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CIVIL APPEAL NO. 8649 OF 2018
(ARISING OUT OF S.L.P. (CIVIL) NO. 24742 OF 2012)

THE STATE OF BIHAR & ORS. ……..Appellants

.Vs.

KIRTI NARAYAN PRASAD ……Respondent

WITH

CIVIL APPEAL NOS. 8650 OF 2018 (Arising out of S.L.P. (Civil) No.24744 of 2012)
CIVIL APPEAL NO. 8651 OF 2018 (Arising out of S.L.P. (Civil) No.11887 of 2012)
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SERVICE LAW – Regularization – Petitioners filed writ petitions before the High Court with a specific prayer to regularize their services and to

set aside the order of termination – They also challenged the report submitted by the State Committee – High court allowed the prayer without examining the controversy as to whether the writ petitioners were legally and validly appointed? – The finding of the State Committee is that many writ petitioners had secured appointment by producing fake or forged appointment letter or had been inducted in Government service surreptitiously by concerned Civil Surgeon-cum-Chief Medical Officer by issuing a posting order – Notice given to them to establish the genuineness of their appointment and to show cause – None of them could establish the genuineness or legality of their appointment before the State Committee – The State Committee on appreciation of the materials on record has opined that their appointment was illegal and void ab initio – Held, we do not find any ground to disagree with the finding of the State Committee – In the circumstances, the question of regularisation of their services by invoking para 53 of the judgment in Umadevi (supra) does not arise – Since the appointment of the petitioners is ab initio void, they cannot be said to be the civil servants of the State, therefore, holding disciplinary proceedings envisaged by Article 311 of the Constitution or under any other disciplinary rules shall not arise – High court order set aside. (Para 17)

Case Laws Relied on and Referred to :-

1. 2006 (4) SCC 1 : Secretary, State of Karnataka & Ors. Vs. Umadevi (3) & Ors.
2. 2010 (9) SCC 247 : State of Karnataka & Ors. Vs. M.L. Kesari & Ors.
3. 2006 (3) PLJR 386 : State of Bihar Vs. Purendra Sulan Kit.
4. (2011) 3 SCC 436 : State of Orissa and Anr. Vs. Mamata Mohanty.

For Petitioner : Mr. Gopal Singh [P-1]
For Respondents : Mr. Rajiv Kumar [R-1]

JUDGMENT Date of Judgment : 30.11.2018

S. ABDUL NAZEER, J.

1. Some of the appeals out of the aforesaid group of matters have been filed by the State of Bihar challenging the order of the High Court of Judicature at Patna, whereby the Division Bench has confirmed the order of the learned Single Judge directing reinstatement of the writ petitioners therein on their respective posts with all consequential benefits in terms of the order dated 6.10.2009 in CWJC No. 6575 of 2009 and analogous cases. In CWJC No. 6575 of 2009 and other connected matters, learned Single Judge while allowing writ petitions has directed reinstatement of the writ petitioners therein from the date of their termination on the post, they were

working with all consequential benefits. The Letter Patent Appeals filed by the State of Bihar challenging the said order have been dismissed by the Division Bench of the High Court holding that the writ petitioners have been working continuously for more than ten years without protection of any interim orders of the Court and Tribunal. It was further held that in view of the Constitution Bench judgment of this Court in **Secretary, State of Karnataka and others** v. **Umadevi (3) and others**, 2006 (4) SCC 1 and in **State of Karnataka and others** v. **M.L. Kesari and others,** 2010 (9) SCC 247, the termination order issued against the writ petitioners cannot be said to be legal. Accordingly, LPAs have been dismissed. These orders have also been challenged by the State of Bihar in this group of appeals.

2. In the other connected matters, the Division Bench of the Patna High Court has allowed the LPAs and the writ petitions filed by the petitioners therein have been dismissed holding their appointment as *non est* and *void ab initio*.

3. Since a common issue has been raised in all these appeals, they are disposed of by this common judgment.

4. The facts of the cases in brief are as under:

5. The writ petitioners had joined the service of State of Bihar under the orders made by the concerned Civil Surgeon-cum-Chief Medical Officer of the district. None of the writ petitioners was appointed through a proper legal recruitment process. They were posted in Class III or Class IV service in a primary health centre within the jurisdiction of the civil surgeon. The State Government having realised the large scale irregularities committed in the appointment by the concerned Civil Surgeon-cum-Chief Medical Officer, scrutinized all the appointments. The State Government having found that large number of appointments were made on the basis of false or forged documents, without following due process of recruitment and mostly without the appointment orders, cancelled such appointments and the concerned incumbents were discharged from service. Those orders of discharge were challenged before the Patna High Court. The High Court by a common judgment and order set aside the impugned orders of discharge from service solely on the ground of violation of the principles of natural justice. All the writ petitioners were directed to be reinstated in service without the salary or remuneration for the interregnum period.

6. Thereafter, the State Government initiated proceedings to terminate the services of such employees by issuing show cause notice and calling upon each of them to establish legality of their respective appointment. The writ petitioners failed to establish the legality of their appointment. Once again their services were terminated. Feeling aggrieved, the writ petitioners challenged the said orders before the High Court, which eventually reached the Division Bench in Letter Patent Appeals. The Division Bench noticed that the writ petitioners were appointed in Class III or Class IV service and were serving as such for a long time. They had claimed the benefit of regularisation in service. In view of the judgment of this Court in Umadevi (supra), the Division Bench in ***State of Bihar v. Purendra Sulan Kit***, reported in 2006 (3) PLJR 386, directed the State Government to find out which of the affected employees are entitled for regularisation. The direction of the Division Bench is as under:

> "All the Letters Patent Appeals whether preferred by the State or by affected employees and all the Writ Petitions preferred by the affected employees are hereby disposed of by this common judgment and order with a direction to the authorities of the Health Department, Government of Bihar to reconsider the cases of all the affected employees with a view to find out on the basis of relevant facts and law as settled by the Constitution Bench in the case of **Secretary, State of Karnataka vs. Uma Devi** (supra) as to which of such affected employees are fit for regularisation in terms of that judgment, particularly in terms of paragraph 44 of the judgment. Such exercise should be completed within a period of six months from today. If for any good reason, the time period is required to be extended then the respondent State must file an application for that purpose and seek extension from this Court. Till the process is completed, the State of Bihar and its authorities shall maintain *status quo* in respect of services of the affected employees as existing on date. The status quo shall get revised by the orders that may be passed by the authorities in respect of affected employees as a result of the exercise to be undertaken by them and their final decision in the light of this judgment and order."

7. Pursuant to the aforesaid directions, the State Government constituted a committee comprising of five officers (for short 'State Committee') to examine the facts of individual cases. However, two members of the said committee did not participate in the proceedings for the reasons best known to them. So, it precipitated into committee of three members which carried out the aforesaid directions and submitted its report. The said committee issued show cause notice to each individual, considered the facts in each individual case and classified the said employees in three categories mentioned hereinbelow:

(i) The employment secured on false and forged document;

(ii) Illegal appointments; and

(iii) Irregular appointments.

8. About 91 cases which were classified as irregular appointments were eventually ordered to be regularised keeping in view the direction in Umadevi (supra). Rest of the appointments being *void ab initio*, were cancelled and the services of the concerned employees were terminated. The writ petitioners again challenged the order of termination before the High Court. Some of the writ petitions were allowed. Against such orders the State Government approached the Division Bench by filing a group of Letter Patent Appeals. The Division Bench by a common judgment and order, with the consensus of the learned advocates for the parties, referred the matter with detailed directions to a Committee comprising Justice Uday Sinha (retired). These matters have been dealt with by Justice Uday Sinha (retired). He has made report in each case placed before him. Those matters are not the subject-matter of this group of appeals. Writ petitions were filed by a group of appointees challenging the report of the State Committee before the High Court. A learned Single Judge of the High Court allowed the said writ petitions. The respective orders made by the learned Single Judge were challenged by filing LPAs before the Division Bench. The Division Bench allowed some of the appeals. In some cases, the Division Bench directed the State Government for regularisation in service of the writ petitioners. These orders are under challenge in the instant appeals.

9. Learned senior counsel appearing for the State of Bihar submits that the writ petitioners are illegal appointees. Those whose appointments were found to be irregular by the committee constituted in pursuance of the judgment and order of the Division Bench were distinct from those whose appointments were illegal and the same cannot be treated on the same footing. Since, the appointments of the writ petitioners were found illegal, their services were terminated after giving them an opportunity of hearing. The State Committee has examined the correctness of appointment of each of the writ petitioners and found them to be illegal. The appointment of the writ petitioners have not been made against the vacant post by the competent authority. Their appointment was on non-sanctioned post by incompetent authority, without an advertisement and that their appointment could not have been saved in terms of the judgment in Umadevi (supra).

10. On the other hand, learned counsel appearing for the writ petitioners submitted that the writ petitioners have the requisite qualification for being

appointed to the post in question. They have been appointed by the committee constituted and headed by the Regional Deputy Director considering their past health service experience and qualification and posted in different primary health centres and worked for the past 2 to 3 decades. Their appointment is fully protected by the judgment in Umadevi (supra) and M.L. Kesari (supra). Therefore, they cannot be terminated from service at this stage of their career, that too without holding any disciplinary enquiry against them.

11. We have carefully considered the submissions of the learned counsel for the parties and perused the materials placed on record.

12. It is not in dispute that the Government of Bihar in its Administrative Reforms department had issued instructions for appointment to Class III posts in the Government office under its circular No. 16440 dated 03.12.1980. The said circular applies to Class III posts other than the posts which are filled in by appointment of candidates selected by Bihar Public Service Commission after a competitive examination and to the posts which are governed by the Government resolution dated 28.01.1976. The said circular sets out a detailed procedure for notifying the vacancies in Secretariat and its attached offices, District Magistrates and other Muffassil Offices and for calling for applications, preparation of a common merit list and appointment from the said common merit list in the order of merit. It also provides the procedure for constitution of selection committee, preparation of merit lists and wait list, duration of merit lists and wait list. A similar circular No. 16441 was also issued on 03.12.1980 for appointment to Class IV posts in the Muffassil Offices of the Government. These circulars had been issued to avoid discrimination in appointment to Class III and Class IV posts in the Government offices and provide for generalized procedure in consonance with Articles 14 and 16 of the Constitution. The appointment of the writ petitioners have not been made in accordance with these circulars. Therefore, the contention of the learned counsel for the writ petitioners is that since the writ petitioners have served for more than 10 years and some of them have even completed 20 years of service, they ought to have been regularized in terms of the judgment in Umadevi (supra) and M.L. Kesari (supra).

13. In Umadevi (supra) the Constitution Bench has held that unless appointment is made in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right

on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it was an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. A temporary employee could not claim to be made permanent on the expiry of his term of appointment. It was also clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. In paragraph 43 of Umadevi (supra), it was held as under:

> **"43.** Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in

ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates."

(Emphasis supplied)

14. However, in paragraph 53 an exception is made to the general principles against regularisation as a one-time measure which is as under:

"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V. Narayanappa*, *R.N. Nanjundappa* and *B.N. Nagarajan* and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such *irregularly* appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

15. In some of the LPAs the Division Bench appears to have followed paragraph 11 in M.L. Kesari (supra) for directing regularisation of service without considering the observations contained in paragraph 7 of the judgment. In paragraph 11, it was observed that "the true effect of the direction is that all persons who have worked for more than ten years as on 10.4.2006 [the date of decision in Umadevi (3)] without the protection of any interim order of any court or tribunal, in vacant posts, possessing the requisite qualification, are entitled to be considered for regularisation within six months of the decision in Umadevi (3) as a one-time measure ……". However, in paragraph 7 after considering Umadevi (supra) this Court has categorically held that for regularisation, the appointment of employee should not be illegal even if irregular.

"7. It is evident from the above that there is an exception to the general principles against "regularisation" enunciated in *Umadevi (3)*, if the following conditions are fulfilled:

> (*i*) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.
>
> (*ii*) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular." (Emphasis supplied)

16. In ***State of Orissa and Anr***. *v.* ***Mamata Mohanty***, (2011) 3 SCC 436, this Court has held that once an order of appointment itself had been bad at the time of initial appointment, it cannot be sanctified at a later stage. It was held thus:

> "68(i) The procedure prescribed under the 1974 Rules has not been followed in all the cases while making the appointment of the respondents/ teachers at initial stage. Some of the persons had admittedly been appointed merely by putting some note on the notice board of the College. Some of these teachers did not face the interview test before the Selection Board. Once an order of appointment itself had been bad at the time of initial appointment, it cannot be sanctified at a later stage".
>
> (Emphasis supplied)

17. In the instant cases the writ petitioners have filed the petitions before the High Court with a specific prayer to regularize their service and to set aside the order of termination of their services. They have also challenged the report submitted by the State Committee. The real controversy is whether the writ petitioners were legally and validly appointed. The finding of the State Committee is that many writ petitioners had secured appointment by producing fake or forged appointment letter or had been inducted in Government service surreptitiously by concerned Civil Surgeon-cum-Chief Medical Officer by issuing a posting order. The writ petitioners are the beneficiaries of illegal orders made by the Civil Surgeon-cum-Chief Medical Officer. They were given notice to establish the genuineness of their appointment and to show cause. None of them could establish the genuineness or legality of their appointment before the State Committee. The State Committee on appreciation of the materials on record has opined that their appointment was illegal and *void ab initio*. We do not find any ground to disagree with the finding of the State Committee. In the circumstances, the question of regularisation of their services by invoking para 53 of the

judgment in Umadevi (supra) does not arise. Since the appointment of the petitioners is *ab initio* void, they cannot be said to be the civil servants of the State. Therefore, holding disciplinary proceedings envisaged by Article 311 of the Constitution or under any other disciplinary rules shall not arise.

18. Therefore, the Civil Appeals filed by the writ petitioners in the aforesaid batch of appeals are hereby dismissed. The Civil Appeals filed by the State of Bihar are allowed and the writ petitions filed before the High Court of Patna in the said cases are hereby dismissed. There shall be no order as to costs.

2019 (I) ILR - CUT- 10 (S.C.)

ABHAY MANOHAR SAPRE, J & INDU MALHOTRA, J.

CIVIL APPEAL NO.11759 OF 2018
(ARISING OUT OF S.L.P.(C) NO. 30465 OF 2017)

ROSHINA T .....Appellant(s)

.Vs.

ABDUL AZEEZ K.T. & ORS. .....Respondent(s)

CONSTITUTION OF INDIA, 1950 – Article 226 – Writ jurisdiction – Whether can be exercised for settling private property dispute – Held, No.

"It has been consistently held by this Court that a regular suit is the appropriate remedy for settlement of the disputes relating to property rights between the private persons. The remedy under Article 226 of the Constitution shall not be available except where violation of some statutory duty on the part of statutory authority is alleged. In such cases, the Court has jurisdiction to issue appropriate directions to the authority concerned. It is held that the High Court cannot allow its constitutional jurisdiction to be used for deciding disputes, for which remedies under the general law, civil or criminal are available. This Court has held that it is not intended to replace the ordinary remedies by way of a civil suit or application available to an aggrieved person. The jurisdiction under Article 226 of the Constitution being special and extraordinary, it should not be exercised casually or lightly on mere asking by the litigant. The High Court, therefore, while directing to restore possession has exceeded its extraordinary jurisdiction conferred under Article 226 of the Constitution. Indeed, the High Court in granting such relief, had virtually converted the writ petition into a civil suit and itself to a Civil Court. In our view, it was not permissible." *(Paras 15 to 18)*

Case Laws Relied on and Referred to :-

1. 1992 (4) SCC 61 : Mohan Pande .Vs. Usha Rani.

2. (2003) 6 SCC 230) : Dwarka Prasad Agrawal .Vs. BD Agrawal.

For Petitioner : Mr. Radha Shyam Jena, Anzu K.Varkey [R-1]
Ranjith K. C. [R-5]
For Respondents : Nishe Rajen Shonker [R-2]

JUDGMENT Date of Judgment : 03. 12. 2018

ABHAY MANOHAR SAPRE, J.

1. Leave granted.

2. This appeal is filed against the final judgment and order dated 30.08.2017 passed by the High Court of Kerala at Ernakulam in Writ Petition (C) No. 15385/2017 whereby the Division Bench of the High Court allowed the writ petition filed by respondent No.1 herein and directed the appellant herein, by issuing a writ of mandamus, to restore the possession of the flat in question to respondent No.1 herein.

3. Facts of the case lie in a narrow compass. They, however, need mention in brief *infra* to appreciate the short question involved in this appeal.

4. The dispute essentially relates to the possession of a flat bearing No. 3D, 3rd floor located in building known as Royal Court Block IV at Kozhikode (hereinafter referred to as "the flat") and is between the appellant and respondent No. 1 herein.

5. Respondent No. 1 filed a writ petition being W.P.(C) No. 15385 of 2017 before the High Court of Kerala against the appellant herein and other respondents(local police authorities) seeking therein a relief of restoration of his possession over the flat in question. The appellant contested the writ petition on various factual and legal grounds including raising an objection about the maintainability of the writ petition and the reliefs claimed therein.

6. By impugned order, the Division Bench allowed the writ petition and directed the appellant (respondent No. 5 in the writ petition) to restore the possession of the flat in question to respondent No. 1 herein (writ petitioner in the High Court) which has given rise to filing of the present appeal by way of special leave by respondent No. 5 of the writ petition in this Court.

7. The short question, which arises for consideration in this appeal, is whether the High Court was justified in entertaining the writ petition filed by respondent No. 1 herein and Secondly, whether the High Court was justified in issuing a mandamus against the appellant directing him to restore the possession of the flat to respondent No. 1.

8. Heard Mr. Haris Beeran, learned counsel for the appellant and Mr. R. Basant, learned senior counsel, Mr. A.K. Joseph and Mr. Nishe Rajen Shonker, learned counsel for the respondents.

9. Having heard the learned counsel for the parties and on perusal of the record of the case, we are constrained to allow the appeal, set aside the impugned order and dismiss the writ petition filed by respondent No. 1 herein out of which this appeal arises.

10. In our considered opinion, the writ petition filed by the respondent No. 1 under Article 226/227 of the Constitution of India against the appellant before the High Court for grant of relief of restoration of the possession of the flat in question was not maintainable and the same ought to have been dismissed in *limine* as being not maintainable. In other words, the High Court ought to have declined to entertain the writ petition in exercise of extra ordinary jurisdiction under Article 226/227 of Constitution for grant of reliefs claimed therein.

11. It is not in dispute that the reliefs for which the writ petition was filed by respondent No. 1 herein against the appellant pertained to possession of the flat. It is also not in dispute that one Civil Suit No. 807/2014 between the appellant and the respondent No. 1 in relation to the flat in question for grant of injunction was pending in the Court of Munsif at Kozhikode. It is also not in dispute that the appellant and the respondent No. 1 are private individuals and both are claiming their rights of ownership and possession over the flat in question on various factual grounds.

12. In the light of such background facts arising in the case, we are of the considered opinion that the filing of the writ petition by respondent No. 1 herein against the appellant herein under Article 226/227 of the Constitution of India in the High Court, out of which this appeal arises, was wholly misconceived.

13. The question as to who is the owner of the flat in question, whether respondent No. 1 was/is in possession of the flat and, if so, from which date, how and in what circumstances, he claimed to be in its possession, whether his possession could be regarded as legal or not *qua* its real owner etc. were some of the material questions which arose for consideration in the writ petition.

14. These questions, in our view, were pure questions of fact and could be answered one way or the other only by the Civil Court in a properly

constituted civil suit and on the basis of the evidence adduced by the parties but not in a writ petition filed under Article 226 of the Constitution by the High Court.

15. It has been consistently held by this Court that a regular suit is the appropriate remedy for settlement of the disputes relating to property rights between the private persons. The remedy under Article 226 of the Constitution shall not be available except where violation of some statutory duty on the part of statutory authority is alleged. In such cases, the Court has jurisdiction to issue appropriate directions to the authority concerned. It is held that the High Court cannot allow its constitutional jurisdiction to be used for deciding disputes, for which remedies under the general law, civil or criminal are available. This Court has held that it is not intended to replace the ordinary remedies by way of a civil suit or application available to an aggrieved person. The jurisdiction under Article 226 of the Constitution being special and extraordinary, it should not be exercised casually or lightly on mere asking by the litigant. (See **Mohan Pande vs. Usha Rani**, 1992 (4) SCC 61 and **Dwarka Prasad Agrawal vs BD Agrawal**, (2003) 6 SCC 230).

16. In our view, the writ petition to claim such relief was not, therefore, legally permissible. It, therefore, deserved dismissal in *limine* on the ground of availability of an alternative remedy of filing a civil suit by respondent No. 1 (writ petitioner) in the Civil Court.

17. We cannot, therefore, concur with the reasoning and the conclusion arrived at by the High Court when it unnecessarily went into all the questions of fact arising in the case on the basis of factual pleadings in detail (43 pages) and recorded a factual finding that it was the respondent No. 1 (writ petitioner) who was in possession of the flat and, therefore, he be restored with his possession of the flat by the appellant.

18. In our opinion, the High Court, therefore, while so directing exceeded its extraordinary jurisdiction conferred under Article 226 of the Constitution. Indeed, the High Court in granting such relief, had virtually converted the writ petition into a civil suit and itself to a Civil Court. In our view, it was not permissible.

19. Learned counsel for respondent No. 1, however, strenuously urged that the impugned order does not call for any interference because the High Court has proceeded to decide the writ petition on admitted facts.

20. We do not agree with the submissions of learned counsel for respondent No.1 for the reasons that first there did exist a dispute between the appellant and respondent No. 1 as to who was in possession of the flat in question at the relevant time; Second, a dispute regarding possession of the said flat between the two private individuals could be decided only by the Civil Court in civil suit or by the Criminal Court in Section 145 Cr.P.C proceedings but not in the writ petition under Article 226 of the Constitution.

21. In view of the foregoing discussion, we are unable to agree with the reasoning and the conclusion arrived at by the High Court in the impugned order.

22. As a consequence, the appeal succeeds and is accordingly allowed. Impugned order is set aside. The writ petition filed by respondent No. 1, out of which this appeal arises, stands dismissed.

23. Liberty is, however, granted to the parties to file civil proceedings in the Civil Court for claiming appropriate reliefs in relation to the flat in question for adjudication of their respective claims.

24. We, however, make it clear that while prosecuting any civil/criminal proceedings by the parties, as the case may be, any observations and the findings recorded by the High Court in the impugned order will not be looked into because the impugned order has since been set aside by this Court.

2019 (I) ILR - CUT- 14

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

W.P.(C) NO. 6722 OF 2017

VISHAL VISWAKARMA & ORS. .....Petitioner

.Vs.

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

(A) WORDS AND PHRASES – Student – Meaning of – Held, a student means, a person who is admitted to an educational institution and whose name is lawfully borne on the attendance register thereof and undergoing a course of studies for obtaining a degree, diploma or other academic distinction duly instituted. (Para 5)

(B) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition challenging the punishment imposed on the students for indiscipline – Interference by court – Scope of – Held, a student has to possess civilly responsible behavior, which helps to maintain social order and contributes to the preservation, if not advancement, of collective interest of society at large – It is expected from the students prosecuting their studies in an educational institution to get education, have to maintain 'discipline' so as to project themselves as good citizens of India – If this avowed objective of an educational institution will be taken into consideration, which is imparting education to the students, and if the discipline in the institution itself is allowed to be jeopardized due to some misdeeds of the students for ulterior motive in the campus, the same cannot and should not be tolerated.

(Paras 12 & 13)

Case Laws Relied on and Referred to :-

1. (2002) 7 SCC 368 : Aruna Roy .Vs. Union of India.
2. (2003) 1 SCC 687 : Rohit Singhal .Vs. Principal, Jawahar N. Vidyalaya.
3. (1993) 1 SCC 645 : Unni Krishnan .Vs. State of A.P.
4. (1991) 2 SCC 716 : Maharashtra State Board of Secondary and Higher Secondary Education .Vs. K.S. Gandhi.
5. AIR 1968 SC 662 : S. Azeez Basha .Vs. Union of India.
6. AIR 1997 SC 1436 : Aditanar Educational Institution .Vs. Addl. C.I.T.
7. (2002) 8 SCC 450 : T.M.A. Pai Foundation .Vs. State of Karnataka.
8. AIR 2005 SC 1924 : M.P. Electricity Board .Vs. Jagdish Chandra Sharma.

For petitioners : M/s. A.A. Das, B.K. Parida, A.N. Pattnayak, S.A. Pattnaik & M. Panda.
For Opp. Parties : Ms. Pami Rath & J.P. Behera.

JUDGMENT Decided On : 11.04.2018

DR. B.R. SARANGI, J.

Petitioners no.1 to 4 are the students of 3rd year B.Com., 2nd year B.A. Political Science (Hons.), 2nd year B.A. Sociology (Hons.) and 2nd year B.Sc., ITM respectively of Ravenshaw University, Orissa, Cuttack and continuing their respective courses residing in the hostel. On the basis of the incident that took place on 21.11.2016 because of clash between two groups of students, who are the boarders of Lalitgiri hostel and New hostel, both groups submitted their complaint against each other. Consequentially, the authority caused an inquiry by constituting discipline committee, which submitted its report that the scuffle among the students/boarders of Lalitgiri hostel and New hostel was due to exchange of words and remarks to each other. In the report dated 15.02.2017, it was observed that the petitioners had involved and instigated the fighting and they were leading the groups.

Consequentially, punishment of detention of four semesters and cancellation of hostel seats against Ajay Behera, Srinu Kumar Patra and Md. Asfak Ali was awarded and detention of two semesters against Vishal Viswakarma, Trailokyanath Upadhya and Srikanta Malik. After the recommendation of the discipline committee, the Vice Chancellor/Competent Authority, in exercise of power under clause-152 of the statute, imposed punishment on the petitioners vide office order dated 03.03.2017 holding that the petitioners were guilty for the alleged involvement in the clash between Lalitgiri hostel and New hostel on 21.11.2016.

So far as petitioner no.1 is concerned, he has been detained for two consecutive semesters along with cancellation of his hostel seat with immediate effect till 31.12.2017 and his studentship was suspended during the said period and he was also not allowed to enter into the University premises till 31.12.2017. It was further directed that he can enroll and complete his remaining semesters after 31.12.2017. So far as petitioner no.2 is concerned, similar punishment has also been imposed on him. As regards petitioners no.3 and 4, they have been detained for four consecutive semesters along with cancellation of their hostel seats with immediate effect till 31.12.2018 and their studentship stood suspended during the said period and also not allowed to enter into the University premises till 31.12.2018. It was further directed that they can enroll and complete the remaining semesters after 31.12.2018. Against such imposition of punishment, the petitioners preferred appeals before the Executive Council to reconsider the same, but in turn the Executive Council in its 31st meeting held on 25.03.2017 upheld the decision of the Vice Chancellor in the matter of punishment inflicted on the petitioners and consequentially issued office order on 28.03.2017. Against imposition of such punishment by the Vice Chancellor dated 03.03.2017 in Annexure-3 series and confirmation thereof in appeals by the Executive Council under Annexures-4 and 5 series dated 28.03.2017, the petitioners have approached this Court by filing the present writ application.

2. Mr. A.N. Pattnayak, learned counsel for the petitioners contended that so far as petitioners no.1 and 2 are concerned, the punishment imposed against them have already been exhausted and the said period has already been over by 31.12.2017. But in the event the order of punishment remained against them, it would affect their career. So far as petitioners no.3 and 4 are concerned, the punishment imposed against them is continuing and the same is going to be over on 31.12.2018. It is contended that clash between the two

groups of students arisen at the spur of the moment without any intention thereon which led to indiscipline in the campus itself and for that they are regretting themselves and as such the punishment so imposed would affect the career of the students. It is further contended that the petitioners owe responsibility by maintaining peace and tranquility in the campus itself being the student of the University. But because of imminent situation, some untoward incidents occurred and for that purpose the punishment so imposed may be relaxed by allowing them to prosecute their study as before. It is further contended that so far as petitioners no.1 and 2 are concerned, their punishment has already been exhausted and so far as petitioners no.3 and 4 are concerned, their punishment still continues. Therefore, the same may kindly be quashed or reduced, as they are repenting for their past deeds. He further contended that the petitioners may be allowed to fill up the forms and appear in the semester examinations, which are scheduled to be held in the month of April, 2018.

3. Ms. Pami Rath, learned counsel for the opposite party-University contended that on the basis of the allegations made by 38 students and after examining the CCTV footage of the hostel, so also giving due opportunity of personal hearing to the petitioners, they have been found guilty and accordingly an inquiry has been conducted by the discipline committee. On the basis of such inquiry report, the competent authority imposed punishment which has been confirmed by the appellate authority. As such, there was no illegality and irregularity committed by the authority in awarding such punishment, which may warrant interference by this Court at this stage. But at the same time, it is contended that due to efflux of time the punishment as against petitioners no.1 and 2 has already been exhausted and so far as petitioners no.3 and 4 are concerned, the punishment is still continuing, and as such the same is going to be exhausted by 31.12.2018.

4. We have heard Mr. A.N. Pattnaik, learned counsel for the petitioner, as well as Ms. Pami Rath, learned counsel for the opposite parties and perused the records. Pleadings between the parties having been exchanged, with the consent of the learned counsel for the parties this writ petition is being disposed of finally at the stage of admission.

