision by State – Delay in filing – Allegation of fraud is proved on record against the tenant as he was trying to grab Govt. Anabadi land by way of hatta patta obtained from ex-intermediary who had no power to lease out – Delay can be condoned.

"Though the provision did not stipulate any time frame in initiating such proceeding but considering the involvement of allegation of fraud and State having succeeded in establishing the allegation of fraud in the revision record, this Court finds the delay in filing the revision under Section 32 of the Orissa Survey & Settlement Act was condonable." *(Para 9)*

Case Laws Relied on and Referred to :-

1. 1995 Supp.(3) SCC 249 : State of Orissa & Ors v. Brundaban Sharma & Anr.
2. (2003) 7 SCC 146 : State of Orissa v. Nityananda Satpathy & Ors
3. (2009) 12 SCC 378 : State of Orissa & Ors v. Harapriya Bisoi.
4. (2013) 116 CLT 805: State of Orissa v. Baidyanath Jena (since dead) represented through his legal heirs & Ors.
5. (2009) 12 SCC 378 : State of Orissa & Ors. v. Harapriya Bisoi.

For Petitioner : Mr.G.P.Samal, S.K.Biswal, P.K.Panda & D.Mishra.

For Opp.Parties : M/s. B.Mohanty, D.P.Mohanty, P.K.Nayak, B.Das, T.K.Mohanty, P.K.Swain & M.Pal. Intervenor)
M/s. R.K.Mohanty, D.Mohanty, S.Mohanty, S.Mohanty & A. Mohanty. (Intervenor)
Mr. Biswajit Mohanty. (Intervenor)
Mr. K.K.Mishra, Addl. Govt. Adv.

JUDGMENT Date of Hearing:01.05.2018 & Date of Judgment: 09.05.2018

BISWANATH RATH,J.

This writ petition involves a challenge to the order dated 3.8.2009 passed by the learned Member, Board of Revenue, Orissa in OSS Case No.43 of 2003.

2. Short background involved in the case is that the property in question appertaining to Sabik Khata No.109, Plot No.961 measuring an Area Ac.26.13 decimals out of Ac.230.92 decimals corresponding to Hal Khata No.175, Plot No.1199 measuring an area of Ac.7.25 decimals, Plot No.1205/1221 measuring an area of Ac.18.88 decimals of Mouza- Khalakata under Nimapara Police Station in the district of Puri originally belong to State Government and the kisam of the land was recorded as Anabadi. The petitioner claimed that the ex-Intermediary, namely, Dhaneswar Routray and others on 14.4.1939 through Hata Patta leased out the said land to the father of the petitioner. After death of Bansidhar Bal, the father of the petitioner, the petitioner is in possession of the suit land and he has been paying rent under Jamabandi No.102/86. This fact also gets discloses from the Tenant Ledger No.102/86. Petitioner while admitting that the suit land was part of Anabadi land, which has been leased out to the father of the petitioner by the ex-Intermediary through Hata Patta taking place much prior to the date of vesting of the land. Tenant ledger has also been opened accordingly. It further reveals from the settlement operation in the locality, the Tahasildar, Nimapara-opposite party no.4 filed a case bearing Suit No.4562/1983 before the Additional Settlement Officer , Puri to record the suit land in favour of the State Government. The Additional Settlement Officer disallowed the claim of the Tahasildar on 19.2.1985 appearing at Annexure-1. Being aggrieved by the order passed by the Additional Settlement Officer, opposite party no.1 preferred a revision before the Member, Board of Revenue vide OSS. Case No.43 of 2004. The present petitioner appeared in the case and the case was disposed of allowing the revision vide Annexure-2 impugned herein.

3. Sri Samal, learned counsel appearing for the petitioner challenged the impugned order on four counts. Firstly the order of the revisional authority is contrary to the material available on record, secondly there is manifest error involving the impugned order, thirdly the proceeding initiated under Section 32 of the Orissa Survey & Settlement Act was hopelessly barred and lastly learned counsel for the petitioner challenged the order on the premises that when the revision petitioner attributed fraud against the petitioner, it becomes the duty of the revisional petitioner to establish the fact of fraud on the premises that the order impugned suffers on account of all the four counts, learned counsel for the petitioner requested this Court for interfering in the impugned order and setting aside the same.

4. Sri K.K.Mishra, learned Additional Government Advocate appearing for the State-opposite parties apart from reiterating the grounds taken in the counter affidavit filed by the opposite party nos.1 to 4 and the plea taken before the revisional authority also contended that the disputed land was recorded as Anabadi land of ex-Intermediary, namely, Dhaneswar Routray in the year 1939. Sri Mishra alleged that on coming into effect the Orissa Estate Abolition Act, neither any ekpadia was submitted by the ex-Intermediary nor any such documents were seized by the O.E.A. Collector from the ex-Intermediary following the provision at Section 5 (i) of the Orissa Estate Abolition Act. The settlement operation was started much after the vesting of the land with the Government and not final record-of-right was published in favour of the petitioner on the basis of alleged unregistered Hata Patta submitted before the Settlement Authority on 23.8.1980. The Tahasildar entertained an application purportedly under Section 8(i) of the Orissa Estate Abolition Act and the Additional Tahasildar, Nimapara allowed the Misc. Case No.859 of 1981without obtaining confirmation order from the Member, Board of Revenue required under Section 5 (i) of the Orissa Estate Abolition Act. Being aggrieved, the Tahasildar filed an appeal registered as Suo Motu Appeal No.4652 of 1983 under Section 22 (A) of the Orissa Survey & Settlement Act challenging the not final record-of-right published in favour of the petitioner. On 19.2.1985, the appeal filed by the State was dismissed for the availability of unregistered Hata Patta thereby accepting the tenancy of the petitioner's father under the ex-Intermediary. After the Collector, Puri came to know the above development filed the revision under Section 32 of the Orissa Survey & Settlement Act taking the plea that since the disputed land was in the nature of Anabadi, popularly known in the locality as "Jhaun Bana" being no agriculture character, there was no scope for the ex-Intermediary for leasing out such land. Sri Mishra, learned Additional Government Advocate while disputing the Hata Patta, claimed to have been granted by the ex-Intermediary in favour of the petitioner, also contended that for the nature of the land, there was no occasion for leasing out of such land by the ex-Intermediary. Ekpadia, if any, showing such land has no existence in the eye of law, learned Additional Government Advocate also contended that there was no

Ekpadia submitted by the ex-Intermediary nor the O.E.A. Collector seized any such documents from the ex-Intermediary. On the entertainment of the application under Section 8 (1) of the Orissa Estate Abolition Act, Sri K.K.Mishra, learned Additional Government Advocate submitted that for the provision contained in Section 5(i) of the Orissa Estate Abolition Act, the Misc. Case No.859 of 1981 should not have been considered without obtaining the confirmation order from the Member, Board of Revenue. Further, on the premises that the ekpadia, if any, available being a manufactured document, Sri Mishra, learned Additional Government Advocate contended that opening of tenant ledger and acceptance of rent, all are eye wash and as a result of production of fraudulent document, Sri Mishra thus contended that for the challenging of fraud played by the petitioner in the previous proceeding and after coming to know that a fraud has been played involving such property, the Collector has no other option than to initiate the proceeding under Section 32 of the Orissa Survey & settlement Act, 1985. Taking reliance of the decisions rendered in the cases of ***State of Orissa & others v. Brundaban Sharma & Anr.,*** *1995 Supp.(3) SCC 249,* ***State of Orissa v. Nityananda Satpathy & others****, (2003) 7 SCC 146,* ***State of Orissa & others v. Harapriya Bisoi****, (2009) 12 SCC 378* and in the case of ***State of Orissa v. Baidyanath Jena (since dead) represented through his legal heirs and others****, (2013) 116 CLT 805,* Sri Mishra, learned Additional Government Advocate submitted that for the observation contained in the revisional order and the support of the decision relied on by the State, there is no infirmity in the impugned order thereby requiring any interference of this Court.

5. Miss.S.Mohanty, learned counsel appearing for the intervenor while supporting the stand taken by the petitioner submitted that there has been illegal consideration of the case of the petitioner by the revisional authority and for delay in the institution of the proceeding under Section 32 of the Orissa Survey & Settlement Act, the revision ought to have been dismissed by the revisional authority.

6. Considering the rival contentions of the parties, this Court finds at the first instance, petitioner's claim is solely based on issuance of a Hata Patta in favour of his father, purported to have been issued on 14.4.1939 by the ex-Intermediary. Petitioner's father also claimed to have been paying rent under Jamabandi No.102/1486 which also appears to find place in the Tenant Ledger No.102/86. Considering all these facts, the Additional Settlement Officer rejected the proceeding initiated by the Tahasildar, Nimapara vide order at Annexure-1. A revision was also preferred before the Member, Board of Revenue bearing OSS Case No.43 of 2003 under Section 32 of the Orissa Survey & Settlement Act. Taking into consideration the allegations of the State Counsel as borne from the revision petition, it appears the State all through claimed that the land was in the nature of Anabadi more specifically in the nature of Jhaun Bana. Petitioner has also admitted all through in the lower court proceeding along with a specific admission

in paragraph-6 of the writ petition that disputed land was a part of Anabadi land for no dispute in between the parties and the land got vested with the State under the provision of the Orissa Estate Abolition Act. This Court finds for the admitted nature of land being Anabadi, there was no question of ex-Intermediary having any right of lease of the Anabadi land. The intermediary interest need to be vested under the Orissa Estate Abolition Act,, 1951 includes homestead means a dwelling house used by the intermediary for the purposes of his own residence or for the purpose of letting on rent together with any courtyard, compound, garden, orchard and out buildings attached thereto and also includes any tank, library and place of worship appertaining to such dwelling house but does not include any building comprised in such estate and used primarily as office or kutchery for the administration of the estate on and from the first day of January, 1946 and Khas Possession with reference to the possession of an Intermediary of any land used for agricultural or horticultural purposes, means the possession of such Intermediary by cultivating such land or carrying on horticultural operations thereon himself with his own stock or by his own servants or by hired labour or with hired stock. For the claim of the parties that the land is in the nature of Anabadi, particularly, called as "Jhaun Bana", this Court finds neither the intermediary had any right to lease the land in question nor looking to the status of the land, the disputed land was in a position to be leased out. Further, looking to the materials available on record, this Court finds for the provision under Section 5 (j) of the Orissa Estate Abolition Act, the ex-Intermediaries were mandated to handover compulsorily all the records of tenancy (called "Ekpadia" on local parleyance) of the land of the ex-Estate on vesting failing to so, Collectors were authorized under law to seized such records from them. There is no seizure of of any such documents admittedly.

7. In the circumstances, this Court looking to the provision at Section 8 (1) of the Orissa Estate Abolition Act finds it becomes automatic to treat a person, who immediately before the date of vesting of an estate in the State Government was in possession of any holding as a tenant, shall be deemed to be a tenant under the State. This Court makes it clear that there cannot be a tenant in respect of an Anabadi Land. There is no provision under Section 8(1) of the Orissa Estate Abolition Act to accept applications from the tenants in respect of Anabadi Land and declare them as tenant. For the clear material available that neither the ex-Intermediary submitted any ekpadia nor there was seizure of any such document by the Tahasildar under the Orissa Estate Abolition Act and for the nature of land involved herein, this Court finds decision involving the petitioner declaring the petitioner as a tenant by the Tahasildar becomes bad and without competency.

8. From the pleadings, this Court also finds while the petitioner claiming that he became a tenant under Section 8(1) of the Orissa Estate Abolition Act, but at the same time, the petitioner also claimed that for his long possession over the disputed property, the petitioner inherits the same by virtue of Sections 23 and 30 of the

Orissa Tenancy Act. This Court finds the petitioner being conscious that he is not likely to get protection under Section 8 of the Orissa Estate Abolition Act, he had very consciously made the alternate claim. Now coming to the finding on the question of limitation and justifying such question showing of a decision by the petitioner of this Court rendered in W.P.(C). No.365 of 2002, this Court finds the decision referred to by the petitioner is completely distinguishable for the allegation of the State that the opening of tenant ledger, payment of rent, all are as a result of fraud practice by the petitioner and the decision relied on by the learned counsel for the petitioner has no application to the case. This Court here also finds the revision involved herein was initiated under Section 32 of the Orissa Survey & Settlement Act, 1958. Though the provision did not stipulate any time frame in initiating such proceeding but considering the involvement of allegation of fraud and State having succeeded in establishing the allegation of fraud in the revision record, this Court finds the delay in filing the revision under Section 32 of the Orissa Survey & Settlement Act was condonable. The claim of the State opposite parties on the question of limitation gets support from the decision rendered in the case of ***State of Orissa & others v. B Brundaban Sharma & Anr.***, *1995 Supp.(3) SCC 249* where the Hon'ble Supreme Court in categoric terms held validity of a non est order can be questioned in any proceeding at any stage and thereby condoned the delay of 27 years in filing the revision. This Court finds the claim of the State opposite parties also gets support of the decision rendered in the case of ***State of Orissa & others v. Harapriya Bisoi****, (2009) 12 SCC 378.* Perusing the revisional order, this Court finds the revisional authority having taking into consideration all the issues involved herein answered the same correctly. Considering the submission of learned counsel for the petitioner on the allegation of finding of the revisional authority is contrary to the materials available on record, this Court observes for the recording of the averments therein is with regard to non-filing of ekpadia before the revisional court and it should not be misconstrued for any other purpose.

9. For the observation made hereinabove, the reasoning assigned by the revisional authority and the support of the decision to the case of the opposite parties indicted hereinabove and the provisions of the Orissa Estate Abolition Act as well as the Orissa Survey & Settlement Act, the claim of the State opposite parties, this Court while finding that there is no infirmity in the impugned order finds no scope to interfere in the impugned order in exercising power under Article 227 of the Constitution of India.

10. In the result, the writ petition fails. However, there is no order as to cost.

Writ petition dismissed.

2018 (I) ILR - CUT-959

BISWANATH RATH, J.

O.J.C. NO.4201 OF 1996

MADHURI DAS & ORS. .....Petitioners

.Vrs.

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

SERVICE – Departmental Enquiry – Proceeding initiated – Delinquent Officer participated in the proceeding but died before passing of the final order – Whether proceeding abates due to the death of the delinquent officer prior to the passing of the order by the Disciplinary Authority? – Held, no, since the enquiry report was submitted during life time of the delinquent officer and the delinquent having submitted his show cause, the disciplinary proceeding cannot abate for his death after submission of the enquiry report – No allegation of violation of the principles of natural justice – No interference called for in the order directing recovery. (Para 7)

Case Laws Relied on and Referred to :-

1.(1998) 8 SCC 194 : Basudeo Tiwary Vs. Sido Kanhu University and others
2. 1986 Lab.I.C.-248 : Hira Bai Vs. State of Maharashtra.
3. (2001)2 J.C.R.-165 : Jayanti Devi .Vs. State of Bihar & Ors.
4. 1993 STPL 8807 SC : Rameshwar Manjhi (Deceased) through his son Lakhiram Manjhi .Vs. Management of Sangramgarh Colliery & Ors.

For Petitioners : M/s. S.C. Dash,R.B. Das
For Opp. Party : Mr. K.K. Mishra, Addl. Govt. Adv.
M/s. S.K. Patnaik, U.C. Mohanty.

JUDGMENT Date of Hearing :1.05.2018 Date of Judgment : 10.05.2018

BISWANATH RATH, J.

This writ petition involves a challenge to a part of the order of the Disciplinary Authority directing for recovery of a sum of Rs.60,000/- from the delinquent on the basis of the findings of the Enquiry Officer.

2. Short background involved in the case is that the delinquent-Madan Mohan Das was appointed as the Sub-Divisional Manager in the year 1965. In course of time he was promoted to the post of Deputy Divisional Manager on 11.1.1988. Thereafter, Madan Mohan Das was transferred to Sambalpur Division and posted at Remade Sawmill. It is claimed by the petitioner that though Madan Mohan Das submitted his joining report but did not take the charge of the timber on the premises of no physical verification of the stock at that point of time was undertaken. Ultimately at the time of physical verification of the stock, it was found, there is shortage of stock of 772.2899 cu.m. of timber. The delinquent was asked to show cause on 24.7.1988 for the shortage in the stock. In spite of the delinquent's

objection that he could not take the possession of the stock for no physical verification by that time and that the delinquent was nowhere connected with the transaction during his incumbency as Deputy Divisional Manager involving the timbers of the Sawmill, placing the petitioner on suspension the charge-sheet was submitted on specific grounds, and was served on the delinquent on 31.8.1989. On appointment of the officer on the Special Duty as Enquiry Officer, the enquiry was conducted involving the charges against the delinquent. On conclusion of the enquiry, the Enquiry Officer submitted his report on 27.7.1991 with the observation that the delinquent officer is the only officer to be held responsible for the cumulative loss. On being asked for his response, the petitioner filed his response to the enquiry report 9.06.1992. Personal hearing in the matter was made on 30.08.1993 and in the meantime, the delinquent died in the year 1995 i.e. on 6.3.1995. Fact of death of the delinquent was informed to the employer by his wife the petitioner no.1 on 22.3.1995. The enquiry report was submitted on 27.7.1991, but by communication dated 21.12.1995 i.e. much after the death of the delinquent, the disciplinary authority passed the final order in the departmental proceeding involving late M.M. Das, thereby, directing to treat the period of suspension as of duty, secondly, since the delinquent officer had already expired directed for no punishment and thirdly, all the outstanding dues and loss caused to the Orissa Forest Development Corporation Limited as indicated by the B.O. amounting to Rs.60,000/- should be recovered from the final benefits accrued to the delinquent. It was also directed therein to obtain an undertaking from the legal heirs of the delinquent to the effect that the outstanding dues should be paid by the legal heirs of the delinquent before the final settlement of the dues, are settled as appearing at Annexure-17. It is upon service of the copy of the order of punishment by the employer wife of the delinquent filed an appeal and the appeal was rejected by the Chairman of the O.F.D.C. at Annexure-B.