5. On the basis of the undisputed facts narrated above, we show our concern about the indiscipline students in the campus of the reputed educational institution like Ravenshaw University. No doubt the institution has its past glory in catering the needs of the education in the State and even

at national level by imparting 'education' to its 'students', whose moral duty and responsibility to acquire knowledge and come out from the institution with flying colors obtaining degree maintaining discipline and set an example for future generation.

Then question comes to consideration, who is a student? A student means, a person who is admitted to an educational institution and whose name is lawfully borne on the attendance register thereof and undergoing a course of studies for obtaining a degree, diploma or other academic distinction duly instituted.

6. Ravenshaw University has got its own importance in the field of education. Many students of this institution have adorned the highest chair of the country as well as the State and many of them have built up their career even as Statesman, bureaucrats, doctors, scientists, historians and what not. More particularly, the institution itself has got its rich heritage, prestigious glory and culture. Therefore, any indiscipline within the campus would definitely frustrate the very purpose for which the institution is established and it would also tarnish the image in the public esteem. It is never expected that students would indulge themselves in such an activity which would affect the reputation of the institution itself. It is also quite unfortunate that parents are spending money for betterment of their children, but the children, without realizing their own position, parental status and their survival in society, are indulging themselves in inter se disputes creating an indiscipline situation in the campus of the educational institution, which not only affect their individual career but also affect the reputation of their parents.

7. In ***Aruna Roy v. Union of India***, (2002) 7 SCC 368, the apex Court held as follows:

> *"Value-based education is likely to help the nation to fight against all kinds of prevailing fanaticism, ill will, violence, dishonesty, corruption, exploitation and drug abuse."*

Similarly, in ***Rohit Singhal v. Principal, Jawahar N. Vidyalaya***, (2003) 1 SCC 687, in the words of Justice R.C. Lahoti, it is stated:

> *"Education is an investment made by the nation in its children for harvesting a future crop of responsible adults productive of a well-functioning society. However, children are vulnerable. They need to be valued, nurtured, caressed and protected."*

8. In ***Unni Krishnan v. State of A.P***., (1993) 1 SCC 645 the apex Court held as follows :

> *"Education has never been commerce in this country. Making it one is opposed to the ethos, tradition and sensibilities of this nation. The argument to the contrary has an unholy ring to it. Imparting of education has never been treated as a trade or business in this country since time immemorial. It has been treated as a religious duty. It has been treated as a charitable activity."*

9. In ***Maharashtra State Board of Secondary and Higher Secondary Education v. K.S. Gandhi***, (1991) 2 SCC 716 the apex Court held as follows:

> *"Education means a process which provides for intellectual, moral and physical development of a child for good character formation; mobility to social status; an opportunity to scale equality and a powerful instrument to bring about social change including necessary awakening among the people."*

In the said case, their Lordships have further held as follows:

> *"In nation building activities, education is a powerful lever to uplift the poor. Education should, therefore, be co-related to the social, political or economic needs of our developing nation fostering secular values breaking the barriers of casteism, linguism, religious bigotry and it should act as an instrument of social change. Education system should be so devised as to meet these realities of life. Education nourishes intellectual advancement to develop dignity of person without which there is neither intellectual excellence nor pursuit of happiness. Education thus kindles its flames for pursuit of excellence, enable and ennobles the young mind to sharpen his/her intellect more with reasoning than blind faith to reach intellectual heights and inculcate in him or her to strive for social equality and dignity of person."*

10. Being an educational institution, what should be the function of Ravenshaw University?

In ***S. Azeez Basha v. Union of India***, AIR 1968 SC 662, while considering the provisions contained in Article 30(1) of the Constitution of India, the apex Court held that the words "educational institutions" are of very wide import and would include a University also.

In ***Aditanar Educational Institution v. Addl. C.I.T.***, AIR 1997 SC 1436, while considering Section 10(22) of the Income Tax Act, the apex Court held that the expression 'educational institution' occurring in Section 10(22) of the Act includes a society which imparts education at the levels of colleges, and schools.

In ***T.M.A. Pai Foundation v. State of Karnataka*** (2002) 8 SCC 450, the apex Court held that the expression 'educational institutions' occurring in various Articles of the Constitution of India means institutions that impart

education from primary school level upto the post graduate level and includes professional educational institutions.

11. Taking into consideration the law laid down by the apex Court as discussed above, it can safely be concluded that a student, who prosecutes his education in an educational institution, has to maintain discipline.

Discipline or management of the school shall mean and include, all matters respecting the conduct of the masters or scholars, the method and times of teaching, the examination into the proficiency of the scholars, of any school; and the ordering of returns or reports with reference to such particulars, or any of them. In a way, it includes the whole conduct of the orderly running of the institution.

In ***Cleary v. Booth***, (1893), I QB 465, discipline has been explained in following manners :

> *"Training, especially use of training which produces self-control, obedience, orderliness; maintenance of a proper sub-ordination in the army or school or the like (as, military discipline; school discipline). The discipline of school children is not confined to school hours; but extends to acts done by a pupil out of school."*

In ***M.P. Electricity Board v. Jagdish Chandra Sharma***, AIR 2005 SC 1924, discipline has been explained by the apex Court, which reads thus :

> *"A form of civilly responsible behaviour which helps to maintain social order and contributes to the preservation, if not advancement, of collective interest of society at large."*

12. In view of the aforesaid law laid down by the apex Court and meaning attached to the word 'discipline', it can safely be concluded that a student has to possess civilly responsible behavior, which helps to maintain social order and contributes to the preservation, if not advancement, of collective interest of society at large. Therefore, it is expected from the petitioners, who are nonetheless students of Ravenshaw University and prosecuting their studies in an educational institution to get education, have to maintain 'discipline' so as to project themselves as good citizens of India.

13. If this avowed objective of an educational institution will be taken into consideration, which is imparting education to the students, and if the discipline in the institution itself is allowed to be jeopardized due to some misdeeds of the students for ulterior motive in the campus, the same cannot and should not be tolerated. As has been indicated in the inquiry report, on the basis of which punishment has been imposed, which has been confirmed

in appeal, the situation would be alarming in case discipline is not maintained in the campus of an educational institution. Normally, we would not have interfered with the order of punishment imposed by the authority concerned, but in the peculiar facts and circumstances of the case, since punishment imposed on petitioners no.1 and 2 has already exhausted, so far as punishment imposed on petitioners no.3 and 4 is concerned, which is going to be exhausted by 31.12.2018, is reduced to that of petitioners no.1 and 2, because of the reasons that the petitioners are vulnerable, caressed and protected. It is worthy to note that this Court, vide order dated 19.03.2018, passed an interim order to the following effect:-

> *"The petitioners no.1 and 2 have already been allowed to reenroll as students as their period of punishment is over. As regards petitioners no.3 and 4, since the last date of filing up of the forms is 20.03.2018, we direct that the opposite party-University shall permit petitioners no.3 and 4 also to fill up the form. The prayer for permitting the petitioners to appear in the examination shall be considered on the next date.*
>
> *List on 28.03.2018.*
>
> *Issue urgent certified copy today on payment of usual charges."*

In compliance of the aforesaid interim order, petitioners no.3 and 4 have already filled up their forms and today by filing an affidavit sworn on 28.03.2018 the petitioners have stated that they are willing to submit any kind of undertaking before the University authority so as to enable them to appear in the ensuing examination by regularizing their studentship without creating any disturbance and indiscipline situation.

14. Taking a lenient view and considering the future of the students, who are the petitioners before this Court, we observe that the opposite party-University should accept the undertaking of the petitioners and allow them to appear in the ensuing examination by regularizing their studentship because they have repented for their misdeeds. Therefore, we are of the opinion that the petitioners should be cautioned not to commit any indiscipline situation in the premises of the University in future by keeping their undertaking as desired by the University authority, so that they shall mend themselves and their conduct and see that the glory of the noble institution remains unimpaired.

15. With the above observation and direction, the writ petition stands disposed of. No order to costs.

2019 (I) ILR - CUT- 22

K.S. JHAVERI, C.J & K.R. MOHAPATRA, J.

W.P.(C) NO. 3206 OF 2003

UNION OF INDIA REPRESENTED THROUGH GENERAL MANAGER, SOUTH EASTERN RAILWAY & ORS. ……..Petitioners

.Vs.

CENTRAL ADMINISTRATIVE TRIBUNAL, CUTTACK BENCH & ORS. ……..Opp.Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition challenging the order passed by the Central Administrative Tribunal directing the Railways to consider the grievances of the applicant – O.A. filed claiming employment in lieu of land acquired for construction of Railway Link Project – The question arose as to whether the Tribunal has jurisdiction to pass such order – Held, no, the impugned order is without jurisdiction as the Tribunal has jurisdiction to decide the cases of the persons those who are in employment or look for an employment under any law and not to decide entitlement of the land oustees for employment, which is not supported by any statutory provisions.

For Petitioners : M/s.N.K.Mohapatra, A.Pal & B.P. Mohapatra
For Opp.Parties:

ORDER Date of Order : 29.11.2018

K.S. JHAVERI C.J.

Heard learned counsel for the parties.

By way of this writ petition, petitioner-Union of India, has challenged the order dated 27.06.2002 passed by the Central Administrative Tribunal, Cuttack Bench in O.A. No. 553 of 2002 whereby the learned Tribunal disposed of the O.A. with direction to the petitioners (respondents therein) to consider the grievances of the applicant and dispose of his representation.

Learned counsel for the petitioner submits that the applicant had filed the O.A. claiming that the lands recorded in the name of his family were acquired for construction of Railway Link Project and hence he had made representations for an employment in Group-C or Group-D post in the Railways. Such representation was not received, but the learned Tribunal issued directions to consider the applicant's case as land oustee candidate for appointment to any posts. It is submitted that the Tribunal has passed an ex-

parte order without hearing the petitioners, that too in a land acquisition proceeding, where the Railways has no such provision for giving appointment on rehabilitation, such erroneous order could not have been passed by the Tribunal without ascertaining the relevant policies of the Railways.

We have gone through the records and the order passed by the Tribunal. In a land acquisition proceeding, the Tribunal could not have directed the petitioners to consider the representation of the applicant and grant necessary relief. In our considered opinion, the impugned order is without jurisdiction. The Tribunal has jurisdiction to decide the cases of the persons those who are in employment or look for an employment under any law and not to decide entitlement of the land oustees for employment, which is not supported by any statutory provisions. Therefore, the impugned order of the Tribunal is liable to be set aside and is accordingly set aside. The writ petition is allowed. Misc. Cases, pending, if any stand disposed of accordingly.

2019 (I) ILR - CUT- 23

K.S. JHAVERI, C.J & K.R. MOHAPATRA, J.

W.P.(C) NO. 9338 OF 2018

G. ASHOK KUMAR & ORS. ……..Petitioners

.Vs

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition challenging administrative action of the State Govt. in cancelling the tender call notice – Allegation of tender fixing – Report of the Collector of the district ratifies such allegation – Pursuant to such report the State Government has taken decision to handover the works to independent agency – Held, the decision taken seems to be prima facie germane – High Court while exercising power under Article 226 of the Constitution should not substitute its opinion when an administrative decision is taken after following the due procedure. (Paras 10 to 12)

Case Laws Relied on and Referred to :-

1. 2018 (I) ILR CUT 254 : United Contractors Association vs. State of Odisha.

For Petitioners : M/s. Sukanta Ku. Dalai, P.N. Swain, S.B. Mohapatra & N.K. Routray.
For Opp. Parties : Mr. B. P. Pradhan Addl. Govt. Adv.

ORDER Heard & Decided On 05.12.2018

K.S. JHAVERI, C.J.

Heard learned counsel for the petitioners, learned Additional Government Advocate for the State opposite parties and learned counsel for the opposite party Nos.5 and 6.

2. By way of this writ petition, the petitioners have challenged the action of the opposite parties-State Government in cancelling the tender call notice dated 03.03.2018 (Annexure-6) vide order/cancellation notice dated 27.03.2018 (Annexure-8) and also the decisions of the State Government dated 04.05.2018 (Annexures-9 and 10) and praying for restoration of the earlier tender notice.

3. Learned counsel for the petitioners aggressively has argued the matter that this case is squarely covered by a reported decision of this Court in the case of ***United Contractors Association vs. State of Odisha, 2018 (I) ILR CUT 254***, wherein in paragraph 12 and 13 a Division Bench of this Court has observed as under:

> "12. Taking into consideration the principles laid down by the apex Court, as discussed above, to the present context, it is only indicated in the 4th Corrigendum that cancellation of tenders for the works from serial no.1 to 168 has been done "due to unavoidable circumstances". While considering the provisions contained in Section 25-FFF of Industrial Disputes Act ***in Kuttanecherry Quseph Antony v. P.V. Kumaran, 1979 LAB IC 1165***, it has been held as follows:
>
> "Legislative intent is to limit the scope of the expression 'unavoidable circumstances' to such cases where closure was for reasons connected with the business. If the closure of the undertaking was on account of unavoidable circumstances beyond the control of an employer, but those circumstances are not connected with the functioning of the undertaking, although such reasons are personal to him, the closure cannot come within the ambit of the Section 25-FFF(1) proviso."
>
> 13. In view of the above mentioned factual and legal discussion, there is no iota of doubt that 4th corrigendum dated 13.06.2017 has been issued without assigning any reason and, as such, the meaning of unavoidable circumstances cannot and could not be inferred from the circumstances mentioned in the said letter.

> Therefore, the cancellation of tenders so made with regard to the works from serial no.1 to 168 of annexure to NIT No.974 dated 07.04.2017 cannot sustain in the eye of law. Consequentially, the National Competitive Bidding through e-procurement issued under Annexure-6 dated 21.08.2017 during pendency of the writ application also cannot sustain and is liable to be quashed. Accordingly, 4th corrigendum notice dated 13.06.2017 cancelling tenders for the works from serial no.1 to 168 of annexure to NIT No.974 dated 07.04.2017 and consequential National Competitive Bidding through e-procurement dated 21.08.2017 vide Annexure-5 and 6 respectively are hereby quashed."

Therefore, he contended that on the face of it, the State Government has flouted the order of this Court and has cancelled the same contract which was earlier tendered by the State Government. He also contended that originally the bid was invited where four different kinds of contractors could have participated in the contract. Clause (1) of National Competitive Bidding Through e-Procurement dated 07.04.2017 is reproduced hereunder for better appreciation of the fact:

"1. Class of Contractor

(a) Estimated cost more than 10.00 Crores	:	Super Class Contractor of (Odisha PWD) or relevant class of other licensing authorities.
(b) Estimated cost more than 4.00 crores up to Rs.10.00 cores.	:	Special Class & Super Class contractor of (Odisha PWD) or relevant class of other licensing authorities.
(c) Estimated cost more than 1.50 crores up to Rs.4.00 crores.	:	A Class & Special Class contractor of (Odisha PWD) or relevant class of other licensing authorities.
(d) Estimated cost more than 40.00 Lakhs up to Rs.1.50 Crores.	:	B Class & A Class Contractor of (Odisha PWD) or relevant class of other licensing authorities.

4. He has also pointed out that the Superintending Engineer, Southern Circle RW, Sunabeda has not assigned any reason in its order dated 27.03.2018 (Annexure-8) in cancelling the tender of the petitioners, which is contrary to law as declared by this Court. He further pointed out the letter dated 04.05.2018 (Annexure-9) where a decision was taken by the Government to handover the project for inviting proposal for assignment of 174 nos of PMGSY projects in the district of Koraput to the CPSU, Ms. NBCC Ltd

5. In support of his contention, he also pointed out that the action of the State Government is arbitrary in view of the statement of the MLA which was sought to be relied upon the 47th Koraput Zilla Parishad Meeting Schedule dated 13.03.2018 under Annexure-12 to the rejoinder affidavit. He has, however, pointed out the letter dated 22.01.2018 issued by the said MLA regarding engagement of CPSU M/s. NBCC Ltd. for executing PMGSY works in IAP districts under Batch-III PMGSY in R.W. Division, Jeypore, he contended that the poor contractors of the poor State of Odisha are deprived of their legitimate expectation to participate in the tender and the prime work of State of Odisha has been handed over to the Central Government undertakings.

6. Mr. B.P. Pradhan, learned Additional Government Advocate for the opposite parties-State has pointed out only one point in the counter affidavit, which is reproduced herein below:

> "It may be mentioned here that on earlier occasion, Sri Kaliprasad Mishra had forcibly stopped the execution of some packages under PMGSY works entrusted to CPSU (Central Public Sector Undertaking), M/s NBCC Ltd. On the basis of written complaint submitted by M/s. NBCC, the Opp. Party No.1 requested the Collector and SP, Koraput vide letter No.28585302792015/RD dtd.22.02.2017 to provide necessary protection to the concerned agencies who have been engaged in execution of PMGSY projects so that they will be able to complete the works smoothly without any threatening or hindrances.
>
> It is pertinent to mention that one news item was published in Odia Daily News paper "The Sambad" on 23.03.2018 that one Sri Kaliprasad Mishra, Super Class Contractor (President of United Contractor Association, Koraput) has been involved in tender fixing. Ultimately, on 22.03.2018 the local police arrested Sri Kaliprasad Mishra in Jeypore P.S. Case No. 74/2018, under Section 386/387/ 294/506/34 of IPC and forwarded to the Court.
>
> Due to lapse of time the tender notice no.924 dtd. 07.04.2017 (1st call) came to an end as the participating bidders to the different packages (from Sl. No.1 to 168) did not submit the letter of willingness for extending the validity of the tender.
>
> **State Government has decided to assign the work to CPSU M/s. NBCC for the following reasons:**
>
> I. The MoRD, GoI has preponed completion date of PMGSY sanctioned projects of all unconnected habitations of the State under PMGSY from the year 2021-22 to March, 2019. Unless funds are utilized within specified period, same shall be liable to be borne by the State.
>
> II. There is a huge balance target of 11000 Km. length of road under PMGSY in the State for the year 2018-19. Hence, there is necessity to engage more no. of

PIUs (Programme Implementation Units) or CPSUs (Central Public Sector Undertaking) in some IAP (Integrated Action Plan District) Districts where existing workload is high.

III. That the CPSU M/s NBCC has been assigned the PMGSY works sanctioned under different phases during 2016-17 & 2017-18 in 6 nos. of IAP Districts i.e. Koraput, Nuapada, Kalahandi, Rayagada, Kandhamal & Sundargarh. The said CPSU has achieved their annual target in respect of Koraput District as well as other Districts also for 2017-18. Hence, in order to enhance the executing capacity of the State to meet the desired target for the year 2018-19, it was decided to assign the above projects to CPSU, M/s NBCC for executing the work through tender.

The written complaint of the Hon'ble MLA, Jeypore regarding fixing of tender vide his letter no.324 dtd. 14.03.2018 is annexed herewith as **ANNEXURE-A/4**. The copy of confidential letter of Collector, Koraput dtd. 23.03.2018 is annexed herewith as **ANNEXURE-B/4**. The copy of letter of MoRD, GoI dtd.19.05.2016 is annexed herewith as **ANNEXURE-C/4**. The copy of letter No.8062 dtd. 27.03.2018 for cancellation of Tender Notice is enclosed herewith as **ANNEXURE-D/4**. The copy of tripartite agreement dtd. 03.03.2015 is annexed herewith as **ANNEXURE-E/4**. The copy of minutes of proceeding of 30th State Level Standing Committee Meeting on PMGSY held on 23.06.2017 is annexed herewith as **ANNEXURE-F/4**. The copy of news paper clipping published in the daily news "Sambad" dt.23.03.2018 is annexed herewith as **ANNEXURE-G/4**.

The copy of guidelines for PMGSY-II issued by Director (Technical), NRRDA, MoRD, GoI is annexed herewith as **ANNEXURE-H/4**. The copy of letter No.28585302792015/ RD dtd.22.02.2017 is annexed herewith as **ANNEXURE-J/4**."

7. It is pertinent to mention here that one news item was published in local odia daily "The Sambad" on 3rd March, 2018 that one Kali Prasad Mishra, Super Class Contractor, President of the United Contractors Association, Koraput has been involved in the tender fixing and ultimately on 23rd March, 2018 the police arrested Kali Prasad Mishra in connection with Jaypore Town P.S. Case No.74 of 2018 corresponding to G.R. Case No.292 of 2018 under Sections 386, 387, 506, 294, 34 I.P.C.

8. The same association was before this Court on earlier writ petition and at that time there was no such report of the Collector which has changed the complete scenario. For ready reference, we are producing the confidential report which has been given by the Collector, Koraput on 23rd March, 2018 as under:

"xx xx xx

Sub: Allegation of Hon'ble MLA, Jeypore regarding Tender fixing in PMGSY works.

Ref: Your letter Nop.23/RD, dtd: 17.03.2018.

Sir,

With reference to the letter on the subject cited above, I am to inform you that during confidential enquiry from various sources including Superintendent of Police, Koraput and Sub-Collector, Jeypore, it appears that allegations against Sri Kali Prasad Mishra involved in fixing of PMGSY Tenders are true. It also appears that fixing of Tender by Sri Kali Prasad Mishra is in connivance with some of the RD staff.

In this regard, I would request you to kindly cancel these Tenders which were invited by S.E., RW, Circle, Sunabeda and to undertake tendering of works centrally at Bhubaneswar or any other safe place."

However, an endeavour is made by the counsel for the petitioners that with a view to come out to support its case vide letter dated 24th March, 2017 the MLA got a fictitious complainant lodged against Kali Prasad Mishra.

9. Learned counsel for the opposite party-NBCC pointed out the report of the Collector, Koraput and government decision dated 31.03.2018 (Annexure-E/5) to the counter affidavit filed on behalf of opposite party Nos.5 and 6, paragraphs-6 and 7 whereof read as under:

"6. The said CPSU has completed 193 Km. length of PMGSY road till 29.03.2018 out of target of 228 Km. during current year in Koraput district & it is expected that the said CPSU will complete the target. Likewise in other IAP districts Sudargarh & Kandhamal the said CPSU has achieved their respective target for the 2 districts during 2017-18.

7. In view of the above, it is recommended to assign 174 nos. of projects costing Rs.353.04 Cr. to construct 168 nos. of roads having 687.33 Km. length and 6 nos of long span bridges to CPSU M/s. NBCC Ltd. in Koraput district to enhance the executing capacity of the State to meet the desired annual target for the year 2018-19."

In view of the above, he contended that now work is already handed over and the same is under progress. However, this Court on 30.05.2018 has passed the interim order; which reads as under:

"xx xx xx

As an interim measure, the process of tender pursuant to the tender call notice dated 12.05.2018 in Annexure-11 shall continue but the same shall be abide by the result of the writ petition."

Before proceeding with the matter, it will not be out of place to mention that the State Government is making endeavour to implement the scheme byexecuting the work as per the list within the time limit of the financial year as

the grant which the Government (both the Central as well as the State) have provided, is to be used during the relevant financial year for which tendering, retendering, cancellation and everything has to be completed in all respect by the State Government.

10. In that view of the matter, pursuant to the report of the independent officer i.e. Collector, Koraput, the State Government has taken decision to hand it over to the independent agency. In our considered opinion, the decision taken seems to be prima facie germane.

11. It is well settled in law that the High Court while exercising power under Article 226 of the Constitution should not substitute its opinion when an administrative decision is taken after following the due procedure and when the report of the Collector is received, where it has been categorically mentioned that the Contractors are controlled by some head strong persons, it will not be appropriate for this Court to sponsor those head strong persons while exercising power under Article 226 of the Constitution of India.

12. In that view of the matter, when the State Government has independently taken decision to control the head strong persons like Kali Prasad Mishra, such an administrative decision cannot be substituted by the High Court under Article 226 of the Constitution of India.

13. Lastly, learned counsel for the petitioners submitted that e-procurement cannot be interfered with by the local people.

14. It is well settled that the contactor while applying for a tender also takes stock of the situation as to whether the work could be allowed to be done peacefully or not. Taking into consideration the history and the situation, which is prevailing in the district, it will not be appropriate to substitute our opinion on e-procurement.

15. In that view of the matter, the judgment referred to above which is sought to be relied upon will not apply in the facts of the case since the facts which have come on record and now it is established in view of the counter affidavit filed on behalf of opposite party Nos.1 to 4 that the earlier writ petition filed by that same Kali Prasad Mishra. Needless to say that the petitioners counsel and the counsel in that petition appears to be coincidentally the same. In that view of the matter, prima facie we are of the view that this is nothing but the petitioners are sponsored by the head strong persons to file such petition. We are of the opinion that we should not be a party to such a sponsorship litigation, hence, we deprecate the practice and the writ petition is liable to be dismissed with cost. Accordingly, the writ petition stands dismissed with cost of Rs.5/- (rupees five).

2019 (I) ILR - CUT- 30

K.S. JHAVERI, CJ & K.R. MOHAPATRA, J.

W.P.(C) No. 18368, 18378, 18384, 18339, 18111, 18972, 17522, 18989, 19515, 19751, 2340, 18337, 19101 & 19110 OF 2018

RANJAN KUMAR PRADHAN & ANR. In W.P.(c) No.18368 of 2018
IPSITA MOHANTY In W.P.(c) No.18378 of 2018
ANUSHRUTI CHOUDHURY In W.P.(c) No.18384 of 2018
BISWA BHUSAN NAYAK In W.P.(c) No.18339 of 2018
MANOJ KUMAR BARIK In W.P.(c) No.18111 of 2018
JANAK ROUT In W.P.(c) No.18972 of 2018
MAMATA MOHANTY & ORS. In W.P.(c) No.17522 of 2018
BANALI TRIPATHY In W.P.(c) No.18989 of 2018
DHANANJAYA NAYAK In W.P.(c) No.19515 of 2018
SUSANTA KUMAR NAYAK In W.P.(c) No.19751 of 2018
AMARENDRA PRADHAN & ORS. In W.P.(c) No.2340 of 2018
DR. PRADEEP KUMAR PRADHAN & ORS. In W.P.(c) No.18337 of 2018
JITENDRIYA PANIGRAHI In W.P.(c) No.19101 of 2018

PRADEEP KUMAR SAMAL & ANR. ……..Petitioners
In W.P.(c) No.19110 of 2018

.Vs.

HIGH COURT OF JUDICATURE OF ORISSA & ANR. ……Opp. Parties
[In all the cases]

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition challenging the recruitment process adopted by the Orissa High Court in the District Judge Examination for the year 2018 – Petitioners are either judicial officers or advocates and they have challenged the procedure adopted by the Court – Plea that even if the petitioners have seven years of practice at the Bar, they are debarred from participating in the selection process of the direct recruitment in the cadre of District Judge on the ground that they are serving as judicial officers and they are not practicing as advocate on the date of submission of their applications – Considered – Held, while allowing any judicial officer to appear in the examination as a lawyer, we are depriving genuine practitioners who have practiced for seven years and more and have been waiting for the turn in the direct recruit and if we will allow this interpretation, it will really hurt the class who is not represented before us.

"Before proceeding with the matter, it will not be out of place to mention that service jurisprudence contemplates that we have to interpret the Rules as it is. This is a condition where the special quota has been fixed as 65% for the direct recruitment and 35% for Judicial Officers to be appointed as District Judge. There is also another bifurcation amongst the Judicial Officers for filling up of the vacancies in the cadre of District Judge from 35% quota. Amongst 35% of vacancies for the Judicial Officers, 25% will be filled up by usual

promotion and 10% to be filled up through limited competitive examination. While interpreting the Rule we have to keep in mind that while allowing any judicial officer to appear in the examination as a lawyer, we are depriving genuine practitioners who have practiced for seven years and more and have been waiting for the turn in the direct recruit and if we will allow this interpretation, it will really hurt the class who is not represented before us. In that view of the matter, once a person has entered into Judicial Service he has to remain in that cadre and he cannot claim the benefit meant for other category of candidates for direct recruitment. However, once a candidate is a direct recruit, he has to remain as a lawyer and compete with the lawyers through direct recruitment quota. But a judicial officer having all the experience and money, he has not struggled at the Bar as a lawyer for seven years whereas the other man has struggled at the Bar for several years. Therefore, while considering the Rule, the Court has to keep in mind that while taking struggle, the experience which he has earned as a lawyer is to be considered as a direct recruit. With regard to the interim order which was passed earlier in several writ petitions to appear the examination for the recruitment of previous year, we can only say that that cannot be treated as a precedent as the same was passed taking into consideration the facts and circumstances of those cases. It is needless to mention here that when a candidate entered into the service, it is the condition precedent that if he wants to appear the examination he has to follow the Service Rules meant for Judicial Officers. The recruitment should be done in accordance with the Service Rules and not otherwise." (Paras 11 & 12)

Case Laws Relied on and Referred to :-

1. (2018) 4 SCC 619 : Dheeraj Mor .Vs. High Court of Delhi.
2. AIR 1983 SC 130 : D.S. Nakara & Ors .Vs. Union of India.

For Petitioners : Mr. V. Narasingh, R.L. Pradhan, J. Samanta Ray & S.G. Das. [In W.P.(C) No.18368 of 2018]
Mr. V. Narasingh, R.L. Pradhan, J. Samanta Ray & S.G. Das. [In W.P.(C) No.18378 of 2018]
Mr. V. Narasingh, R.L. Pradhan, J. Samanta Ray & S.G. Das. [In W.P.(C) No.18384 of 2018]
M/s. A Pattnaik, T.K. Pattnaik, Pattnaik, S. Pattnaik, B.S. Rayaguru, S. Mohapatra, R. Pati, P.P. Mulin, S.P. Moharana. [In W.P.(C) No.18339 of 2018]
M/s. Gautam Mukherjee, P. Mukherjee, A.C. Panda, S.D. Ray, S. Sahoo & S. Panda. [In W.P.(C) No.18111 of 2018]
M/s. Brahma Nanda Tripathy & D. Chatterjee. [In W.P.(C) No.18972 of 2018]
Sri S.K. Nayak, Sr. Adv. M/s Tahali Charan Mohanty, Sr. Adv. J. Mohanty, R.P. Bhagat, M.M. Mohanty, & C.R. Dhal [In W.P.(C) No.17522 of 2018]
M/s. Tahali Charan Mohanty, Sr. Adv. B.K. Tripathy, K. Kar, R.P. Bhagat & G.P. Mohanty. [In W.P.(C) No.18989 of 2018]
M/s. Umakanta Sahoo, S.K. Mohanty & S. Das [In W.P.(C) No.19515 of 2018]
M/s. Gopal Sinha, P.P.Behera, K. Khuntia & A.Ku.Parida [In W.P.(C) No.19751 of 2018]
M/s. P.R. Chhatoi, A.B. Mallick & G.S. Muduli, [In W.P.(C) No.2340 of 2018]
M/s. A. Pattnaik, B.S. Rayguru & B. Mohanty, [In W.P.(C) No.18337 of 2018]
M/s. Choudhury Aswini Kumar Das, H.B. Dash, R. Das Nayak & B.K. Sethy [In W.P.(C) No.19101 of 2018]

M/s. B.S. Rayguru, A. Pattnaik, B.K. Mishr & A.U. Senapati
[In W.P.(C) No.19110 of 2018]

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

JUDGMENT Date of Hearing & Judgment 10.12.2018

K.S. JHAVERI, C.J.

By all these writ petitions, the petitioners have challenged the recruitment process adopted by the Orissa High Court in the District Judge Examination for the year 2018.

2. The facts of the case are that the petitioners are either judicial officers or advocates and they have challenged the procedure adopted by the this Court.

3. Mr. Narasingh, learned counsel for the petitioners, in first three cases, has submitted that even if the petitioners have seven years of practice at the Bar, they are debarred from participating the selection process of the direct recruitment in the cadre of District Judge on the ground that they are serving as judicial officers and they are not practicing as advocate on the date of submission of their applications. Learned counsel for the petitioners has mainly submitted as under:

> **"**A. The issue which falls for kind consideration of this Hon'ble Court in the present writ application, is whether the petitioner-applicants who have 7 years of practice at bar can be debarred from participating in the selection process for "direct recruitment in the cadre of District Judge" on the ground they serving as judicial officers and are not in practice as advocates on the date of submission of the application.
>
> B. The opp.parties have in their counter sought/prayed for dismissal of the writ application primarily on two grounds:
>
> 1. In view of the law laid down in Deepak Aggarwal vrs. Keshav Koushik in (2013) 5 SCC 277, the petitioners are not eligible to participate in the selection process as they were not continuing as an advocate on the date of application. (Para-5, 6, 7 and 11 of the counter affidavit in W.P.(C) No.19110/2018 filed by the opposite party No.1)
>
> 2. Full Court of this Hon'ble Court on 30.10.2018 has been pleased to reject the candidatures of the petitioners and other similarly situated candidates on the ground that "they were not in practice as an advocate on the date of submission of the application". (Para-5 of the Counter Affidavit filed in W.P.(C) No.19110/2018 filed by the Opp.Party No.1)

C. It is pertinent to bring to the kind notice of this Hon'ble Court that the issue(s) involved in the present writ application and the judgment relied upon by the opp.party in Deepak Aggarwal vrs. Keshav Koushik in (2013) 5 SCC 277 has been referred to larger bench in (2018) 4 SCC 619 (Dheeraj Mor vs. Hon'ble High Court of Delhi) and pending adjudication before the Apex Court.

The Apex Court, during pendency of such proceeding, has permitted similarly situated candidates not only to participate in the selection process for appointment but also directed the concerned Opp.Parties to proceed with the appointment in case they are found eligible, post selection, subject to the decision of the Constitution Bench."

In support of his submission, Mr. Narasingh, learned counsel for the respective petitioners has relied upon the decision of the Hon'ble Supreme Court in the case of ***Dheeraj Mor vs. High Court of Delhi, reported in (2018) 4 SCC 619***, wherein the Hon'ble Supreme Court in paragraphs-2, 8, 12, 13, 14, 15 and 16 has held as under:

"2. The petitioners have raised mainly two contentions - (i) in case a candidate has completed seven years of practice as an advocate, he/she shall be an eligible candidate despite the fact that on the date of the application/appointment, he/she is in the service of Union or State; (ii) the members who are in judicial service as Civil Judge, Junior Division or Senior Division, in case they have completed seven years as Judicial Officers or seven years as Judicial Officer-cum-Advocate, they should be treated as eligible candidates.

xx xx xx

8. In Deepak Aggarwal v. Keshav Kaushik and Others.4, a 4 (2013) 5 SCC 277 three-judge Bench of this Court held that the appellants did not cease to be advocates while working as Assistant District Attorney/Public Prosecutor/Deputy Advocate General. In arriving at this decision, this Court also dealt with the expression, "if he has been for not less than 7 years an advocate" in Article 233(2). Paras 51 and 102 read as follows :-

"51. From the above, we have no doubt that the expression, "the service" in Article 233(2)means the "judicial service". Other members of the service of the Union or State are as it is excluded because Article 233 contemplates only two sources from which the District Judges can be appointed. These sources are: (i) judicial service; and (ii) the advocate/pleader or in other words from the Bar. The District Judges can, thus, be appointed from no source other than judicial service or from amongst advocates. Article 233(2) excludes appointment of District Judges from the judicial service and restricts eligibility of appointment as District Judges from amongst the advocates or pleaders having practice of not less than seven years and who have been recommended by the High Court as such." xxx xxx xxx

"102. As regards construction of the expression, "if he has been for not less than seven years an advocate" in Article 233(2) of the Constitution, we think Mr Prashant Bhushan was right in his submission that this expression means seven

years as an advocate immediately preceding the application and not seven years any time in the past. This is clear by use of "has been". The present perfect continuous tense is used for a position which began at sometime in the past and is still continuing. Therefore, one of the essential requirements articulated by the above expression in Article 233(2) is that such

person must with requisite period be continuing as an advocate on the date of application." (Emphasis Supplied)

xx xx xx

12. Some of the learned counsel have also invited our attention to All India Judges Association and others v. Union of India and others, Kumar Padma Prasad v. Union of India and others and State of Assam v. Horizon Union and another

13. In the order dated 03.04.2017 in Sukhda Pritam and Anr v. Hon'ble High Court of Rajasthan and Anr which is one of the cases in the batch, there is also a reference to rules framed by certain states which provide that "in computing the period of seven years there shall be included a period during which he (a candidate) has held judicial office". This is also an issue which is required to be considered.

14. ` In view of the various decisions of this Court, one major issue arising for consideration is whether the eligibility for appointment as district judge is to be seen only at the time of appointment or at the time of application or both. Thus, having regard to the contentions and the materials placed before us and having regard to the ratio and observations in the cases referred to above, some of which are apparently diverse, we are also of the view that these cases involve substantial questions of law as to the interpretation of Article 233 of the Constitution of India. Therefore, we are of the opinion that this matter should be placed before Hon'ble the Chief Justice of India for constituting an appropriate Bench.

15. Learned counsel for the petitioners pointed out that all the petitioners herein, by virtue of interim orders, have appeared in the written examinations and in some cases they have also attended the interview. We are informed that in some of the cases, appointment of other eligible candidates is held up on account of pendency of these cases.

16. The Registry may seek appropriate orders from Hon'ble the Chief Justice of India having regard to the special circumstances referred to above, for an early posting."

He has also relied upon paragraphs-1 and 4 of the order dated 15.02.2018 passed by the Hon'ble Supreme Court in W.P.(C) No.64 of 2018 (Nitin Raj vs. High Court of Delhi), which are reproduced hereinbelow:

The issue in these writ petitions is whether i) the petitioners, who are judicial officers in service, but who have completed seven years before rendering service or; ii) who have a combined service of practice as lawyer and judicial service of seven years or; iii) even in judicial service of seven years, are eligible to participate in the selection to the Delhi Higher Judicial Service.

XX XX XX

The learned counsel has brought to our notice a Reference made by this Court as per Order dated 23.01.2018 to a larger Bench in SLP (C) No. 14156 of 2015 and connected matters. We direct the High Court of Delhi to register the applications of the petitioners and intervenors, if they are otherwise in order, ignoring the objections regarding seven years practice and in case they are otherwise eligible as per the three aspects referred to above."

Apart from the above, learned counsel for the petitioners tries to justify his argument placing reliance upon various interim orders vig. orders dated 31.07.2018, 08.10.2018, 09.10.2018, 24.07.2018 and 26.09.2018 passed by the Hon'ble Supreme Court in Special Leave to Appeal (C) No.14156 of 2015 (Dheeraj Mor vs. Hon'ble High Court of Delhi) as well as order dated

10.05.2018 in Wirt Petition (Civil) No.316 of 2017 (G. Sabitha & Ors vs. High Court of Judicature at Hyderabad) and submits that the Hon'ble Supreme Court has clarified the position in the said orders permitting the candidates to participate in the selection process.

4. Dr. Tahali Charan Mohanty, learned Senior Advocate appearing for the petitioners in W.P.(c) No.17522 of 2018, W.P.(C) No.18989 of 2018 and other connected cases places reliance upon the decision of the Hon'ble Suprme Court in the case of *Vijay Kumar Mishra and another vs. High Court of judicature at Patna and others* reported in (2016) 9 SCC 313 and has emphasized on paragraphs-8 and 24 thereof, which read as under:

> "8. The text of Article 233(2) only prohibits the appointment of a person as a District Judge, if such person is already in the service of either the Union or the State. It does not prohibit the consideration of the candidature of a person who is in the service of the Union or the State. A person who is in the service of either of the Union or the State would still have the option, if selected to join the service as a District Judge or continue with his existing employment. Compelling a person to resign his job even for the purpose of assessing his suitability for appointment as a District Judge, in our opinion, is not permitted either by the text of Art. 233(2) nor contemplated under the scheme of the constitution as it would not serve any constitutionally desirable purpose.
>
> xx xx xx
>
> 24) In my opinion, there is no bar for a person to apply for the post of district judge, if he otherwise, satisfies the qualifications prescribed for the post while remaining in service of Union/State. It is only at the time of his appointment (if occasion so arises) the question of his eligibility arises. Denying such person to apply for participating in selection process when he otherwise fulfills all conditions prescribed in the advertisement by taking recourse to clause (2) of Article 233 would, in my opinion, amount to violating his right guaranteed under Articles 14 and 16 of the Constitution of India.

5. In view of the above position of law and that in the last year the earlier Bench of this Court had allowed the petitioner to appear in the examination, Dr. Mohanty, learned Senior Advocate submitted that the petitioner should be allowed to appear in the examination because in the next year he will be ineligible. Therefore the case of the petitioners may be considered to appear in the District Judge Examination which is starting from 16.12.2018.

6. Mr. B.N.Tripathy, learned counsel, appearing in W.P.(C) No.18972 of 2018 for the petitioner-Judicial Officer, has adopted the above submissions and prayed for the relief as claimed in the petition.

7. Mr. P.R. Chhotoi, learned counsel for the petitioners-Amarendra Pradhan and others, in W.P.(C) No.2340 of 2018, has argued that the petitioners have to wait for five years. In addition to his submission, Mr. Chhotoi, learned counsel also places reliance upon decision of the Hon'ble Supreme Court in the case of *Malik Mazhar Sultan (3) and another vs. Uttar Pradesh Public Service*

Commission and others, reported in (2008) 17 SCC 703, where time schedule is given in para-7, which reads as under:

> 7. For filling up of vacancies in the cadre District Judge, accepting the proposal to which none has objected, except in the manner hereinafter noticed, we direct as under:
>
> ***A. For filling up of vacancies in the cadre of District Judge in respect of***
>
> (a) twenty five per cent vacancies to be filled by direct recruitment from the Bar; and
>
> (b) twenty five per cent by promotion through limited competitive examination of Civil Judges (Senior Division) not having less than five years of qualifying service.

Sl.No.	*Description*	*Date*
1.	Number of vacancies to be notified by 31st March the High Court. Vacancies to be calculated including (a) existing vacancies (b) future vacancies that may arise within one year due to retirement. (c) future vacancies that may arise due to elevation to the High Court, death or otherwise, say ten per cent of the number of posts. (d) Vacancies arising due to deputation of judicial officers to other department may be considered as temporary vacancy.	*31st March*
2.	Advertisement inviting applications 15th April from eligible candidates	*15th April*
3.	Last date for receipt of application	*30th April*
4.	Publication of list of eligible applicants. List may be put on website	*15th May*
5.	Dispatch/Issue of admit cards to the eligible applicants.	*16th May to 15th June*
6.	Written examination Written examination may Objective questions with multiple choice which can be scrutinized by the computer; and Subjective/narrative	*30th June*
7	Declaration of result of written examination (a) Result may be put on the website and also published in the newspaper (b) The ratio of 1 : 3 of the available vacancies to the successful candidates be maintained.	*16th August*

8.	Viva Voce	*1st to 7th Sept.*
9.	Declaration of final select list and communication to the appointing authority (a) Result may be put on the website and also published in the newspaper (b) Select list be published in order of merit and should be double the number of vacancies notified. (c) Select list shall be valid till the next select list is published.	*15th Sept.*
10.	Issue of appointment letter by the competent authority for all existing vacant posts as on date.	30th Sept.
11.	Last date for joining.	31st October

B. For filling of vacancies in the cadre of District Judge in respect of fifty per cent vacancies to be filled by promotion

Sl.No.	*Description*	*Date*
1.	Number of vacancies to be notified by the High Court. Vacancies to be calculated including (a) existing vacancies (b) future vacancies that may arise within one year due to retirement. (c) future vacancies that may arise due to elevation to the High Court, death or otherwise, say ten per cent of the number of posts.	*31st March*
2.	Publication of list of eligible officers (a) The list may be put on the website (b) Zone of consideration should be 1 : 3 of the number of vacancies.	15th May
3.	Receipt of judgments from the eligible officers.	30th May
4.	Viva Voce Criteria (a) ACR for last five years; (b) Evaluation of judgments furnished; and (c) Performance in the oral interview	15th to 31st July
5.	Declaration of final select list and communication to the appointing authority (a) Result may be put on the website and also published in the newspaper (b) Select list be published in order of merit and should be double the number of vacancies notified.	31st August
6.	Issue of appointment letter by the competent authority for all existing vacant posts as on date.	30th September
7.	Last date for joining.	31st October

C. For filling of vacancies in the cadre of Civil Judge (Senior Division) to be filled by promotion.

Sl.No.	*Description*	*Date*
1.	Number of vacancies to be notified by the High Court. Vacancies to be calculated including (a) existing vacancies (b) future vacancies that may arise within one year due to retirement. (c) future vacancies that may arise due to promotion, death or otherwise, say ten per cent of the number of posts.	*31st March*
2.	Publication of list of eligible officers (a) The list may be put on the website (b) Zone of consideration should be 1 : 3 of the number of vacancies.	15th May
3.	Receipt of judgments from the eligible officers.	30th May
4.	Viva Voce Criteria (a) ACR for last five years; (b) Evaluation of Judgments furnished; and (c) Performance in the oral interview	1st to 16th August
5.	Declaration of final select list and communication to the appointing authority (a) Result may be put on the website and also published in the newspaper (b) Select list be published in order of merit and should be double the number of vacancies notified.	15th September
6.	Issue of appointment letter by the competent authority for all existing vacant posts as on date.	30th September
7.	Last date for joining.	31st October

D. For appointment to the posts of Civil Judge (Junior Division) by direct recruitment.

Sl.No.	*Description*	*Date*
1.	Number of vacancies to be notified by the High Court. Vacancies to be calculated including (a) existing vacancies (b) future vacancies that may arise within one year due to retirement. (c) future vacancies that may arise due to promotion, death or otherwise, say ten per cent of the number of posts.	15th January
2.	Advertisement inviting applications from eligible candidates.	1st February

3.	Last date for receipt of application.	1st March
4.	Publication of list of eligible applicants The list may be put on the website.	2nd April
5.	Despatch/issue of admit cards to the eligible applicants.	2nd to 30th April
6.	Preliminary written examination. Objective questions with multiple choice which can be scrutinized by computer.	15th May
7.	Declaration of result of preliminary written examination (a) Result may be put on the website and also published in the Newspaper (b) The ratio of 1 : 10 of the available vacancies to the successful candidates be maintained.	15th June
8.	Final Written examination Subjective/narrative.	15th July
9.	Declaration of result of final written examination (a) Result may be put on the website and also published in the Newspaper (b) The ratio of 1 : 3 of the available vacancies to the successful candidates be maintained (c)Dates of interview of the successful candidates may be put on the internet which can be printed by the candidates and no separate intimation of the date of interview need be sent.	30th August
10.	Viva Voce.	1st to 15th October
11.	Declaration of final select list and communication to the appointing authority (a) Result may be put on the website and also published in the newspaper (b) Select list be published in order of merit and should be double the number of vacancies notified.	1st November
12.	Issue of appointment letter by the competent authority for all existing vacant posts as on date.	1st December
13.	Last date for joining.	2nd January of the following year

8. In one of the matters, another counsel appearing for the petitioner states that the petitioner has completed 9 years of service as a judicial officer and he wants to appear the examination as advocate.

9. Similarly, in another writ petition i.e. W.P.(C) No.18111 of 2018, Mr. G. Mukherjee learned counsel for the petitioner has contended that the petitioner was born on 1st of August 1973 and he has completed 45 years, therefore, he is underage and not over-age.

10. We have heard Mr. Narasingh, learned counsel, Dr. T. Mohanty, learned Senior Advocate, Mr. B.N. Tripathy, learned counsel, Mr. G. Mukherjee, learned counsel, Mr. Chhatoi, learned counsel appearing for the respective petitioners as well as other counsel for the petitioners and Mr. R.K. Mohapatra, learned Government Advocate for the opposite parties.

11. Before proceeding with the matter, it will not be out of place to mention that service jurisprudence contemplates that we have to interpret the Rules as it is. This is a condition where the special quota has been fixed as 65% for the direct recruitment and 35% for Judicial Officers to be appointed as District Judge. There is also another bifurcation amongst the Judicial Officers for filling up of the vacancies in the cadre of District Judge from 35% quota. Amongst 35% of vacancies for the Judicial Officers, 25% will be filled up by usual promotion and 10% to be filled up through limited competitive examination. While interpreting the Rule we have to keep in mind that while allowing any judicial officer to appear in the examination as a lawyer, we are depriving genuine practitioners who have practiced for seven years and more and have been waiting for the turn in the direct recruit and if we will allow this interpretation, it will really hurt the class who is not represented before us.

12. In that view of the matter, once a person has entered into Judicial Service he has to remain in that cadre and he cannot claim the benefit meant for other category of candidates for direct recruitment. However, once a candidate is a direct recruit, he has to remain as a lawyer and compete with the lawyers through direct recruitment quota. But a judicial officer having all the experience and money, he has not struggled at the Bar as a lawyer for seven years whereas the other man has struggled at the Bar for several years. Therefore, while considering the Rule, the Court has to keep in mind that while taking struggle, the experience which he has earned as a lawyer is to be considered as a direct recruit. With regard to the interim order which was passed earlier in several writ petitions to appear the examination for the recruitment of previous year, we can only say that that cannot be treated as a precedent as the same was passed taking into consideration the facts and

circumstances of those cases. It is needless to mention here that when a candidate entered into the service, it is the condition precedent that if he wants to appear the examination he has to follow the Service Rules meant for Judicial Officers. The recruitment should be done in accordance with the Service Rules and not otherwise.

13. In our considered opinion, the view taken by us is in consonance with the Rules and it will not be appropriate to set aside the Rules at this stage. The cut-off date and the procedure adopted by this Court for District Judge Examination, 2018 is absolutely in consonance with the Rules in view of the decision of the Hon'ble Supreme Court in the case of ***D.S. Nakara and others vs. Union of India,*** *reported in AIR 1983 SC 130.* The Hon'ble Supreme Court in paragraphs 15, 16 and 50 has held as under:

> "15. Thus the fundamental principle is that Art. 14 forbids class legislation but permits reasonable classification for the purpose of legislation which classification must satisfy the twin tests of classification being founded on an intelligible differntia which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must have a rational nexus to the object sought to be achieved by the statute in question.
>
> 16. As a corrolary to this well established proposition, the next question is, on whom the burden lies to affirmatively establish the rational principle on which the classification is founded correlated to the object sought to be achieved ? The thrust of Art. 14 is that the citizen is entitled to equality before law and equal protection of laws. In the very nature of things the society being composed of unequals a welfare state will have to strive by both executive and legislative action to help the less fortunate in the society to ameliorate their condition so that the social and economic inequality in the society may be bridged. This would necessitate a legislation applicable to a group of citizens otherwise unequal and amelioration of whose lot is the object of state affirmative action. In the absence of doctrine of classification such legislation is likely to flounder on the bed rock of equality enshrined in Art. 14. The court realistically appraising the social stratification and economic inequality and keeping in view the guidelines on which the State action must move as constitutionally laid down in part IV of the Constitution, evolved the doctrine of classification. The doctrine was evolved to sustain a legislation or State action designed to help weaker sections of the society or some such segments of the society in need of succor. Legislative and executive action may accordingly be sustained if it satisfies the twin tests of reasonable classification and the rational principle correlated to the object sought to be achieved. The State, therefore, would have to affirmatively satisfy the Court that the twin tests have been satisfied. It can only be satisfied if the State establishes not only the rational principle on which classification is founded but correlate it to the objects sought to be achieved. This approach is noticed in Ramana Dayaram Shetty v. The International Airport Authority of India & Ors.(1) when at page 1034, the Court observed that a

discriminatory action of the Government is liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory".

xx xx xx

50. There is nothing immutable about the choosing of an event as an eligibility criteria subsequent to a specified date. If the event is certain but its occurrence at a point of time is considered wholly irrelevant and arbitrarily selected having no rationale for selecting it and having an undesirable effect of dividing homogeneous class and of introducing the discrimination, the same can be easily severed and set aside. While examining the case under Art. 14, the approach is not: 'either take it or leave it', the approach is removal of arbitrariness and if that can be brought about by severing the mischievous portion the court ought to remove the discriminatory part retaining the beneficial portion. The pensioners do not challenge the liberalised pension scheme. They seek the benefit of it. Their grievance is of the denial to them of the same by arbitrary introduction of words of limitation and we find no difficulty in severing and quashing the same. This approach can be legitimated on the ground that every Government servant retires. State grants upward revision of pension undoubtedly from a date. Event has occurred revision has been earned. Date is merely to avoid payment of arrears which may impose a heavy burden. If the date is wholly removed, revised pensions will have to be paid from the actual date of retirement of each pensioner. That is impermissible. The State cannot be burdened with arrears commencing from the date of retirement of each pensioner. But effective from the specified date future pension of earlier retired Government servants can be computed and paid on the analogy of fitments in revised pay-scales becoming prospectively operative. That removes the nefarious unconstitutional part and retains the beneficial portion. It does not adversely affect future pensioners and their presence in the petitions becomes irrelevant. But before we do so, we must look into the reasons assigned for eligibility criteria, namely, 'in service on the specified date and retiring after that date'. The only reason we could find in affidavit of Shri Mathur is the following statement in paragraph 5 :

"The date of effect of the impugned orders has been selected on the basis of relevant and valid considerations."

14. Apart from that, the petitioner, who is represented by Mr. Mukherjee, was born on 1st of August, 1973 and has completed 45 years on 31st July, 2018 and he has entered 46th year on the last date of submission of the application form. Therefore, he is over-aged.

15. In that view of the matter, none of the matters requires any consideration and the same are liable to be rejected summarily. It will not be appropriate to allow anybody to appear the examination. The writ petitions along with connected I.A.s stand dismissed. No order as to costs.

2019 (I) ILR - CUT- 43

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

W.P.(C) NO. 2044 OF 2018

KHALESWAR NAIK .....Petitioner

.Vs.

THE DIRECTOR GENERAL OF POLICE, ODISHA & ORS. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Petitioner a Grama Raskhi having involved in a criminal case discharged from service – Acquitted as the prosecution could not prove the charges beyond reasonable doubt – Plea of reinstatement – Discharged from service while in judicial custody – Discharge order not served on him – State's plea, since the acquittal is not a honourable one reinstatement not considered – Held, Since the relevant Acts and Rules have not been followed and natural justice has also not been followed while passing the discharge order, as admitted by the parties, and the Tribunal has lost sight of such facts while passing the impugned orders, this Court sets aside the impugned orders passed by the Tribunal and directs opposite party no.2 to take a decision in accordance with the Acts and Rules.

Case Laws Relied on and Referred to :-

1. AIR 1963 SC 395 : Bachhittar Singh .Vs. State of Punjab.
2. 2017 (II) OLR 503 : State of Punjab & Ors .Vs. The Senior Vocational Staff Masters Association & Ors.
3. 2007 (II) OLR 197 : Niranjan Nayak .Vs. State of Orissa & Ors.

For Petitioner : M/s. B.K. Nayak-3 & S. Rath

For Opp. Parties : Mr. J.P. Pattanaik, Addl Govt. Adv.

JUDGMENT Date of Judgment : 18.05.2018

S. PANDA, J.

The petitioner assails the order dated 17.08.2015 passed by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack in T.A. No. 4(C) of 2014 and dated 12.01.2018 passed by the said Tribunal in R.P. No. 9 (C) of 2016, wherein the Tribunal rejected the prayer of the petitioner to re-engage him in the post of Grama Rakshi with all service benefits.

2. The brief fact as delineated in this writ petition tends to reveal as follows:

The petitioner joined as a Gram Rakshi in the year 1988. While working as such, he was arrested in connection with Gania P.S. Case No. 15

dated 10.02.2005 along with others for commission of offences punishable under Sections 457/395 of the IPC read with Section 9 (B) of the Indian Explosive Act. After conclusion of the Trial, vide judgment dated 05.11.2007, the Trial Court acquitted the petitioner on the ground that the prosecution could not establish the case against the petitioner beyond all reasonable doubt. After acquittal from the case and released from the jail custody, he went to the Gania Police Station to join in his post of Grama Rakshi, however opposite party no.3-Inspector-in-Charge, Gania Police Station did not allow him. Thereafter he approached the higher authorities. When no action was taken by the authorities, he approached the Odisha Administrative Tribunal in O.A. No. 174 (C) of 2009. The Tribunal disposed of the said Original Application in its order dated 17.02.2009 and directed the authorities to consider the representation of the applicant for his re-instatement in the post of Grama Rakshi. The Director General and Inspector General of Police, Odisha vide order dated 20.06.2011 rejected the prayer of the applicant for reinstatement. Accordingly, he approached this Court in W.P.(C) No. 15301 of 2013. This Court vide order dated 04.03.2014 transferred the same to the Odisha Administrative Tribunal for adjudication within a period of six months and thereafter the same was registered as T.A. No. 4 (C) of 2014.

The Tribunal vide order dated 17.08.2015 observed that even though the applicant was acquitted, still then a view has been taken and rightly so that he is reasonably suspected to be concerned in the office, for which he was facing the trial. Accordingly the Tribunal did not interfere with the impugned order dated 20.06.2011 and dismissed the case of the petitioner. The petitioner challenged the said order dated 17.08.2015 before this Court in W.P.(C) No. 16044 of 2015. However the petitioner withdrew the writ petition on 10.03.2016 with liberty to file review petition and accordingly he filed R.P. No. 9 (C) of 2016. The same was rejected by the Tribunal vide order dated 12.01.2018. Hence the applicant challenged both the orders in the present writ application.

3. Learned counsel for the petitioner, Mr. Nayak, submitted that since the petitioner was acquitted from the charges, there is no impediment on the part of the authorities to re-instate him in the post of Grama Rakshi. Without giving any show cause notice, the authorities did not allow him to be reinstated in service after acquittal from the criminal case.

4. According to him at the time of hearing of the case, a copy of the counter was served on the counsel for the petitioner from where he could

know that the petitioner has been discharged from the post vide order dated 28.02.2005 with effect from 22.02.2005, however, no such order was ever served or supplied to him prior to that date. He further contended that at paragraph-9 of the counter, the opposite parties have admitted that the said order could not be served on the applicant since he was in jail custody during that period. Though the petitioner raised the point that he has not been served with the discharge order nor any show cause was served on him, the Tribunal did not accept such objection of the petitioner and passed the impugned order. According to him, Sub-Section 2 of Section 7 of the Grama Rakshi Act, 1967 and Rule-15 (1)(d) of the Odisha Grama Rakshi Rules, 1969 is very clear with regard to dismissing the service of a Grama Rakshi. For ready reference, the same are however quoted hereunder:-

> Sub Section-2 of Section-7
>
> (2) When the appointing authority passes an order suspending, fining or dismissing any Grama Rakshi under Sub Sec (1) he shall record such order with the reasons therefore and note of the enquiry in writing and no such order shall be passed unless the Grama Rakshi concerned has been given an opportunity of being heard in his defence.
>
> Rule-15 (1)(d)
>
> (1) Grama Rakshi-
>
> xxx xxx xxx
>
> (d) shall be liable to be discharged if he changes his residence from the beat for which he is appointed, if at any time during the tenure of his appointment found physically unfit to perform his duties as a Grama Rakshi, or if he is convicted or reasonably suspected to be concerned in any offence.