3. Restricting his submission Shri S.C. Dash, learned counsel for the petitioners to the extent of award of recovery of the amount indicated hereinabove, on reiteration of the pleadings in the writ petition submitted that the enquiry report was submitted by the Enquiry Officer on 27.7.1991, the delinquent submitted his response to the enquiry report pursuant to a direction of the employer dated 7.3.1992, consequently, the delinquent late Das filed his explanation on 9.6.1992. In the meantime, late Das breathed his last on 6.3.1995. It is only after the death of the delinquent, the final order of punishment was passed on 21.12.1995. It is on the premises that the final order of punishment having been passed against a dead person, Shri Das, learned counsel for the legal heirs of the delinquent i.e. the petitioners submitted that the impugned order at Annexure-17 so far it relates to recovery of a sum of Rs.60,000/- is concerned, remains void. Shri Das, taking help of some judgments in the case of ***Manoj Kumar, Petitioner*** *versus* ***Central Coal Field Limited, Ranchi & others, Opposite parties*** involving W.P.(S) No.2991 of 2014 disposed of on 20th January, 2016, in another decision in the case of ***Hira Bai***

Vs. ***State of Maharashtra*** as reported in **1986 Lab.I.C.-248**, in another case ***Jayanti Devi*** *versus* ***State of Bihar & others*** as reported in **(2001)2 J.C.R.-165** submitted that for the support of the decisions indicated hereinabove to the case of the petitioners, the impugned order should be interfered with and set aside on the principle of abetment of the disciplinary proceeding on account of death of the delinquent before passing of the final order by the disciplinary authority. Shri Dash, also relaying another decision in the case of ***Gulam Gausul Azam & others*** *versus* ***State of U.P. & Others*** decided on 12th May, 2014 in Writ Appeal No.18653 of 2012 prayed this Court for interfering in the impugned order at Annexure-17 and setting aside the same.

4. Shri S.K. Patnaik, learned Senior Advocate for the Orissa Forest Development Corporation Ltd. in his attempt to justify the order of the Disciplinary Authority and in answering the questions raised by the learned counsel for the petitioner representing the claim of the delinquent, submitted that the report of the Enquiry Officer is based on the findings of facts and after giving opportunity of defending to the delinquent. The order of the Disciplinary Authority since based on the report already submitted during the lifetime of the delinquent and taking into account the response of the delinquent pursuant to the service of copy of enquiry report, death of delinquent before the date of order being passed by the disciplinary authority becomes immaterial. It is on the application of the provisions contained in the Order 22 Rule 4 of C.P.C., Shri Patnaik, learned Senior Advocate also contended that for the above provision, the disciplinary proceeding cannot abate. Placing reliance of a decision in the case of ***Rameshwar Manjhi (Deceased) through his son Lakhiram Manjhi*** *versus* ***management of Sangramgarh Colliery and other*** as reported in **1993 STPL 8807 SC** and taking support of the same to the case of the Corporation Shri Patnaik, learned Senior Advocate contended that for the support of the above decision to the case of the Corporation, the claim of the petitioners is unsustainable.

In the above premises, Shri Patnaik, learned Senior Advocate for the opposite parties submitted that there is no infirmity in the impugned order requiring no interference of this Court in the same.

5. Considering the rival contentions of the parties and leaving the other details involving the disciplinary proceeding as not relevant for this purpose, this Court finds, the delinquent the husband of the petitioner no.1 involved in a disciplinary proceeding. After his suspension the delinquent was served with charge-sheet based on the audit report on 31.8.1989 vide Annexure-5. The delinquent submitted his explanation on 29.1.1990 and the Enquiry Officer was appointed on 12.04.1990. The delinquent was in the meantime reinstated in the service pending disposal of the enquiry on 3.6.1991. The Enquiry Officer submitted his report on 27.7.1991 as appearing at Annexure-8. In the meantime, the delinquent was asked by the disciplinary authority to file written submission on the enquiry report. Pursuant to

which the delinquent submitted a written submission on 9.6.1992. It is thereafter seen that the delinquent had expired on 6.3.1995 while in service and ultimately, the order of recovery vide Annexure-17 was passed on 12.12.1995. This Court, therefore, observes that admittedly, the order of recovery by the disciplinary authority was passed after the death of the delinquent. There is also no dispute that the enquiry was concluded in the year 1991 and the final order of the Disciplinary Authority came on 21.12.1995 after almost four years and after death of the delinquent. Question here falls for determination is, for the death of the delinquent prior to date of passing of the order by the Disciplinary Authority, if the proceeding abates? It is, here taking into consideration the contentions raised by the rival parties, this Court considering the decision cited at Bar in the case of ***Manoj Kumar, Petitioner*** *versus* ***Central Coal Field Limited, Ranchi & others, Opposite parties*** involving W.P.(S) No.2991 of 2014 disposed of on 20th January, 2016, finds, the Hon'ble Jharkhand High Court considering the allegation involved therein finding that the delinquent involved therein died on 16.08.2013 much before the submission of the report of the Enquiry Officer on 10.10.2013, so in the above peculiar circumstance the Hon'ble Jharkhand High Court held that the enquiry proceeding got vitiated for the death of the delinquent taking place prior to submission of the report. The Hon'ble Bombay High Court in the case of ***Hira Bai*** *Vs.* ***State of Maharashtra*** as reported in **1986 Lab.I.C.-248** has observed that for the death of the delinquent taking place before conclusion of the disciplinary proceeding, the proceeding be terminated and abated. Fact involved herein is that delinquent involved therein died on 10.09.1978 whereas the report of the enquiry was submitted on 4.6.1979 much after the death of the delinquent. In another case the Hon'ble Jharkhand High Court in another decision ***Jayanti Devi*** *versus* ***State of Bihar & others*** as reported in **(2001)2 J.C.R.-165** considering the fact that the disciplinary proceeding involved therein was initiated against the delinquent on 14.7.1995, Enquiry Officer was appointed on 27.7.1998 and the enquiry proceeding did not take effect till death of the delinquent on 24.3.1994 and the proceeding was decided ex parte after death of the delinquent thus the Hon'ble Jharkhand High Court observed that, the departmental proceeding could not have continued against the dead employee. In the case of ***Basudeo Tiwary*** *Vs*. ***Sido Kanhu University and others*** as reported in **(1998) 8 SCC 194** the Hon'ble Apex Court considering the fate of the disciplinary proceeding involving a terminated employee dying during pendency of the appeal, came to the conclusion that for the death of the delinquent during pendency of the proceedings, no further direction either as to further enquiry or reinstatement can be given. The case involves death of the person in the pendency of appeal and after finding that the person involved therein though not given notice but under the compelling situation of death of the person in the meantime, granted suitable relief after observing that there is no further scope to reopen the proceeding. This Court from another decision in the case of ***Gulam Gausul Azam & others*** *versus* ***State of U.P. & Others*** decided on 12th May, 2014 in Writ Appeal No.18653

of 2012 finds that once the delinquent died, the department proceeding automatically abates. The facts involved herein is that the delinquent involved therein died on 15.7.2011 whereas the report in the enquiry was submitted on 30.6.2011 and the order of the disciplinary authority proceeded to pass order of punishment on 3.07.2011. But on the premises that the impugned order therein withholding the retiral and other dues of late Abdul Kareem having been passed on 21.11.2011, which order having been surfaced after the death of the delinquent, the proceeding abated. This judgment did not involve the order in the disciplinary proceeding

6. It is here considering the decision vide **AIR 1994 (S.C.) 1176** placed reliance by Shri Pattnaik, the learned Senior counsel appearing for the opposite parties, for the difference in the facts and situation involved therein, this Court finds, the decision referred to hereinabove has no application to the case at hand. So far Shri Patnaik's claim for application of the provision at Order 22 Rule 4 of C.P.C. is concerned, for no continuance of the liability of delinquent on the legal heirs of the delinquent, this Court observes that the provision at Order 22 Rule 4 of C.P.C. has absolutely no application to the case at hand.

It is here considering that all the High Court cases cited involving case of death of delinquent prior to submission of report by the Enquiry Officer none of the decision has any application to the case of the petitioner. Similarly, coming to consider the decision involving **(1998) 8 S.C.C. 194** for the difference in the facts of the case involved therein, this Court also finds this decision has no application to the case at hand.

7. For the enquiry report already submitted much prior to the death of the delinquent, even response of the delinquent to such report having been submitted much prior to passing of final order of the Disciplinary Authority and during lifetime of the delinquent, this Court, thus, finds no force in the submission of Shri Dash, learned counsel for the petitioner. Accordingly, this Court while observing that the disciplinary proceeding cannot abate for the death of the delinquent after the submission of the enquiry report. This Court here also perused the explanation to the enquiry report submitted by the delinquent and finds, there is no allegation of violation of principle of natural justice. Thus, this Court finds, there is otherwise also no scope for interfering in the impugned order at Annexure-17 as it does not suffer from any infirmity.

8. The writ petition thus stands dismissed for having no merit. However, in the circumstances, there is no order as to cost.

Writ petition dismissed.

2018 (I) ILR - CUT- 964

S.K. SAHOO, J.

JCRLA NO.16 OF 2010

PRAKASH KANHAR .....Appellant

.Vrs.

STATE OF ORISSA .....Respondent

(A) INDIAN PENAL CODE, 1860 – Section 376(2)(f) – Offence under – Victim is eight years old – Defence has not at all challenged the age of the victim and nothing has been brought on record to disbelieve the evidence adduced by the prosecution relating to the age of the victim – Delay in lodging the FIR explained reasonably – Not fatal to the prosecution – Held, having played with the life of a child, the appellant does not deserve any leniency in the matter of sentence.

"Evidence of victim regarding commission of rape on her on a piece of stone by the appellant is corroborated by the medical evidence. The victim has disclosed about the incident before her mother (P.W.3) who has stated that after three days of the occurrence, the victim disclosed her that the appellant committed rape on her. She further stated that she took her daughter to the house of the appellant and confronted the appellant who confessed his guilt. Not only the evidence of the doctor but also the evidence of the mother of the victim corroborates the version of the victim relating to commission of rape. The occurrence in question took place on 28.06.2006 and the first information report was lodged on 30.08.2006 but the material has come on record that initially the victim did not disclose about the occurrence as she was threatened by the appellant and when her mother detected her pain and confronted her about the occurrence, she disclosed about the same. Therefore, in my humble opinion, the learned trial Court was justified in holding that the delay of two days in lodging the first information report has been satisfactorily explained and it is not at all fatal to the prosecution and the prosecution case cannot be completely discarded on that score. The blood and semen stains could not be detected on the wearing apparel of the victim as per the chemical analysis report but that cannot be a ground to discard the prosecution case particularly when the evidence of the victim is clear, cogent and trustworthy." (Para 9)

(B) ODISHA VICTIM COMPENSATION SCHEME, 2017 read with Section 357 A of the Code of Criminal Procedure,1973 – Provisions under – Payment of compensation to the victim – Held, keeping in view the age of the victim at the time of occurrence and the nature and gravity of the offence committed and the family background of the victim, I feel it necessary to recommend the case of the victim to District Legal Services Authority, Kandhamal to examine the case of the victim after conducting the necessary enquiry in accordance with law for grant of compensation. (Para 11)

For Appellant : Mr. Rajib Lochan Pattnaik (Amicus Curiae)

For Respondent : Mr. Chita Ranjan Swain, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment: 12.04.2018

S. K. SAHOO, J.

It is a case of rape of an eight year old girl child. She had been to jungle to collect mushroom in one fine morning. It was just like any other day for her. She

was unaware that the appellant's vulture eyes were waiting there for preys. Finding her alone, the appellant did not spare the innocent helpless child in pursuit of the sexual pleasure least bothered about the emotional, psychological and physical harm likely to be caused on the child. An uncut diamond was smashed to pieces. Due to the perverse lust for sex of the appellant, the disastrous effect of the crime on the mind of the child is likely to remain for lifelong and the catastrophe which had befallen her will haunt her forever. The unfathomable misery and grief will last till end of her life and the ripple effect will be unceasing. The appellant not only violated the victim's privacy and personal integrity but destroyed the whole personality of the victim and degraded her very soul.

2. The appellant Prakash Kanhar faced trial in the Court of learned Asst. Sessions Judge, Balliguda in S.T. Case No.10 of 2007/S.T. 25 of 2007 (D.C.) for offence punishable under section 376(2)(f) of the Indian Penal Code on the accusation that on 28.08.2006 at about 8.00 a.m., he committed rape on the victim who was aged about eight years inside a jungle of village Penagaberi.

The learned trial Court vide impugned judgment and order dated 30.01.2010 found the appellant guilty of the offence charged and sentenced him to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo rigorous imprisonment for a period of one year more under section 376(2)(f) of the Indian Penal Code.

3 The prosecution case, as per the first information report lodged by Smt. Ratni Pradhan (P.W.3) before the officer in charge of Tikabali police station on 30.08.2006 is that the victim who was her daughter and aged about eight years had gone to Penagaberi jungle on 28.08.2006 at about 8.00 a.m. for collecting mushroom and the appellant followed the victim and took the victim inside the jungle and opened her pant and his own pant and committed rape on her on a stone. The victim cried aloud and the appellant threatened her not to disclose about the incident before anybody and thereafter he left the place. The victim returned back home but out of fear she did not disclose before anybody. When the informant found the victim was limping, she confronted her about the difficulty and then the victim disclosed about the occurrence and accordingly, the first information report was lodged.

4. P.W.6 Aswini Kumar Nayak, officer in charge of Tikabali police station after receipt of the written report from P.W.3 Ratni Pradhan, registered Tikabali P.S. Case No.61 dated 30.08.2006 under section 376(2)(f) of the Indian Penal Code and took up investigation. During course of investigation, he examined the victim, seized wearing apparels of the victim and sent the victim to District Headquarters Hospital, Phulbani for her medical examination. He visited the spot and arrested the appellant on the next day and the appellant was sent to Tikabali P.H.C. for medical examination. The blue colour trouser of the appellant was seized and he was

forwarded to the Court of learned J.M.F.C., G. Udayagiri for commission of offence under section 376(2)(f) of the Indian Penal Code. On 02.6.2006 the victim was sent to M.K.C.G. Medical College and Hospital, Berhampur for her medical examination and the investigating officer received the medial report of District Headquarters Hospital, Phulbani on 02.09.2006. On 19.09.2006 as per the direction of the Superintendent of Police, Phulbani, P.W.6 handed over the charge of investigation to Sri Mangulu Nayak, S.I. of police, Tikabali police station who after completion of investigation submitted charge sheet on 27.12.2006 against the appellant under section 376(2)(f) of the Indian Penal Code.

5. During course of trial, the prosecution examined eight witnesses.

P.W.1 Prasanta Kumar Digal was the home-guard attached to Tikabali police station and is a witness to the seizure of command certificate as well as blue colour trouser of the appellant.

P.W.2 is the victim and she stated about commission of rape on her by the appellant and also her disclosure before her mother (P.W.3).

P.W.3 Smt. Ratni Pradhan is the mother of the victim and she stated about the disclosure made by the victim about the occurrence. She is also the informant in this case. She stated that one frock and one chadi of the victim which the victim was waring at the time of occurrence were seized by police which were marked as M.O.I and M.O.II respectively.

P.W.4 Kadangi Pradhan has not stated anything about the prosecution case.

P.W.5 Abhimanyu Pradhan stated that the informant disclosed before him as well as before the other villagers regarding the commission of rape by the appellant on the victim and after knowing the same, he along with the villagers proceeded to the house of the informant and found the victim was unable to walk and thereafter, the victim was shifted to the hospital. He is a witness to the seizure of wearing apparels of the victim under seizure list Ext.3.

P.W.6 Aswini Kumar Nayak was the officer in charge of Tikabali police station and he is the investigating officer.

P.W.7 Dr. Sangita Das was the Asst. Surgeon attached to the District Headquarters Hospital, Phulbani who examined the victim on police requisition on 31.08.2006 and noticed injury on her person and submitted her report Ext.13.

P.W.8 Dr. Geeta Sahu was the lecturer in F.M.T. Department, M.K.C.G. Medical College and Hospital, Berhampur and after physical, dental and radiological examination of the victim, she opined the age of the victim was nine years (+- one year) as per her report Ext.14

The prosecution exhibited as many as fourteen documents. Exts.1, 2 and 3 are the seizure lists, Ext.4 is the requisition for medical examination of victim, Ext.5

is the requisition for ossification test of victim, Ext.6 is the requisition for medical examination of accused, Ext.7 and Ext.8 are the command certificates, Ext.9 is the spot map, Ext.10 is the F.I.R., Ext.11 is the formal F.I.R., Ext.12 is the seizure list, Ext.13 and Ext.14 are the medical reports.

The prosecution proved two material objects. M.O.I is the frock and M.O.II is the chadi.

6. The defence plea of the appellant is that there was previous civil dispute between the parties for which case has been foisted.

7. The learned trial Court after assessing the evidence on record has been pleased to hold that in spite of thorough cross-examination, the defence has not been able to shake the credibility of the evidence of P.W.2 (victim) regarding the commission of rape on her by the appellant and her evidence gets ample support from the evidence of the doctor who medically examined the victim and so also from the evidence of P.W.3 to the effect that the victim narrated the incident before her that the appellant committed rape on her. The learned trial Court further held that delay of two days in lodging the first information report has been satisfactorily explained and as such the said delay is not at all fatal to the prosecution case and the prosecution case cannot be completely discarded on that score. The learned trial Court further held that the defence plea to the effect that the case has been falsely foisted due to previous land dispute between the family members of the victim and the family members of his maternal uncle cannot be accepted to be trustworthy. The learned trial Court further held that the prosecution has proved that on 28.08.2006 at about 8.00 a.m. in Pakali jungle near village Penagaberi, the appellant Prakash Kanhar committed rape on the victim when she was under twelve years of age.

8. Mr. Rajib Lochan Pattnaik, learned counsel was engaged as Amicus Curiae on behalf of the appellant and he was supplied with the paper book. He was given time to prepare the case. After going through the case records, he placed the evidence of the victim and doctor as well as the impugned judgment and contended that the evidence of the victim is not acceptable and in view of the delayed disclosure about the occurrence, the learned trial Court has committed illegality in relying upon her evidence.

Mr. Chita Ranjan Swain, learned Additional Standing Counsel on the other hand supported the impugned judgment and contended that in view of the statement of the victim and the doctor, the prosecution has clearly proved regarding commission of rape on the victim by the appellant. He further contended that the evidence of the victim is getting ample corroboration from the statement of her mother (P.W.3) and therefore, no fault can be found with the learned trial Court in convicting the appellant.

9. P.W.2 has stated her age to be eight years when she deposed before the learned trial Court on 06.09.2007. She has stated that she was reading in Class-IV.

The doctor (P.W.8) who examined the victim on 01.09.2006 at M.K.C.G. Medical College and Hospital, Berhampur has stated that from the physical, dental and radiological examination of the victim, she formed opinion that the age of the victim was nine years (+- one year). She has proved her report Ext.14. The defence has not at all challenged the age of the victim and nothing has been brought on record to disbelieve the evidence adduced by the prosecution relating to the age of the victim. Therefore, from the evidence of P.W.2, the victim as well as the doctor (P.W.8), it is clear that the age of the victim was lesser than twelve years at the time of occurrence.

Coming to the occurrence in question, the victim has stated that on the date of occurrence while she was collecting mushroom inside Pakali jungle near village Penagaberi, at that time the appellant lifted her with his hands to a little distance and made her lie on the ground on a piece of stone and then forcibly opened her paint and when she raised hullah, the appellant gagged her mouth and thereafter, the appellant opened his pant and committed rape on her and the appellant threatened her not to disclose the matter before anybody and she sustained bleeding injury on her private part due to the commission of rape and she was unable to walk. She further stated that she came to her house slowly with most difficulty and narrated the incident before her mother (P.W.3) that the appellant committed rape on her and she further stated about her medical examination in the District Headquarters Hospital, Phulbani as well as M.K.C.G. Medical College and Hospital, Berhampur.

Since the victim was a child witness, the learned trial Court before recording her evidence asked some formal questions and recorded the answers given by the victim and the learned trial Court was of the opinion that the victim was capable of understanding the questions put to her and she is able to give rational answers and he has given a certificate in that respect. Except giving suggestion to the victim that the appellant has not committed rape on her and that she was deposing falsely, nothing substantial has been elicited in her cross-examination to discard her evidence.

The doctor (P.W.7) has stated that on police requisition on 31.08.2006, she examined the victim and found the following injuries:-

> "The labia majora was intact, posterior commissure and fourchette was intact and congested. A laceration measuring 0.5 cm x 0.5 cm was present over the left labia minora and another laceration 0.2 x 0.2 cm was present over the right labia minora and whole of labia minora was congested. Hymen could not be visualized due to the tender labia minora. Spermatozoa was not detected in the vaginal swab. One abrasion 1" x 0.5 cm was present over the right scapula. Reddish brown scab was present. Abrasion 1.5" x 0.5 cm was present on the back about 1" below the right scapula. There was spasm of the right erector spinal muscle with painful gait."

Accordingly to P.W.7, the time of the injuries was within twenty four hours to four days of her examination and she proved her report Ext.13.

Therefore, the evidence of victim regarding commission of rape on her on a piece of stone by the appellant is corroborated by the medical evidence. Nothing has been brought out in the cross-examination of the doctor to discard her evidence. The victim has disclosed about the incident before her mother (P.W.3) who has stated that after three days of the occurrence, the victim disclosed her that the appellant committed rape on her. She further stated that she took her daughter to the house of the appellant and confronted the appellant who confessed his guilt. Therefore, not only the evidence of the doctor but also the evidence of the mother of the victim corroborates the version of the victim relating to commission of rape.

The occurrence in question took place on 28.06.2006 and the first information report was lodged on 30.08.2006 but the material has come on record that initially the victim did not disclose about the occurrence as she was threatened by the appellant and when her mother detected her pain and confronted her about the occurrence, she disclosed about the same. Therefore, in my humble opinion, the learned trial Court was justified in holding that the delay of two days in lodging the first information report has been satisfactorily explained and it is not at all fatal to the prosecution and the prosecution case cannot be completely discarded on that score.

The blood and semen stains could not be detected on the wearing apparel of the victim as per the chemical analysis report but that cannot be a ground to discard the prosecution case particularly when the evidence of the victim is clear, cogent and trustworthy.

10. In view of the forgoing discussions, I am of the view that not only the prosecution has established that the victim was below twelve years of age at the time of occurrence but has also proved that the appellant has committed rape on the victim on 28.08.2006. There is no infirmity or illegality in the impugned judgment and the sentence imposed by the learned trial Court is also the minimum sentence which is prescribed for such offence. Having played with the life of a child, the appellant does not deserve any leniency in the matter of sentence. Therefore, I am not inclined to interfere with the conviction of the appellant under section 376(2)(f) of the Indian Penal Code and the sentence passed thereunder.

11. In view of the enactment of the Odisha Victim Compensation Scheme, 2017, keeping in view the age of the victim at the time of occurrence and the nature and gravity of the offence committed and the family background of the victim, I feel it necessary to recommend the case of the victim to District Legal Services Authority, Kandhamal to examine the case of the victim after conducting the necessary enquiry in accordance with law for grant of compensation. Let a copy of the order be sent to the District Legal Services Authority, Kandhamal for compliance.

Lower Court's record with a copy of this judgment be communicated to the learned trial Court forthwith for information and necessary action.

Before parting with the case, I would like to put on record my appreciation to Mr. Rajib Lochan Pattnaik, the learned Amicus Curiae for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.2,500/- Accordingly, the Jail Criminal Appeal stands dismissed.

Appeal dismissed.

2018 (I) ILR - CUT- 970

S.K. SAHOO, J.

ABLAPL NO.5399 OF 2017

SANJAYA NARAYAN SAHOO ….....Petitioner

.Vrs.

STATE OF ODISHA **….....**Opp.Party

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 438 – Pre-arrest bail – Petitioner, a Legal Practitioner – Prima facie appears that the Petitioner collected the Vakalatnama along with signatures in stamp papers and blank papers from the victim as her lawyer in a matrimonial dispute – The conduct of the petitioner is highly suspicious as not performing the duty of a lawyer properly and having conspiracy with the husband of the victim – Held, the petitioner being the lawyer has breached the trust and acted against the interests of the victim – Anticipatory bail plea rejected. (Para 6)

(B) LEGAL PRACTITIONER – Duties and responsibilities towards the client and society at large – Discussed.

"The legal profession which is essentially a service oriented profession is the major component of the justice delivery system. Role of the legal profession in strengthening the administration of justice is unique. The relationship between the lawyer and the client is one of trust and confidence. The client entrusts the whole obligation of handling legal proceedings to an advocate and the advocate has to act with utmost good faith, integrity, fairness and loyalty. Nothing should be done by any member of the legal fraternity which might tend to lessen in any degree the confidence of the public in the fidelity, honesty and integrity of the profession. The conduct of members of the legal profession who do not follow ethics contributes to obstruction of administration of justice. If a legal practitioner fails to understand the significance of the profession and his role in providing access to justice and assisting the citizens in securing their fundamental and other rights then he has no right to continue as a member of this noble profession. Any violation of the principles of professional ethics by an advocate is unfortunate and unacceptable." *(Paras 7 & 8)*

Case Laws Relied on and Referred to :-

1. (2018) 69 OCR (SC) 400 : B. Sunitha -Vrs.- The State of Telengana & Ors.

For Petitioner : Mr. Devashis Panda
For Opp. Party : Mr. Chita Ranjan Swain Addl. Standing Counsel
For informant : Mr. Srinivas Mohanty

ORDER Date of Hearing: 18.04.2018 Date of Order: 01.05.2018

S. K. SAHOO, J.

The petitioner Sanjaya Narayan Sahoo has filed this application under section 438 of Cr.P.C. seeking pre-arrest bail in connection with C.T. Case No.2702 of 2016 pending in the Court of learned S.D.J.M., Bhubaneswar which arises out of Kharavela Nagar P.S. Case No.188 of 2016 for offences punishable under sections 294, 323, 354, 420, 427, 468, 471 of the Indian Penal Code.

2. One Pravati Swain, wife of Ashok Kumar Gupta filed a complaint petition in the Court of learned S.D.J.M., Bhubaneswar on 13.5.2016 against her husband and the petitioner who is an advocate of Bhubaneswar Bar. The said complaint petition was sent by the learned S.D.J.M., Bhubaneswar under section 156(3) of Cr.P.C. to the Inspector in charge, Kharavela Nagar police station for registration of the case and investigation and accordingly on 12.06.2016 Kharavela Nagar P.S. Case No.188 of 2016 was registered.

It is the case of the complainant-victim that her husband Ashok Kumar Gupta married to another lady and tortured her demanding more dowries for which one F.I.R. was lodged by her against her husband who was an employee of Oriental Bank of Commerce. Since the service of her husband would have been affected due to institution of the first information report, in order to save his service, he made an attempt for amicable settlement. The victim, her husband and their respective family members decided to dissolve the marriage between the victim and her husband and it was agreed upon that the victim would be paid a sum of Rs.35,00,000/- (rupees thirty five lakh) as permanent alimony by her husband. The victim engaged the petitioner as her advocate who was known to her to safeguard her interest. The petitioner was engaged as an advocate in Civil Proceeding No.32 of 2016 which was filed by the victim and her husband jointly under section 7 of the Family Courts Act, 1984 read with section 28 (1) of this Special Marriage Act, 1954 in the Court of Judge, Family Court, Bhubaneswar. It is the case of the victim that on the advice of the petitioner, she signed the divorce petition and agreement for permanent alimony and she received only Rs.9.5 lakh on 11.01.2016 but her husband in criminal conspiracy with the petitioner cheated her sum of Rs.18.5 lakh. Both the accused persons denied their liability to pay money to the victim after taking fraudulent illegal deed of divorce. On the deed of divorce, the petitioner took her signatures illegally giving her an impression regarding receipt of payment of Rs.7 lakh in the month of March 2016. The victim engaged a new advocate doubting the conduct and

character of the accused persons and through her new advocate, she came to know that fraud/cheating has been practised on her. On 12.05.2016 when the victim asked her husband about such fraud/cheating, he abused her in filthy language, pushed and dragged her before public with intent to disrobe her and threatened to kill her.

3. Mr. Devashis Panda, learned counsel appearing for the petitioner contended that the victim is an educated lady and she is working as Asst. Manager in Andhra Bank at Power House Branch, Bhubaneswar and she has deliberately suppressed her status in the complaint petition as well as in the original mutual divorce proceeding. It is contended that the victim married Ashok Kumar Gupta on 08.08.2013 before the Sub-Registrar, Bhubaneswar but after marriage, dispute arose between the parties. When the victim came to know about the marital status of her husband, she lodged an F.I.R. against her husband and other in-laws' family members and accordingly, Bhubaneswar Mahila P.S. Case No.347 of 2015 was registered under sections 498-A/417/342/494/506/34 of the Indian Penal Code read with section 4 of the Dowry Prohibition Act. It is further contended that after lodging of the F.I.R. by the victim, the matter was amicably settled between the parties and as per their own decision, a divorce proceeding was filed. It is further contended that as per the agreement between the parties, a sum of rupees nine lakh fifty thosand was transferred from the account of the husband of the victim to the account of Panchu Swain who is the father of the victim on 11.01.2016 on the date of filing of the divorce petition. Subsequently on 19.03.2016 the husband of the victim issued four cheques in favour of the victim, total amounting to rupees seven lakh which was also encashed by the victim. It is contended that the victim and her husband executed a mutual divorce deed before the D.S.R., Bhubaneswar on 19.03.2016 and in the said deed of divorce, there was no mention about the quantum of permanent alimony. It is contended that the petitioner has never executed any document with regard to the quantum of permanent alimony and the victim never produced any original document with regard to permanent alimony as alleged before the Court or before the Investigating Officer and therefore, the conduct of the victim is suspicious. It is further contended that after filing of the complaint petition/F.I.R., the victim filed a petition before the learned Judge, Family Court, Bhubaneswar for declaration of the registered divorce deed dated 19.03.2016 as fraudulent and void with a further prayer for permanently restraining her husband in using the divorce deed for any purpose and also for recovery of Rs.18,50,000/- (rupees eighteen lakh fifty thousand) only from her husband and the said proceeding was registered as C.P. No.330 of 2016 which was ultimately dismissed on 16.01.2017. It is further contended that after changing the counsel, the victim has instituted a false case against the petitioner to harass him on the accusation of preparation of forged document and cheating. It is further contended that if any outstanding dues was there towards permanent alimony, the victim could have instituted appropriate proceeding for recovery of such amount from her husband and the petitioner has been unnecessarily dragged into the dispute between the victim and her husband. It is

further contended that there is no chance of absconding or tampering with the evidence and since the petitioner is an advocate of Bhubaneswar Bar, unless he is released on anticipatory bail, he will face unnecessary humiliation in the society. The petitioner filed an additional affidavit annexing certain relevant documents.

Mr. Srinivas Mohanty, learned counsel appearing for the victim in his imitable style vehemently opposed the prayer for bail and contended that the conduct of the petitioner as an advocate is highly suspicious and he was in hand in glove with the husband of the victim although he was the advocate for the victim and he conspired with the husband of the victim, created forged documents in order to cheat the victim who without knowing the niceties of law reposed trust on the petitioner and believed the petitioner and signed on different documents as told to her by the petitioner on good faith and she was unaware about the ill intention of her husband and also the petitioner. It is contended by the learned counsel for the victim that knowing full well that a mutual divorce petition can only be entertained by the learned Judge, Family Court, Bhubaneswar, a divorce deed as per mutual consent was prepared on the advice of the petitioner wherein nothing was mentioned about the permanent alimony deliberately and the victim put her signatures thereon on good faith as advised by the petitioner. It is contended by the learned counsel that after coming to know about the illegal activities of her husband and the petitioner, the victim filed Civil Proceeding No.330 of 2016 before the learned Judge, Family Court, Bhubaneswar for declaring the registered deed dated 19.03.2016 purporting divorce as fraudulent and void and also permanently restraining her husband for using the divorce deed 19.03.2016 for any purpose and for recovery of rupees eighteen lakh fifty thousand from her husband. The learned Judge, Family Court, Bhubaneswar vide order dated 16.01.2017 declared the registered deed 19.03.2016 as illegal, void and inoperative and restrained the husband of the victim permanently from using the said deed till a decree of divorce dissolving the marriage between the victim and her husband is pronounced by a competent Court. The prayer for recovery of rupees eighteen lakh fifty thousand as was claimed by the victim from the salary of her husband stood dismissed.