5. In support of his contention, learned counsel for the petitioner cited the decision in the case of ***Bachhittar Singh v. State of Punjab*** reported in ***AIR 1963 SC 395***, wherein it has been held that no order is effective if not communicated. He further cited the decision in the case of ***State of Punjab & ors v. The Senior Vocational Staff Masters Association and others*** reported in ***2017 (II) OLR 503*** to the effect that no order which affects the employee financially should be made behind the back of the employee. He also submitted that the applicant is entitled the protection under the Provisions of Article 311 (2) of the Constitution of India as well as Rule-24 of the Orissa Grama Rakshi Rules. In support of the same he cited the decision of the case in the case of ***Niranjan Nayak v. State of Orissa and others*** reported in ***2007 (II) OLR 197***.

6. Mr. J. Patnaik, learned Additional Government Advocate on the other hand narrated the powers and duties of the Grama Rakshi and the rules, more specifically Rule-6 (e) as to how a Grama Rakshi is to be appointed, wherein it has been indicated that “a person who is convicted or reasonably suspected

to be concerned in any offence, which in the opinion of the Superintendent of Police of the District renders him unfit for appointment or retention as a Grama Rakshi". According to him he was inside the jail for almost two years and was discharged with effect from 22.02.2005 while he was in jail custody. Since Rule-15 (1)(d) is very clear to the effect that Grama Rakshi is to be discharged if he is convicted or reasonably suspected to be concerned in any office, therefore, DG&IG of Police rightly passed the order on 20.06.2011 rejecting the claim of the petitioner for re-instatement. Since the petitioner was acquitted by extending the benefit of doubt, the situation never changed as the same is not a clear honourable. Once the authorities have taken a view that the petitioner reasonably suspected to be concerned in the offence, then it is the duty of the authority to discharge such a person in order to save embarrassment and unworkability of such person in discharging the duty of a Grama Rakshi of the beat where he was arrested and charge sheeted and remained in jail for almost two years.

7. In support of his contentions, he relied on the decisions of the apex court reported in ***(2016) 9 SCC 179*** and in ***(2005) 7 SCC 764*** to the extent that an acquittal by a Criminal Court would not debar an employer from exercising the power in accordance with Rules and Regulations in force.

He also cited the decision reported in ***(2018) 1 SCC 797*** to the extent that when a person is not honourably acquitted, he cannot seek for re-instatement and the consequential benefit. According to him acquittal in criminal case does not entail automatic re-instatement.

8. Thus, his contention was that the Tribunal has rightly did not interfere with the impugned order dated 20.06.2013 and also rightly passed the impugned orders, which need not be interfered with.

9. This Court went though the relevant provisions of the Acts and Rules governing the field so far as Grama Rakshis are concerned. This Court also went through the judicial pronouncements made in the aforementioned cases. Since the relevant Acts and Rules have not been followed and natural justice has also not been followed while passing the discharge order, as admitted by the parties, and the Tribunal has lost sight of such facts while passing the impugned orders, this Court sets aside the impugned orders passed by the Tribunal and directs opposite party no.2 to take a decision in accordance with the Acts and Rules as discussed above. The writ petition is accordingly disposed of.

2019 (I) ILR - CUT- 47

S. PANDA, J & S. K. SAHOO, J.

O.J.C. NO. 6608 OF 1993

L.I.C. OF INDIA ……Petitioner

.Vs.

PRESIDING OFFICER, INDUSTRIAL TRIBUNAL, BHUBANESWAR & ANR. ……Opp. Parties

INDUSTRIAL DISPUTES ACT, 1947 – Section 10 – Reference under – Termination of an employee of Life Insurance Corporation of India – Plea that the service conditions of an employee of the Life Insurance Corporation is governed by a statutory provisions called "Staff Regulations", and thus the provision of Industrial Disputes Act, 1947 will have no application – Held, an industrial forum will have full jurisdiction to go into the questions particularly when the reference to that effect has been made by the appropriate Government.

"The terms and conditions of the services of an employees of the Life Insurance Corporation no doubt are governed by the provisions of the regulations framed by the Corporation in exercise of the power conferred under the Life Insurance Corporation Act but whether an order of termination of an employee is within the such power of the employer or the employer has transgressed his power by passing an order of termination in a malafide manner or contrary to the provisions of the Regulations or on the ground of misconduct of the employee so on and so forth did not come within the expression "occupied field" used by their Lordships of the Supreme Court in ***A.V. Machane and another -Vrs.- Union of India and another*** *(supra) and, therefore, an industrial forum will have full jurisdiction to go into the questions particularly when the reference to that effect has been made by the appropriate Government."* *(Para 8)*

B. INDUSTRIAL DISPUTES ACT, 1947 – Section 10 – Reference under – Termination of an employee of Life Insurance Corporation of India – Award directing reinstatement on the basis of a compromise made in another dispute where the workman was not a party – Whether the award is vitiated – Held, Yes.

"It is too well settled that a compromise effected between the parties is not the law of the land and it binds only the parties to the dispute. The Industrial Tribunal itself has categorically found that the present workman was not a party to the reference decided by the National Industrial Tribunal and subsequently by the Supreme Court by virtue of the compromise entered into between the Management and the worker. Having held so, the Tribunal suddenly erred in law in applying those principles of compromise in deciding the present reference. The terms and conditions of compromise entered into between the parties in a matter pending in the Supreme Court certainly cannot govern the service conditions of all employees who were neither parties to the dispute nor had entered into the compromise in

question. In that view of the matter, the impugned award contained an apparent error on the face of it and, therefore, the same has to be struck down and we accordingly strike down the same". (Para 9)

Case Laws Relied on and Referred to :-

1. A.I.R. 1982 S.C.1126 : A.V. Machane and another .Vs. Union of India & Anr.
2. 1993 (1) S.L.R. 290 : Terminated Full Time Temporary L.I.C. Employees' Welfare Association .Vs. Sr. Divisional Manager, L.I.C. of India Ltd.
3. A.I.R. 1994 S.C. 1343 : M. Venugopal .Vs. The Divisional Manager Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh & Anr.

For Petitioner : Mr. S.P. Panda
For Opp. Party : Sarita Maharana

JUDGMENT Date of Hearing & Judgment: 12.12.2018

S. PANDA, J.

The award passed by the Presiding Officer, Industrial Tribunal, Odisha dated 22.06.1993 in Industrial Disputes Case No.5 of 1991 (Central) under Annexure-2, is being impugned in this writ application by the petitioner Life Insurance Corporation of India.

The Government of India in the Ministry of Labour in exercise of powers conferred upon them by clause (d) of sub-section (1) and sub-section (2-A) of section 10 of the Industrial Disputes Act, 1947 had referred the following dispute for adjudication of the Tribunal:

> "Whether the action of the Management of Life Insurance Corporation of India, Rourkela Branch Office, Sector-19, Rourkela in terminating the services of Shri Paramananda Sahu, Sub-staff with effect from 12.4.1990 is lawful and justified. If not, to what relief, the workman is entitled to?"

2. The case of the workman before the Tribunal was that he had been appointed on 30.09.1985 by the Senior Branch Manager, LIC of India, Rourkela Branch as a sub-staff on daily wage basis and had been discharging his duties to the utmost satisfaction of his employer. During the period of his employment for four and half years, he had been paid bonus, house rent allowance as admissible to the permanent staff but suddenly he was served with a notice of termination on 12.04.1990. It was his further case that in a dispute between the Corporation and some of its workers, the Supreme Court had prohibited any recruitment to various posts until finalization of the matter but that prohibition having been withdrawn, the Life Insurance

Corporation of India started the recruitment process. During that time, the General Secretary of the Union representing Class III and Class IV employees of Sambalpur Division had submitted a list of daily and Badli workers for absorption on regular basis but the Management though absorbed all other daily workers but did not absorb the petitioner on the ground that he had crossed the prescribed age limit. It is accordingly contended that the petitioner having entered the services of the Corporation while he was within the age limit, he could not have been excluded from consideration on the ground of overage.

3. The Management contended before the Tribunal that the service conditions of the staff of the Life Insurance Corporation is governed by the Life Insurance Corporation of India (Staff) Regulations, 1960. Under the Regulations, Class-III and Class-IV employees were appointed on temporary basis to meet the exigencies of the work load and such temporary employees cannot claim any right of permanent absorption against any permanent post. It was further urged that in view of the ban on recruitment of new employees imposed by the National Industrial Tribunal, to meet the work load of the Corporation, a few temporary sub-staff had been engaged in the Division Office and the petitioner was one of such employees who had been engaged on 30.09.1985 as a temporary hand. He was being paid his wages daily. He had no right to the post and in accordance with the terms of contract, his services stood terminated. It was also urged that the compromise between the management and workmen in the Supreme Court was in relation to temporary and part-time Badli workmen, who had been recruited between the period 01.01.1982 and 20.05.1985 and the present workman was neither a party to the litigation which was entered into compromise in the Supreme Court nor would he be governed by the terms of the said compromise.

4. The Industrial Tribunal though came to the conclusion that the workman was not a party to the reference which had been adjudicated upon by the National Industrial Tribunal and subsequently by the Hon'ble Supreme Court by virtue of the compromise but those principles should have been applied to the present workman's case and the present workman should have been absorbed on permanent basis. Non-consideration of the case of the workman for regular absorption on the basis of overage was held to be unsustainable. The Tribunal observed that the Management should have relaxed the age limit and should have appointed the workman against a regular vacancy in Class-IV post. With these findings, the learned Tribunal came to the conclusion that the Management acted arbitrarily in terminating

the services of the workmen and, therefore, the action of the Management was held to be illegal and unjustified. The Tribunal having directed for reinstatement and payment of back wages to the workman-opposite party no.2, the petitioner-Management has assailed the same.

5. Learned counsel for the petitioner raised two contentions in assailing the legality of the impugned award:

> (i) the service conditions of an employee of the Life Insurance Corporation being governed by statutory provisions called "Staff Regulations", the provision of Industrial Disputes Act, 1947 will have no application at all in respect of the matters which are governed by such statutory provisions and therefore, the Industrial Tribunal has no jurisdiction to decide the legality of the order of termination; and
>
> (ii) the award contains an error apparent on the face of record that the same is based upon the principles of compromise entered into between the Management and the workmen in the Supreme Court even though the present workman was not a party to the aforesaid compromise.

6. Learned counsel appearing for the workman-opposite party no.2, on the other hand, contended that even though the terms and conditions of service of an employee of the Life Insurance Corporation are governed by the Regulations framed under the provisions of the Life Insurance Corporation Act but the question whether an order of termination passed by the employer is legal or illegal cannot be said to be an occupied field under the Regulations and, therefore, the Tribunal has full jurisdiction to entertain and adjudicate the dispute particularly when the same has been referred to it by the appropriate Government. He further contended that the conclusion of the Tribunal that the order of termination is arbitrary is not on the basis of the principles of compromise entered into between the workers and the employer in some other case in the Supreme Court but essentially on the ground of non-consideration of the petitioner's case on the ground of overage and in view of the power of relaxation of age of an employee with the employer. It is contended that the Tribunal has rightly held the order of termination to be arbitrary.

7. In view of the rival contentions of the parties, the first question that arises for consideration is whether the legality of an order of termination of a temporary employee of the Life Insurance Corporation can at all be considered by the Industrial Tribunal. Learned counsel for the Corporation in support of his contention has placed reliance on the decision of the Supreme Court in the case of **A.V. Machane and another -Vrs.- Union of India and**

another reported in A.I.R. 1982 S.C.1126, Full Bench decision of the Madras High Court in the case of **Terminated Full Time Temporary L.I.C. Employees' Welfare Association -Vrs.- Sr. Divisional Manager, L.I.C. of India Ltd. reported in 1993 (1) S.L.R. 290** and a decision of the Supreme Court in the case of **M. Venugopal -Vrs.- The Divisional Manager Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh and another reported in A.I.R. 1994 S.C. 1343**.

8. In case of **A.V. Machane and another -Vrs.- Union of India and another** (supra) what has been held by their Lordships of the Supreme Court is that in respect of the matter covered by the rules or regulations framed under the Life Insurance Corporation Act in respect of its employees, the provisions of the Industrial Disputes Act will have no application but that does not mean that an industrial forum will have no jurisdiction to entertain and decide the legality of a dispute relating to the termination of services of an employee. If an order of termination though apparently appears to be in accordance with the terms of appointment but actually it is found to be on the ground of misconduct of the employees or is found to have been passed maliciously or on some extraneous consideration, the industrial forum will have the power to hold such order of termination illegal and grant appropriate relief thereon. In fact in the Full Bench decision of the Madras High Court in the case of **Terminated Full Time Temporary L.I.C. Employees' Welfare Association -Vrs.- Sr. Divisional Manager, L.I.C. of India Ltd.** (supra) on which learned counsel appearing for the petitioner has strongly relied upon also stipulated that whether a particular order of termination is on unfair labour practice of the employer can be gone into by the Tribunal and the burden is on the employee to establish the same. The terms and conditions of the services of an employees of the Life Insurance Corporation no doubt are governed by the provisions of the regulations framed by the Corporation in exercise of the power conferred under the Life Insurance Corporation Act but whether an order of termination of an employee is within the such power of the employer or the employer has transgressed his power by passing an order of termination in a malafide manner or contrary to the provisions of the Regulations or on the ground of misconduct of the employee so on and so forth did not come within the expression "occupied field" used by their Lordships of the Supreme Court in **A.V. Machane and another -Vrs.- Union of India and another** (supra) and, therefore, an industrial forum will have full jurisdiction to go into the questions particularly when the reference to that effect has been made by the

appropriate Government. The decision of the Supreme Court in **M. Venugopal -Vrs.- The Divisional Manager Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh and another** (supra) is also to the same effect. We are, therefore, unable to accept the contention of learned counsel for the petitioner that a Tribunal to whom a reference has been made has no jurisdiction to go into the question of legality of the order of termination passed by the employer. That apart, this question has really not been pointedly posed before the tribunal or answered. The first contention of learned counsel for the petitioner accordingly fails.

9. The next question that arises for consideration is whether the award is vitiated, the same having been passed on the basis of a compromise entered into between the Management and the workers to which dispute, neither the present workman was a party nor the compromise can be held to be binding so far as the present workman is concerned. The answer to this question must be in favour of the employer. It is too well settled that a compromise effected between the parties is not the law of the land and it binds only the parties to the dispute. The Industrial Tribunal itself has categorically found that the present workman was not a party to the reference decided by the National Industrial Tribunal and subsequently by the Supreme Court by virtue of the compromise entered into between the Management and the worker. Having held so, the Tribunal suddenly erred in law in applying those principles of compromise in deciding the present reference. The terms and conditions of compromise entered into between the parties in a matter pending in the Supreme Court certainly cannot govern the service conditions of all employees who were neither parties to the dispute nor had entered into the compromise in question. Learned counsel for the workman-opposite party no.2 in course of his argument vehemently urged that the decision of the Tribunal is not solely based on the terms of the compromise in question. But we do not find any substance on the same. On a bare reading of the award of the Tribunal, we are of the considered opinion that the Tribunal has solely been swayed away by the terms and conditions of the compromise and has applied those terms to decide the legality of the order of termination of services of the workman and thereby has committed gross error of law. The very reference was to the effect whether the order in terminating the services of Sri Paramananda Sahoo (opposite party no.2) with effect from 12.04.1990 was lawful and justified or not. In deciding that reference, the Tribunal was wholly incompetent to look into the compromise entered into between the Management and the workers in some other dispute which was pending

before the Supreme Court to which dispute the present workman was not at all a party. In that view of the matter, the impugned award contained an apparent error on the face of it and, therefore, the same has to be struck down and we accordingly strike down the same.

10. The argument of learned counsel for the opposite parties that the award is on the ground of non-consideration of workman's case for regularization as he was overaged, is also of no substance, since the question of non-consideration of regularization of the services of the workman was not at all a point of reference. On the other hand, the reference was whether the order of termination dated 12.04.1990 is legal or illegal and in that context reference to any age limit is wholly irrelevant. The Tribunal was not justified in recording a finding as to what the Management should have done by relaxing the age limit. In answering a reference made to it, the Tribunal was competent merely to find out whether the order of termination of the services of the workman on 12.04.1990 is lawful and justified or not. In view of our conclusion and the apparent error found by us in the award of the Tribunal, the conclusion becomes irresistible that the award cannot be sustainable in the eye of law.

11. In the premises, as aforesaid, we quash the impugned award of the Tribunal and remit the matter to the Tribunal for reconsideration and redisposal bearing in mind the observations made by us and such redisposal would be only after giving opportunity of hearing to the parties concerned. It would be open for the employer to raise the contention that the matter is governed by "occupied field" under the Staff Regulations and the Tribunal would certainly examine the same and answer it. While quashing the award of the Tribunal under Annexure-2 and remitting the matter for reconsideration, since the employer has already reinstated the employee, we direct that the order of reinstatement may not be interfered with during the pendency of the matter before the Tribunal and it would abide by the ultimate direction to be given by the Tribunal.

Since the dispute is a year-old one, the Tribunal shall do well to dispose of the same within the stipulated time i.e., by end of March 2019. The parties through their counsel are directed to appear before the Tribunal in the 2nd week of January 2019 with a certified copy of this order. With the aforesaid observation and direction, the writ application is disposed of. Parties shall bear their own costs.

2019 (I) ILR - CUT- 54

S. PANDA, J & S. K. SAHOO, J.

O.J.C. NO. 10518 OF 2000

OFFICER-IN-CHARGE, RUBBER RESEARCH INSTITUTE .....Petitioner

.Vs.

PRESIDING OFFICER, INDUSTRIAL TRIBUNAL & ORS. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition challenging the award passed by the Industrial Tribunal – Interference with the award of the Industrial Tribunal in the certiorari jurisdiction – Scope of – Held, when the findings recorded by the Tribunal are perverse or irrational or arrived at by ignoring materials on record or arbitrary or contrary to the principles of natural justice, the same can be interfered with in a petition under Article 226 of the Constitution.

"In view of such settled position of law, under Article 226 of the Constitution of India, this Court will not interfere with weighing of evidence led before the Tribunal as if a Court of appeal. A finding of fact cannot be challenged on the ground that relevant materials and evidence adduced before the Tribunal was insufficient or inadequate to sustain the findings. The adequacy or sufficiency of evidence and the inferences to be drawn from the evidence are the exclusive domain of the Tribunal and the same cannot be agitated before this Court. Even if another view is possible on the evidence adduced before the Tribunal, this Court would not be justified to interfere with the findings recorded by the Tribunal. When the findings recorded by the Tribunal are perverse or irrational or arrived at by ignoring materials on record or arbitrary or contrary to the principles of natural justice, the same can be interfered with by the this Court in a petition under Article 226 of the Constitution." *(Para 10)*

Case Laws Relied on and Referred to :-

1. A.I.R. 1978 S.C. 548 : Banglore Water Supply & Sewerage Board .Vs. A. Rajappa & Ors
2. 1992 (I) OLR 173 : Mohini Kumar Naik .Vs.Orissa State Electricity Board.
3. A.I.R. 1964 S.C. 477 : Syed Yakoob .Vs.K.S. Radhakrishnan.
4. A.I.R. 1984 S.C. 1467 : Sadhu Ram .Vs.Delhi Transport Corporation.

For Petitioner : Mr. B.K. Nayak, J.K. Khuntia, S.S. Patra
For Opp. Parties : None

JUDGMENT Date of Hearing & Judgment: 13.12.2018

S. PANDA, J.

Heard Mr. B.K. Nayak, learned counsel for the petitioner. None appears for the opposite parties nos.2 and 3.

2. The petitioner Officer-in-charge (RRII), Rubber Board of India who was the 1st Party Management in Industrial Dispute Case No. 26 of 1998 (Central) has challenged the award dated 01.06.2000 passed by the Presiding Officer, Industrial Tribunal, Orissa, Bhubaneswar in the aforesaid I.D. Case in directing the 1st Party Management to provide employment to the opposite party no.3 Smt. Rohini Das, W/o- Late Kashinath Das on compassionate ground.

3. The Government of India in the Ministry of Labour in exercise of powers under section 10(1)(d) & 10(2A) of the Industrial Disputes Act, 1947 referred the following dispute for adjudication:

> "Whether the action of the Management of Rubber Research Institute of India, Kadlipal Farm, Dhenkanal not providing employment to Smt. Rohini Das, W/o Late Kasinath Das, Ex-Employee of Rubber Research Institute of India on compassionate ground is justified? If not, what relief the workman is entitled to?"

4. The 2nd Party workman was represented by the President, Annapurna Rubber Board Worker's Union. It is the case of 2nd Party workman before the Court below that the 1st Party Management employed Kasinath Das, the husband of the opp. party no.3 in the Farm on 14.12.1986 and he died on 15.04.1996 while he was in employment under the 1st party Management. He had put in more than nine years of continuous employment in the Farm. He was a landless person and was the only earning member of his family. After his death, his widow Rohini Das (opp. party no.3) sought for employment under the 1st Party management on compassionate ground and made a representation to that effect on 17.10.1996 and subsequently he made another representation on dated 20.11.1996. As it involved a common interest of the workmen, the Union also made a grievance for appointment of the widow of Kasinath Das. During conciliation, the Management pleaded that there is non- existence of any rehabilitation scheme in the establishment to consider the case of appointment of the opp. party no.3 in the Farm. On failure of conciliation, the reference was made to the Tribunal for adjudication.

5. Petitioner-Management took a stand before the learned Court below that the Research Station is not an 'industry' within the meaning of Section 2(j) of the Industrial Disputes Act. It is further contended that the Research Institute is devoted to scientific and technological research exploring the possibility of rubber cultivation in Orissa with a view to provide technological support to the farmers. The organization does not indulge in any commercial activity nor is any systematic operation carried out in

cooperation between the employer and employee to supply or distribute goods and services with a view to satisfy human wants and wishes. It is further contended that the legal heir of the deceased employee Kasinath Das is not a 'workman' within the meaning of section 2(s) of the Industrial Disputes Act and the service conditions of the workman in the Research Station is governed by standing orders, settlements, awards and legislations applicable to the Rubber Plantation workers in the State which are silent about rehabilitation employment on compassionate ground. It was further contended that as there is no scheme in operation regarding rehabilitation appointment, the question of giving appointment to the widow of late Kasinath Das does not arise.

6. The Union-opposite party no.2 filed its written statement before the Court below stating, inter alia, that Rubber Research Institute of India is under the Department of Rubber Board created by the Central Government and functions under the Ministry of Commerce, Govt. of India. All the officers and field staffs are getting their salary, leave benefit pension, welfare measures etc. as per the Central Governments Rules. It is further averred that the Central Government Establishment and Administrative Rules provides for compassionate appointment to the dependants of the deceased employees who die in service as a welfare measure and the employees of the Rubber Board are availing the said benefits. It is also stated that in other public undertakings, benefits of rehabilitation appointment have been extended to the legal heirs of the deceased employees.

7. The learned Industrial Tribunal framed the following issues:-

(i) Whether the case is maintainable?

(ii) Whether claim for giving compassionate appointment is an Industrial Dispute to be adjudicated upon by reference under section 10(1) of the I.D. Act, 1947?

(iii) Whether not providing compassionate appointment to Smt. Rohini Das is justified?

(iv) To what relief?

8. The parties adduced their evidence before the Court below.

While discussing the issue nos.1, 2 and 3 together, relying upon several decisions, the Tribunal held that the dispute which validly gave rise to a reference under the Industrial Disputes Act need not necessarily be a dispute directly between an employer and his workman and that the

definition of the expression 'industrial dispute' is wide enough to cover a dispute raised by the employer's workman in regard to non-employment of others who may not be his workman at the material time. Accordingly, the learned Tribunal turned down the argument advanced by the 1st party-management that the widow of the deceased employee being not a workman, no industrial dispute is constituted on the issue of not providing compassionate appointment to the heir of the deceased workman dying in harness.

The learned Tribunal taking into account the ratio laid down by the Hon'ble Supreme Court in case of **Banglore Water Supply & Sewerage Board -Vrs.- A. Rajappa & Others reported in A.I.R. 1978 S.C. 548** held that the Rubber Board and all its institutions come within the fold of 'industry' and accordingly turned down the challenges of the 1st Party Management relating to the maintainability of the reference and admissibility of the claim.

The learned Tribunal further held that the Rubber Board is a statutory Board of the Government of India formulated under the Rubber Act and the Central Government rules are being strictly adhered to in the establishment. The Govt. of India has a scheme of compassionate appointment for the heirs of the deceased workman dying in harness when the family is unable to sustain itself on account of sad demise. It was further held relying upon the decision of this Court in case of **Mohini Kumar Naik -Vrs.- Orissa State Electricity Board reported in 1992 (I) Orissa Law Reviews 173** that the Rehabilitation Assistance Scheme is of special category and it is meant to mitigate the hardship caused to the family due to the death of the bread earner in the family. It was further held that a vacancy upon the death of the husband of opposite party no.2 in the workforce of the establishment still existed and in law and in equity, the widow opposite party no.3 deserves to be considered for such appointment. The action of the 1st Party Management in not providing employment to the opposite party no.3 on compassionate ground was held to be neither legal nor justified. While answering issue no.4, the learned Tribunal directed the 1st Party Management to provide employment to the opp. party no.3 on compassionate ground.

9. Mr. Nayak, learned counsel for the Petitioner-Management contended that the institute established at Kadlipal being a research station and no commercial activities were going on in such institute and therefore, it was not proper on the part of the learned Tribunal to hold it as an 'industry'. It is

further contended that when the opp. party no.3 was not a workman under section 2(s) of the Industrial Disputes Act, the Union cannot raise any dispute for compassionate appointment/employment of the opp. party no.3 as legal heir of the deceased workman. It is further contended that the learned Industrial Tribunal has committed illegality in passing the impugned award and therefore, it should be set aside.

10. Before addressing the contentions raised by the learned counsel for the petitioner, it is necessary to discuss the scope of interference with the award passed by the Industrial Tribunal in the certiorari jurisdiction of this Court under Article 226 of the Constitution of India.

In case of **Syed Yakoob -Vrs.- K.S. Radhakrishnan reported in A.I.R. 1964 S.C. 477**, a Constitution Bench of the Hon'ble Supreme Court held as follows:-

> "7. The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Art. 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or Tribunals: these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding is within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before

> a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised (vide **Hari Vishnu Kamath -Vrs.- Ahmad Ishaque, A.I.R. 1955 S.C. 233**; **Nagendra Nath -Vrs.- Commr. of Hills Division, A.I.R. 1958 S.C. 398** and **Kaushalya Devi -Vrs.- Bachittar Singh, A.I.R. 1960 S.C. 1168**)."

The Hon'ble Supreme Court in case of **Sadhu Ram -Vrs.- Delhi Transport Corporation reported in A.I.R. 1984 S.C. 1467** held as follows:-

> "3. We are afraid the High Court misdirected itself. The jurisdiction under Article 226 of the Constitution is truly wide but, for that very reason, it has to be exercised with great circumspection. It is not for the High Court to constitute itself into an appellate Court over Tribunals constituted under special legislations to resolve disputes of a kind qualitatively different from ordinary civil disputes and to re-adjudicate upon questions of fact decided by those Tribunals. That the questions decided pertain to jurisdictional facts does not entitle the High Court to interfere with the findings on jurisdictional facts which the Tribunal is well competent to decide. Where the circumstances indicate that the Tribunal has snatched at jurisdiction, the High Court may be justified in interfering. But where the Tribunal gets jurisdiction only if a reference is made and it is therefore impossible ever to say that the Tribunal has clutched at jurisdiction, we do not think that it was proper for the High Court to substitute its judgment for that of the Labour Court and hold that the workman had raised no demand with the management...."

In view of such settled position of law, under Article 226 of the Constitution of India, this Court will not interfere with weighing of evidence led before the Tribunal as if a Court of appeal. A finding of fact cannot be challenged on the ground that relevant materials and evidence adduced before the Tribunal was insufficient or inadequate to sustain the findings. The adequacy or sufficiency of evidence and the inferences to be drawn from the evidence are the exclusive domain of the Tribunal and the same cannot be agitated before this Court. Even if another view is possible on the evidence adduced before the Tribunal, this Court would not be justified to interfere with the findings recorded by the Tribunal. When the findings recorded by the Tribunal are perverse or irrational or arrived at by ignoring materials on record or arbitrary or contrary to the principles of natural justice, the same can be interfered with by the this Court in a petition under Article 226 of the Constitution.

11. After hearing the learned counsel for the petitioner and going through the documents relied upon by him, we find that the learned Tribunal has framed the issues correctly and discussed all the issues elaborately with reference to the materials available on record. The citations placed on the

relevant issues have also been considered. There is no error of law apparent on the face of the record. It cannot be said that the view taken by the learned Tribunal is not possible on the evidence adduced before it. We find no patent illegality for interfering with the impugned award which appears to be just and reasonable. In that view of the matter, there is little scope for interference with the same in exercise of writ jurisdiction.