Mr. Chita Ranjan Swain, learned Addl. Standing counsel produced the case records and opposed the prayer for bail and contended that the allegation against the petitioner is serious in nature and being an Advocate, since he has flouted the professional ethics, he is not entitled to be released on anticipatory bail.

4. During hearing of the bail application, on 05.07.2017 the learned counsel for the State took time for recording the 164 Cr.P.C. statement of the victim and accordingly, the 164 Cr.P.C. statement of the victim was recorded on 12.07.2017.

In her statement recorded under section 164 Cr.P.C., the victim has stated, inter alia, that when dissention started with her husband Ashok Kumar Gupta, she agreed for a mutual divorce with permanent alimony of Rs.50,00,000/- (rupees fifty

lakh) only and accordingly, she instructed the petitioner who was her friend and an advocate to prepare the divorce agreement with a sum of Rs.50,00,000/- (rupees fifty lakh) only. She stated that the petitioner took her signatures in Vakalatnama, stamp papers and also in blank papers but the petitioner prepared an agreement for permanent alimony of Rs.35,00,000/- (rupees thirty five lakh) only. The original agreement was not given to the victim and after ten days, a xerox copy of the agreement was given to her. She further stated that Rs.9.5 lakh was given to her by way of cheques and in the agreement, it was written that Rs.15.5 lakh would be given in the month of February 2016 which was not given to her. In March 2016, cheques amounting to Rs.7,00,000/- (rupees seven lakh) only in total were given to her and some of her signatures were taken in the Marriage Registration Office in the deed of divorce and it was told to her that notice would be issued to her and the balance amount of Rs.8.5 lakh would be given to her afterwards. It is further stated that the petitioner avoided receiving phone calls from her and she came to know from her husband that there has already been divorce between them and accordingly, she filed a petition to cancel the deed of divorce. It is further stated in her 164 Cr.P.C. statement that after she lodged F.I.R. against the petitioner, the petitioner came to her Branch Office and threatened her to kill and she also received a legal notice on behalf of the petitioner demanding 10% of the alimony which she received from her husband.

5. On going through the case records and documents filed by the respective parties, it appears that an agreement for permanent alimony was executed between the victim and her husband namely Ashok Kumar Gupta on 11.01.2016 before Sri P.K. Nanda, Notary Public, Bhubaneswar wherein it is mentioned that due to misunderstanding between the parties, they decided to divorce each other and divorce suit bearing C.P. No.32 of 2016 was filed before the Family Court, Bhubaneswar. It is further indicated that the husband of the victim agreed to pay a sum of Rs.35,00,000/- (rupees thirty five lakh) to the victim and on that day he paid a sum of Rs.9,50,000/- (rupees nine lakh fifty thousand) to the victim by way of a cheque. It is further indicated that the husband of the victim shall pay a further sum of Rs.15,50,000/- (rupees fifteen lakh fifty thousand) to the victim in the month February 2016 and before the close of C.P. No.32 of 2016 filed before the Marriage Officer, Bhubaneswar, the husband of the victim would pay Rs.10,00,000/- (rupees ten lakh) to the victim for permanent alimony/compensation.

According to the victim as per her 164 Cr.P.C. statement, by taking her signatures in stamp papers and blank papers, such a document was prepared.

On bare perusal of the agreement for permanent alimony, it appears that the petitioner as advocate has certified that the agreement was drafted by him as per the instruction of the parties. If the victim had specifically instructed to the petitioner to prepare divorce agreement with a sum of Rs.50,00,000/- (rupees fifty lakh), there was no earthly reason on the part of the petitioner to prepare an agreement for

permanent alimony with a sum of Rs.35,00,000/- (rupees thirty five lakh) without intimating the victim in that respect. The victim was not provided with the original of the agreement for permanent alimony instantly but after ten days, she was given a xerox copy. It appears that the agreement paper was purchased by Ashok Kumar Gupta, husband of the victim on 11.01.2016 from C.R. Prusty, Stamp Vender and he has also received the original agreement on 11.01.2016 which would be evident from the endorsement made in the agreement.

On 11.01.2016 a petition for divorce by mutual consent under section 28 of the Special Marriage Act, 1954 was filed before the Judge, Family Court, Bhubaneswar by the victim and her husband which was registered as Civil Proceeding No.32 of 2016. In the said petition, the victim is shown to have been identified by the petitioner on 11.01.2016 before Jagyneswar Acharya, Notary Public, Bhubaneswar. Most peculiarly there is no mention about any fixation of permanent alimony between the parties which is to be given by the husband of the victim to her. Similarly in the agreement for permanent alimony, it is mentioned that C.P. No.32 of 2016 was filed before Marriage Officer, Bhubaneswar which is not correct. Therefore, prima facie it appears that on 11.01.2016 agreement for permanent alimony was executed so also petition for divorce by mutual consent was filed before the learned Judge, Family Court, Bhubaneswar in C.P. No.32 of 2016. The agreement for permanent alimony was drafted by the petitioner and he also certified the contents of the agreement to have been drafted as per the instruction of the parties. The petitioner has also identified the victim before the Notary Public on the very day in the petition for divorce by mutual consent.

The petitioner has filed an additional affidavit before this Court which is dated 02.08.2017 in which he has mentioned in paragraph 7 that he had no knowledge about the quantum permanent alimony which is obviously an incorrect statement in view of the fact that he has himself drafted the agreement for permanent alimony and certified the same to be correct on 11.01.2016 before Mr. P.K. Nanda, Notary Public, Bhubaneswar. Again in paragraph 10 of the additional affidavit dated 02.08.2017, the petitioner has mentioned that he had never executed any document with regard the quantum of permanent alimony which is again an incorrect statement. It is further mentioned that the victim never produced any original document with regard to quantum of permanent alimony before any Court or before the investigating officer which creates serious doubt. When as per the endorsement made in the agreement for permanent alimony, the original agreement was retained by the husband of the victim on 11.01.2016 and a xerox copy of the same was handed over to the victim after ten days by the petitioner as per her 164 Cr.P.C. statement, the averments taken in the additional affidavit in that respect looses all its sanctity.

On 19.03.2016 a divorce deed per mutual consent was presented before the Registering Officer, Bhubaneswar in which the victim's husband was the first party

and the victim was the second party and in this divorce deed, nothing was mentioned about the fixation of permanent alimony. According to the victim, this mutual divorce deed was procured illegally without explaining the contents of the deed to her and when she came to know about the same, she filed a petition before the Judge, Family Court, Bhubaneswar vide Civil Proceeding No.330 of 2016 to declare the divorce deed dated 19.03.2016 as fraudulent and void and also with a prayer to restrain her husband from using the divorce deed for any purpose and for recovery of Rs.18,50,000/- from her husband.

The learned Judge, Family Court, Bhubaneswar vide judgment and order dated 16.01.2017 in Civil Proceeding No.330 of 2016 declared the divorce deed document dated 19.03.2016 as illegal, void and inoperative and the husband of the victim was also permanently restrained from using the said deed till a decree of divorce dissolving the marriage between the parties is pronounced by a competent Court. However, the prayer of the victim directing her husband for recovery of Rs.18,50,000/- (rupees eighteen lakh fifty thousand) from his salary was not accepted.

Most peculiarly the petitioner in his additional affidavit filed before this Court has mentioned in paragraph 11 that the petition filed by the victim before the learned Judge, Family Court, Bhubaneswar in Civil Proceeding No.330 of 2016 was dismissed vide judgment dated 16.01.2017. This is apparently a false statement.

The learned counsel for the victim has drawn the attention of this Court to the legal notice issued on behalf of the petitioner on dated 20.05.2016 to the victim by S & S Legal Services wherein it is indicated that she had promised to give 10% of the amount of permanent alimony which she would get and therefore, she has to clear Rs.2,20,000/- (rupees two lakh twenty thousand) within fifteen days of the receipt of the notice and if failed, legal proceeding is to be instituted. It is contended by the learned counsel for the informant that an advocate like the petitioner demanding percentage on the permanent alimony is against professional ethics which is not permissible in law.

On 20.03.2018 Miss Sandhyarani Singh, Inspector of Police, Kharvela Nagar police station was present and she submitted that as per the agreement between the parties, a sum of Rs.18,50,000/- (rupees eighteen lakh fifty thousand) is yet to be paid to the victim by her husband. The learned counsel for the petitioner submitted on that day that the balance amount as per agreement has also been paid to Panchu Swain, the father of the victim. Taking note of such submission of the learned counsel for the petitioner, the Inspector in charge of Kharavela Nagar police station was asked to file an affidavit in that respect. The Inspector in charge filed an affidavit which is dated 27.03.2018. In the affidavit she has mentioned that as per the agreement of permanent alimony of Rs.35,00,000/-, the father of the victim Panchu Swain and the victim have received a sum of Rs.16,50,000/- and they have not received the rest of the amount of Rs.18,50,000/- from the husband of the victim.

Therefore, the statement which was made by the learned counsel for the petitioner on instruction that the balance amount as per agreement has also been paid to Panchu Swain is also not correct.

6. In view of the forgoing discussions, it prima facie appears that there is ring of truth in the statement of the victim that her Vakalatnama along with her signatures in stamp papers and blank papers were collected by the petitioner. The conduct of the petitioner who was the advocate for the victim is also highly suspicious. Reflection of permanent alimony of Rs.35,00,000/- (rupees thirty five lakh) instead of Rs.50,00,000/- (rupees fifty lakh) in the agreement for permanent alimony dated 11.01.2016, non-mentioning of the permanent alimony amount in Civil Proceeding No.32 of 2016 filed before the learned Judge, Family Court, Bhubaneswar on the same day, presenting a divorce deed as per mutual consent on dated 19.03.2016 before the Registering Officer, Bhubaneswar without mentioning the permanent alimony amount which was declared to be illegal and void and inoperative by the learned Judge, Family Court, Bhubaneswr in Civil Proceeding No. 330 of 2016 indicates prima facie conspiracy between the petitioner and the husband of the victim. The victim entrusted the petitioner to conduct her case on good faith as he was known to her but the petitioner has breached the trust and acted against the interests of the victim.

7. The legal profession which is essentially a service-oriented profession is the major component of the justice delivery system. Role of the legal profession in strengthening the administration of justice is unique. The relationship between the lawyer and the client is one of trust and confidence. The client entrusts the whole obligation of handling legal proceedings to an advocate and the advocate has to act with utmost good faith, integrity, fairness and loyalty. Nothing should be done by any member of the legal fraternity which might tend to lessen in any degree the confidence of the public in the fidelity, honesty and integrity of the profession. The conduct of members of the legal profession who do not follow ethics contributes to obstruction of administration of justice. If a legal practitioner fails to understand the significance of the profession and his role in providing access to justice and assisting the citizens in securing their fundamental and other rights then he has no right to continue as a member of this noble profession. Any violation of the principles of professional ethics by an advocate is unfortunate and unacceptable.

In **Re: Sanjiv Dutta and Ors. reported in (1995) 3 Supreme Court Cases 619**, it is held as follows:-

> "20. The legal profession is a solemn and serious occupation. It is a noble calling and all those who belong to it are its honourable members. Although the entry to the profession can be had by acquiring merely the qualification of technical competence, the honour as a professional has to be maintained by its members by their exemplary conduct both in and outside the Court. The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of the civilized society. Both as a leading member of the intelli gential of the

> society and as a responsible citizen, the lawyer has to conduct himself as a model for others both in his professional and in his private and public life. The society has a right to expect of him such ideal behavior. It must not be forgotten that the legal profession has always been held in high esteem and its members have played an enviable role in public life. The regard for the legal and judicial systems in this country is in no small measure due to the tiredness role played by the stalwarts in the profession to strengthen them. They took their profession seriously and practised it with dignity, deference and devotion. If the profession is to survive, the judicial system has to be vitalised. No service will be too small in making the system efficient, effective and credible. The casualness and indifference with which some members practise the profession are certainly not calculated to achieve that purpose or to enhance the prestige either of the profession or of the institution they are serving. If people lose confidence in the profession on account of the deviant ways of some of its members, it is not only the profession which will suffer but also the administration of justice as a whole. The present trend unless checked is likely to lead to a stage when the system will be found wrecked from within before it is wrecked from outside. It is for the members of the profession to introspect and take the corrective steps in time and also spare the Courts the unpleasant duty. We say no more."

It prima facie appears that the petitioner has completely betrayed the trust reposed in him by the victim. He has even gone to the extent of claiming percentage on the permanent alimony given to the victim which is illegal. The Bombay High Court in **Re: K.L. Gauba reported in A.I.R. 1954 Bombay 478** held that fees conditional on the success of a case and which gives the lawyer an interest in the subject matter tends to undermine the status of the profession. The same has always been condemned as unworthy of the legal profession. If an advocate has interest in success of litigation, he may tend to depart from ethics. In the case of **Mr. 'G'., A Senior Advocate of the Supreme Court reported in (1955) 1 Supreme Court Reporter 490**, the Hon'ble Supreme Court held that the claim of an advocate based on a share in the subject matter is a professional misconduct. In case of **B. Sunitha - Vrs.- The State of Telengana and Ors. reported in (2018) 69 Orissa Criminal Reports (SC) 400**, it is held that claim based on percentage of subject matter in litigation cannot be the basis of a complaint under section 138 of the N.I. Act.

8. After evaluating the available materials on record with utmost care and caution, considering the nature and gravity of the accusation, availability of the prima facie material to constitute the ingredients of the offences, the manner in which the petitioner betrayed the trust reposed on him by the victim and tried to mislead this Court by filing additional affidavit in giving incorrect and false statement and the possibility of tampering with the evidence, I am not inclined to exercise the discretionary power under section 438 of the Code by granting pre-arrest bail to the petitioner. Accordingly, the ABLAPL application being devoid of merits, stands dismissed.

Application dismissed.

2018 (I) ILR - CUT- 979

S.K. SAHOO, J.

MISC. CASE NO.2001 OF 2017
(Arising out of CRLA NO. 265 OF 2014)

RANJIT PAIKA & ANR. ….....Petitioner

.Vrs.

STATE OF ORISSA ….....Opp.Party

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 20(b) (ii)(C) – Offence under – Conviction – Appeal against – One of the convict is a minor – The question was as to whether the convict who is a minor can be released on bail without satisfying the provision under section 37 of the N.D.P.S. Act since the said section starts with a non-obstante clause and it is a case of seizure of commercial quantity of ganja – Held, yes – Principles – Discussed.

Case Laws Relied on and Referred to :-

1. (2000) 6 SCC 759 : Raj Singh -Vrs.- State of Haryana.
2. 1993 (I) OLR 464 : Antaryami Patra -Vrs.- State of Orissa.
3. 2007(I) OLR 1137 : Sumanta Bindhani -Vrs.- State of Orissa
4. (2010) 47 OCR (SC) 855 : Ajay Kumar -Vrs.- State of M.P.
5. (2010) 46 OCR(SC) 665 : Mohan Mali Vrs.- State of M.P.

For petitioners : Mr. Srinibas Parija
For State : Mr. Priyabrata Tripathy

ORDER Date of Order : 11.05.2018

S.K. SAHOO, J.

Heard Mr. Srinibas Parija, learned counsel for the appellant no.2 Bijaya Raita (petitioner) and Mr. Priyabrata Tripathy, learned Addl. Standing Counsel for the State.

The petitioner faced trial in the Court of learned Special Judge, Gajapati, Paralekhemundi in G.R. Case No.116/2011 (T.R. No.20/2011) for offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') along with appellant no.1 Ranjit Paika and they were found guilty of the offence charged and sentenced to undergo R.I. for ten years and to pay a fine of Rs.1,00,000/- (rupees one lakh only) each, in default, to undergo R.I. for one year.

This application is filed by the appellant no.2 Bijay Raita for declaring him as a juvenile and release him on bail.

On 04.05.2018, I passed a detailed order declaring the appellant no.2 Bijaya Raita as 'juvenile' as per the definition provided under section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereafter '2000 Act'), as his date of birth is 10.03.1997 and the occurrence in question took place on 11.04.2011.

The question that was posed on the last date is whether the petitioner can be released on bail without satisfying the provision under section 37 of the N.D.P.S. Act since the said section starts with a non-obstance clause and it is a case is a seizure of commercial quantity of ganja.

Learned counsel for the petitioner drew the attention of this Court to two decisions of the Hon'ble Supreme Court i.e. **Ajay Kumar -Vrs.- State of M.P. reported in (2010) 47 Orissa Criminal Reports (SC) 855** and **Mohan Mali -Vrs.- State of M.P. reported in (2010) 46 Orissa Criminal Reports(SC) 665** and contended that since in view of section 15 of 2000 Act, a juvenile can be kept in a special home for a maximum period of three years, the bail application of the petitioner may be favourably considered.

In case of Ajay Kumar (supra), after considering the section 15 of the 2000 Act, it was held that the maximum period for which a 'juvenile' could be kept in a special home is for a period of three years and since in that case, the appellant was a minor on the date of commission of offence and he had already undergone more than the maximum period of detention as provided for under section 15 of the 2000 Act, keeping in view the provision under Rule 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereafter '2007 Rules'), the Hon'ble Court directed the appellant to be released forthwith.