12. Accordingly, the impugned award passed by the learned Presiding Officer, Industrial Tribunal, Orissa, Bhubaneswar in Industrial Dispute Case No.26 of 1998 stands confirmed and the writ petition being devoid of merits, stands dismissed.

2019 (I) ILR - CUT- 60

S.K. MISHRA, J.

W.P.(C) NO.13567 OF 2015

UDAYA NATH AICH .....Petitioner

.Vs.

B.D.A. & ANR. .....Opp. Parties

CONSTITUTION OF INDIA,1950 – Articles 226 and 227 – Writ petition challenging the order cancelling the allotment of plot by BDA and forfeiture of EMD – Petitioner became the highest bidder in respect of a plot – Bid Amount not deposited in time – Allotment cancelled – Genuine ground for delay – Not considered – Held, BDA should have acted like a model developer of land – Order of cancellation quashed.

"It is also taken note of that the B.D.A. is an instrumentality of the State and is supposed to act as a model developer of land and it should not benefit from the difficulties faced by the petitioner. So, this Court is inclined to quash Annexure-C/1 by allowing the writ petition and direct the B.D.A. to calculate 15% interest from 12th March, 2014 up to 21.10.2014. The B.D.A. shall take steps within a period of fifteen days from the date of communication of this order and allows thirty days time to the petitioner to pay the same. On payment of the same, Plot No.268, Prachi Enclave Plotted Development Scheme, Chandrasekharpur, Bhubaneswar, shall be allotted to him within a period of fifteen days thereafter." *(Paras 9 & 10)*

For Petitioner : M/s. Rakesh Kumar Mallick & H.Panigrahi.

For Opp Parties : M/s. Sisir Das, S.R.Mohapastra & T.K.Mohapatra

JUDGMENT Date of Judgment: 30.11.2018

S.K.MISHRA, J.

In this writ petition, the petitioner has sought a direction from this Court to the Bhubaneswar Development Authority (hereinafter referred to as the B.D.A. for brevity) to handover possession of residential Plot No.268 situated in Prachi Enclave Plotted Development Scheme, Chandrasekharpur, Bhubaneswar.

2. In the year 2013, the B.D.A. issued a brochure-cum-application form for auction sale of constructed assets and plots and the last date of submission of application was on 11.12.2013 and the opening of sealed quotations was on 20.12.2013 at 11.00 A.M. The petitioner in pursuant to issuance of brochure, submitted an application and participated in the auction bid by the B.D.A. in respect of Plot No.268 of Prachi Enclave Plotted Development Scheme, Chandrasekharpur, Bhubaneswar (hereinafter referred to as the developed area). The petitioner offered a sum of Rs.7,28,200/- as the bid value and he was declared as the highest bidder. Pursuant to the terms and conditions of the auction the petitioner deposited 10% of the bid amount as EMD. On 11.2.2014 the B.D.A. issued a letter in favour of the petitioner asking him to deposit the remaining amount of Rs.65,53,800/- within thirty days, but because of the reasons beyond his control, he could not deposit the same and as per Clause-6(2) another 6 months time were given to the petitioner to pay the amount subject to payment of interest @ 15% per annum compounded on the balance amount for the extended period.

3. It is borne out from the record that after 39 days of the extended period, the petitioner paid the money, but the B.D.A. did not accept his payment as it was not accompanied with 15% interest and directed the petitioner to take back his money deposited without any interest and the 10% E.M.D. deposited was forfeited by the B.D.A.

4. In the writ petition the petitioner has submitted that for the conduct of the allotment officer, i.e. opposite party no.2, in remaining on leave for a long period, his application for sanction of loan, by the Bank, could not be processed.

5. In course of hearing taken on 11.8.2017, learned counsel for the petitioner submitted that the petitioner is willing to pay 15% interest on the delayed payment, but the B.D.A. did not accept the same and instead filed a further affidavit on the rejoinder affidavit filed.

6. Admittedly, the petitioner was the highest bidder with respect to the Plot No.268 of the developed area and as per Clause-6.1 he should have deposited the full balance amount after adjustment of the EMD within thirty days from the date of provisional allotment letter. Inability to pay the balance amount within the prescribed time limit or withdrawal by the bidder shall render the bid invalid and the total EMD amount will be forfeited. Clause-6.2 provides that on the request of the bidder, the B.D.A. has discretion to extend the last date of deposit of the balance bid amount for a reasonable period up to maximum of six months, subject to payment of interest @ 15% per annum compounded on the balance amount for the extended period. Inability to pay the balance amount within the extended period shall render the bid invalid and the EMD will be forfeited.

7. In this case the EMD has been forfeited and the allotment has been cancelled vide Annexure-C/1. It is borne out from the record that the petitioner was given extension of time as per Clause-6.2 of the brochure and though he could not pay the same within the stipulated time, after the delay of only 39 days the amount was paid by him on 21.10.2014 and the B.D.A. has accepted the deposit without prejudice. It is true that the petitioner's allotment has been cancelled on 23.4.2015, as per Annexure-6/1, but prior to that i.e. on 21.10.2014 the petitioner has deposited the bid amount minus the security deposit with the B.D.A. and the B.D.A. remained silent for six months and then cancelled his application and asked the petitioner to take away Rs.65,53,800/-, i.e. the amount after deducting the EMD.

8. In course of hearing as noted earlier, the petitioner is ready and willing to pay 15% interest compounded from the last date deposit of money as per Clause-6.1 and the actual date of payment, i.e. 21.10.2014. He was supposed to deposit Rs.65,53,800/- along with service tax, vat, TDS etc. within 30 days, i,e. from 11.2.2014. He has deposited the money on 21.10.2014, i.e. 39 days after extension of the date of payment.

9. It is apparent from the record that the offset price of Plot No.268 was Rs.35,81,600/-and the petitioner has offered for more than that, i.e. Rs.72,82,000/-. Though the petitioner had some difficulty in payment as because of non-availability of the Bank loan, which is primarily attributable to the action of opposite party no.2, and the plea, which is raised by the petitioner, has not been denied by the opposite parties, this Court is of the opinion that the petitioner should be extended the benefit.

10. It is also taken note of that the B.D.A. is an instrumentality of the State and is supposed to act as a model developer of land and it should not benefit from the difficulties faced by the petitioner. So, this Court is inclined to quash Annexure-C/1 by allowing the writ petition and direct the B.D.A. to calculate 15% interest from 12th March, 2014 up to 21.10.2014. The B.D.A. shall take steps within a period of fifteen days from the date of communication of this order and allows thirty days time to the petitioner to pay the same. On payment of the same, Plot No.268, Prachi Enclave Plotted Development Scheme, Chandrasekharpur, Bhubaneswar, shall be allotted to him within a period of fifteen days thereafter.

11. With such observation, the writ petition is disposed of.

12. There shall be no order as to costs.

2019 (I) ILR - CUT- 63

S. K. MISHRA, J & DR. A. K. MISHRA, J.

CRIMINAL APPEAL NO. 36 OF 2004

P. DURYODHAN PATRA ……Appellant

.Vs.

STATE OF ODISHA ……...Respondent

(A) CRIMINAL TRIAL – Offence under Section 302 of Indian Penal Code – No evidence indicating the motive of the accused – Effect of – Indicated. (Para 10)

(B) CRIMINAL TRIAL – Offence under Section 302 of Indian Penal Code – Contradiction in evidence of prosecution witnesses vis-a-vis statement under section 161 of Cr. P.C. – Effect of – Held, It is settled principle of law that when a witness states certain aspect of the case in the court which he has not stated before the investigating officer at the time of recording his statement under Section 161 of the Cr.P.C. then such statement shall be taken as contradiction and if it has a great bearing on the case, then it should be treated as a major contradiction. (Paras 12 & 13)

(C) CRIMINAL TRIAL – Absconding of the accused from the spot of occurrence – Whether such absconding will make the accused the author of crime? – Held, no, absconding is a weak link in the chain of the circumstance, it can only be pressed into service when other clinching materials are available on record – Only absconding from the spot of occurrence will not make anybody guilty of any offence. (Para-14)

(D) EVIDENCE ACT, 1872 – Section 11 – Plea of alibi – Failure to establish the plea of alibi – Effect of – Held, failure to establish a plea of alibi can be pressed into service as an additional link but not an incriminating link – If other links/ circumstances are there, then failure to establish alibi would take the case of the prosecution further & supply the missing link & lend credence to the evidence adduced on behalf of prosecution. (Para 16)

Case Laws Relied on and Referred to :-

1. (2016) 65 OCR 159 : Gedu @ Parameswar Patra Vs. State of Orissa.

For Appellant : Mr. P. K. Deo and Prasanta Kumar Das.
For Respondent : Miss. Sabitri Rath, Addl. Govt. Adv.

JUDGMENT Date of Hearing & Judgment : 14.12.2018

S. K. MISHRA, J.

The sole appellant in this case assails his conviction U/s.302 of the Indian Penal Code by the Additional Sessions Judge (Fast Track Court) Chatrapur in Sessions Case No.7 of 2003 (S.C. No.342/2002 (GDC)) as per the judgment dtd.12.01.2004 wherein he has been sentenced to undergo imprisonment for life and to pay file of Rs.500/-, in default to further undergo imprisonment for six months.

2. The case of the prosecution in brief is as follows:-

The marriage between the accused P. Durjyadhan Patra and the deceased Amoyee @ Laxmi Patra was performed about 15 years prior to the lodging of the FIR. Initially both the wife and husband lived peacefully. In order to extract more dowry from the parents of Amoyee, accused Durjyadhan along with his mother accused Motiyalu started to torture Amoyee. To keep peace, the father of Amoyee had given her two varans of land. That did not satisfy the lust of the accused persons. The torture continued forcing the deceased Amoyee to desert her marital home. Claiming maintenance, she had filed a case for maintenance against the accused Durjyadhan. The order for payment of maintenance to her was passed. The accused Durjyadhan did not comply with the order as a result of which the deceased had filed the execution proceeding for realization of the same. At this juncture, the accused Durjyadhan had entered into a compromise with the deceased and brought her to his house. Some time thereafter the accused Durjya had married the accused Jamalu Patra and took her as his second wife after giving a portion of his house and 2 varans of land to the deceased Amoyee as per the decision of the village Bhadraloks. The

deceased Amoyee lived separately in the room given to her and the three accused persons lived together in separate part of the house of the accused Durjyadhan. Despite such separate staying, the accused Durjyadhan continued to torture the deceased. On 17.3.2001 the dead body of the deceased with ligature mark injury on her neck was found from inside her room. The case was registered on the basis of the report of the brother of the deceased. The investigation revealed that the accused persons with a view to take away the properties of the deceased had killed her by throttling in the previous night i.e. the night intervening 16.3.2001 and 17.3.2001. During investigation the I.O. had made inquest of the dead body of Amoyee and had sent the dead body for postmortem. The accused Durjyadhan was arrested by the police from near by railway station while he was attempting to flee away. After completion of investigation the I.O. had submitted charge sheet against the accused persons where upon the accused persons were committed to the court of Sessions.

3. The plea of defence is that of denial and false implication. Defence has further pleaded that the deceased committed suicide by hanging. The appellant took a specific plea of alibi stating that he was not present in the house in the night of occurrence and he was at Keshapur when he came to know about death of his wife, being intimated by police.

4. Prosecution has examined as many as 9 witnesses. P.W.7 – K. Lakhana Patra is the informant of the case. He happens to be the brother of deceased. P.W.4 – K. Narayana Patra, P.W.5 – K. Gobinda Patra, P.W.3 – K. Sima Patra and P.W.2 – M. Chennaya Patra are co-villagers of the convict and independent witnesses. P.W.8 is Dr. Sachidananda Mohanty, Asst. Professor, Department of F.M.T., M.K.C.G. Medical College and Hospital, Berhampur who has conducted post mortem examination. P.W.1 – Kamaraja Behera is the police constable who accompanied the dead body of the deceased Amoyee for postmortem and identified the dead body of the deceased to the doctor who conducted postmortem. P.W.9 – Ashok Kumar Bisoi happens to be the Officer-in-Charge of Khallikote Police Station and the investigating officer of this case who submitted charge-sheet against the present appellant and his mother and second wife.

One D.W. has been examined on behalf of defence, namely K. Krishna Patra who happens to be the brother of the deceased.

5. Learned Additional Sessions Judge took six circumstances of the case in to consideration to arrive at a conclusion that prosecution has proved its

case beyond reasonable doubt against the accused – appellant Durjyadhana and acquitted the other two co-accused persons.

The six circumstances are as follows:-

(i) Motive to commit the crime, i.e. to grab the property of the deceased. Learned Additional Government Advocate submits that this motive is proved by the testimony of P.Ws.2 and 3.

(ii) The next circumstance is testimony of P.W.4 who has stated that he heard accused Durjyadhan saying "BOULA BADI TA DE, AA PAITI CHHINDEI DEBA" (mother give a badi, we will finish the job).

(iii) Thirdly, P.W.5 has stated that when he reached at the spot house he found the door of the room locked from inside, he gave a push and saw the convict Durjya standing there and the deceased was lying with injury on her neck. However, when this witness asked the appellant about the deceased, he stated to have said that she is dead and ran away from the spot.

(iv) Fourth circumstance is the abscondence of the convict from his house and arrest from the railway station when he was waiting for train.

(v) The other circumstance which is raised by the learned Additional Government Advocate is that when the dead body of the deceased was found inside the house of appellant, he is to give explanation and in absence of explanation, presumption should be drawn against the convict – appellant.

(vi) The last circumstance is failure to establish the plea of alibi.

6. Mr. Prasanta Kumar Das, learned counsel arguing on behalf of Mr. P. K. Deo argued that all the circumstances have not been established in this case and only on the basis of inference conviction has been slapped.

7. Learned Additional Government Advocate, on the other hand, submits that all the circumstances have been well established from the statement of witnesses and no illegality has been committed by the learned Additional Sessions Judge in convicting the appellant.

8. It is not in dispute at this stage that death of the deceased was due to asphyxia because of the ligature mark found on the neck of the deceased. The learned Additional Sessions Judge has held that the death of the

deceased was not suicidal, rather it is homicidal. Hence at this stage it is beyond dispute that the death of the deceased is homicidal.

9. Learned counsel for the appellant submits that the six circumstances upon which the learned Additional Sessions Judge has relied, has not been proved to the hilt, i.e. beyond reasonable doubt, hence the conviction should be set aside.

10. Upon such rival submissions, let us examine each of the circumstances one by one;

The first circumstance is motive to commit the offence.

It is argued by the learned Additional Government Advocate that P.Ws.2 and 3 have stated about motive of the appellant to commit the crime alleged against him.

P.W.2 – M. Chinnaya Patra has stated about the relationship between husband and wife and their separation and reunion. He has stated that Amoyee was tortured by the appellant Durjyadhan for not bringing dowry. Thereafter Mangala Patra, the father of deceased had given two Bharanas of land as dowry and had registered the land in the name of his daughter, the deceased Amoyee. The registration of the land took place after about six years of marriage between the appellant and deceased Amoyee. Thereafter, for about six years the parties lived peacefully after registration of the land. Again the deceased was denied food and assaulted by the appellant Durjya. Due to torture the deceased could not live with the appellant and went to her parents' house. She filed a case for maintenance against the appellant. Thereafter the appellant entered into a compromise with the deceased and again took her back to his house. Sometime thereafter, the appellant Durjya proposed to marry accused Jamalu and took her as second wife.

In this connection there was a meeting in the village where it was held that the appellant Durjya was to give two Bharans of his lands and a portion of his house having width of 6 cubits to the deceased and then take his second wife. It was decided that Amoyee will stay with appellant Durjya and the appellant will maintain her well. The appellant Durjya and Amoyee agreed with the decision of the village Bhadraloks. As per the decision, the appellant Durjya had registered two Bharans of land and a portion of his living house in the name of deceased Amoyee. Thereafter the appellant Durjya had married the co-accused Jamalu and took her as his second wife about five years back from the date of deposition. The deceased stayed in a

portion of the house which was given to her and the three accused persons stayed in the remaining portion of the house.

This witness has further stated that about one year after the second marriage, quarrel between the deceased on one side and the appellant Durjya and his mother accused Motyalu, on the other hand started. Quarrel started concerning the lands of Amoyee which were given to her by her father and also by the appellant Durjya. About two years and five to six months back, one day in the morning he heard that Amoyee was dead. He along with other co-villagers went to the house where Amoyee was living and saw her dead body lying on the living room of the house, foul smell was emitting. So he had only a glance over the dead body of the deceased and came out of the room. Then he speaks about arrival of police, inquest over the dead body, etc. He is also a witness to the seizure.

As such from the discussion of the testimony of this witness, it is clear that he does not speak anything about motive of the appellant behind commission of the crime. He has only stated that there was some dispute regarding lands which were given to her by her father and the appellant. From this it is not forthcoming that the convict – appellant had intention to grab her lands by committing her murder.

As far as P.W.3 – K. Sima Patra is concerned, he also states about the quarrel between the husband and wife, the meeting of the village Bhadraloks and the second marriage. He also stated that other accused Motyalu had also picked up quarrel with deceased Amoyee and he heard about two to three years back that deceased was murdered by three accused persons.

This witness has also not stated about motive, but the learned lower court has inferred the motive of crime from the statement of the witnesses regarding dispute about the landed property of the deceased.

In our considered view there is no sufficient evidence to establish beyond reasonable doubt that there was motive on the part of present appellant to commit murder of the deceased so that he could grab the landed property of the deceased.

11. The circumstance which is put forth by P.W.4- K. Narayan Patra that he heard the voice of appellant Durjya saying “BOULA BADI TA DE, AA PAITI CHHINDEI DEBA” (mother give a badi, we will finish the job). This itself does not show that the appellant had intended to commit the murder of deceased. Moreover, it is not the case of prosecution that the deceased was

done to death by means of lathi and badi. She was throttled as per prosecution case and there was no external injury on the part of her body. Hence P.W.4 fails to establish that the appellant had any intention to murder the deceased when he asked for a 'BADI'.

12. Then comes the evidence of P.W.5 – K. Govinda Patra who has been examined to establish that when he came to the house of deceased, the door was locked from inside and as he gave push, the appellant opened the door and was standing there in the same room where the dead body was lying.

This aspect has been contested by the learned defence counsel and a major contradiction has been brought out.

With the reference to the evidence of P.W.5 at paragraph 6 and P.W.9 at paragraph 24 it is revealed that P.W.5 has not stated before the investigating officer in his statement recorded U/s.161 of the Cr.P.C. that there was ill-feeling between the deceased Amoyee and accused persons. He has also not stated before police that deceased Amoyee had intimated him about her willingness to go for earth work along with the witness and that the witness had stated her that he would ask the contractor.

Another major contradication borne out in the cross-examination that the witness has not stated before police in his Section 161 statement that the front door of the house of deceased Amoyee and also of the appellant was closed from inside and when he pushed the door of the house of deceased Amoyee after calling her, the door opened to his push, he saw appellant Durjya standing inside the house.

P.W.9 has categorically stated that P.W.5 has not stated before him that the front door of the house of deceased Amoyee was closed when he went there and when he pushed, the door opened and he saw appellant Durjya standing inside the house.

13. It is settled principle of law that when a witness states certain aspect of the case in the court which he has not stated before the investigating officer at the time of recording his statement under Section 161 of the Cr.P.C. then such statement shall be taken as contradiction and if it has a great bearing on the case, then it should be treated as a major contradiction.

Since the case of the prosecution hinges precariously on the testimonies of P.W.4 and 5, this contradiction that P.W.5 did not see the accused standing inside the room where the dead body was lying goes a long

way to raise a doubt against the case of prosecution, hence we do not believe the version of P.W.5 and come to hold that there is no material to show that the accused was standing in the room where the deceased was lying dead and P.W.5 saw him there.

14. The next circumstance is that of the abscondance of the accused – appellant. It is true that the accused – appellant was arrested from the railway station. It is stated so by the I.O and other witnesses, but only absconding will not make a person guilty of the crime. Such act of absconding is also not by itself conclusive either of guilt or of guilty conscience.

In this regard the learned counsel for the appellant has relied upon a judgment rendered by this court in the case of **Gedu @ Parameswar Patra Vrs. State of Orissa** (2016) 65 OCR 159 wherein at paragraph 14 the Division Bench of this court has held as follows:-

> *"14. The next circumstance relied upon by the learned Trial Court was that the appellant was absconding from 28.11.1998 till 5.10.1999. It is the case of the appellant that he was staying in his brother's house at Sector-6, Rourkela. Except making a statement that he raided at different places including the relations' houses to apprehend the appellant, the I.O. has not proved any search list. No witness has been examined to corroborate the statement of the I.O.*
>
> *In the case of **Bata Munda V. State of Orissa** reported in Vol.59 (1985) Cuttack Law Times 370, it is held as follows:-*
>
> *"Absconding is a weak link in the chain of circumstances. Even an innocent person may feel panicky and try to keep out of the way if he learns of his false implication in a serious crime reported to the police. It is not, by itself, conclusive either of guilt or of a guilty conscience and may only lend some assurance to the other evidence pointing to the guilt of an accused persons."*

Thus, absconding is a weak link in the chain of circumstances. It can only be pressed into service when other clinching materials are available on record. Only absconding from the spot of occurrence will not make anybody guilty of any offence.

15. The next circumstance that is put-forth by the prosecution is that since the accused and the deceased were living in the same house but in different rooms, and the deceased was found dead in suspicious circumstances, the accused has to explain about the death of deceased. This kind of explanation is necessary when both the accused and deceased are living in a house exclusively and no other person was living there. It is admitted that the second wife and the mother of the accused were living in the same house, so it is not the case of the prosecution that the house was

exclusively occupied or inhabited by the accused and the deceased, and no other person was present there.

In that view of the matter, we are of the view that absence of explanation by the accused will not lead to an inference that the accused has committed the crime.

16. The last circumstance is that of failure to establish alibi.

As no evidence is led on behalf of defence in this regard, it can be safely assumed that the plea of alibi has failed in this case but this court as well as the Supreme Court has consistently held that failure to establish a plea of alibi can only be pressed into service as an additional link but not an incriminating link. If other links / circumstances are there, then failure to establish alibi would take the case of the prosecution further and supply the missing link and lend credence to the evidence adduced on behalf of the prosecution.

In that view of the matter we are of the view that no material is forthcoming to establish the above four circumstances relied upon by the learned Sessions Judge, and circumstances no.5 and 6, are not sufficient, either conjointly or separately, do not prove the guilt of the appellant beyond reasonable doubt.

17. We also take into consideration the inherent contradiction between p.w.7 and d.w.1 who happen to be the brothers of the deceased. In their testimonies, they have contradicted each other and one of the witnesses stated that the deceased had committed suicide by means of a rope but she had not seen any rope. In the holistic view of the entire material on record, we are of the opinion that the prosecution has failed to establish its case beyond reasonable doubt by proving incriminating circumstances which form a complete chain unerringly pointing towards the guilt of the accused.

In that view of the matter the accused – appellant is not liable to be convicted U/s.302 of the Indian penal Code.

18. Learned Additional Government Advocate at this stage argues that the conviction should be turned to one U/s.306 of the Indian penal Code.

However, it is neither the case of the prosecution nor any evidence is adduced to show that the accused had abetted the suicide of the deceased. In fact the case of the prosecution is that the death of the deceased was

homicidal and not suicidal. So, we are not inclined to accede to such contention. In the result the appeal is allowed. The judgment and order of conviction is hereby set aside. The appellant be set at liberty forthwith if his detention is not required in any other case. L.C.R. be returned.

2019 (I) ILR - CUT-72

S.K.MISHRA, J & DR. A.K.MISHRA, J.

WPCRL NO. 32 OF 2018

NAKULA MAHAKUD .....Petitioner

.Vs.

STATE OF ORISSA & ORS. .....Respondent

NATIONAL SECURITY ACT, 1980 – Section 3(4) – Detention under – Representation of the detenu submitted on 04.01.2018 through Superintendent, Special Jail, Jharpada, Bhubaneswar was received in the Home Department on 9.1.2018 causing 5 days delay without any explanation – Another representation dated 10.1.2018 was rejected by the State Government on 25.1.2018 for which 14 days delay was caused and the said rejection order was served on detenu on 28.1.2018 without any acceptable explanation – Held, the delay in forwarding the representation of the detenu to the Central Government on 12.1.2018 which was received on 19.1.2018 is not properly explained – Delay not explained as to why the rejection order of the State Government dated 25.1.2018 which was served on the detenu on 28.1.2018 while the detenu was inside the jail – Plea that delay caused due to holiday – Held, the holidays like Saturday, Sunday and Republic day cannot be considered to intercept liberty of a detenu for communicating the order – The delay caused in forwarding the representation to the Union of India and serving the rejection order on the detenu could have been avoided – It was not beyond the control of the authority – It is nothing but administrative laxity which has failed to honour the liberty of the detenu in accordance with law – On this score of delay, the detention of the petitioner is found illegal. (Para 15)

Case Laws Relied on and Referred to :-

1. (1993) 3 SCC 384 : Kamlabai Vs. Commissioner of Police, Nagpur & Ors.
2. (1972) 3 SCC 831 : Kanu Biswas Vs. State of West Bengal.
3. (2008) 5 SCC 490 : Union of India & Ors. Vs. Laishram Lincola Singh @ NICOLAI
4. (2005) 10 SCC 97 : Union of India and Another Vs. Chaya Ghoshal (SMT) & Anr.
5. (AIR) 2018 SC 3419 : Hetchin Haokip V. State of Manipur and Ors.

For Petitioner : M/s.Udit Ranjan Jena, B.Mishra &
Mr. Dharanidhar Nayak, Sr.Advocate

For Opp. Parties : Mr. Anup Kumar Boase(ASGI),
Mr. Chandra Kanta Pradhan, CGC.

JUDGMENT Date of Hearing : 12.12.2018 Date of Judgment :14. 12.2018

DR. A.K.MISHRA, J.

The order dated 26.12.2017 of the Government of Odisha Home(Special Section) Department under Section 3(4) of the National Security Act, 1980 approving the detention order dated 17.12.2017 of the Commissioner of Police, Bhubaneswar-Cuttack in respect of the detenu, namely, Nakula Mahakud is under challenge in this writ petition under Article 226 of the Constitution of India.

2. The Commissioner of Police, Bhubaneswar-Cuttack on being subjectively satisfied that detenu who was already in jail in Khandagir P.S. Case No. 520 dt, 17,11. 2017 was frequently unleashing reign of terror and thereby acting prejudicial to the maintenance of public order in the areas of Bhubaneswar urban district, had invoked Section 3(3) of the National Security Act and directed to detain him in the Special Jail, Jharpada until further orders. For such subjective satisfaction, the Commissioner of Police had taken into consideration of eight criminal cases pending against the detenu and use of lethal weapons, fire arms and creation of panic at the point of gun to collect Dada Bati.

3. On 26.12.2017 the order of detention was approved by the Home(Special Section) Department, Government Odisha vide Annexure-1. The said order was served upon the petitioner on 28.12.2017. On 4,1,2018 the petitioner filed his representation to the Home(Special Section) Department, Government of Odisha through Superintedent , Special Jail Jharpada, Bhubaneswar. On 9.1.2018 the said representation was received in the Home Department, Orissa. The State Government rejected the representation of the detenu on 25.1.2018 and it was served upon him 28.1.2018.

4. On 23.1.2018 the Joint Secretary, Internal Security(II) forwarded the representation of detenu to the Union, Home Secretary. On 24.1.2018 the Central Government rejected the representation of the denue, but it was intimated to the Superintendent of Special Jail Jharpada on 29.1.2018 and in turn it was served upon the detenu on 31.1.2018.The opinion of the NSA Advisory Board dated 3.2.2018 was obtained. The order of confirmation of

State Government was issued on 7.2.2018 but was served upon the petitioner on 13.2.2018. It is the further case of the petitioner that his liberty was curtailed by inordinate delay of the authority in forwarding his representation and serving rejection order upon him. Even though he was involved in eight numbers of cases, in no case his act was prejudicial to the public order. The difference between law and order and public order was not kept in view.

5. As the detention was illegal, this petition for Habeas corpus was filed on 19.3.2018 to quash the impugned order dated 26.12.2017, issued and confirmed by the opposite party No.1, State of Odisha.

6. The Additional Secretary to Government of Orissa filed affidavit on behalf of opposite party no.1 denying allegation of violation of any provision of law for approving the order of detention of the petitioner. It is stated that the State Government had approved the detention order on 26.12.2017 which was within 12 days of the detention as stipulated under Section 3(4) of the National Security Act. The ground of detention was nothing but threat to public order and on 28.12.2017 the order of detention was served upon the petitioner. The relevant portion of the said counter affidavit filed by opposite party no.1 runs thus:-

> " Para-11. That the representation of the detenu dated 4.1.2018 was received by the State Government on 9.1.2018 through the Superintendent, Special Jail, Bhubaneswar. The Commissioner of Police, Bhubaneswar-Cuttack was requested to furnish the parawise comments on the representation of the detenu, which was sent to the Commissioner of Police, Bhubaneswar on 11.1.2018. On the same day another representation dated 10.01.2018 was received by the State Govt. and parawise comments were provided by the Commissioner of Police, Bhubaneswar-Cuttack to that very day to the State Govt. without any delay.
>
> 12. That both the representations of detenu dated 4.1.2018 and 10.1.2018 were duly looked into by the Commissioner of Police, Bhubaneswar-Cuttack during submission of parawise comments and as per Section 3 (5) of the National Security Act, 1980 the order of detention was duly sent to the Central Govt. as per requirement of Section 3(5) of the National Security Act, 1980
>
> 13. That the representation and parawise comments of the Commissioner of Police, Bhubaneswar-Cuttack was also forwarded to the Ministry of Home Affairs Govt. Of India on 18.01.2018.
>
> 14. That both the representations of the detenu dated 4.1.2018 and 10.1.2018 were duly considered by the State Govt. And the same was rejected ultimately on 25.1.2018 and the same was served on the detenu in the Jail premises on 28.1.2018 completing all formalities including translated copy in Oriya vernacular.