In case of Mohan Mali (supra), the Hon'ble Court considered the provisions of sections 7-A, 20 and 64 of the 2000 Act as well as Rule 98 of 2007 Rules and held that since Rule 98 of 2007 Rules squarely applies to the appellant no.2 Dhanna Lal's case and his case is to be considered not only for grant of bail, but also for release in terms of said Rule, since he had completed more than the maximum period of sentence as provided under Section 15 of the 2000 Act.

Learned counsel for the petitioner further placed a decision of this Court in case of **Sumanta Bindhani -Vrs.- State of Orissa reported in 2007(I) Orissa Law Reviews 1137,** wherein it is held that when the legislature has provided for the juvenile to be extended special care, treatment, development and rehabilitation and the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereafter '2015 Act') contemplates total separation of juveniles from the mainstream offenders and both the Acts i.e. 2015 Act and N.D.P.S. Act are Special Acts passed by the Parliament and contain non-obstance clauses having overriding effect in the bail matters but the juveniles having been given special place in the scheme of things, section 12 of the 2015 Act overrides the provisions of section 37 of the N.D.P.S. Act, in the case of a person who is a juvenile.

Mr. Priyabratha Tripathy, learned Addl. Standing Counsel for the State on the other hand placed a decision of this Court in case of **Antaryami Patra -Vrs.- State of Orissa reported in 1993 (I) Orissa Law reviews 464** wherein Hon'ble Justice G. B. Pattnaik (as His Lordship then was) held that the provision in N.D.P.S.

Act is a special statutory provision and it overrides the general provision of section 18 of the Juvenile Justice Act.

The reason for enacting 2000 Act in relation to the juveniles can be seen from the statement of objects and reasons given by the Parliament. It is worthwhile to read a portion of the statement of objects and reasons given therein:-

> "2. (ii) to make the juvenile system meant for a juvenile or a child more appreciative of the developmental needs in comparison to criminal justice system as applicable to adults;
>
> xxx xxx xxx xxx xxx
>
> (x) to provide for effective provisions and various alternatives for rehabilitation and social reintegration such as adoption, foster care, sponsorship and after care of abandoned, destitute, neglected and delinquent juvenile and child."

It is pertinent to note that Juvenile Justice Act, 1986 has undergone a sea change in the 2000 Act and further by insertion in Juvenile Justice (Care and Protection of Children) Amendment Act, 2006 (33 of 2006) which came into force on 22.08.2006 and further in 2015 Act. The Juvenile Justice Act, 1986 was repealed as per section 69 of the 2000 Act.

In the statement of objects and reasons in Amendment Act 33 of 2006, it is indicated that the modifications proposed in the bill, inter alia, intend to clarify that the Juvenile Justice Act shall apply to all cases involving detention or criminal prosecution of juveniles *under any other law*.

The rights of the juvenile has been placed on a high pedestal by the legislature and the procedure prescribed under the 2000 Act governs all cases concerning juveniles in conflict with law irrespective of the offence they are alleged to have committed as well as all children covered under the definition of 'children in need of care and protection'. Every aspect of the matter including detention, prosecution, sentencing, rehabilitation, restoration of a person who has not completed eighteen years of age has to be dealt with in accordance with provisions of the 2000 Act. The Parliament was very much aware of the existence of the provision under section 37 of the N.D.P.S. Act, 1985 when they introduced 2000 Act which came into force w.e.f. 22.08.2006 and particularly the provision under section 12 of the said Act. Section 12 of the 2000 Act makes it clear that bail could only be refused when the Court comes to the conclusion that there are reasonable grounds for believing that the release of juvenile is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.

In case of **Raj Singh -Vrs.- State of Haryana reported in (2000) 6 SCC 759,** the appellant was less than 16 years of age. He was, therefore, a 'juvenile' within the meaning of the expression under the Juvenile Justice Act, 1986 on the date of the alleged committal of offence under section 20 of the N.D.P.S. Act, 1985. The Court held that for the reason that he was a juvenile at the time of the

occurrence, his trial could have only been held under the provisions of the Juvenile Justice Act, 1986 and that his trial having been conducted by the Sessions court was bad in law, and consequently, his conviction stood vitiated.

The petitioner was on bail during trial and after conviction on 25.03.2014, he has already undergone more than four years of substantive sentence. Therefore, keeping in view the ratio laid down by the Hon'ble Supreme Court in case of Ajay Kumar (supra) and Mohan Mali (supra), I am inclined to accept the prayer of the petitioner and direct the petitioner to be released on bail.

Let the appellant no.2 Bijaya Raita be released on bail pending disposal of the appeal on furnishing personal bond of Rs.50,000/-(rupees fifty thousand only) with two solvent sureties each for the like amount to the satisfaction of the learned trial Court. The Misc. Case is accordingly disposed of.

Peition disposed of.

2018 (I) ILR - CUT- 982

S. N. PRASAD, J.

W.P.(C) NO.23133 OF 2014

GARGABA BISWAL ….....Petitioner

.Vrs.

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

(A) RECRUITMENT – Appointment of Jogana Sahayak – The selected candidate was appointed, who resigned after serving few months for legal necessity – The Petitioner being the second candidate in the merit list was asked to join – Petitioner joined – Few days after the authority asked him to resign as upon calculation of marks the petitioner was found not to be the second candidate in the merit list but the OP No. 6 was the second candidate as per merit list – Plea of petitioner that before asking for resignation no show cause notice was given – Held, competent authority, after realizing the mistake, has issued the order to ask the petitioner to tender his resignation since he is not entitled to hold the post by giving a go bye to the candidature of opposite party no.6, according to my view, asking the petitioner to tender resignation cannot be said to be arbitrary exercise since the opposite parties have given a chance to the petitioner so that the illegality which has been occurred in selecting him may be rectified otherwise he would have been terminated from service – So in order to avoid the order of termination, the petitioner has been given a chance to tender his resignation asking him to resign, is not held to be illegal by this court in the facts and circumstances of the case. (Para 4)

(B) NATURAL JUSTICE – When to be followed – Principles – Indicated.

"There is no dispute in the settled position of law that before taking any adverse action against an incumbent or any party, the principle of natural justice is to be followed, but simultaneously the principle of natural justice cannot be said to be followed in straight jacket formula and if there is no chance of any change in the factual aspect, merely on the ground of non-observance of principle of natural justice, the decision taken by the authority cannot be held to be illegal rather the question of following the principle of natural justice will be applicable when the fact is in dispute." *(Para 5)*

Case Laws Relied on and Referred to :-

1. (2004) 4 SCC 281: Escorts Farms Ltd. Vrs. Commissioner, Kumaon Division, Nainital, U.P. & Ors.,
2. (2015) 8 SCC 519 : Dharampal Satyapal Ltd. Vrs. Deputy Commissioner of Central Excise, Gauhati & Ors.

For Petitioner : M/s. Jagabandhu Sahu and P. K. Nanda.
For Opp.Parties : M/s. H. S.Mishra, A. K. Mishra, K. Badhei & Dr. A. K. Tripathy.

JUDGMENT Date of Hearing & Judgment: 02.05.2018

S. N. PRASAD, J.

The writ petition is for quashing the order in directing for resignation of service issued by the Sarapanch of Patuapali Grampanchayat under Annexure-9 and letter dtd.30.10.20-14 and second selection list dated 10.10.2013 issued by the Panchayat Samiti Officer, Agalpur (Duduka) under Annexure-8 and further to issue direction upon them to allow the petitioner to continue as Jogana Sahayak of Patuapali Grampanchayat in the district of Balangir along with all service benefits.

2. The brief fact of the case of the petitioner is that in pursuance to an advertisement published on 16.5.2012 by the Block Development Officer, Agalpur (Duduka) by which applications have been invited to fill up the post of Jogana Sahayak in respect of each Grampanchayat of Agalpur Block, District Balangir. In pursuance thereto the petitioner along with others had applied for appointment as Jogana Sahayak in respect of Patuapali Grampanchayat. The petitioner had submitted all the documents for consideration of his candidature. The selection committee has concluded the selection process, merit list was prepared in which one Manjusri Mahakud stood in the 1st position, the petitioner at 2nd position and opposite party no.6 at serial no.3. The said Manjusri Mahakud, after rendering her service for few months, has resigned due to legal necessity on 31.7.2014. Thereafter one letter was issued from the office of the Grampanchayat, Patuapali to the petitioner for joining as Jogana Sahayak which was issued on the ground that the petitioner was placed at 2nd position in the merit list, accordingly the petitioner has joined as Jogana Sahayak on 19.9.2014 and started discharging his duty. The petitioner while continuing as such, one letter was issued from the office of Block Development Officer, Agalpur (Duduka) Block by preparing a separate panel list of

Jogana Sahayak in order to appoint chronologically vide order dtd.30.10.2014 which was issued on the ground that the petitioner has secured 3rd position and one Sujata Mishra has secured 2nd position, thereafter the appointment of the petitioner has been held to be wrong in view of the subsequent calculation by the authorities, accordingly an order has been passed by the Sarapanch, Patuapali Grampanchayat (O.P. No.5) directing the petitioner to resign from service on 21.11.2014 and it was reflected therein that the petitioner has to resign from service within seven days from the communication of the order.

The petitioner thereafter has applied under Right to Information Act seeking information as to what led the authorities to place opposite party no.6 in 2nd position.

According to the petitioner the calculation of marks of opposite party no.6 is wrong reason being that her marks has been calculated out of total marks including the marks secured by her in the optional subject, as such the aggregate comes to 37.54% and so far as the petitioner is concerned, he has obtained 342 marks out of total 900 which is coming 38%, as such he cannot be placed at 3rd position.

Learned counsel for the petitioner, in course of argument, has submitted that even accepting the calculation of marks as true, but asking him to resign from service is an arbitrary action of the authorities and that too without issuing any show cause notice, as such this writ petition has been filed.

3. The opposite party – State as well as opposite party no.6 have appeared and represented through their counsels who have submitted that although initially the opposite party no.6 has submitted in her application form the total marks secured by her in the CHSE as 413 out of 1100, percentage of marks secured comes to 37.54%. The opposite party no.6 has enclosed the mark-sheet of CHSE, the authority, on verification, has found that 1100 marks include the total marks of optional subject and 413 is inclusive of the marks secured by her in optional subject, as such subsequently it was calculated out of 900 deducting the 200 marks earmarked for optional subject and calculating it from the actual marks excluding the marks obtained in the optional subject which was 374. The total percentage of marks comes to 41.56% in the CHSE.

It has been stated that the criteria to select has been fixed under Annexure-1 which is an advertisement which contains the provision for selection procedure which will be based on career marking with weightage of matriculation being 30% for +2 being 30% and for +3 being 40% and accordingly the marks of matriculation, +2 and +3 has been calculated by taking it of its 30%, 30% and 40% respectively of Matriculation, +2 and +3, total comes to 46.20%. While on the other hand the petitioner's mark has come to 45.99%.

However, due to bona fide mistake the opposite party no.6 was placed in serial no.3 but subsequently while rectifying it the opposite party no.6 has been placed in the 2nd position, hence the authorities have taken decision to consider the

appointment of opposite party no.6 since she is found to be more meritorious in comparison to that of the petitioner, accordingly asked the petitioner to tender his resignation, hence there is no illegality in the same, otherwise the authority would have taken decision to terminate him from service for the simple reason that if any meritorious candidate is there, he / she cannot be given go bye ignoring the merit over and above the performance of the less meritorious candidate.

So far as the contention of the petitioner that no show cause notice has been issued, it has been submitted by them that when the fact is admitted, merely on account of the fact that show cause notice has not been issued, the decision of the authority cannot be said to be improper.

4. Heard the learned counsel for the parties and on appreciation of their rival submissions and from the material available on record it is evident that one advertisement was published on 16.5.2012 for fulfilling the post of Jogana Sahayak for each Grampanchayat of Agalpur (Duduka) Block of Balangir district for smooth distribution of public distribution system at Grampanchayat point. The eligibility criteria has been stipulated therein as per which the candidate should be a permanent resident of the Grampanchayat, he / she should be a graduate (+3) and he / she should be of age between 21 to 35 years up to 31.5.2012. Selection procedure has also been provided therein which is to be based on career marks with weightage for matriculation being 30%, for +2 being 30%, for +3 being 40%. A committee under the Chairmanship of Block Development Officer with MI / IS as convener and concerned Sarpanch of Grampanchayat as member will do the selection and provide the panel of 3 names to the Collector / Sub-Collector (as decided by Collector) for approval. Upon approval by the appropriate authority, the panel names will be provided to the concerned Gram panchayat for appointment of the 1st person (scoring highest mark) as Jogana Sahayak. If no graduate is available, then re-advertisement shall be made for selection from amongst +2 pass applicants of the concerned Grampanchayat.

In pursuance to the said advertisement, the petitioner along with other candidates have participated in the selection process including opposite party No.6 and one Manjusri Mahakud. The selection committee has prepared a merit list and on the basis of the selection procedure fixed under Annexure-1 the said Manjusri Mahakud has been found to be securer of highest marks, i.e. 56.70% hence was placed at top in the merit list. The petitioner initially was in the 2nd position while the opposite party no.6 was at 3rd position.

It is further evident from the material available on record that the opposite party no.6, in his application form, has disclosed the marks secured by him in CHSE examination showing therein total marks 1100 and marks secured as 413, percentage of which is 37.54. The total marks as reflected in the mark-sheet which was enclosed with the application form was 1100 which was inclusive of the marks of the optional

subject, 413 was also inclusive of marks secured by opposite party no.6 in the optional subjects.

The candidate who has been ranked at sl. No.1, namely Manjusri Mahakud since was found to be more meritorious in comparison to other two candidates, she was offered with the appointment, she has accepted it and resumed her duty but subsequently she has resigned. By virtue of resignation of Manjusri Mahakud, the authorities have issued appointment letter in favour of the petitioner. In pursuance thereto he has started discharging his duty but subsequently it was detected by the selection committee that the committee has wrongly calculated the marks of opposite party no.6 since in place of 1100 under the total marks it should be 900 and the total marks secured would be 374 and not 413 since 413 was the marks including the marks obtained in the optional subject. Accordingly the percentage of marks has come to 46.20%, in consequence thereof she has been found to be second in the merit list.

The selection committee, thereafter, has asked the petitioner to tender his resignation since over and above him, opposite party no.6 is more meritorious, as such she being in the second position is to be appointed. Thereafter the petitioner has approached this court by way of the instant writ petition questioning the decision of the authorities.

The contention raised by the petitioner is that he cannot be said to be 3rd in the rank since he has secured 56.24% while opposite party no.6 has secured 56.01% as would be evident from Annexure-4. His submission is that the opposite party no.6 has tried to mislead the authority by disclosing in the application form 1100 and securing 413 marks which subsequently has been rectified to 900 and 374 which is the marks secured by her in CHSE.

This court, after appreciating the argument advanced on behalf of the petitioner, is of the view that the opposite party no.6 has filled up her application form although disclosing therein the total marks of 1100 and marks secured as 413 but along with mark-sheet of CHSE.

It is not in dispute that the total subject of the CHSE also inclusive of optional subjects and the total marks under the said heading is 200 and 900 is of the actual subjects. The opposite party no.6 has secured 374 out of 900 apart from the marks secured by her in the optional subjects, but she has disclosed in the application form as 1100 and 413 inclusive the marks obtained in optional subject, the percentage of marks secured has come as 37.54%.

After resignation of Manjusri Mahakud, although appointment has been offered to the petitioner but it has been realized by the selection committee that there is some mistake which has been committed by the selection committee so far as the addition of marks of opposite party no.6 is concerned, accordingly on verification of

calculation it was found that the marks secured by her excluding the optional marks is 374 out of 900, accordingly the total percentage in CHSE comes to 41.56%.

It is evident from the revised selection list that with comparison with the addition of marks of the petitioner vis-à-vis opposite party no.6 done in pursuance to Annexure-1, the opposite party no.6 has got weightage of 30% in Class X as 16.96%, +2 as 12.47% and +3 weightage of 40% as 16.77, total comes to 46.20%, while on the other hand petitioner's weightage of Class-X comes to 19.36%, in +2, 11.40% and +3, 15.23% which comes to 45.99%.

The competent authority, after realizing the mistake, has issued the order to ask the petitioner to tender his resignation since he is not entitled to hold the post by giving go bye to the candidature of opposite party no.6, according to my view, asking the petitioner to tender resignation cannot be said to be arbitrary exercise since the opposite parties have given a chance to the petitioner so that the illegality which has been occurred in selecting him may be rectified otherwise he would have been terminated from service. So in order to avoid the order of termination, the petitioner has been given a chance to tender his resignation asking him to resign, is not held to be illegal by this court in the facts and circumstances of the case.

The fact remains that when the petitioner is less meritorious than any other candidate then the more meritorious candidate has got every right to be appointed and candidature of such candidate cannot enrolled and if any illegality has been committed in enrolling the candidature of such candidate, it is open to the selection committee or the competent authority to rectify it on the principle that if any illegality has been committed it will not be allowed to be perpetuated and the moment it came to the knowledge of the authority it has to be rectified, as such considering this legal position the petitioner has been asked to tender his resignation, hence there is no error in the said decision.

5. Learned counsel for the petitioner submits that before asking to tender resignation no show cause notice has been issued, there is no dispute in the settled position that before taking any adverse action against an incumbent or any party, the principle of natural justice is to be followed, but simultaneously the principle of natural justice cannot be said to be followed in straight jacket formula and if there is no chance of any change in the factual aspect, merely on the ground of non-observance of principle of natural justice, the decision taken by the authority cannot be held to be illegal rather the question of following the principle of natural justice will be applicable when the fact is in dispute, reference in this regard may be made to the judgments rendered by Hon'ble Apex Court in the case of **Dharampal Satyapal Ltd. Vrs. Deputy Commissioner of Central Excise, Gauhati and Others**, reported in (2015) 8 SCC 519 wherein their lordships have laid down that even if notice has been issued, if there is no chance of change in the factual aspect, merely on the ground of not following the principles of natural justice the order cannot be said to be illegal. In the case of **Escorts Farms Ltd. Vrs. Commissioner,**

Kumaon Division, Nainital, U.P. & Ors., (2004) 4 SCC 281 it has been held by their Lordships that it would be of no use if it amounts to completing a mere ritual of hearing without possibility of any change in the decision of the case on merits.

Here in the instant case it is evident that the petitioner admittedly has secured lesser marks in comparison to that of opposite party no.6, as would be evident from the material available on record which cannot be disputed by the petitioner even assuming that the matter would be remitted before the authority by directing him to provide an opportunity of hearing, no purpose would be served since the factual aspect as stated herein above related to marks obtained by the petitioner vis-à-vis opposite party no.6 is not in dispute and cannot be disputed by the petitioner and if it will be remitted before the authority it will lead to empty formality and useless theory, as such this court is of the view that merely on account of the fact that the principle of natural justice has not been followed, the decision of the authority cannot be held to be illegal.

In view of the entirety of facts and circumstances, in my considered view the petitioner has failed to make out a case for passing positive direction in his favour, accordingly the writ petition fails and it is dismissed.

Writ petition dismissed.

2018 (I) ILR - CUT- 988

S. N. PRASAD, J.

W.P. (C). NO. 11136 OF 2007

DURGAPRASAD SANGRAMJIT MALLICK .....Petitioner

.Vrs.

NABARD & ORS. ….....Opp.Parties

CONSTITUTION OF INDIA,1950 – Articles 226 and 227 read with Article 12 – Writ petition by an Employee of 'NABARD' challenging the order of his dismissal from service – Plea of maintainability of the writ petition against 'NABARD' raised since it is a corporate body established U/s.3 of the NABARD Act, 1981 – Whether NABARD to be considered as an "Authority" within the meaning of Article 12 – Answer is yes – Held, the term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12 – Article 12 is relevant only for the purpose of enforcement of fundamental rights under Art. 32 – Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights – The words "Any person or

authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State – They may cover any other person or body performing public duty – The form of the body concerned is not very much relevant – What is relevant is the nature of the duty imposed on the body – The duty must be judged in the light of positive obligation owed by the person or authority to the affected party – No matter by what means the duty is imposed – If a positive obligation exists mandamus cannot be denied. (Para 7)

Case Laws Relied on and Referred to :-

1. (1981) 1 SCC 722 : Ajay Hasia & Ors. –vs- Khalid Mujib Sehravardi & Ors.
2. (2008) 3 SCC 469 : Divisional Forest Officer, Kothagudem & Ors. Vrs. Madhusudhan Rao.
3. (1989) 2 SCC 691 : Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust –vs- V.R.Rudani.
4. (1976) 2 SCC 981 : Siemens Engineering & Manufacturing Co. of India Ltd. Vrs. Union of India & Anr.
5. (1990) 4 SCC 594 : S. N. Mukherjee Vrs. Union of India
6. (1992) 4 SCC 605 : Krishna Swami Vrs. Union of India & Ors.
7. AIR 1994 SC 2696 : Workmen of Meenakshi Mills Ltd. Vrs. Meenakshi Mills Ltd. & Anr.
8. AIR 1998 SC 3104 Rani Laxmibai Kshetriya Gramin Bank vrs. Chand Behari Kapoor & Ors.
9. (2009) 4 SCC 240 : Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank Vrs. Jagdish Sharan Varshney & Ors.
10. (2008) 3 SCC 469 : Divisional Forest Officer, Kothagudem & Ors.Vrs. Madhusudhan Rao.

For Petitioner : In person
For Opp.Parties : M/s. B. P. Tripathy, P. K. Chand, D. Satpathy, J. Mohanty; Mr. J. K. Tipathy, Sr. Advocate.

JUDGMENT Date of Hearing : 19.04.2018 Date of Judgment: 04.05.2018

S. N. PRASAD, J.

This writ petition is under Article 226 and 227 of the Constitution of India wherein the order of dismissal dtd.26th August, 2005 and Appellate order dtd.4th January, 2007 are under challenge whereby and where under the petitioner has been dismissed from service.

2. The brief fact of the case of the petitioner is that he after joining his service as an officer of the National Bank for Agricultural and Rural Development, in short NABARD, has started rendering his service from 25th July, 1985 as a Grade-A officer, while he was in service he was departmentally proceeded by serving a memorandum of charge dtd.19th February, 2004 alleging therein altogether three charges and accordingly the petitioner was asked to appear before the enquiry officer.

The case of the petitioner is that before his appearance before the enquiry officer, he has refuted the allegations leveled against him but in one pretext or the other he has not been provided opportunity to defend himself before the enquiry officer and in his absence two of the charges out of 3 has been found to be proved by

the enquiry officer, which has been accepted by the disciplinary authority and thereafter order of dismissal has been passed.

The petitioner has challenged the same before the appellate authority by raising all the points but the same has been rejected as has been informed to him vide communication dtd.4th January, 2007, hence this writ petition has been filed.

3. The grounds taken by the petitioner in assailing the orders passed by the disciplinary authority as also the appellate authority is that he has not been provided with adequate opportunity to defend himself in spite of time having been sought for and in one day the enquiry has been concluded.

Further ground has been taken that the enquiry officer has given finding proving the charges which are not in the memorandum of charge, as such the enquiry officer has proceeded mechanically.

The enquiry officer, while proving the charge has taken note of the fact that for availing loans from outside agencies permission from the national Bank was required but whether he has taken permission or not it has not been verified by the enquiry officer and if the petitioner would have been provided with an opportunity he would have brought to the notice of the enquiry officer this fact.

So far as charge relating to non-submission of statement of liability, the same has also been found to be proved without appreciating the documents which have been exhibited.

So far as the allegation related to charge no.3 which relates to avoiding to go for training on the plea of illness but in support of his stand, he has not submitted any medical certificate, as such the enquiry officer has came to finding that there was predetermined plan by the petitioner to avoid attending the training programme, which according to the petitioner is absolutely incorrect in view of the fact that for getting leave on the ground of medical illness there is no requirement to produce any medical certificate, he further submits that the period of leave subsequently been regularized and the encashment of the said period has also been given to the petitioner, as such, the authorities while on the one hand has accepted the plea of leave during the said period but on the other hand has not considered the same and reached to the conclusion that he has avoided to go for training and for that he has taken ground of medical ailment, hence the action of the authority is contradictory.

So far as charge no.4 is concerned which relates to failure of the petitioner to report to the new centre of posting, the same has also found to be proved, but according to the petitioner the basis of proof is not cogent to prove the said charge.

He has taken the ground that the disciplinary authority has also not appreciated the entire aspect of the matter and mechanically accepted the finding of the enquiry officer and passed the order of dismissal from service.

The order of dismissal has been passed by the Managing Director and the appeal has been filed before the Chairman but during the time when the appeal was preferred the incumbent holding the post of Managing Director has become the Chairman, as such the appeal was placed before the executive committee but the executive committee, without applying its mind, has rejected the appeal by observing that no fresh valid point has been made by the petitioner in support of his case, hence according to him, the appellate authority has not exercised his quasi judicial mind that too when the petitioner has not appeared before the enquiry officer.

4. While on the other hand, Mr. J. K. Tripathy, learned Sr. Counsel appearing for opposite party NABARD has raised preliminary objection regarding maintainability of the writ petition by taking the stand that the writ petition is not maintainable against NABARD since it is a corporate body established U/s.3 of the NABARD Act, 1981 and under section 5(1) of the said Act, general superintendence, direction and management of the NABARD has been vested upon the Board of Directors.

According to the learned senior counsel writ petition will not lie against any service dispute.

He further submits that the petitioner has been given ample opportunity to participate in the enquiry before the enquiry officer but he has avoided himself to appear before the enquiry officer and ultimately the enquiry officer has to issue fresh notice by publishing it in the daily newspaper but even on the date fixed he has not appeared on the plea that writ petition has been filed before this court, as such it is not a case that the petitioner has not been given opportunity of hearing.

He submits that the nature of allegation is very serious since the petitioner being holder of Group A officer post, has flouted the decision of the higher authority which amounts to misconduct and thereafter the authorities have taken decision to initiate departmental proceeding in which the enquiry officer has found the charge proved against him which after being accepted by the disciplinary authority, the order of dismissal from service has been passed which has also been affirmed by the appellate authority in its appellate jurisdiction.

He submits that since there is fact finding, as such this court may not interfere assuming the power of appeal.

5. Heard the learned counsel for the parties, their arguments, statements made by them in the pleading as also the judgment relied upon by them have been minutely examined by this court.

This court after going across the pleading made by the parties has found that the writ petition is against the order passed by the disciplinary authority as also the appellate authority whereby and where under the petitioner has been dismissed from service are under challenge. Admittedly the petitioner was working as a Grade-A officer in NABARD.

6. Learned Sr. Counsel has raised preliminary objection regarding maintainability of the writ petition by submitting that since the petitioner is raising service dispute, the same will not come under Fundamental Rights, hence this writ petition under Article 226 and 227 of the constitution of India is not maintainable.

7. Now the main concern for consideration before this court is as to whether NABARD is a State or other authorities under Article 12 of the Constitution of India. For better appreciation of the controversy it becomes necessary to look into the constitution of the body, purpose for which it has been created, manner of its function including mode of its fund.

Article 12 of the Constitution of India provides an inclusive definition of the term 'State' by saying, in this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the government and the legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. The leading authority in this field is the decision of the Constitution Bench of the Apex Court in the case of **Ajay Hasia and Others –vs- Khalid Mujib Sehravardi and others**, reported in (1981) 1 SCC 722 wherein Hon'ble Shri Justice P.N.Bhagawati, as he then was, explained that the government in many of its ventures and public enterprises is resorting to more and more frequently to this resourceful legal contrivance as it has many practical advantages and at the same time does not involve the slightest diminution in its ownership and control of undertaking. In such cases, "the true owner is the State, the real operator is the State and the effective controller is the State and accountability for its actions to the community and to Parliament is of the State. It is undoubtedly true that the corporation is a distinct juristic entity with a corporate structure of its own and it carries on its functions on business principles with a certain amount of autonomy which is necessary as well as useful from the point of view of effective business management, but behind the formal ownership which is cast in the corporate mould, the reality is very much the deeply pervasive presence of the Government. *It is really the Government which acts through the instrumentality or agency of the corporation and the juristic veil of corporate personality worn for the purpose of convenience of management and administration cannot be allowed to obliterate the true nature of the reality behind which is the Government*. Now it is obvious that if a corporation is an instrumentality or agency of the Government, it must be subject to the same limitations in the field of constitutional law as the Government itself, though in the eye of the law it would be a distinct and independent legal entity. If the Government acting through its officers is subject to certain constitutional limitations, it must follow a *fortiorari* that the Government acting through the instrumentality or agency of a corporation should equally be subject to the same limitations. If such a corporation were to be free from the basic obligation to obey the fundamental rights, it would lead to considerable erosion of the efficiency of the fundamental rights, for in that event the Government

would be enabled to override the fundamental rights by adopting the stratagem of carrying out its functions through the instrumentality or agency of a corporation, while retaining control over it. The fundamental rights would then be reduced to little more than an idle dream or a promise of unreality.

Against the preliminary objection, learned counsel for the petitioner submits that NABARD is the creation of statute i.e. created under the National Bank for Agriculture and Rural Development Act,1981, a 3-tier machinery is prescribed to achieve the object set out in the opening part of NABARD Act. The object is as under:

> *"An act to establish a bank to be known as the National Bank for Agriculture and Rural Development for providing credit for the promotion of agriculture, small-scale industries, cottage and village industries, handicrafts and other rural crafts and other allied economic activities in rural areas with a view to promoting integrated rural development and securing prosperity of rural areas, and for matters connected therewith or incidental thereto. (emphasis supplied) 6.1 The term State Cooperative Bank is defined in clause (u) of section 2 of the NABARD Act. The definition reads as under State Cooperative Bank means the Principal Cooperative Society in a state, the primary object of which is the financing of other Cooperative Societies in the State"*

It is the legal position that the prerogative writ of mandamus confined only to public authorities to compel performance of public duty. The 'public authority' for them means everybody which is created by statute - and whose powers and duties are defined by statute. So Government departments, local authorities, police authorities, and statutory undertakings and corporations, are all 'public authorities'. But there is no such limitation for our High Courts to issue the writ 'in the nature of mandamus'. Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issued to any person or authority'. It can be issued "for the enforcement of any of the fundamental rights and for any other purpose".

Article 226 of the Constitution of India reads as follows:-

> *"Power of High Courts to issue certain, writs (1) Notwithstanding anything in Art. 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority including in appropriate cases, any Government, within those territories directions, orders or writs, including (writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari,) or any of them for the enforcement of any of the rights conferred by Part III and for any other purpose."*

The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Art. 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "Any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is

relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied.

In the case of **Praga Tools Corporation –vs- Shri C.A. Imanual**, reported in AIR 1969 SC 1306 it has been held that a mandamus can be issued against a person or body to carry out the duties placed on them by the Statutes even though they are not public officials or statutory body. It was further observed therein as follows:-

> *"It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the purpose of fulfilling public responsibilities."*

In the case of **Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust –vs- V.R.Rudani,** reported in (1989) 2 SCC 691 the Hon'ble Apex Court has held as follows:-

> *"Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issued to "any person or authority". The term "authority" used in the context, must receive a liberal meaning unlike the term in Article 12 which is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers powers on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owned by the person or authority to the affected party, no matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied."*

Thus it is clear that when a private body exercised its public duty even it is not a State the aggrieved has remedy not only under the ordinary law but also under the Constitution by way of writ petition under Article 226 of the Constitution of India.

This Court has also gone through the judgments rendered by Hon'ble Apex Court in the case of **International Airport Authority Case**, reported in (1979) 3 SCC 489 as also in **Ajay Hasia and others –vs- Khalid Mujib Sehravardi and others**(supra) and gathered the following summary from both the decisions:-

> *"(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.*

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with Governmental character.

(3) It may also be a relevant factor ... whether the corporation enjoys monopoly status which is State conferred or State protected.

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.

(5) If the functions of the corporation are of public importance and closely related to Governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(6) 'Specifically, if a department of Government is transferred to a corporation, it would be a strong factor/supportive of this inference' of the corporation being an instrumentality or agency of Government."

Thus, NABARD since creation of the statute of the year 1981, as such it will come under the fold of the State Government within the meaning of Article 12 of the Constitution of India and as such amenable to the prerogative writ.

Learned Senior counsel has also raised objection that since prerogative writ is under Article 226 of the Constitution of India is only for enforcement of the legislature conferred under Part-III, since according to him, certain matters since come under Part-III and IV of the precedence, hence writ under Article 226 of the Constitution of India cannot be issued in the matter of service jurisprudence.

This Court, after appreciating the arguments advanced by the learned counsel for the opposite parties, is of the view that fundamental right has been conferred under Part-III of the Constitution, one of the fundamental rights is under Article 14 which speaks about equality before law.

Article 14 speaks that the State shall not deny to any persons equality before the law or the equal protection of the law within the territory of India. Meaning of equal protection is right to equal treatment in similar circumstances, both in the privileges conferred and in the liabilities imposed.

The petitioner herein having been appointed by virtue of an advertisement floated by NABARD which is directly under the control of Central Government and since he has been dismissed from service, according to the petitioner, the same is without providing opportunity of hearing as also the appellate authority has not appreciated the factual aspects at all, as such this court has got jurisdiction to look into the matter under the power of Judicial review by entertaining writ petition under Article 226 of the Constitution of India which is under basic statute of the Constitution of India.

In view thereof, according to my considered view, the writ petition will be maintainable, as such this writ petition is held to be maintainable before this court under Article 226 of the Constitution of India.