> It would be appropriate to state here that during consideration, the Under Secretary after getting the parawise comments from the Commissioner of Police, Bhubaneswar-Cuttack looked into the file on 12.1.2018 which was also looked into by the Additional Chief Secretary and after due administrative considerations, the representation was placed for submission to the Govt. for kind orders on 19.1.2018."

7. The Additional Secretary to Government, Home Department has filed additional counter affidavit.

8. On behalf of O.P.2- Union of India, Under Secretary, Ministry of Home Affairs, Government of India, New Delhi has filed counter affidavit stating that the copies of the representation of detenu dated 4.1.2018 and 10.1.2018 along with parawise comments were forwarded by the State Government on 12.01.2018. The same was received on 19.1.2018. It is stated in paragraph-4 of the counter of affidavit filed by opposite party No.2 that:-

> " **Para-4**. That with regard to para no.5, 7, 10, 14,17 & 22 of the petition, it is humbly submitted that, the copies of representations dated 04.01.2018 and 10.01.2018 from the petitioner along with parawise comments of the detaining authority were forwarded by the Additional Secretary, Home (Special Section) Department, Government of Odisha vide letter No.101/C Dated 12.01.2018. The same was received in the section concerned of Ministry of Home Affairs on 19.01.2018. The representations of the detenu along with parawise comments of the detaining authority were processed for consideration of the Union Home Secretary, who has been delegated powers vide Order No. A-32013/24/2017-Ad.l dated 29.09.2017 by the Union Home Minister to decide such cases (a copy of the delegation of powers is enclosed as Annexure No. A-2) on 19.01.2018. The file reached the Under Secretary (NSA) on 22.01.2018. The Under Secretary (NSA) with his comments forwarded the same to the Deputy Legal Advisor on 22.01.2018. The Deputy Legal Advisor forwarded the same to the Joint Secretary (Internal Security-II) on 22.01.2018. The Joint Secretary (Internal Security-II) with his comments forwarded the same to the Union Home Secretary on 23.01.2018. During the intervening period 20th and 21st January, 2018 were holidays being Saturday and Sunday."

9. The ground of detention is assailed on the following two points:-

(i). That the representation of the detenu dated 4.1.2018 submitted through Superintendent, Special Jail, Jharpada, Bhubaneswar having been received in the Home Department, Odisha on 9.1.2018, 5 days delay has been caused without any explanation. The representation of the detenu dated 10.1.2018 was rejected by the State Government on 25.1.2018 for which 14 days delay was caused and the said rejection order was served on detenu on 28.1.2018 without any acceptable explanation. It is also urged on this ground

of delay that the representation of detenu dated 4.1.2018 was forwarded by the Additional Secretary, Home Department on 12.1.2018, but it was received on 19.1.2018 and thereby 7 days delay was caused in forwarding the representation to the Union Government of India. The Union Government rejected the representation of the petitioner on 24.1.2018 but it was served on the petitioner on 31.1.2018 and thereby 7 days delay was caused. The above unexplained delays are sufficient to show that the detention of petitioner is illegal.

(ii) Secondly, the involvement of the detenu in eight number of cases in which he is not convicted, cannot be the sole basis for subjective satisfaction to the effect that detenu was acting to create panic and thereby maintenance of public order was affected. The subjective satisfaction in this regard is not justified as detenue was not indulged in any objectionable activity affecting the society as a whole.

10. Learned counsel for the petitioner has relied upon the following decisions in support of his above contention:-

1. Hetchin Haokip V. State of Manipur and Others: AIR 2018 SC 3419

2. Ram Dhondu Borade Vs. V. K. Saraf: AIR 1989 SC 1861)

3. Smt. Pebam Ningol Mikoi Devi V. State of Manipur and Ors. ((2010) 47 OCR (SC) 694)

4. Kalia @ Alok Kumar Das V. District Magistrate, Dhenkanal & Two Ors. ((2007) 38 OCR 386)

5. Md. Raju @ Md. Azim V. State of Odisha and Ors ((2012) 51 OCR 1027)

6. Bikash Munda V. State of Orissa & Others ((2014) 58 OCR 582)

7. Shanina Begum V. State of Orissa and others ((2001) 20 OCR 347)

8. Sasanka Dash V. Collector and District Magistrate, Kalahanid and Ors ((1999) 17 OCR 233)

9. K. Alley Vrs. State of Orissa and Others (2014 (Supp.-II) OLR 1083)

10. Animesh Ghosh Vs. The State of Orissa and Others ((2002) 23 OCR 491)

11. Karan @ Pradeep Sagar V. State of Orissa (1997) 13 OCR 286

12. Sumati Das vs. State of Orissa (1998) 15 OCR 149 (Para.16)

13. Ashok Kumar Yadav vs. State of Odisha(2005) 31 OCR 343.

11. Learned Additional Government Advocate repelled the above contention stating that as per the requirement of law, the file was processed and within prescribed period not only the petitioner was informed about the ground of detention but also his representations to both the State

Government and Central Government were considered. It is further submitted that whatever delay was caused it was due to public holidays, i.e. 22.1.2018 and 23.01.2018 as Basanta Panchami and Netaji Subhash Chandra Bose Jayanti while 26.1.2018 was the Republic day and following days i.e. 27.1.2018 and 28.1.2018 were Satur day and Sunday. Relying upon a decision reported in (1993) 3 SCC 384: **Kamlabai Vrs. Commissioner of Police, Nagpur & others,** it is argued that "*the delay itself is not a ground which proves to be fatal, if there is an explanation*." Learned Additioal Government has also relied upon the following decisions:- **Kanu Biswas Vrs. State of West Bengal (1972) 3 SCC 831**, **Union of India and Others Vrs. Laishram Lincola Singh @ NICOLAI (2008) 5 SCC 490**, **Union of India and Another Vrs. Chaya Ghoshal (SMT) and Another (2005) 10 SCC 97**.

12. Learned Assistant Solicitor General for Union of India-opposite party no.2, vehemently opposed the ground of delay submission, relying upon the affidavit filed by the Under Secretary, Ministry of Home Affairs, Government of India. He has also advanced the explanation of holidays, i.e. 20.1.2018 and 21.1.2018 as well as 26.1.2018, 27.1.2018 and 28.1.2018 to negate the ground of delay.

13. Having heard learned counsel for the petitioner, learned Additional Government Advocate for the State-opposite party no.1 and learned Assistant Solicitor General for opposite party no.2, we are of the opinion that three judges Bench decision of the Supreme Court, **Hetchin Haokip V. State of Manipur and Others (AIR) 2018 SC 3419** is helpful singularily to understand the meaning of "forthwith" occurring in Section 3(4) of the National Security Act, 1980. In that decision their Lordships have stated that:-

> "16. The expression "forthwith" under Section 3(4), must be interpreted to mean within reasonable time and without any undue delay. This would not mean that the detaining authority has a period of twelve days to submit the report (with grounds) to the State Government from the date of detention. The detaining authority must furnish the report at the earliest possible. Any delay between the date of detention and the date of submitting the report to the State Government, must be due to unavoidable circumstances beyond the control of the authority and not because of administrative laxity."

14. In **Rama Dhondu Borada Vs. V.K.Saraf**(supra) their Lordships while taking into consideration of holidays had not accepted the delay for not communicating the decision on the working days intervening the same vide para-10 of the decision. In **Chaya Ghosal** case (supra) vide para-13, their

Lordships have considered Article 22(5) of the Constitution of India to state that "*it also impetrates the authority to whom the representation is addressed to deal with the same with utmost expedition*."

15. Keeping in view the above laws, the facts of the case at hand reveal that the delay in forwarding the representation of the detenu dated 4.1.2018 to the Central Government on 12.1.2018 which was received on 19.1.2018 is not properly explained. It is also not understood as to why the representation to the State Government received by the Superintendent, Special Jail, Jharpada on 4.1.2018 was sent to the Home Department, Odisha on 9.1.2018. Similarly it is not explained as to why the rejection order of the State Government dated 25.1.2018 which was served on the detenu on 28.1.2018 while the detenu was inside the jail. The holidays like Saturday, Sunday and Republic day cannot be considered to intercept liberty of a detenu for communicating the order.

16. These delays are attempted to be explained, but not sufficient to come under the category of short delay. It may be stated here that detenu was in Jharpada Jail which situates in the heart of the capital at Bhubaneswar. To say the least, the delay caused in forwarding the representation to the Union of India and serving the rejection order on the detenu could have been avoided. It was not beyond the control of the authority. It is nothing but administrative laxity which has failed to honour the liberty of the detenu in accordance with law. On this score of delay, the detention of the petitioner is found illegal.

17. As we are going to set aside the detention order on the ground of un-explained inordinate delay, it is felt just not to consider the second point concerning subjective satisfaction on maintenance of public order.

18. In the wake of above analysis holding the illegality of detention of the petitioner for unexplained inordinate delay in processing the representation and communicating the order, the writ petition is to be allowed.

19. In the result the detention order darted 17.12.2017 and the order of approval dated 26.12.2017 passed against the petitioner are quashed.

20. The detenu be set at liberty forthwith unless his detention is required in connection with any other case. Copy of the judgment be sent to the Government immediately.

21. The WPCRL is allowed. There shall be no order as to costs.

2019 (I) ILR - CUT-79

S.K. MISHRA, J & DR. A.K. MISHRA, J.

AHO NO. 09 OF 1997

PRAMODINI MISHRA & ORS. …….Appellants

.Vs.

KRUSHNA PRASAD MISHRA & ORS. ……..Respondent

LETTERS PATENT APPEAL – Scope and ambit to interfere in the order of Single Judge passed in First Appeal – Held, it will be open to the High Court to review even findings of fact in a Letters Patent appeal from a first appeal heard by a learned Single Judge, though generally speaking the Letters Patent Bench would be slow to disturb concurrent findings of fact of the two courts below – But there is no doubt that in an appropriate case a Letters Patent Bench hearing an appeal from a learned Single Judge of the High Court in a first appeal heard by him is entitled to review even findings of fact – A Letters Patent Appeal, as permitted under the Letters Patent, is normally an intra-court appeal where under the Letters Patent Bench, sitting as a Court of Correction corrects its own orders in exercise of the same jurisdiction as was vested in the Single Bench – Such is not an appeal against an order of a subordinate Court – In such appellate jurisdiction the High Court exercises the powers of a Court of Error – So understood, the appellate power under the Letters Patent is quite distinct, in contrast to what is ordinarily understood in procedural language – Asho Devi Vs. Dukhi Sao & another, reported in 1974 AIR 2048, Alapati Kasi Viswanathan Vs. A.Sivarama Krishnayya and Ors. (C.A. No. 232 of 1961 decided on January 11, 1963) an unreported judgment and Baddula Lakshmaiah & Others Vs. Sri Anjaneya Swami Temple & Others, reported in 1996 SCC(3) 52 followed.

(Para 16)

(B) CODE OF CIVIL PROCEDURE, 1908 – Order 14 Rule 2 – Provisions under – Court to pronounce judgment on all issues – Plea that issue No. 5 and 6 was not pressed – Held, a lawyer can abandon an issue but the court is under legal obligation to answer that issue, it is desirable that a written memorandum is obtained in that regard and mention is made in the order sheet and the consequence of such 'not pressed' statement should be analyzed in answering the issues so that meaning of 'not pressed' can be read in to the context of the decision.

[Para 17(c)]

(C) CODE OF CIVIL PROCEDURE, 1908 – Section 96 read with Order 41 Rule 24 – Provisions under – Jurisdiction of appellate court – Held, It is a settled principle of law that a right to file first appeal

against the decree under Section 96 of the Code is a valuable legal right of the litigant – The jurisdiction of the first Appellate Court while hearing the first appeal is very wide like that of the Trial Court and it is open to the appellant to attack all findings of fact or/and of law in the first appeal – It is the duty of the first Appellate Court to appreciate the entire evidence and arrive at its own independent conclusion, for reasons assigned, either of affirmance or difference – Since learned Single Judge acted within the jurisdiction of Order 41 Rule 24, no fault can be found in not remanding back the matter to the lower court - AIR 2017 SC 5604 in the case of C.Venkat Swamy Vs. H.N.Shivanna(D) by L. R.and another etc, followed. [Para 18(a)]

Case Laws Relied on and Referred to :-

1. 1974 AIR 2048 : Asho Devi Vs. Dukhi Sao & Anr.
2. 1996 SCC(3) 52: Baddula Lakshmaiah & Ors. Vs. Sri Anjaneya Swami Temple & Ors.
3. Civil Appeal No. 9182-9188 of 2018 : Mysore Urban Development Authority .Vs. K.M. Chikkathayamma & Ors.
4. AIR 2017 SC 5604 C.Venkat Swamy .Vs. H.N.Shivanna(D) by L. R. & Anr.

For Appellants : M/s. R.C.Mohanty, R.K.Mohanty, D.K.Mohanty N.Behuria & S.K. Acharya.

For Respondents : M/s. R.K.Mohapatra, A.K.Baral, S.S.Kanungo, B.Dash, B.Sarangi, B.Routray, A.K.Mohanty, K.B.Kar, B.Parida, Sapan Sahoo, Bharati Das & U.C.Panda.

JUDGMENT Date of Hearing : 27.11.2018 Date of Judgment :18. 12. 2018

DR. A.K.MISHRA, J.

This letters patent appeal has been preferred by the substituted legal heirs of the plaintiff against the judgment dated 30.09.1996 of the learned Single Judge in F.A. No. 386 of 1983 wherein and whereunder the preliminary decree dated 13.05.1983 in a partition suit bearing No. T. S. 59 of 1980 passed by the learned Subordinate Judge, Jajpur was reversed resulting dismissal of the suit.

2. The facts in brief, shorn of detail and necessary for the disposal of this intra-court appeal lie on a narrow compass.

Upendra, the common ancestor of the parties had three sons, namely, Panchanan, Basudev and Dasarathi and three daughters, namely, Suma, Uma and Phula. Basudev had two sons, namely, Krushna and Niranjan. Dasarathi had two sons, namely, Bishnu and Prahalad. Upendra died in the year 1976.

3. Upendra had owned joint family property of Ac.9.47,1 Kadi 12 Biswas of land. During the period from 1929 to 1974 he had acquired 9 ½ acres of land in his name exclusively. There was a mutual partition in the year 1972. By gift deed dated 30.07.1974 Upendra had transferred Ac.4.97.3 links of land in favour of the sons of Basudev and Dasarathi, who were defendant nos. 3 to 6 in the original suit. Two sons of Upendra, namely, Basudev and Dasarathi filed Title Suit No. 38 of 1977 against their brother Panchanan and others for partition of the joint family property except lands measuring Ac.4.97. 3 links covered under the gift deed dated 30.07.1974. The above gifted land was not brought to the hotchpotch of the T.S. No. 38 of 1977 where Panchanan had registered contest.

3.1 As the brothers were gifted with the landed property measuring Ac. 4.97.3links by their grandfather Upendra, plaintiff- Panchanan felt aggrieved.

3.2 Panchanan as plaintiff brought the present T.S. No. 59 of 1980 against his two brothers defendant nos. 1 and 2 and their sons defendant nos. 3, 4, 5 and 6. For clarity it may be stated that defendant nos. 3 to 6 were the donees under gift deed dated 30.07.1974 executed by their grandfather, Upendra.

4. The lands covered under the gift deed was the subject matter of the partition suit on the ground that the donor Upendra had no authority to make gift of joint family properties which were acquired with the aid and assistance of joint family nucleus.

5. The contesting defendant nos. 3, 4 and 5 resisted the claim for partition advancing plea that the gifted property was the self-acquisition of Upendra,

6. Defendant no.6, one of the donees, being minor was represented by the GAL. The other defendants did not choose to contest the suit. The plea of constructive res-judicata for the partition of joint family property in the earlier suit bearing T.S. No. 38 of 1977, and the period of limitation to challenge the deed of gift was taken.

7. The learned Subordinate Judge framed the following eight issues:-

1. Is the suit maintainable?
2. Has the plaintiff any cause of action to file the suit?
3. Are the suit properties liable to be partitioned?
4. Is the deed of gift dated 30.7.1974 executed by Upendra Misra in the names of defendant nos. 3 to 6 valid transaction?

5. Are the defendant nos. 3 to 5 bound by the decree in T.S. No. 38 of 1977?

6. Is this suit barred by res-judicata in view of T.S. No. 38/77?

7. To what share and extent of property in suit the plaintiff is entitled?

8. To what relief, if any, the plaintiff is entitled?

8. Learned Subordinate Judge in answering the issues nos. 3, 4, 7 and 8 held that the suit properties were the part and parcel of the ancestral properties belonging to the family and Upendra had no authority to alienate the same by way of gift in favour of defendant nos. 3 to 6. The share of the plaintiff was carved out to be 7/24 on the basis of notional partition. Issue nos. 1 and 2 were answered affirmatively in favour of the plaintiff.

9. As against issue nos. 5 and 6, learned Subordinate Judge in paragraph-14 of his judgment has mentioned "not pressed".

Thus, a preliminary decree was passed in the subsequent suit T.S.No.59 of 1980.

10. The defendants who were donees in gift deed dated 30.07.1974 had preferred First Appeal No. 386 of 1983 before the learned Single Judge. It was pleaded and urged in the first appeal that the contesting defendants had never made any submission not to press issue nos. 5 and 6 and learned Subordinate Judge had committed error in mentioning the same "not pressed" against those two issues.

11. The respondent-plaintiff in the first appeal had contradicted such contention and urged to confine the defendants at the contour of the truthful expression of the court made in the judgment in respect of issue nos. 5 and 6.

12. Learned Single Judge on scrutiny of records, which include the judgment and previous decree in T.S. No. 38 of 1977 concluded that:-"*there could not have been an occasion for not pressing the aforesaid issues. There is nothing on record to accept the said recording. The matter could have been different if a memorandum to that extent duly signed by the counsel would have been kept on record.*"

13. Learned Single Judge found that the plaintiff had occasioned to contest the non-inclusion of present suit lands in previous suit number T.S. No. 38 of 1977 and recorded that:-"*a party being aware and taking positive defence challenging the maintainability of the suit and thereafter abandoning it, the same would amount to acceptance by him. He had, in fact,*

conceded that the property was self-acquired." It is further observed that the suit was barred by the principle of res-judicata and the suit was not maintainable for partition. The appeal was allowed. Resultantly, the suit filed by the plaintiff was dismissed.

14. In this intra-court appeal, the respondents were absent to argue the matter.

15. Mr.Ramakanta Mohanty, learned counsel for the appellants submitted the following points for answer:-

> (i) The endorsement 'not pressed' against issue nos. 5 and 6 in the lower court judgment by the learned Subordinate Judge should not have been doubted by the learned Single Judge in the appeal because it was recorded in the court proceeding and contesting defendants did not prefer to challenge the same soon thereafter in the lower court filing affidavit.
>
> (ii) Learned Single Judge should have remanded the matter to the trial court once the 'not pressed' endorsement against issue nos.5 and 6 was disbelieved in the appeal.

16. Before answering the above two points urged by Mr. Mohanty, learned counsel for the appellants, expediency demands to remind ourselves the ambit of letters patent appeal.

In the case of **Asho Devi Vs. Dukhi Sao & another, reported in 1974 AIR 2048,** the Hon'ble Apex Court reiterate the scope of letters patent appeal in the following words:-

> "We may also mention that a five-Judges Bench of this Court in Alapati Kasi Viswanathan v. A.Sivarama Krishnayya and Ors. (C.A. No. 232 of 1961 decided on January 11, 1963) (3)-an unreported judgment had dealt directly with this question. Wanchoo, J.,speaking for the Court observed:
>
> xxx xxx xxx xxx xxx
>
> In these circumstances it will be open to the High Court to review even findings of fact in a Letters Patent appeal from a first appeal heard by a learned Single Judge, though generally speaking the Letters Patent Bench would be slow to disturb concurrent findings of fact of the two courts below. But there is no doubt that in an appropriate case a Letters Patent Bench hearing an appeal from a learned Single Judge of the High Court in a first appeal heard by him is entitled to review even findings of fact. The contention of the appellant therefore that the Letters Patent Bench was not in law entitled to reverse the concurrent findings of fact must be negatived."

In the case of **Baddula Lakshmaiah & Others Vs. Sri Anjaneya Swami Temple & Others, reported in 1996 SCC(3) 52,** the Hon'ble Apex Court also observed that:-

> "Against the orders of the trial court, first appeal lay before the High Court, both on facts as well as law. It is the internal working of the High Court which splits it into different 'Benches' and yet the court remains one. A Letters Patent Appeal, as permitted under the Letters Patent, is normally an intra-court appeal whereunder the Letters Patent Bench, sitting as a Court of Correction corrects its own orders in exercise of the same jurisdiction as was vested in the Single Bench. Such is not an appeal against an order of a subordinate Court. In such appellate jurisdiction the High Court exercises the powers of a Court of Error. So understood, the appellate power under the Letters Patent is quite distinct, in contrast to what is ordinarily understood in procedural language."

17. Between the lines drawn above, the questions raised need narration.

Point No.(i) – The meat of the matter is Ac. 4.98.3 links of land covered under gift deed dated 30.07.1974 and not brought to the hotchpotch of partition suit T.S. 38 of 1977. The donees, who happen to be the brother's son of plaintiff asserted the same to have been self-acquired by Upendra as against the plaintiff's, one of the sons of Upendra, attempt to characterize the same as joint family property.

The trial court framed issue nos. 5 and 6 of which answer could have tilted the decision either way. Those issues had assumed distinction amongst others. There is no material either in the order sheet or in the form of memorandum or in the body of judgment as to who made such advance to preempt learned Subordinate Judge to record 'not pressed' against both the issues.

From the materials on record, it is apparent that the maker of the statement 'not pressed' is unknown.

'Not pressed' contextually is a statement which may mean abandonment, admission and taken back. It is not an answer to any issue. The consequence of 'not pressed' of an issue if not analyzed in the judgment, cannot be a caveat to doubt and ambiguity. It is wrong to import meaning into the words 'not pressed' when the said combination of words, i.e. 'not pressed' is likely to have several consequences in the lis.

17(a). Though in a different context, it is apposite to note that Hon'ble Apex Court, in a judgment dated 07.09.2018 in the case of **Mysore Urban Development Authority vs. K.M. Chikkathayamma & Others in Civil Appeal No. 9182-9188 of 2018**, on the question as to whether Court can form an opinion to record as 'not pressed' in absence of any basis has observed that:-

> " 27) In our opinion, neither there was any express prayer made by the MUDA and nor it could be inferred from the document relied on by the Division Bench at the instance of respondents (writ petitioners) for forming an opinion ' not to press the appeal". In other words, the opinion formed by the High Court for dismissing the appeals "as not pressed" had no basis."
>
> xxx xxx xxx
>
> "28) He can, however, forgo such right but it has to be done with express authority and free will."
>
> (Underline is ours)

17(b). When the statement 'not pressed' against issue nos. 5 and 6, has no basis and open to many meanings, the appellate court can examine the same.

17(c). The trial court is bound to pronounce the judgment on all the issues. It is the command of the provision under Order 14 Rule 2(1) of the Code of Civil Procedure, 1908, which runs as follows:

> "Or. XIV Rule-2.- **Court to pronounce judgment on all issues**- (1) Not withstanding that a case may be disposed of on a preliminary issue the Court shall, subject to the provisions of Sub-rule(2), pronounce judgment on all issues."

17(d). A lawyer can abandon an issue but when court is under legal obligation to answer that issue, it is desirable that a written memorandum is obtained in that regard and mention is made in the order sheet. The consequence of such 'not pressed' statement should be analyzed in answering the issues so that meaning of 'not pressed' can be read in to the context of the decision.

17(e). Learned Single Judge obviously for want of any basis behind the 'not pressed' statement against issue nos. 5 and 6, had pondered over the same and consequently disbelieved the fact that the defendants had abandoned the same. Such exercise was within the legal limits of the first appeal. The contention of the learned counsel for the appellant on this score is not tenable.

18. **Point No.(ii)** – Learned Single Judge after recording a finding that issue nos. 5 and 6 were not pressed by the contesting defendants, had recast the issue no.5 and proceeded to answer the same from the evidence available before him. Remanding the matter was not necessitated because, to quote the learned Single Judge, *"as the parties have been litigating for a consideration length of time and they were aware of the real controversy*."

18(a). The unambiguous provision of Order 41 Rule 24 of the Code of Civil Procedure,1908 makes it obligatory on the part of the court to take a refuse

first to answer the issue if the evidence on record is sufficient. The said provision is extracted herein for ready reference:-

> "Or.XLI R.24. **Where evidence on record sufficient, Appellate Court may determine case finally**- Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may after, resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds."

19. In a decision reported in **AIR 2017 SC 5604 in the case of C.Venkat Swamy vs. H.N.Shivanna(D) by L. R. and another etc**, the Hon'ble Apex Court has reiterated the scope of first appeal as follows:-

> "11. It is a settled principle of law that a right to file first appeal against the decree under Section 96 of the Code is a valuable legal right of the litigant. The jurisdiction of the first Appellate Court while hearing the first appeal is very wide like that of the Trial Court and it is open to the appellant to attack all findings of fact or/and of law in the first appeal. It is the duty of the first Appellate Court to appreciate the entire evidence and arrive at its own independent conclusion, for reasons assigned, either of affirmance or difference."

20. The learned Single Judge acted within the jurisdiction of Or. 41 R. 24 C.P.C. No fault can be found in not remanding back the matter to the lower court. Because of above the second plank of submission of learned counsel for appellant fails to withstand the rigour of fact and law on record.

21. The whole exercise of the learned Single Judge as first appellate court is found within the parameters of the legal compass. Any interference in this intra-court appeal is uncalled for. The appeal stands dismissed. No costs

2019 (I) ILR - CUT- 86

S. K. MISHRA, J & DR. A. K. MISHRA, J.

MATA NO. 44 OF 2015

BANDITA MISHRA ……..Appellant.

.Vs.

RAMAKRISHNA MISHRA ……..Respondent.

THE FAMILY COURTS ACT, 1984 – Section 19 – Appeal under – Challenge is made to the order dissolving the marriage and the quantum of permanent alimony to the wife and daughter – Challenge

confined to the quantum of permanent alimony – Principles – Discussed – Husband is capable to earn and the wife & minor daughter have no source of income – The wife needs spousal support from the husband – Husband's ability to earn as a daily labourer to extend spousal support is a factum of necessity – His bad economy is not the outcome of bad health – Considering the income the quantum of permanent alimony enhanced to three lakhs instead of one lakh.

(Paras 7 & 8)

Case Laws Relied on and Referred to :-

1. OLR 2014 (II) 691 : Ruby @ Pritipadma Pradhan Vs. Debasish Pradhan.
2. OLR 2013 (Supp.) (II) 874 : Miss Moumita Roychoudhury Vs. Abhijit.
3. AIR 2017 SC 2383 : Kalyan Dey Chowdhury Vs. Rita Dey Chowdhury Nee Nandy.

For Appellant : Mr. Sangram Rath.
For Respondent : M/s.Trilochan Panigrahi, D. Nayak, S. Biswal & S.C. Bairiganjan.
M/s.Ashok Kumar Mohapatra-I & S. Ch. Pati.

JUDGMENT Date of Hearing: 05.12.2018 Date of Judgment : 18.12.2018

DR. A. K. MISHRA, J.

This appeal, preferred by the appellant – wife, is directed against the judgment dtd.18.11.2014 of learned Judge, Family Court, Puri in C.P. No.403 of 2010 whereby and where under the marriage between the appellant and respondent – husband was dissolved by a decree of divorce and the husband was directed to pay a sum of Rs.1,00,000/- towards permanent alimony of the wife and future maintenance of her daughter.

2. The petitioner married respondent on 25.5.2003 as per Hindu Caste and Customs. From their wed-lock, on 10.06.2005, a daughter was born. The wife, on account of ill-treatment meted out to her, stayed separately and for having not returned, the husband instituted a proceeding for divorce on 17.12.2010 on the ground of desertion since 05.12.2005.

The wife controverted the factum of desertion but admitted relationship and birth of a daughter. In her written statement, she had alleged second marriage of the husband and filing of FIR at Chandanpur Police Station.

Considering the rival pleadings, learned lower court framed one issue "as to whether the respondent – wife deserted the petitioner – husband for a continuous period of not less than two years immediately preceding the presentation of the petition".

The husband examined himself and his mother. The wife examined herself, her mother and brother-in-law. LIC policy and copies of sale deeds and willnama were exhibited from the side of the husband while copy of order-sheet of a proceeding before the Women Commissioner and record of rights in the name of husband's father were exhibited at the behest of wife.