8. So far as merit of the case is concerned, admittedly four charges have been leveled, which are as follows:-

1. Availing loans from outside agencies without taking permission from National bank and not liquidating the same.
2. Non-submission of statements on liability (secured and unsecured) and documentary evidence thereof.
3. Nomination of attending the training programme from 14-26 July, 2003 as advised vide RO's letter No.89 dtd.26th May, 2003 and non-attendance of the programme by the CSO.
4. Failure of the CSO to report to the new centre of posting (Kerala Regional Office).

It is admitted position that the petitioner has not availed the opportunity to participate in the enquiry, however he has tried to justify that he has not been provided opportunity, however the opposite parties have come out with several documents in support of their argument that they have tried to ensure appearance of the petitioner and when the petitioner has not put his appearance, they have gone for paper publication and thereafter on the basis of the paper publication the petitioner has made correspondence to defer the enquiry but according to the petitioner the same has not been deferred and in one day the enquiry has been concluded, as such the allegation of mala fide has been alleged against the Management in proving the charge and inflicting punishment of dismissal from service.

The petitioner has raised the issue of non-consideration of the plea with respect to the allegation proved against him. The petitioner has also assailed the order of appellate authority which according to him is mechanical and no quasi judicial mind has been applied by the appellate authority.

This court, after going through the Discipline and Appeal Rules governing the field, is of the view that right of appeal has been conferred under statute to be exercised by the petitioner and in view thereof he has preferred an appeal before the Chairman of the NABARD but he has only been communicated with a communication under Annexure-13 whereby and where under it has been communicated to him that the appeal has been rejected, save and except nothing has been brought on record even in the counter affidavit, however, it has been pointed out by the learned Sr. Counsel appearing for the opposite parties that since the Managing Director who has passed the order of dismissal has become Chairman of the NABARD at the time of preferring appeal, hence memo of appeal has been decided to be placed before the executive committee and the executive committee has found that there is no fresh valid ground to interfere with the decision taken by the disciplinary authority.

This court has perused the said minutes of meeting as contained under Annexure-L which is the 92nd meeting of the executive committee of NABARD held on 30th October, 2006 wherein it has been reflected as quoted herein below :-

"31. Introducing the Memorandum No.7 dated 21 September 2006, it was informed that Shri D.P.S. Mallick, Manager, was charged with the acts of misconduct vide charge sheet No.NB.HRMD-PPD/1045/ Disc.BHU/2003-04 dated 19 February 2004.

32. Further, the Charge Sheeted Officer (CSO) did not reply to the above mentioned charge sheet. In order to enquire into the charges it was decided to hold a domestic enquiry and accordingly, in terms of Rule 47(4) of NABARD (Staff) Rules, 1982, the power to hold consequential enquiry with the exception of passing of the final orders was delegated vide Memorandum of Delegation dated 15 October 2004. The Enquiry Officer has stated in his report that the CSO was given two opportunities to appear before the Enquiry Officer on 16 December 2004, and 11 January 2005, and on both these occasions the CSO chose not to attend the enquiry. Considering the seriousness of misconduct committed by the CSO, the Competent Authority by virtue of Rule 47(1)(c) of NABARD (Staff) Rules, 1982 ordered that Shri D.P.S. Mallick, Manager be dismissed from the service of the Bank. The CSO submitted an appeal dated 26 August 2006 against the orders of the Competent Authority. A brief history of the case against Shri D.P.S. Mallick and gist of the appeal together with analysis thereof were placed before the Executive Committee for its consideration.

33. As the Chairman – then MD – had passed the orders as Competent Authority, he disassociated himself from the discussions and Shri Surampudi Sivakumar Chaired the discussion. The Executive Committee noted that the disciplinary proceedings had been completed as per the rules and the due procedures had been followed. As no fresh valid points had been made by Shri Mallick in support of his case the Executive Committee agreed with the final orders passed by the Competent Authority and decided to reject the appeal preferred by him.

34. After discussions, the Executive Committee took on record the Managing Director's Memorandum No.7 dated 21 September 2006 on Domestic Enquiry: Shri D.P.S. Mallick, Manager (Dismissed) : Appeal."

There is no dispute about the fact that without any reason the order will be said to be nullity in the eye of law, reference in this regard may be made to the judgments rendered in the case of **Siemens Engineering & Manufacturing Co. of India Ltd. Vrs. Union of India and Another**, reported in (1976) 2 SCC 981 wherein at paragraph 6 their Lordships have held as follows:-

"6. Xxxxxx it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law. xxxxxxxxx"

Reference in this regard may also be made to the judgment rendered in the case of **S. N. Mukherjee Vrs. Union of India**, reported in (1990) 4 SCC 594. In the case of **Krishna Swami Vrs. Union of India and Others**, reported in (1992) 4 SCC 605 wherein at paragraph 46 their Lordships have held as follows:-

"*46. The question then is the scope of judicial review of the admission of the motion by the Speaker. Arts. 32, 131 to 136 entrust in express terms judicial review to the Supreme Court; in particular. Art. 32 as the ultimate repository and guardian of the rights and liberties of the*

people. The constitution is the fundamental law of the land. It limits, as its touchstone, the powers and functions of the organs of the State, viz. the Executive, the Legislature and the Judiciary. The Constitution also demarcated and delienated the powers and functions of these organs which implies that each organ would maintain a delicate balance with self-imposed restrictions for smooth functioning of the parliamentary democracy to establish an egalitarian social order under rule of law. Judicial review thus is an incident of and flows from the Constitution to securing and protecting the welfare of the people as effectively as it may, according justice - social, economic and political in all the institutions of national life. Court is the living voice of the Constitution which stands against any winds that blow as a haven of refuge to those who might otherwise suffer due to their helplessness, inability, non-conformity, handicaps, exploitation, victims of prejudice or public excitement etc. The paramount duty of the court is to protect their rights and translate the glorious and dynamic contents of the Directive Principles and the fundamental rights as a living law, making them meaningful to all manner of people."

Reference in this regard may also be made to the judgment rendered in the case of **Workmen of Meenakshi Mills Ltd. Vrs. Meenakshi Mills Ltd. and Another**, reported in AIR 1994 SC 2696, **Rani Laxmibai Kshetriya Gramin Bank vrs. Chand Behari Kapoor and Others**, reported in AIR 1998 SC 3104 and **Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank Vrs. Jagdish Sharan Varshney and Others**, reported in (2009) 4 SCC 240.

Thus it is evident from the ratio laid down therein that without any reason the order will be said to be nullity in the eye of law and further it will be said to be in violation of the principle of natural justice.

9. So far as the appellate order is concerned, it is true that an Appellate / Regional Authority is not required to give detail reasoning for agreement or confirming the order but in the interest of justice the delinquent officer is entitled to know the mind of the Appellate/Regional Authority, as such some reason must be there in the order of appeal or revision, reference in this regard may be made to the judgments rendered in the case of **Divisional Forest Officer, Kothagudem and Others Vrs. Madhusudhan Rao**, reported in (2008) 3 SCC 469 wherein at paragraph 19 their Lordships have held as follows:-

"19. Having considered the submissions made on behalf of the respective parties and also having regard to the detailed manner in which the Andhra Pradesh Administrative Tribunal had dealt with the matter, including the explanation given regarding the disbursement of the money received by the respondent, we see no reason to differ with the view taken by the Administrative Tribunal and endorsed by the High Court. No doubt, the Divisional Forest Officer dealt with the matter in detail, but it was also the duty of the appellate authority to give at least some reasons for rejecting the appeal preferred by the respondent. A similar duty was cast on the revisional authority being the highest authority in the Department of Forests in the State. Unfortunately, even the revisional authority has merely indicated that the decision of the Divisional Forest Officer had been examined by the Conservator of Forests, Khammam wherein the charge of misappropriation was clearly proved. He too did not consider the defence case as made out by the respondent herein and simply endorsed the punishment of dismissal though reducing it to removal from service."

It is evident from Annexure-L that no reasoning has been assigned by the appellate authority, as such it has got bearing with the issue since it is a case of dismissal of the petitioner from service who has not participated in the enquiry, and since he has raised so many issues before the appellate authority, he was required to look into the matter minutely for just and proper decision of the case but that committee has failed to do so, as would be evident from the quoted part which is the extract of the 92nd meeting of the executive committee held on 30th October, 2006.

Accordingly this court is of the view that the appellate authority has not exercised its quasi judicial mind in proper manner, hence this court, without making any observation on the legality and propriety of the order passed by the disciplinary authority, is remitting the matter back before the competent appellate authority by quashing the appellate order to decide the appeal afresh after providing opportunity of hearing to the petitioner within reasonable period, preferably within eight weeks from the date of receipt of copy of this order. Accordingly the writ petition stands disposed of.

Writ petitioin disposed of.

2018 (I) ILR - CUT- 999

J.P. DAS, J.

RPFAM NO.323 OF 2017

SIBA CHARAN PRADHAN ……..Petitioner.

.V*rs.*

BINA PRADHAN & ANR. ……...Opp-Parties.

CODE OF CRIMINAL PROCEDURE,1973 – Section 126(2) – Application for setting aside ex parte order of maintenance – Filed after about 13 years 11 months – Order granting monthly maintenance was passed in 2003 – Wife executed the order in 2017 – Petitioner husband came to know about the ex parte order granting maintenance only after his arrest pursuant to the NBW issued in the execution proceeding – Wife's plea that the husband was aware of about the case and was paying maintenance – No material placed to substantiate the plea – Held, the husband must be given an opportunity to put forth his case – Delay condoned – Ex parte order set aside – Matter remanded.

Case Laws Relied on and Referred to :-

1. 2005 I OLR 642 : (Santosh Naik Vrs State of Odisha and anr.)

For Petitioner : M/s. M.Acharya,
For Opp. Parties : M/s.Y.S.P.Babu, P.R.Singh

JUDGMENT Date of Hearing : 04.05.2018 Date of Judgment : 15.05.2018

J.P.DAS, J.

This is an application under Section 19 of the Family Court Act read with Section 401 of the Code of Criminal Procedure (Cr.P.C., in short) assailing the order dated 27.11.2017 passed by the learned Judge, Family Court, Nayagarh in the Criminal Misc. Case No.281 of 2017 rejecting an application filed by the present petitioner to set-aside the ex-parte order of maintenance passed against the petitioner on 29.11.2003 in C.M.C. No.62 of 2003 by the learned S.D.J.M.,Nayagarh.

2. The application to set-aside the ex-parte order was filed under Section 126(2) of the Cr.P.C. along with an application under Section 5 of the Limitation Act to condone the delay in filing such application. The learned trial court has rejected the application solely on the ground that the petitioner was set ex-parte on his refusal to receive the notice and the application to set-aside the ex-parte order was filed after about 13 years 11 months of the ex-parte order, while Section 126(2) of the Cr.P.C. provides that such an application should be made within three months from the date of order.

3. It is submitted on behalf of the petitioner that the opposite party-wife filed the application under Section 125,Cr.P.C. before the learned S.D.J.M.,Nayagarh vide C.M.C. No.62 of 2003. In the said proceeding, notice was issued to the present petitioner and it was held sufficient since it was allegedly refused by him and notice was served by way of affixture by the concerned Process Server obtaining signatures of two witnesses. Simply relying on that the present petitioner as opposite party was ex-parte and taking up ex-parte hearing the learned S.D.J.M. passed the ex-parte order on 29.11.2003 directing the petitioner to pay monthly maintenance of Rs.1500/-.

4. It was submitted that the said service report was manufactured at the behest of the petitioner-wife since one of the witnesses namely, Manguli Parida, who signed on the service report, filed an affidavit before the trial court, presently learned Judge, Family Court, Nayagarh in course of hearing of the application of the petitioner to set-aside the ex-parte order that he has never signed on any such document and also submitted that there was no such person as Narendra Parida in their village who was shown to have signed as the other witness. It was further submitted that the opposite party after obtaining ex-parte order of maintenance, did not execute the same and only in the year 2017, he filed Crl.M.P.No.65 of 207 for realization of arrear maintenance of Rs.18,000/-. It was submitted that only after the petitioner was arrested on the strength of N.B.W. issued by the court in the said proceeding, he could know about the ex-parte order passed against him and immediately thereafter, he filed an application under Section 126(2) Cr.P.C. to set-aside the same along with an application to condone the delay.

5. It was also submitted by learned counsel for the petitioner that the marriage between the petitioner and the opposite party is not disputed but both the parties on mutual agreement had separated from each other since 1998 and one document was executed in that respect severing the marital relationship between the petitioner and the opposite party with certain terms and conditions. The opposite party was returned with all her articles besides some cash and both the parties agreed not to initiate any proceeding against each other relating to such marital relationship. It was submitted that thereafter the petitioner had no occasion to suspect even that a proceeding under Section 125,Cr.P.C. was initiated against him much less passing of an ex-parte order. It was also submitted that not only the service report against the petitioner was manufactured at the behest of the opposite party to set him ex-parte but also the relevant document severing the marital relationship between the parties was kept out of consideration of the court by concealing the same by the opposite party.

6. It was submitted by learned counsel for the opposite party that the petitioner intentionally avoided to receive the notice and was rightly set ex-parte. It was further submitted that only to harass the opposite party and to avoid paying maintenance, the petitioner approached the learned trial court to set-aside the ex-parte order after a period of long fourteen years.

7. The learned counsel for the petitioner while placing his contentions brought to the notice of the court the relevant service report, the affidavit filed by one of the signatories to the said service report, a copy of the mutual agreement made between the parties and also copies of the relevant order-sheets of the learned Magistrate besides the impugned ex-parte order of maintenance. It is seen that the petitioner was set ex-parte simply accepting the service return by way of affixture as sufficient. In the impugned ex-parte order it has been simply been mentioned that the opposite party did not appear and hence, the order was passed in his absence.

8. It was submitted on behalf of the opposite party that the petitioner filed the application to set-aside the ex-parte order a long lapse of fourteen years whereas it was the submission on behalf of the petitioner that he came to know about the ex-parte order only after being arrested on the strength of N.B.W. issued in the Execution Proceeding filed in the years 2017. On being asked, the learned counsel for the opposite party submitted that the Execution proceeding was filed in the year 2017 since the petitioner was paying the monthly maintenance regularly prior therteto after the ex-parte order. But, no material could be placed to show that the petitioner was regularly paying monthly maintenance at any point of time after passing of the ex-parte order or the said ex-parte order was ever executed by getting the maintenance amount from the present petitioner. Thus, the contentions made on behalf of the petitioner that he know about the ex-parte order only after the filing of Execution Proceeding in the year 2017 appears to be reasonable. The petitioner has also an arguable case to be considered in contesting the claim of maintenance.

9. Learned counsel for the petitioner relied upon a decision of this reported in ***2005 I OLR 642 (Santosh Naik Vrs State of Odisha and anr.***) the factual and legal aspects of which were almost similar to the present case. There was also similar separation on mutual consent and there was a delay in filing the application for setting aside the ex-parte order. A wife is undoubtedly entitled to maintenance by her husband if the requirements under Section 125 of the Cr. P.C are satisfied. But, at the same time, the husband must be given and opportunity to put forth his case in the proceeding in the interest of justice.

10. Considering the facts, circumstances and the submissions made on behalf of the parties, it is directed that the present application is allowed. The impugned order passed by the learned Judge, Family Court, Nayagarh dated 27.11.2017 in CRLM No. 281 of 2017 as well as the ex-parte order of maintenance passed by the learned S.D.J.M., Nayagarh on 29.11.2003 in C.M.C. No. 62 of 2003 are set-aside.

11. The matter is remitted back to the learned Judge, Family Court, Nayagarh, for disposal after giving fresh opportunity of hearing to both the parties according to law. The mater being related to the year 2003, it is directed that the learned trial court would do well to dispose of the case as expeditiously as possible and both the parties are directed to co-operate for the same. The RPFAM is disposed of accordingly.

Petition disposed of.

2018 (I) ILR - CUT- 1002

DR. D.P.CHOUDHURY,J.

S.A. NO. 361 OF 1989

WITH I.A. NO. 167 OF 2018, I.A. NO. 166 OF 2018 & I.A. NO. 165 OF 2018

SMT. PRAMODA DAS & ORS. .....Appellants

.Vrs.

SAROJ KANTA MISRA & ORS. .....Respondents

CODE OF CIVIL PROCEDURE, 1908 – Order 22 Rule 1 to 4 read with Article 171 of the Limitation Act – Applications for substitution, setting aside abatement and for condonation of delay – Delay of about 22 years – Plea that the limitation period should be counted from the date of knowledge about the death – Held, not acceptable, the delay has to be explained from the date of death.

"In the case of Union of India –V- Ram Charan (deceased) through his Legal Representatives' AIR 1964 SC 215, the Hon'bel Supreme Court has observed that limitation

application to set aside the abatement of a suit or appeal do start from the date of death of the deceased respondent. The first schedule to Article 171 of the Limitation Act provides that it does not provide limitation to start from the date of appellant's knowledge thereof. With due respect to the aforesaid decision, it appears that the party desiring to substitute the deceased either appellant or defendant, has to explain the delay right from the date of death of the deceased-defendant. So, it is not a question of knowledge but the limitation to commence from the date of death." *(Paras 13 & 14)*

Case Laws Relied on and Referred to :-

1. AIR 1967 SC 1786 : Mangal Singh & Ors. -V- Smt. Rattno (dead) by her L.R. & Anr.
2. AIR 1990 SC 273 : Hira Lal and another -V- Gajjan & Ors.
3. 1997 (I) OLR 222 : Dhuma Khan -V- Commissioner of Consolidation &d Ors.
4. 1986 (II) OLR 272 : Danei Sahoo -V- Jagannath Sahu & Ors.
5. AIR 1964 SC 215 : Union of India -V- Ram Charan (deceased) through his L.R.

For Appellant : M/s. B.H. Mohanty, M/s. Budhadav Routray, R.N.Panda, S.Routray, S.K.Samal, S.C. Mohanty, D.P.Mohanty , J.K.Bastia, B. Das, B.B. Bhuuyan, R.K.Nayak, V. Narasingh, S.Das, S.Jena, S.D.Routray.

For Respondent : M/s. G Rath, M/s. R.K.Rath, B.K.Nayak-1, J.P.Behera, N.R. Rout, B.K.Nayak, P.Rath.

ORDER Date of Order : 05.05.2018

DR. D.P.CHOUDHURY,J.

This applications have been purportedly filed by the appellant for substitution of respondent no.2, setting aside abatement and for condonation of delay in filing the substitution application.

2. Heard Mr.B.Routray, learned Senior Advocate for the appellants and Mr.R.K.Rath, learned Senior Advocate for the respondent no.1.

3. Mr.Routray, learned Senior Advocate for the appellants submitted that respondent no.2 (Laxmidhar Moharathi) died on 8.1.1996 and his death was not within the knowledge of the present appellant no.2, who is the legal heir of appellant no.1. According to him, after the death of appellant no.1 on 4.1.2015, the present appellant stepped in as sole appellant.

4. Mr.Routray, learned counsel for the appellants further submitted that while the present appellant had gone to the village to collect certain document from respondent no.2 from whom the original plaintiff (present appellant no.1 is father) has allegedly purchased the suit property, she came to know for the first time on 10.4.2018 that respondent no.2 has died on 8.1.1996 leaving behind his wife, eldest son and other LRs, in the meantime, the widow has also expired. Since the appellant could not able to collect the detail information in spite of the best efforts made by her, only came to know about the death on 10.04.2018, she filed the present application for

substitution. Further, it has been submitted by learned counsel for the appellants that respondent no.2 has not appeared in spite of notice issued in the second appeal. As per Order 22 Rule 10-A of the Civil Procedure Code (hereinafter called as "the Code"), the contesting respondent is required to inform about the death of the parties but the contesting respondent did not inform the Court. So, the in the present circumstances and the fact into consideration the fact that the appellant is a woman, the delay may be condoned, set aside the abatement against respondent no.2 and allow the substitution by substituting the proposed LRs in place of respondent no.2 for effective adjudication of the second appeal.

5. Mr.R.K.Rath, learned Senior Advocate for the respondent no.1 (Saroj Kanta Mishra), relying on the counter affidavit, submitted that the present appellant are the legal heirs of the original plaintiff Alekh Chandra Das, who has filed Original Suit No.9 of 1975 (I) before the learned Sub-ordinate Judge, Bhuabneswar against the present respondent no.1-defendant no.1. As per the case of the plaintiff, the suit land was purchased by him from the present deceased-respondent no.2 (Laxmidhar Moharathi) and before the trial Court, the deceased-defendant no.2 has categorically taken a plea that since the plaintiff has not sought any relief against him, he does not have any interest in the suit property as the defendant no.2 has already transferred the ownership and possession of the suit property to the plaintiff-Alekha Charan Das. Not only this but also defendant no.2 also deposed the in favour of the plaintiff. The original suit was dismissed and against that Title Appeal No.2/8/4 of 1981/80/78 was filed before the First Appellate Court, i.e, learned Additional District Judge, Bhubaneswar, which was also dismissed and against the order passed by the first appellate Court, Second Appeal No.160 of 1981 has been filed before this Court and this Court, vide order dated 6.12.1988, had remanded the matter to the first appellate Court for fresh disposal. Before the first appellate Court, the said defendant no.2 was set ex-parte as he did not appear. That appeal was again dismissed against which the present second appeal has been filed where the defendant no.2 was described as proforma respondent.

6. Mr.R.K.Rath, learned counsel for the respondent no.1 strenuously argued that when the defendant no.2 has been sailing in the same boat of the plaintiff and he has been set ex-parte before the first appellate Court against whose order, the present second appeal has been filed and the respondent no.2 has been arrayed as proforma respondent, he is not a necessary party before whom, the appeal should be disposed of. Apart from this, he submitted

that the appeal has already been heard for three dates and in the midst of the hearing of the second appeal, present applications have been filed with ulterior motive to cause delay in disposal of the second appeal, which is of the year 1989.

7. Mr.Rath, learned counsel for the respondent no.1 further submitted that it is fallacious to note that the respondent no.2 died on 8.1.96, which is twenty-two years old. It is not known why the original appellant has not sought for substitution of respondent no.2 till 2015 when she expired and further it is not known why the present LR of the appellant no.1 had remained silent till date. The petition for condonation of delay also does not describe why the appellant was not serious about ascertaining facts for substitution till 10.04.2018. On the other hand, he submitted that the explanation for condoning the delay is not sufficient to condone the same, rather it is a dilatory tactics for causing the delay in disposal of the second appeal. Since the delay has not been condoned, the appeal against respondent no.2 abated but abatement of the appeal against respondent no.2 would not affect in the peculiar facts and circumstances that he is not a necessary party and his substitution can be exempted. In support of his submissions, he relied upon the decisions of the Hon'ble Supreme Court in the cases of ***Mangal Singh and others –V- Smt. Rattno (dead) by her legal representatives and another; AIR 1967 SC 1786, Hira Lal and another –V- Gajjan and others, AIR 1990 SC 273*** and of this Court in the cases of ***Dhuma Khan –V- Commissioner of Consolidation and others; 1997 (I) OLR 222*** and ***Danei Sahoo –V- Jagannath Sahu and others; 1986 (II) OLR 272.***

8. Considered the submission of the learned counsel for the respective parties. It is admitted fact that the original plaintiff has alleged in the suit that he has purchased the suit land from defendant-respondent no.2. It is not in dispute that the defendant no.2 is a proforma respondent in view of the fact that he has been examined as P.W.3 in O.S. No.9 of 1975 admitting the fact that he has sold the suit land to plaintiff on payment of due consideration and handed over possession of the same to the original plaintiff-Alekha Ch. Das. In course of hearing, Mr.Routray, learned Senior Advocate for the appellant admitted that the defendant no.2 has also been set ex-parte before the first appellate Court. Thus, it is clear that the present respondent was a proforma respondent or defendant. Moreover, he has already been examined in the original suit for the plaintiff which reinforces the fact that the defendant no.2 is not a necessary party but a proforma party. Order 22 Rule 4(4) of the Code is placed in the following manner for better appreciation:

"(4)The court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and 9 contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."

9. In view of the aforesaid provisions, it appears that since in the present case, the respondent no.2 has already transferred the ownership and possession of the suit land already to the original plaintiff as per his evidence and pleading and he had not contested against the original plaintiff, there is no necessity to substitute him in case of his death. Not only this but also he has been set ex-parte before the first appellate Court against whose order the present second appeal has been filed. So, according to Order 22 Rule 4(4), respondent no.2 is not required to be substituted.

10. The Hon'ble Supreme Court, in the case of ***Mangal Singh and others (Supra),*** at paragraph-3, have observed in the following manner:

"3…….further, supported the claim of the plaintiff by pleading that there had been no karewa marriage between them. The suit was dismissed by the trial court. It was decreed by the first appellate Court only against defendants 1 to 3, treating Ishar Singh as a profoma defendant. In these circumstances, it is obvious that, when the case came up before the High Court, the dispute was confined between Smt. Rattno, legal representative of the original plaintiff on the one side, and defendants 1 to 3 on the other. Defendants 1 to 3 sought vacation of the decree for possession which had been granted against them in favour of Smt. Rattno. lshar Singh, against whom the suit had not been decreed at all, thus became an unnecessary party……."

With due respect to the aforesaid decision, it is clear that where the party has become a proforma paty and not a necessary party, it is not necessary to substitute such party and even if such party is abated, the entire appeal will not abate because no necessity of substituting such proforma party.

11. In the instant case, since the present respondent no.2 has already become proforma party and also set ex-parte in the first appellate Court, it is reiterated that it is not necessary to substitute that respondent no.2 and even if a suit would abate against him, it will not affect the merit of the appeal.

12. Moreover, in the instant case, the explanation of the appellant to substitute respondent no.2 appears to be not sufficient cause long after 22 years. The petition is filed to substitute during midst of the hearing of the second appeal. When the mother of the present appellant, during her life time, did not think it proper to substitute respondent no.2 by taking steps and the present respondent no.2 only died on 10.4.2018 after the death of her mother in 2015, the action of the present appellant is found negligence on her part to have desire to substitute respondent no.2.

13. In the case of ***Union of India –V- Ram Charan (deceased) through his Legal Representatives' AIR 1964 SC 215,*** the Hon'bel Supreme Court has observed that limitation application to set aside the abatement of a suit or appeal do start from the date of death of the deceased respondent. The first schedule to Article 171 of the Limitation Act provides that it does not provide limitation to start from the date of appellant's knowledge thereof.

14. With due respect to the aforesaid decision, it appears that the party desiring to substitute the deceased either appellant or defendant, has to explain the delay right from the date of death of the deceased-defendant. So, it is not a question of knowledge but the limitation to commence from the date of death. Since the delay for twenty-two years has not been explained properly, the petition for condonation of delay stands rejected. Accordingly, the application for setting aside abatement of respondent no.2 is rejected. As observed above, the substitution is unnecessary. Thus, the petition for substitution, being devoid of merit, stands rejected.

Application dismissed.

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DR. D.P.CHOUDHURY,J.

CRLMC NO.536 OF 2007

KEFAYAT KHAN ……..Petitioner

.Vrs.

ABDUL HALIM KHAN ……..Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 340 read with Section 195(1) – Provisions under – Prosecution against the persons for the commission of offences affecting the administration of justice – Principles to be followed – Indicated.

"The Court is not bound to make any complaint, only it is expedient in the interests of justice and not in every case. The question of magnitude of injury suffered by the person affected by the offence has to be only given regard by keeping in view the impact of that offence upon administration of justice and before sanctioning prosecution for prejury Court must be satisfied that there is prima facie case of deliberate falsehood on a matter of substance and that there is reasonable foundation for the charge to attract Section 195(1)(b), Cr.P.C." *(Paras 8 & 9)*

Case Laws Relied on and Referred to :-

1. AIR 1971 SC 1367 : Chajoo Ram -v.- Radhey Shyam & Anr.
2. (2005) 4 SCC 370 : Iqbal Singh Marwah & Anr.-v.-Meenakshi Marwah & Anr.

For petitioner : M/s. Bidhayak Pattnaik & S.K. Swain
For Opp. Party : M/s. P.K. Satapathy, A.K. Rout, R.N. Parija & S.K. Ghosh

JUDGMENT Date of Hearing & Judgment: 08.05.2018

DR. D.P. CHOUDHURY, J.

Challenge has been made to the inaction of the learned Civil Judge (Junior Division), Jagatsinghpur for not proceeding against the opposite party under Section 340, Cr.P.C. in Misc. Case No.118 of 2002 arising out of T.S. No.174 of 1990.

FACTS:-

2. The factual matrix leading to the case of the petitioner is that the plaintiff had filed Title Suit No.174 of 1990 in the Court of the learned Civil Judge (Junior Division), Jagatsinghpur with a prayer for declaration that he is the legally born son of late Abdul Aziz through his mother Khairun Nisha. The present opposite party being defendant therein filed written statement stating that there was compromise between the plaintiff and present opposite party. It is alleged, inter alia, that since late Abdul Aziz died issueless and he had no son like Abdul Halim Khan and had only widow Nisha, the question of sonship of Abdul Halim Khan does not arise. The present petitioner is the sister's son to inherit his property. It is alleged that the compromise decree was obtained by the present opposite party by suppressing the material fact and applying fraud on the Court. So, the petition under Section 151, C.P.C. was filed for inquiry. Learned Civil Judge (Junior

Division) dismissed the petition under Section 151, C.P.C. by observing that there is no fraud. The present petitioner carried the matter in the appeal before the learned Additional Sessions Judge, Jagatsinghpur vide Criminal Appeal No.5 of 2003. The said Court remanded the matter to the learned Civil Judge (Junior Division), Jagatsinghpur for de novo enquiry. Learned Civil Judge (Junior Division), Jagatsinghpur during de novo enquiry, after examining the parties and witnesses held that there is no necessity of filing any complaint under Section 340, Cr.P.C. Against that order, this present petitioner again filed Criminal Appeal No.24 of 2006 before the learned Additional Sessions Judge, Jagatsinghpur where the order of the learned Civil Judge, (Junior Division), Jagatsinghpur was confirmed. The present petitioner has challenged the said order in this application.

SUBMISSION:-

3. Mr. Pattnaik, learned counsel for the petitioner submits that since the material fact has been suppressed by the present opposite party and obtained a compromise decree by exercising fraud, it would affect the administration of justice. Moreover, he submitted that there is no question of adoption under Mahammedan Law and under no circumstances Abdul Halim Khan can be said to be the son of Adbul Aziz. So, the learned Civil Judge(Junior Division), Jagatsinghpur has committed error by not proceeding under Section 340, Cr.P.C. against the present opposite party. Also in criminal appeal, learned Appellate Court has failed to appreciate the material on record and committed the same mistake as committed by the learned trial Court. He also drew attention of the Court to the provision under Section 195(1)(b), Cr.P.C. where the Court concerned should make complaint for proceeding against wrongdoer to punish under Section 340, Cr.P.C.

4. Mr. Pattnaik, learned counsel for the petitioner further submits that in such matters, the Court should proceed against the opposite party who has made submission falsely and misplaced the fact and thereby exercised fraud on the court to obtain a decree. So, he prays to interfere with the order and direct for filling of complaint.

5. Learned counsel for opposite party submits that no fraud has been committed but it is a civil dispute with regard to the status of Abdul Halim Khan. Learned Court below has not failed to appropriate the matter with proper perspective, rather after taking evidence of both the sides came to hold that there is no prima facie case to proceed under Section 340, Cr.P.C. He also informed that against the decision of the learned Civil Judge (Junior Division) on factual aspect, has been already challenged before this Court in appeal.

6. Considered the submissions of the learned counsel for the respective parties. Perused the order passed by the learned courts below. It is categorically observed by the learned trial Court that he has examined the witnesses produced by the parties and finally found that point of adoption or the status of opposite party has already

been decided in T.S. No.174 of 1990 and that suit has been decreed in terms of compromise where Abdul Aziz has been declared to be natural son of Abdul Halim Khan. That decree has not been challenged so far as observed by the learned court below but it is said by the parties that R.F.A. No.305 of 2017 has been filed against that decree. It is also observed by the learned trial court that the entire testimony of P.W.1 does not disclose any commission of offence under I.P.C. to file a complaint under Section 195(1), Cr.P.C. Not only this but also he has considered the evidence of the respondent adduced before the same Court. Finally, he concluded that there is no any offence committed to file any complaint under Section 195(1)(b), Cr.P.C.

7. The learned Appellate Court also in its wisdom observed that he did not find any material to proceed against the opposite party under Section 340, Cr.P.C.

8. Since the civil appeal has been filed before this Court and both the courts below have not found any appropriate reason to proceed for affecting the administration of justice, the impugned order does not require interference. Apart from this, it is reported in (**2005) 4 SCC 370; Iqbal Singh Marwah and another-versus-Meenakshi Marwah and another** where Their Lordships observed that the Court is not bound to make any complaint, only it is expedient in the interests of justice and not in every case. The question of magnitude of injury suffered by the person affected by the offence has to be only given regard by keeping in view the impact of that offence upon administration of justice.

9. Apart from this, it is also reported in **AIR 1971 SC 1367; Chajoo Ram-v.-Radhey Shyam and another** where Their Lordships observed that before sanctioning prosecution for prejury Court must be satisfied that there is prima facie case of deliberate falsehood on a matter of substance and that there is reasonable foundation for the charge to attract Section 195(1)(b), Cr.P.C.

10. With due regard to the aforesaid decision, it appears that the Court below did not find any prima facie case to proceed under Section 340, Cr.P.C. to file complaint and this Court also do not find any merit with this petition. Hence, the CRLMC stands dismissed. The L.C.R. be returned forthwith by special messenger to the Court below forthwith.

Application dismissed.