Analyzing the evidence on record, both oral and documentary, the learned lower court has recorded a finding that on the ground of desertion, the petition for divorce deserved to be considered and consequently dissolved the marriage dtd.25.5.2003 U/s.13(1)(i-b) of The Hindu Marriage Act, 1955.

Incidentally learned lower court made assessment of the documentary evidence including the fact that prior to marriage, husband had secured one LIC policy in favour of respondent – wife paying premium and directed the husband to pay s sum of Rs.1,00,000/- (one lakh) towards permanent alimony of the wife and for future maintenance of their daughter.

3. In this appeal, the said decree of divorce and granting of permanent alimony have been challenged but in course of argument Mr. Sangram Rath, learned counsel for the appellant – wife expressly abandoned the challenge to the decree of divorce. It is unequivocally submitted that this appeal may be confined to the amount of permanent alimony which is inadequate in the facts and circumstances of the case. It is argued with vehemence that the respondent – husband having source of income from business and ancestral landed property, is capable to maintain the appellant and her minor daughter and for that the amount of permanent alimony be enhanced to Rs.5,00,000/-.

4. Mr. Trilochan Panigrahi, learned counsel appearing for the husband repelled the above contention stating that husband has neither any income from business nor has any landed property to own and possess for which he is unable to pay even the awarded amount of Rs.1,00,000/-.

5. As the challenge to the decree of divorce is taken back, this appeal is confined to a sole point - as to whether the permanent alimony amount of Rs.1,00,000/- awarded by the Lower Court is to be enhanced?

6. It is indisputable that the respondent – husband does not own any landed property in his name. The sale deeds and record of rights which are filed and exhibited do not indicate the extent of land under command of the respondent and the income therefrom. Though in the written statement at paragraph 9, the respondent – wife had pleaded that her husband was earning

Rs.25,000/- per month from the business, the evidence in regard to the detail of the same is conspicuously silent. Husband as P.W.1 has admitted in his evidence at paragraph 6 that prior to marriage, after engagement, he had paid premium towards LIC policy bearing No.585301619 dtd.28.03.2003 up to the year 2007. Exhibit-1 the original LIC policy reveals that the annual premium of Rs.7,525/- was payable in the name of Bandita Mishra, the respondent – wife. Exhibit-3 reveals that the premium has not been paid after March, 2009.

The startling revelation of the evidence adduced from both the sides is that the husband had income for which he had paid LIC premium which was in the name of his wife and both of them had shared a rented house. It strikes at the root and proves that husband has ability to earn. Under legal obligation, the husband has to pay permanent alimony. Added to this, no evidence is adduced to show that the wife – appellant has any source of income.

7. On a fresh assessment of the evidence on record, in the above manner, the sole point on adequacy of alimony needs narration.

7-a. A Division Bench of this Court, in the judgment rendered in the case of **Ruby @ Pritipadma Pradhan Vrs. Debasish Pradhan -** OLR 2014 (II) 691, after analyzing the ratio laid down by Hon'ble Supreme Court, has summed up the following principles :-

> *"17. Thus, after considering the above position of law, it is evident that the following principles emerge from the judgments available in the field:-*
>
> *(a) Maintenance depends upon the summation of all the facts of the situation involved in the particular case.*
>
> *(b) For granting maintenance, the scale and mode of living, the age, habits, wants and class of the life of the parties has to be regarded.*
>
> *(c) Maintenance being such that the wife could live in a reasonable comfort; considering her status and mode of life which she was used to while living with her husband.*
>
> *(d) During the pendency of the suit for maintenance, which may take a considerable time to attain finality, the wife cannot be forced to face starvation till she is subsequently granted maintenance from the date of the filing of the suit.*
>
> *(e) Maintenance must necessarily encompass a provision for residence. Maintenance is given so that the lady can live in the manner, more or less, to which she was accustomed.*

(f) Maintenance, necessarily must encompass a provision for residence. Maintenance is given so that the lady can live in the manner, more or less, to which she was accustomed. The concept of maintenance must, therefore, include provision for food and clothing and the like and take into account the basic need of a roof over the head.

(g) Maintenance must vary according to the position and status of a person. It does not only mean food and raiment.

(h) It is to be seen that the amount fixed cannot be excessive of affecting the living condition of the other party.

7-b. In the case of **Miss Moumita Roychoudhury Vrs. Abhijit** - OLR 2013 (Supp.) (II) 874, the Division Bench of this Court while enhancing the amount of permanent alimony, has referred to the judgments of Hon'ble Apex Court in the following manner:-

"19. The apex Court in Vinny Parmvir Parmar v. Parmvir Parmar, AIR 2011 SC 2748 held as follows:-

".....It is further seen that the court considering such claim has to consider all the above relevant materials and determine the amount which is to be just for living standard. No fixed formula can be laid for fixing the amount of maintenance. It has to be in the nature of things which depend on various facts and circumstances of each case. The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay, having regard to reasonable expenses for his own maintenance and others whom he is obliged to maintain under the law and statute. The courts also have to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort was used to live when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party. These are all the broad principles courts have to be kept in mind while determining maintenance or permanent alimony."

20. In Vishwanath Sitaram Agrawal v. Sau. Sarla Vishwanath Agrawal, reported in AIR 2012 SC 2586 the apex Court while granting permanent alimony has observed that the amount that has already been paid to the respondent-wife towards alimony is to be ignored as the same had been paid by virtue of the interim orders passed by the courts. It is not expected that the respondent-wife has sustained herself without spending the said money.

21. In U. Sree v. U. Srinivas, AIR 2013 SC 415, the apex Court while dealing with Section 25 of the Act has observed as follows:-

"..... while granting permanent alimony, no arithmetic formula can be adopted as there cannot be mathematical exactitude. It shall depend upon the status of the parties their respective social needs, the financial capacity of the husband and other obligations."

In the said judgment the apex Court has also observed that "..... it is the duty of the court to see that the wife lives with dignity and comfort and not in penury. The living need not be luxurious but simultaneously she should not be left to live in discomfort. The court has to act with pragmatic sensibility to such an issue so that the wife does not meet any kind of man made misfortune....."

And then held that :-

"23. In view of the fact that law discussed above, this court has the power under Section 25 of the Act to award permanent alimony just like the original court. The respondent being the Director of a company, taking his social status and income on the basis of income tax return, share valuation certificate and the balance sheet of the company into consideration, it would be just and proper to award a sum of Rs.15 lakhs towards the permanent alimony in favour of the appellant – wife, though she has claimed compensation of Rs.10 lakhs and also return of her articles as mentioned in Schedule-A of the petition. Accordingly, we direct the respondent to pay a sum of Rs.15 lakhs within a period of two months.

7-c. In the case of **Kalyan Dey Chowdhury Vrs. Rita Dey Chowdhury Nee Nandy** - AIR 2017 SC 2383, their Lordships of Hon'ble Apex Court at paragraph 16 have calculated the permanent alimony on the basis of 25% of the salary of the husband in the following words:-

"16.....Following Dr. Kulbhushan Kumar Vs. Raj Kumari and Anr. (1970) 3 SCC 129, in this case, it was held that 25% of the husband's net salary would be just and proper to be awarded as maintenance to the respondent – wife. The amount of permanent alimony awarded to the wife must be befitting the status of the parties and the capacity of the spouse to pay maintenance. Maintenance is always dependant on the factual situation of the case and the court would be justified in moulding the claim for maintenance passed on various factors....."

8. In the case at hand, the husband – respondent is capable to earn and the appellant – wife and minor daughter have no source of income. The wife needs spousal support from the husband. Husband's ability to earn as a daily labourer to extend spousal support is a factum of necessity. His bad economy is not the outcome of bad health.

As a necessary corollary, we feel it proper to adopt 25% of the husband's net income per month as a basis towards spousal support. The incremental period to cap the permanent alimony depends upon the age, income and status of the parties.

Considering the daily income of a labourer in the present time @ Rs.300/- per day and giving concession for five days, the monthly income of respondent - husband would be Rs.300/- X 25 = Rs.7,500/- per month. The annual income would be Rs.7,500/- X 12 = Rs.90,000/-. Drawing support

from a principle of deduction of 25% from monthly income, the husband – respondent can contribute Rs.22,500/- per annum.

For permanent alimony, having regards to the age, income and status of the parties and their daughter as well as the date of decree of divorce, it is felt just and proper to extend incremental period for 14 years. On computation of the said 25% of annual income of husband for 14 years, the amount would be Rs.22,500/- X 14 = Rs.3,15,000/-. But judicial conscience commands to round up the same to Rs.3,00,000/- (Three Lakhs).

9. In the wake of above analysis, the awarded amount of Rs.1,00,000/- towards permanent alimony is found inadequate and the same is required to be enhanced to the tune of Rs.3,00,000/-. Accordingly the appeal is to be allowed in part.

10. Hence it is ordered;

The appeal is allowed in part on contest without cost. The decree of divorce in the impugned judgment dtd.18.11.2014 dissolving the marriage between the appellant and respondent is hereby confirmed.

The award of permanent alimony is modified to the effect that the respondent – husband is directed to pay a sum of Rs.3,00,000/- (Three Lakhs) towards permanent alimony of the appellant. The same shall be paid within three months hence.

2019 (I) ILR - CUT- 92

DR. A.K.RATH, J.

CMP NO.1328 OF 2018

PRAVAT KUMAR SAHOO ……..Petitioner

.Vs.

STATE BANK OF INDIA ……Opp. Party

CODE OF CIVIL PROCEDURE, 1908 – Order 1 Rule 10 – Addition of party – Suit by Bank for realization of loan amount – Prayer by defendant to implead the Insurer a party to the suit – Whether can be considered – Distinction between a necessary party and a proper party – Held, a necessary party is one without whom no order can be made effectively and a proper party is one in whose absence an effective

order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding – A person may be added as a party to a suit then he should have a direct interest in the subject matter of the litigation – In a suit for recovery of money by the bank, the loanee and the guarantor are the necessary parties – Neither the insurer nor the surveyor is a necessary party or a proper party to the suit.

Case Laws Relied on and Referred to :-

1. AIR 1963 SC 786 : Udit Narain Singh Malpaharia .Vs. Additional Member Board of Revenue, Bihar & Anr.
2. AIR 1958 SC 886 : Razia Begum .Vs. Sahebzadi Anwar Begum & Ors.
3. 2015 (I) ILR-CUT-41 : Dr.(Smt.) Geetanjali Panda .Vs. Dr.Pranaya Ballari Mohanty & Ors.

For Petitioner : Mr. Jyoti Patnaik

JUDGMENT Date of Hearing & Judgment: 26.11.2018

DR.A.K.RATH, J.

This petition seeks to lacinate the order dated 11.5.2018 passed by the learned Civil Judge (Sr.Division), Banki in C.S.(III) No.31 of 2014, whereby and whereunder, learned trial court rejected the application of the defendants to implead the New India Assurance Co. Ltd., Khurda and its Surveyor as defendants under Order 1 Rule 10 C.P.C.

2. Plaintiff-opposite party instituted the suit impleading the petitioner as defendant no.1 for realization of Rs.5,63,662/- along with P.I and F.I.. The case of the plaintiff is that defendant no.1 availed a cash credit facility from the bank and executed the necessary documents in favour of the bank. Defendant no.2 stood as a guarantor in the said loan. Subsequently they became chronic defaulters.

3. The defendants entered contest and filed written statement. While the matter stood thus, the defendants filed an application under Order 1 Rule 10 C.P.C. to implead the New India Assurance Co. Ltd. and its Surveyor as defendants on the ground that defendant no.1's unit was insured with the New India Assurance Co. Ltd., Khurda. In 2008 high flood, the unit sustained loss. The insurer appointed a surveyor. The surveyor assessed the loss and paid money to the bank. In view of the same, the insurer as well as its surveyor should be impleaded as parties.

4. Mr.Jyoti Patnaik, learned Advocate for the petitioner submits that the insurer and its surveyor are proper parties to the suit. The unit has sustained

loss. The surveyor was appointed. He assessed the loss, whereafter the insurer paid the amount to the bank. The submission of Mr. Pattnaik, learned Advocate for the petitioner, is difficult to fathom.

5. The distinction between a necessary party and a proper party is well known. In Udit Narain Singh Malpaharia v. Additional Member Board of Revenue, Bihar and another, AIR 1963 SC 786, the apex Court held that a necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.

6. In Razia Begum v. Sahebzadi Anwar Begum and others, AIR 1958 SC 886, the apex Court held that it is firmly established as a result of judicial decisions that in order that a person may be added as a party to a suit, he should have a direct interest in the subject matter of the litigation whether it raises questions relating to moveable or immoveable property.

7. After having survey of the decisions of the apex Court, a Division Bench of this Court in the case of Dr.(Smt.) Geetanjali Panda vrs. Dr.Pranaya Ballari Mohanty and others, 2015 (I) ILR-CUT-41, held :

> "12. The next question is whether the appellant is a proper party to the said proceeding. As regards proper parties, the question depends upon the judicial discretion of the High Court in the circumstances of each case. Either one of the parties to the proceedings may apply for impleading of such a party or such a party may suo motu approach the court for being impleaded therein. In Deputy Commr., Hardoi, in charge Court of Wards, Bharawan Estate v. Rama Krishna Narain and others, AIR 1953 SC 521, the apex Court held that the eventual interest of a party in the fruits of a litigation cannot be held to be the true test of impleading a person as a party. (Emphasis ours)
>
> The principles enunciated in the aforesaid decisions apply with full force to the facts and circumstances of the present case.
>
> 13. The eventual interest of the appellant in the fruits of a litigation cannot be held to be the true test of impleading her as a party."

8. In a suit for recovery of money by the bank, the loanee and the guarantor are the necessary parties. Neither the insurer nor the surveyor is a necessary party or a proper party to the suit.

9. A priori, the petition fails and is dismissed. No costs.

2019 (I) ILR - CUT- 95

DR. A.K. RATH, J.

CMP NO.1413 OF 2018

BIBHUTI BHUSAN MOHANTY ……..Petitioner

.Vs.

JAGABANDHU MOHANTY ……..Opp. party

CODE OF CIVIL PROCEDURE, 1908 – Order 1 Rule 10 – Addition of party – Suit for declaration of title and for declaration that the order dated 10.10.2013 passed by the Commissioner of Endowment in O.A. is illegal and for permanent injunction – Application by the Petitioner of OA who was not made a party to the suit – Allowed – Held, a person may be added as a party to a suit, he should have a direct interest in the subject matter of the litigation whether it raises questions relating to moveable or immoveable property – Impugned order does not suffer from illegality or infirmity warranting interference.

Case Laws Relied on and Referred to :-

1. AIR 1963 SC 786 : Udit Narain Singh Malpaharia Vs. Additional Member Board of Revenue, Bihar & Anr.
2. AIR 1958 SC 886 : Razia Begum Vs. Sahebzadi Anwar Begum & Ors.

For Petitioner : Mr. Suvendu Kumar Ray

JUDGMENT Date of Hearing & Judgment: 30.11.2018

DR. A.K.RATH, J.

This petition challenges the order dated 15.9.2018 passed by the learned 2nd Additional Civil Judge (Sr.Division), Bhubaneswar, whereby and whereunder, learned trial court has impleaded one Jagabandhu Mohanty as defendant.

2. The plaintiff-petitioner instituted the suit for declaration of title, for declaration that the order dated 10.10.2013 passed by the Commissioner of Endowment in O.A.No.3 of 2009 is illegal and permanent injunction. During pendency of the suit, one Jagabandhu Mohanty filed an application under Order 1 Rule 10 C.P.C. to implead him as a party. It is stated that he is the successor of the recorded marfatdar of deity Sri Sri Swapneswar Dev bije Pratapsasan. He filed O.A.No.3 of 2009 before the Commissioner of Endowments under Section 25 of the Orissa Hindu Religious Endowments Act, 1951. Thus he is a necessary party to the suit. The same was objected by the plaintiff. Learned trial court allowed the same.

3. Mr.S.K.Ray, learned Advocate for the petitioner submits that the intervenor is neither necessary or proper party. He is not the successor of marfatdar. He has no interest in the deity property.

4. The submission of Mr.Ray, learned Advocate for the petitioner, is difficult to fathom.

5. The distinction between a necessary party and a proper party is well known. In Udit Narain Singh Malpaharia v. Additional Member Board of Revenue, Bihar and another, AIR 1963 SC 786, the apex Court held that a necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.

6. In Razia Begum v. Sahebzadi Anwar Begum and others, AIR 1958 SC 886, the apex Court held that it is firmly established as a result of judicial decisions that in order that a person may be added as a party to a suit, he should have a direct interest in the subject matter of the litigation whether it raises questions relating to moveable or immoveable property.

7. On the anvil of the decisions cited supra, the instant case may be examined.

8. Admittedly, the intervenor filed an application under Section 25 of the Orissa Hindu Religious Endowments Act, 1951 before the Commissioner of Endowment. According to him, he is the successor of the recorded marfatdar of the deity Sri Sri Swapneswar Dev bije Pratapsasan. He has direct interest in the subject matter of the litigation.

9. In view of the same, the impugned order does not suffer from illegality or infirmity warranting interference of this Court under Article 227 of the Constitution of India. The petition is dismissed.

2019 (I) ILR - CUT- 97

DR. A.K. RATH, J.

CMP NO. 987 OF 2014

BINAPANI JETHI @ BARIK ……..Petitioner

.Vs.

BIJAY KUMAR JETHI & ORS. ……Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Section 10 – Stay of suit – Pre-conditions must be satisfied – Trial court's order stipulating the condition that after impletion of the necessary parties, the petition for stay can be considered – Whether such a condition can be made? – Held, no, the provision of Section 10 is independent and the Provisions of Section 10 and Order 22 Rules 3 & 4 CPC operate in different field – If the conditions enumerated in Section 10 CPC are satisfied, then the Court shall stay the further proceeding of the suit – Whether the suit will fail or abate, it is not the determining factor for deciding the application u/s 10 CPC and while deciding the application u/s 10 CPC, the Court cannot impose any condition.

(Para 12)

Case Laws Relied on and Referred to :-

1. A.I.R.1998 SC 1952 : In Indian Bank Vs.. Maharastra State Co-operative Marketing Federation Ltd.
2. AIR 2005 SC 242 : National Institute of Mental Health & Neuro Sciences Vs. C. Parameshwara.

For Petitioner : Mr.Damodar Deo
For Opp. Parties : Mr.Soumya Mishra

JUDGMENT Date of Hearing & Judgment: 05.12.2018

DR. A.K. RATH, J.

This petition challenges the order dated 4.8.2014 passed by the learned Senior Civil Judge, 1st Court, Cuttack in C.S.No.146 of 2001, whereby and whereunder, learned trial court deferred the hearing of application u/s 10 CPC to stay further proceeding of the suit and imposed conditions on the plaintiff to take steps for appearance of L.Rs of Arjuna Behera.

2. The plaintiff-petitioner instituted C.S.No.146 of 2001 for partition of schedule-B property. The defendants entered appearance and filed an application u/s 10 CPC to stay further proceeding of the suit till disposal of the First Appeal No.224 of 1990 pending before this Court. It is stated that the plaintiff instituted the suit for partition claiming 1/4th share in schedule-B

property which comprises of 5 Lots. Out of 5 Lots, the property covered under Lot No.2 appertains to Hal Settlement Khata No.303, Plot No.296-A0.430 and Plot No.296/942-A0.006 dec. in Mouza-Cuttack Town, Unit No.37, Badambadi. It is further stated that Arjun Behera and his four sons filed T.S.No.86 of 1981 against Dijabara Jethi, father of the plaintiff, defendant nos.1 and 2 and husband of defendant no.3 for declaration of title and confirmation of possession over the property. During pendency of the suit, Arjuna Behera died, whereafter his widow and daughters were substituted. Similarly, after death of Dijabara, the present plaintiff and defendants were substituted as defendant nos.1(a) to 1(d) respectively. They filed a counter claim for permanent injunction, damages and other ancillary reliefs against the plaintiffs. By judgment and decree dated 30.4.1990 and 11.5.1990 respectively, the suit was decreed and counter claim was dismissed. Aggrieved by the said judgment and decree, the L.Rs of Dijabara Jethi filed First Appeal No.224 of 1990 before this Court. The same is sub-judice. In para-5(a) of the written statement, the defendants have specifically pleaded that Ruma Bewa and others, who are the L.Rs of Arjuna Behera, have interest over the property described in Lot No.2 of schedule-B property and figured as defendants in First Appeal No.224 of 1990. The dispute relates to right, title, interest over Lot No.2 of schedule-B property is pending before this Court in First Appeal No.224 of 1990 and adjudication of the dispute in the present suit is fully dependent upon the final result of the aforementioned First Appeal. Accordingly, a prayer is made to stay the further proceeding of the present suit till disposal of First Appeal No.224 of 1990.

3. The plaintiff filed objection denying the assertions made by the defendants. She admitted institution of the suit and pendency of the First Appeal No.224 of 1990 before this Court. It was stated that the plaintiff filed a petition in First Appeal No.224 of 1990 bearing Misc.Case No.53 of 2009 praying that she relinquished her right over the suit property in favour of her brothers and mother and did not want to pursue the appeal as an appellant. The same was allowed. The plaintiff, who was appellant no.2 in the First Appeal No.224 of 1990, was transposed as respondent no.9. It was further stated that the plaintiff filed an application in the suit under Order 23 Rule 1 CPC abandoning her claim in respect of Lot No.2 of schedule-B property. The same was allowed by order dated 2.7.2011. Against the said order, defendant nos.1 and 2 filed W.P.(C) No.21445 of 2011 before this Court. The petition was disposed of on 27.3.2014 modifying the order dated

2.7.2011. Since the plaintiff has already relinquished her right over Lot No.2 of schedule-B property, there is no justification to stay further proceeding of the present suit till disposal of First Appeal No.224 of 1990.

4. The learned trial court came to hold that Lot No.2 of schedule-B property was the subject matter of dispute in T.S.No.86 of 1981. The suit was decreed by declaring the right, title and interest of the plaintiffs over the suit schedule property. Assailing the judgment and decree, the defendants filed First Appeal No.224 of 1990, which is sub-judice before this Court. The result of the First Appeal No.224 of 1990 will be the determining factor to decide the suit for partition in which the property described in Lot No.2 of schedule-B of the plaint is also one amongst the other properties. It further held that the L.Rs of Arjuna Behera, who are respondents in First Appeal No.224 of 1990, are necessary parties in the suit and in their absence, no effective partition can be made. Neither the plaintiffs nor the defendants have filed an application to implead the L.Rs of late Arjuna Behera, particularly when their interest are involved in the present suit. Impleadment of L.Rs of Arjuna Behera in the present suit is badly required for just decision of the case. Held so, it directed the plaintiff to make the L.Rs of Arjuna Behera as defendants in the present suit and deferred the application u/s 10 CPC to stay further proceeding of the suit.

5. Heard Mr.Damodar Deo, learned Advocate for the petitioner and Mr.Soumya Mishra, learned Advocate on behalf of Mr.S.P.Mishra,learned Senior Advocate for opposite parties 1 & 2.

6. Mr.Deo, learned Advocate for the petitioner submits that the Court cannot impose any condition on the plaintiff while deciding an application u/s 10 CPC. The order is not sustainable in the eye of law.

7. Per contra, Mr.Mishra, learned Advocate for opposite parties 1 & 2 submits that the order passed by the learned trial court is perfectly legal, valid and justified. Lot No.2 of schedule-B property is the subject matter of dispute. The result of the First Appeal No.224 of 1990 shall decide the fate of the suit. The L.Rs of Arjuna Behera are respondents in the First Appeal. They are necessary parties. In view of the same, learned trial court has directed the plaintiff to implead them.

8. Before proceeding further, it is apt to refer to Section 10 CPC. Section 10 CPC reads as follows:-

> "10. Stay of suit.-No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court."

9. On a bare reading of Section 10 CPC, it is evident that the following conditions must be fulfilled to attract the provisions of Section 10 CPC.

1. The suit must be between the parties.
2. The matter in issue in the later suit must be directly and substantially the same as in the previous suit.
3. On the date of application, both the suits must be pending.
4. The parties must be litigating under the same title.

10. In Indian Bank v. Maharastra State Co-operative Marketing Federation Ltd., A.I.R.1998 SC 1952, the Apex Court in paragraph-8 of the report held :

> "8……..The object of the prohibition contained in Section 10 is to prevent the Courts of concurrent jurisdiction from simultaneously trying two parallel suits and also to avoid inconsistent findings on the matters in issue. The provision is in the nature of a rule of procedure and does not affect the jurisdiction of the Court to entertain and deal with the later suit nor does it create any substantive right in the matters. It is not a bar to the institution of a suit. It has been construed by the Court as not a bar of the passing of interlocutory orders such as an order for consolidation of the later suit with earlier suit, or appointment of a Receiver or an injunction or attachment before judgment. The course of action which the Court has to follow according to Section 10 is not to proceed with the 'trial' of the suit but that does not mean that it cannot deal with the subsequent suit any more or for any other purpose. In view of the object and nature of the provision and the fairly settled legal position with respect to passing of interlocutory orders it has to be stated that the word 'trial' in Section 10 is not used in its widest sense."

11. In National Institute of Mental Health & Neuro Sciences v. C. Parameshwara, AIR 2005 SC 242, the Apex Court in paragraph-8 of the report held :

> "8. The object underlying section 10 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The object underlying Section 10 is to avoid two parallel trials on the same issue by two Courts and to avoid recording of conflicting findings on issues which are directly and substantially in issue in previously instituted suit. The language of Section 10 suggests that it is referable to a suit instituted in the civil

> Court and it cannot apply to proceedings of other nature instituted under any other statute. The object of Section 10 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The fundamental test to attract section 10 is, whether on final decision being reached in the previous suit, such decision would operate as res judicata in the subsequent suit. Section 10 applies only in cases where the whole of the subject matter in both the suits is identical. The key words in section 10 are "the matter in issue is directly and substantially in issue" in the previous instituted suit. The words "directly and substantially in issue" are used in contra-distinction to the words "incidentally or collaterally in issue". Therefore, section 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of subject matter in both the proceedings is identical."

12. The basic purpose of this section is to protect a person from multiplicity of proceedings as also to avoid conflict decisions.Section 10 CPC is an independent provision. The same is untrammeled by any provision of CPC. Provisions of Section 10 and Order 22 Rules 3 & 4 CPC operate in different field. They embrace the fields which are covered by the conditions embodied therein. The provisions of Order 22 CPC do not in any way circumscribe or limit the operation of Section 10 CPC. If the conditions enumerated in Section 10 CPC are satisfied, then the Court shall stay the further proceeding of the suit. Whether the suit will fail or abate, it is not the determining factor for deciding the application u/s 10 CPC. While deciding the application u/s 10 CPC, the Court cannot impose any condition.

13. Resultantly, the impugned order is quashed. The learned trial court shall decide the application u/s 10 CPC on merit. The petition is allowed. No costs.

2019 (I) ILR - CUT- 101

DR. A.K. RATH, J.

C.M.P. NO. 1545 OF 2018

SANJAY KUMAR DAS .....Petitioner

.Vs.

MUNMUM PATNAIK & ORS. .....Opp. Parties

COURT FEES ACT, 1870 – Section 35 – Notification by Government of Orissa exempting women and others from paying court fee – Suit by a woman who is a domicile of the State of Orissa and became US citizen – Whether she is exempted from payment of court fee – Held, Yes.

"On a bare reading of the notification, it is evident that seven categories of persons are exempted from payment of court fees. Women are exempted from payment of court fees. The language of the notification is clear & explicit. The word 'woman' has not been pre-fixed by any adjective. It takes with its sweep the woman of any status or nationality. The Court cannot interpret the same in a manner which will defeat the purpose of the notification. The plaintiff is a woman. In view of the notification issued by the State of Orissa, she is exempted from payment of court fees". *(Para 5)*

For Petitioner : Mr. Prafulla Ch. Biswal

JUDGMENT Date of Hearing & Judgment : 21.12.2018

DR. A.K.RATH, J.

The core question that falls for determination in this petition is whether a woman, who is a domicile of the State of Orissa and became US citizen, is exempted from payment of court fee ?

2. Since the dispute lies in a very narrow compass, facts need not be recounted in details. Suffice it to say that plaintiff-opposite party no.1 instituted the suit for declaration of title, partition and permanent injunction. The suit is valued at Rs.1,11,84,300/- on which, advolerum court fees of Rs.3,61,931/- is payable. As the plaintiff is a woman, she is exempted from payment of court fees. After appearance, defendant no.1 filed an application stating therein that the plaintiff is a citizen of USA since 1991. She is an NRI. She is not exempted from payment of court fees. Learned trial court rejected the same on 4.12.2018. The instant petition seeks to laciniate the said order.

3. Heard Mr. Prafulla Ch. Biswal, learned counsel for the petitioner.

4. The Government of Orissa, in exercise of power conferred under Section 35 of the Court Fees Act, 1987, issued SRO No.575 of 1994 remitted in the whole of the State of Orissa all fees mentioned in schedule I & II of the Act payable for filing or instituting cases or proceedings in any Court in Orissa the persons named in the clauses (i) to (vii). The same reads as follows:

> "S.R.O. No.575/94 – In exercise of the powers conferred by Section 35 of the Court-fees Act, 1870 (VII of 1870), the State Government do hereby remit in the whole of the State of Orissa all fees mentioned in Schedules I and II to the said Act payable for filing or instituting cases or proceedings in any Court in Orissa by the following categories of persons, namely:

(i) member of Scheduled Castes;
(ii) member of Scheduled Tribes;
(iii) minors;
(iv) persons with disabilities;
(v) persons whose annual income does not exceed one lakh rupees, and
(vi) persons who are otherwise entitled to legal service under the Legal Service Authorities Act, 1987."

5. On a bare reading of the notification, it is evident that seven categories of persons are exempted from payment of court fees. Women are exempted from payment of court fees. The language of the notification is clear & explicit. The word 'woman' has not been pre-fixed by any adjective. It takes with its sweep the woman of any status or nationality. The Court cannot interpret the same in a manner which will defeat the purpose of the notification.

6. The plaintiff is a woman. In view of the notification issued by the State of Orissa, she is exempted from payment of court fees.

7. The impugned order does not suffer from any illegality or infirmity warranting interference of this Court under Article 227 of the Constitution. The petition is dismissed.

2019 (I) ILR - CUT- 103

DR. B.R. SARANGI, J.

OJC NO. 5456 OF 2001

KALIPADA ACHARYA .....Petitioner

.Vs.

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

BORDER SECURITY FORCE ACT, 1968 – Sections 2(d), 9 & 46 read with Boarder Security Force Rules, 1968 – Rule 47 – Petitioner is an employee of BSF – He was charged for committing civil offence under section 354 IPC – Petitioner arrested and in summary trial under the Act by the Summary Security Force Court and dismissed from service – Petitioner challenged the dismissal order before appellate authority – The appellate authority confirmed the punishment – Both the orders challenged in the present writ petition – Whether the offence u/s. 354

IPC can be tried summarily by the Summary Security Force Court ? – Held, Section 46, which deals with civil offences subject to provisions of section 47, only permits to deal with an offence of simple hurt & theft, thereby, except simple hurt & theft, no other offence shall be dealt with summarily, under Rule 47 – As such, the offence under section 354, IPC has been excluded from the purview of the meaning of section 46 of civil offences & can't be triable by a Summary Security Force Court, as classified under section 64 r/w section 70 of the BSF Act, 1968 – Therefore, the Summary Security Force Court is not competent and lacks jurisdiction to try civil offences u/s 46 of the BSF Act, 1968 except simple hurt & theft – Thereby, the punishment so imposed on the petitioner can't sustain in the eye of law.

Case Laws Relied on and Referred to :-

1. (2013) 10 SCC 324 : Deepali Gundu Surwase .Vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED)
2. (2015) 15 SCC 184 : Pawan Kumar Agrawala .Vs General Manager-II and Appointing Authority, State Bank of India.
3. (1999) 1 SCC 759 : Apparel Export Promotion Council .Vs A.K. Chapra.
4. AIR 1976 SC 1785 : Siemens Engg. Mfg. Co. of India Ltd. .VsUnion of India.
5. AIR 1978 SC 597 : Maneka Gandhi .Vs Union of India.
6. AIR 1967 SC 1435 : CIT v. Walchand & Co. (P) Ltd.
7. AIR 1990 SC 1984 : S.N. Mukherjee .Vs Union of India.
8. AIR 1974 SC 87 : Union of India .Vs Mohan Lal Capoor.
9. AIR 2018 ORISSA 162 : Sanjay Kumar Rout .VsState of Orissa.
10. (1975) Supp SCC 1 : Indira Nehru Gandhi .VsRaj Narain.
11. (1974) 1 SCC 424 : Raval & Co. .Vs K.G. Ramachandran.

For petitioner : Mr. Jayant Das, Sr. Advocate, M/s. A.N. Das, A.N. Patnaik, N. Sarkar, R.K. Mohapatra & D.K. Rout,

For Opp. Parties : Mr. D.N. Lenka, Central Govt. Counsel

JUDGMENT Date of Hearing : 30.11.2018 Date of Judgment 07.12.2018

DR. B.R. SARANGI, J.

The petitioner, who was working as constable in the Border Security Force, has filed this writ application seeking following reliefs:-

> *"The petitioner, therefore, most respectfully prays that your Lordships may be pleased to admit this writ application and issue rule NISI to the Opp.Parties to show cause as to why the order dtd.07.3.2001 in Annexure-4 and order dtd.14.9.2001 in Annexure-7 shall not be quashed;*
>
> *And further why a direction shall not be issued to the Opp.Parties directing them to reinstate the petitioner with all financial benefits;*

And on their failing to show-cause or showing insufficient cause issue a writ in the nature of certiorari quashing the order dtd.07.03.2001 in Annexure-4 and order dtd.14.9.2001 in Annexure-7;

And issue a writ in the nature of mandamus or any other appropriate writ directing the Opp.Parties to reinstate the petitioner along with all financial benefits, which he is entitled to."

2. Factual matrix of the case, in hand, is that the petitioner, by following due procedure of selection, was appointed and joined as constable in Border Security Force (BSF) on 02.04.1987 bearing no. 87655462 in 142 BN and posted to 'C' Coy. He was discharging his duty assigned to him and as such there was no adverse remark against him at any point of time. On 27.02.2001, while he was deputed for RP duty at BSF Gate No.2 of 142 BN HQ, Khemkaran, Punjab, he was charged for committing a civil offence under Section 46 of Border Security Force Act, 1968 (in short "BSF Act, 1968"), punishable under Section 354 IPC. On the same day, he was arrested and was under the charge of Guard Commander of Quarters Guards' vide order of Deputy Commandant. Charge sheet was filed against him on 01.03.2001 under Section 46 of BSF Act, 1968 in committing a civil offence alleging outraging the modesty of a woman. Thereafter, a decision was taken by the competent authority for having a trial by Summery Security Force Court and he was intimated, vide letter dated 05.03.2001, to take assistance of any Officer/SO/Legal Practitioner during the trial proceeding. While he was under the charge of Guard Commander he was not able to take assistance of any Officer/SO/Legal Practitioner. During trial on 07.03.2001, the petitioner was given the assistance of one Asst. Commandant. As many as ten witnesses, including the petitioner, were examined during the trial and on the same day he was dismissed from service with immediate effect without financial/pensionary benefit.

2.1 Though the petitioner denied all the allegations, but due to animosity and previous grudge he was falsely implicated. Needless to say, while the petitioner was posted at Gate No.2 on 27.02.2001, he was helping the School children in crossing the road. Seeing the victim girl crossing the road hurriedly, the petitioner took hold of the victim girl, scolded her and helped her in crossing the road. But on the allegation of the minor girl, her father lodged an FIR, on basis of which the petitioner proceeded under Section 46 of the BSF Act, 1968. The victim girl was also examined by the Chief Medical Officer (C.M.O.), 142 BN, B.S.F.. The medical report does not reveal any injury or any type of sexual abuse by the petitioner, but with an

oblique motive, by adopting a trial of summary security force, major penalty of dismissal from service with immediate effect was inflicted on 07.03.2001. The petitioner, after receiving the order of major penalty, preferred statutory appeal on 21.03.2001 before the Director General, Border Security Force-opposite party no.2 with a prayer to set aside the order of punishment of dismissal from service and sought for reinstatement in service with all benefits. The appellate authority, without considering the grievance of the petitioner, rejected the appeal in a cryptic manner vide order dated 14.09.2001 in Annexre-7, hence this writ application.

3. Mr. Jayant Das, learned Senior Counsel appearing along with Mr. N. Sarkar, learned counsel for the petitioner contended that as per the provisions of the BSF Act, 1968 and Rules framed thereunder, Summary Security Force Court is not competent and lacks jurisdiction to try the civil offences under Section 46 of the BSF Act, 1968, except simple hurt and theft. Civil offences under Section 46 of the BSF Act are excluded from the jurisdiction of the Summary Security Force Court. Therefore, the Summary Security Force Court, having no power and jurisdiction to try any offence under Section 46 of the BSF Act, 1968 (other than simple hurt and theft), the punishment/sentences so imposed by it was ab-initio void, illegal, non est and not sustainable in the eye of law. It is further contended that opposite parties have not followed the prescribed procedure and not given adequate opportunity to the petitioner as provided under Rules 54, 63, 101, 151 and 157 of the Border Security Force Rules, 1969 (in short "the BSF Rules, 1969"). Therefore, the impugned sentence/punishment, being not in conformity with Sections 46 and 48 of the BSF Act, 1968 read with Rule 47 of the Rules, and the order of rejection made by the appellate authority, being a non-speaking one without assigning any reason, are to be quashed. It is further contended that the petitioner has been without any gainful employment and is living in penury and thereby, he raises preliminary objection regarding lack of jurisdiction of Summary Security Force Court relating to Section 354, IPC read with Section 46 of BSF Act, 1968 and Rule 47 of the BSF Rules, 1969 and claims for reinstatement in service with all consequential benefits.

To substantiate his contention he has relied upon the judgment of the apex Court in **Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.ED),** (2013) 10 SCC 324 and **Pawan Kumar Agrawala v. General Manager-II and Appointing Authority, State Bank of India** (2015) 15 SCC 184.

4. Mr. D.N. Lenka, learned Central Government Counsel argued with vehemence justifying the punishment imposed on the petitioner and contended that the petitioner, having committed a civil offence, that is to say outraging the modesty of a woman punishable under Section 354 IPC, was tried by Summary Security Force Court keeping in view the gravity of the case, and sentenced to be dismissed from service. It is further contended that on conjoint reading of Section 46 of BSF Act, 1968 read with Rule 47 of Rules, 1969 Summary Security Force Court has jurisdiction to try the civil offence under Section 46 of the BSF Act, punishable under Section 354 of IPC. It is further contended that outraging a modesty of a woman or attempt to sexually molest are to be examined on the broader probabilities of a case and not swayed by insignificant discrepancies or narrow technicalities. Such cases ought to be dealt with great sensitivity.

To substantiate his contention he has relied upon the judgment in **Apparel Export Promotion Council v. A.K. Chapra**, (1999) 1 SCC 759.

5. This Court heard Mr. Jayant Das, learned Senior Counsel appearing along with Mr. N. Sarkar, learned counsel for the petitioner, and Mr. D.N. Lenka, learned Central Government Counsel. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. In view of the above narrated facts, which are undisputed, the following issues are formulated:--

> *(i) Whether the petitioner is guilty of committing civil offence under Section 46 of the Border Security Force Act, 1968 punishable under Section 354, IPC and consequentially whether Summary Security Force Court has got jurisdiction to try such offence?*
>
> *(ii) Whether the appellate authority, while rejecting the appeal of the petitioner, has passed a reasoned and speaking order?*
>
> *(iii) Any other relief or reliefs which the petitioner is entitled to?*

7. To answer issue no.(i) with regard to jurisdiction of the Summary Security Force Court, reliance has been placed on the following provisions of BSF Act, 1968:-

> *"**2(d).** "civil offence" means an offence which is triable by a Criminal Court."*
>
> ***xx** **xx** **xx***
>
> ***2(g)** "Criminal Court" means a Court of ordinary criminal justice in any part of India."*

xx ***xx*** ***xx***

*"**46. Civil offences**.— Subject to the provisions of section 47, any person subject to this Act who at any place in, or beyond, India commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section shall be liable to be tried by a Security Force Court and, on conviction, be punishable as follows, that is to say,—*

(a) if the offence is one which would be punishable under any law in force in India with death, he shall be liable to suffer any punishment, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and

(b) in any other case, he shall be liable to suffer any punishment, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned."

*"**47. Civil offences not triable by a Security Force Court**.— A person subject to this Act who commits an offence of murder or of culpable homicide not amounting to murder against, or of rape in relation to, a person not subject to this Act shall not be deemed to be guilty of an offence against this Act and shall not be tried by a Security Force Court, unless he commits any of the said offences,—*

(a) while on active duty; or

(b) at any place outside India; or

(c) at any place specified by the Central Government by notification in this behalf."

*"**48. Punishments awardable by Security Force Courts**.— (1) Punishments may be inflicted in respect of offences committed by persons subject to this Act and convicted by Security Force Courts according to the scale following, that is to say,—*

(a) death;

(b) imprisonment which may be for the term of life or any other lesser term but excluding imprisonment for a term not exceeding three months in Force custody;

(c) dismissal from the service;

(d) imprisonment for a term not exceeding three months in Force custody;

(e) reduction to the ranks or to a lower rank or grade or place in the list of their rank in the case of an under-officer;

(f) forfeiture of seniority of rank and forfeiture of all or any part of the service for the purpose of promotion;

(g) forfeiture of service for the purpose of increased pay, pension or any other prescribed purpose;

(h) fine, in respect of civil offences;

(i) severe reprimand or reprimand except in the case of persons below the rank of an under-officer;

(j) forfeiture of pay and allowances for a period not exceeding three months for an offence committed on active duty;

(k) forfeiture in the case of person sentenced to dismissal from the service of all arrears of pay and allowances and other public money due to him at the time of such dismissal;

(l) stoppage of pay and allowances until any proved loss or damage occasioned by the offence for which he is convicted is made good.

(2) Each of the punishments specified in sub-section (1) shall be deemed to be inferior in degree to every punishment preceding it in the above scale."

xx xx xx

***"64. Kinds of Security Force Courts**.— For the purposes of this Act there shall be three kinds of Security Force Courts, that is to say,—*

(a) General Security Force Courts;

(b) Petty Security Force Courts; and

(c) Summary Security Force Courts."

xx xx xx

***"69. Composition of a Petty Security Force Court**.— A Petty Security Force Court shall consist of not less than three officers each of whom has held the post of Deputy Superintendent of Police for not less than two whole years."*

***"70. Summary Security Force Court**.— (1) A Summary Security Force Court may be held by the Commandant of any unit of the Force and he alone shall constitute the Court.*

(2) The proceedings shall be attended throughout by two other persons who shall be officers or subordinate officers or one of either, and who shall not as such, be sworn or affirmed."

xx xx xx

***"80. Choice between Criminal Court and Security Force Court**.— When a Criminal Court and a Security Force Court have each jurisdiction in respect of an offence, it shall be in the discretion of the Director-General, or the Inspector-General or the Deputy Inspector-General within whose command the accused person is serving or such other officer as may be prescribed, to decide before which court the proceedings shall be instituted, and, if that officer decides that they shall be instituted before a Security Force Court, to direct that the accused person shall be detained in Force custody."*

8. In exercise of powers conferred by sub-sections (1) and (2) of Section 141 of the Border Security Force Act, 1968, the Central Government framed a rule called "the Border Security Force Rules, 1969", relevant provision of which necessary for proper adjudication of the case, are extracted hereunder:-

***"47. Charges not to be dealt with summarily**.-A charge for an offence under section 14 or section 15 or clauses (a) and (b) of section 16 or section 17 or clause (a) of section 18 or clause (a) section 20 or clause (a) section 24 or section 46(other than that for simple hurt or theft) or a charge for abetment of or an attempt to commit any of these offences shall not be dealt with summarily."*

xx xx xx

***"54. Charges.**-(1) There shall be a separate charge for each offence.*

(2) (a) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once or he may be charged in the alternative with having committed some one of the said offences.

(b) The charge for the more serious offence shall precede the one for the less serious offence.

(3) Each charge shall consist of two parts, namely:

(a) statement of offence, and

(b) particulars of the offence.

(4) The offence shall be stated, if not a civil offence, as nearly as practicable, in the words of the Act, and if a civil offence, in such words as would sufficiently describe that offence.

(5) (a) The particulars shall state the time and place of the alleged offence and the person (if any) against whom, or the thing (if any) in respect of which, it was committed and these should be sufficient to give the accused notice of the matter with which he is charged.

(b) In case such particulars are not sufficient to give the accused notice of the matter with which he is charged, the charges shall also contain such particulars of the manner in which the offence was committed as will be sufficient for that purpose."

xx xx xx

***"63. Preparation of defence by the accused**.- (1) An accused, who has been remanded for trial, shall be afforded proper opportunity for preparing his defence and shall be allowed proper communication with his defending officer or counsel and with his witnesses.*

(2) A defending officer shall be appointed to defend an accused who has been remanded for trial unless the accused states in writing that he does not wish such an appointment to be made.

(3) if the prosecution is to be undertaken by a legally qualified officer or by a counsel the accused shall be notified of this fact in sufficient time to enable him, if he so desires to make arrangement for a legally qualified officer or counsel to defend him.

(4) As soon as practicable after a decision has been taken to place the accused on trial and in any case not less than four days before his trial he shall be given;
(a) a copy of the charge-sheet;

(b) an unexpurgated copy of the record or abstract of evidence showing the passages (if any), which have been expurgated in the copy sent to the senior member;

(c) notice of any additional evidence which the prosecution intends to adduce; and
(d) if the accused so requires, a list of the ranks, names and units of the members who are to form the Court and of any waiting members.

(5) when an accused is given a copy of the charge-sheet and of the record or abstract of evidence in accordance with this rule, he shall:

(a) have the charge explained to him; and

(b) be informed that, upon his making a written request to his Commandant not less than twenty four hours before his trial requiring the attendance at his trial of a witness (other than a witness for the prosecution) whom he desire to call in his defence (such witness to be named by him), reasonable steps will be taken in accordance with these rules to procure the attendance of any such witness at his trial.

(6) The provisions of sub-rules (2) and (3) shall not apply in relation to a trial before a Summary Security Force Court and in relation to such a trial the period of four days referred to in subrule (4) shall be construed as twenty four hours."

xx xx xx

***"101. Procedure on Conviction**.- (1) If the finding on any charge is ''guilty'', then, for the guidance of the Court in determining its sentence, and of the confirming authority in 1. subs by SO 2628(E) dated 25th Nov 2011 considering the sentence, the Court, before deliberating on the sentence, shall, whenever possible, take evidence of and record the general character, age, service, rank, any recognised acts of gallantry or distinguished conduct of the accused, any previous convictions of the accused either by Security Force Court or a criminal court, any previous punishments awarded to him by an officer exercising authority under section 53 or 55 as the case may be; the length of time he has been in arrest or in confinement on any previous sentence, and any decoration, or reward, of which he may be in possession or to which he is entitled.*

(2) Evidence on the above matters may be given by a witness verifying a statement which contains a summary of entries in the service books respecting the accused and identifying the accused as the person referred to in that summary.

(3) The accused may cross-examine any such witness and may call witnesses to rebut such evidence; and if the accused so requests, the service books or a duly certified copy of the material entries therein, shall be produced and if the accused alleges that the summary is in any respect not in accordance with the service books or such certified copy, as the case may be, the Court shall compare the summary

with those books or copy and if it finds that it is not in accordance therewith, shall cause summary to be corrected or the objection of the accused to be recorded.

(4) When all the evidence on the above matters has been given, the accused may address the Court thereon and in mitigation of punishment."

xx xx xx

***"151. Procedure on finding of "Guilty"**.- (1) Where the finding on any charge is "Guilty" the Court may record of its own knowledge, or take evidence of any record, the general character, age, service, rank, and any recognised acts of gallantry, or distinguished conduct of the accused, and previous convictions of the accused either by a Security Force Court, or a Criminal Court, any previous punishment awarded to him by an officer exercising authority under section 53, the length of time he has been in arrest or in confinement on any previous sentence, and any decoration, or reward of which he may be in possession or to which he may be entitled.*

(2) Where the Court does not record the matters mentioned in this rule of its own knowledge, evidence on these matters may be taken in the manner directed in rule 101 for similar evidence."

xx xx xx

***"157. Friend of the accused.-** During a trial at a Summary Security Force Court an accused may take the assistance of any person, including a legal practitioner as he may consider necessary;*

Provided that such person shall not examine or cross-examine witnesses or address the Court."

xx xx xx

***"160. Review of Proceedings**.- The proceedings of a Summary Security Force Court shall, immediately on promulgation be forwarded through the Chief Law Officer, or a Law Officer to the Deputy Inspector General under whom the accused may have been serving."*

***161. Action by the Deputy Inspector-General** - (1) Where the Deputy Inspector-General to whom the proceedings of a Summary Security Force Court have been forwarded under rule 160, is satisfied that injustice has been done to the accused by reason of any grave irregularity in the proceedings or otherwise, he may ,-*

(a) set aside the proceedings of the Court; or

(b) reduce the sentence or commute the punishment awarded to one lower in the scale of punishment given in 1 [Section 48 and return it to the unit of the accused for promulgation].

(2) Where no action under sub-rule (1) has been taken he shall countersign the proceedings 2 (***).

(3) The proceedings shall, after its promulgation 3 [under sub rule (1) or counter signature under sub-rule (2)] be forwarded to the Chief Law Officer for custody."

9. As per the provisions contained in Section 2(d), "civil offence" has been defined to mean an offence which is triable by a Criminal Court. The "Criminal Court" has also been defined under Section 2(g) to mean a Court of ordinary criminal justice in any part of India. Section 46, which deals with "civil offences", stipulates that subject to the provisions of Section 47, any person subject to the BSF Act, 1968, who at any place in, or beyond, India commits any civil offence shall be deemed to be guilty of an offence against the said Act and, if charged therewith under Section 46 of the BSF Act, 1968 shall be liable to be tried by a Security Force Court and, on conviction, be punishable as mentioned in sub-clause (a) and (b) of the said section. Section 47 specifically speaks about the civil offences not triable by a Security Force Court. Section 64 states about kinds of Security Force Courts, namely, (a) General Security Force Courts; (b) Petty Security Force Courts; and (c) Summary Security Force Courts. Sections 65 and 66 deal with power to convene a General Security Force Court and Petty Security Force Court respectively, whereas Section 67 states about the contents of warrants issued under Sections 65 and 66. The composition of General Security Force Court has been prescribed under Section 68. Section 69 deals with composition of a Petty Security Force Court, whereas Section 70 deals with Summary Security Force Court. Section 80 deals with choice between Criminal Court and Security Force Court and stipulates that when a Criminal Court and a Security Force Court have each jurisdiction in respect of an offence, it shall be in the discretion of the Director-General, or the Inspector-General or the Deputy Inspector-General within whose command the accused person is serving or such other officer as may be prescribed, to decide before which Court the proceedings shall be instituted, and if that officer decides that they shall be instituted before a Security Force Court, to direct that the accused person shall be detained in Force custody.

10. Rule 47 of BSF Rules, 1969 speaks about charges not to be dealt with summarily and stipulates that a charge for an offence under section 14 or section 15 or clauses (a) and (b) of section 16 or section 17 or clause (a) of section 18 or clause (a) of section 20 or clause (a) of section 24 or section 46 (other than that for simple hurt or theft) or a charge for abetment of or an attempt to commit any of these offences shall not be dealt with summarily. On close reading of Rule 47 it clearly provides that the charge for an offence under Section 46 (other than that of simple hurt or theft) shall not be dealt with summarily. Meaning thereby, by using the expression "other than", it indicates carving out a specific class from the generic class. Therefore, the

offence under Section 354, IPC, under which a charge has been framed against the petitioner, shall not be dealt with summarily under the provisions of Rule 47 of the BSF Rules, 1969. The use of phrase "other than" had come up for consideration by the apex Court in ***Gem Granites v. CIT, Tamil Nadu***, (2005) 1 SCC 289 and, while considering the provisions contained under Section 80 HHC and 2(b) of the Income Tax Act, 1961, the apex Court held as follows-

> *"The use of phrase 'other than' in clause (b) sub-section 2 of Section 80HHC (as it stood prior to 1991) of the Act indicates the craving out of a specific class from the generic class of 'minerals and ores' which would mean that the specified processed minerals and ores would have been covered by the words 'minerals and ores'."*

11. Applying the same analogy to the present context, Section 46, which deals with civil offences subject to provisions of Section 47, only permits to deal with an offence of simple hurt and theft. Thereby, except simple hurt and theft, no other offence shall be dealt with summarily under Rule 47. As such, the offence under Section 354, IPC has been excluded from the purview of the meaning of Section 46 of civil offences and cannot be triable by a Summary Security Force Court, as classified under Section 64 read with Section 70 of the BSF Act, 1968. Under Section 80 though choice has been left with the authority to approach the Criminal Court or Security Force Court, it only empowers the authority concerned to decided to institute the case before the Security Force Court, then to direct that the accused person shall be detained in Force custody. There is thus no dispute with regard to choice between the Criminal Court and Security Force Court, as prescribed under Section 80 of the BSF Act, 1968, but when a specific provision has been made under Section 46 of the Act with regard to civil offences and read with Rule 47 it is also mentioned which offences are to be charged summarily, the offence committed under Section 354, IPC cannot be included within the meaning of Section 46 of civil offences so as to be tried summarily by Summary Security Force Court.

12. The definition under Section 2(d) specifically states that civil offence means an offence which is triable by Criminal Court and Criminal Court has been defined under Section 2(g) means a Court of ordinary criminal jurisdiction in any part of India. If the civil offence, as defined under Section 2(d), can be tried by Criminal Court, in that case choosing a forum and deciding the same by Summary Security Force Court, cannot have any justification and that too the same is contrary to the provisions of law.

13. Chapter-VIII of BSF Rules, 1969 deals with charges and matters antecedent of trial. Rule 54 deals with charges, whereas Rule 63 deals with preparation of defence by the accused. Rule 101 deals with procedure on conviction and Rule 151 deals with procedure on finding of "Guilty". Unless there is a finding of "guilty" by the Court, who record of its own knowledge, or take evidence of any record, the general character, age, service, rank and any recognized acts of gallantry, or distinguished conduct of the accused, and previous convictions of the accused either by a Security Force Court, or a Criminal Court, any previous punishment awarded to him by an officer exercising authority under Section 53, the procedure of conviction under Rule 101 having not been followed and charges having not been framed under Rule 54, the imposition of punishment cannot have any justification and, therefore, the same is required to be interfered with.

14. In view of the aforesaid facts and circumstances, this Court is of the considered view that the Summary Security Force Court is not competent and lacks jurisdiction to try civil offences under Section 46 of the BSF Act, 1968, except simple hurt or theft. Thereby, the punishment so imposed on the petitioner cannot sustain in the eye of law.

15. Answering issue no.(ii) as it reveals from Annexure-7, the appellate authority, without assigning any reason, rejected the appeal preferred by the petitioner being devoid of merit. This clearly shows non-application of mind by the appellate authority, while passing the impugned order dated 14.09.2001 in Annexure-7.

16. In ***Siemens Engg. Mfg. Co. of India Ltd. v. Union of India***, AIR 1976 SC 1785 the apex Court held that the rule requiring reasons to be recorded by quasi-judicial authorities in support of the orders passed by them is a basic principle of natural justice.

Hon'ble Justice Bhagwati (as he then was), speaking for the Court, observed as follows:

> *"If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative Law, they may have to be so replaced, 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."

The same view has been reiterated in ***Maneka Gandhi v. Union of India***, AIR 1978 SC 597.

17. In ***CIT v. Walchand & Co. (P) Ltd.***, AIR 1967 SC 1435 the apex Court observed:

"The practice of recording a decision without reasons in support cannot but be deprecated."

18. In ***S.N. Mukherjee v. Union of India***, AIR 1990 SC 1984 the apex Court observed:

"Except in cases where the requirement of recording reasons has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions must record reasons in support of their decisions. The considerations for recording reasons are :1) such decisions are subject to the appellate jurisdiction of the Supreme Court under Article 136 as well as supervisory jurisdiction of the High Courts under Article 227; 2) it guarantees consideration by the adjudicating authority; 3) it introduces clarity in the decisions; and 4) it minimizes chances of arbitrariness and ensures fairness in the decision-making process."

19. Reasons being a necessary concomitant to passing an order, the appellate authority can thus discharge its duty in a meaningful manner either by furnishing the same expressly or by necessary reference to those given by the original authority.

In ***Union of India v. Mohan Lal Capoor***, AIR 1974 SC 87 it has been held:

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

The decisions, referred to above, have been followed in ***Sanjay Kumar Rout v. State of Orissa,*** AIR 2018 ORISSA 162, rendered by a Division Bench of this Court, where Dr. Justice B.R. Sarangi is a member.

In view of the above, the impugned order of appellate authority in Annexure-7, having been passed without assigning any reason, cannot sustain in the eye of law.

20. Coming to issue no.(iii), reliance has been placed by the learned counsel for the petitioner in **Deepali Gundu Surwase** (supra), wherein the apex Court held that for wrongful/illegal termination of service, the petitioner was entitled to get back wages. Similar view has also been taken in **Pawan Kumar Agrawala** (supra), wherein the apex Court held that in absence of evidence of being gainfully employed elsewhere, order of reinstatement without full back wages is unjustified. The apex Court directed reinstatement with full back wages from the date of removal till date of attaining the age of superannuation on basis of periodical revisions of salary and pension amount paid, to be deducted from back wages.

21. Reliance has been placed by learned Central Government Counsel on **Apparel Export Promotion Council** (supra) in which sexual harassment in working place was under consideration by the apex Court. While considering the act of superior against female employee that is against moral sanctions and does not withstand test of decency and modesty not amount to sexual harassment and was not a good conduct and not expected behavior from superior officer. Therefore, punishment imposed by the employer commensurate with gravity of his objectionable behavior was sustained by the apex Court. And while sustaining such punishment, the apex Court held as follows:

> *"In a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities of a case and not get swayed by insignificant discrepancies or narrow technicalities or dictionary meaning of the expression molestation. They must examine the entire material to determine the genuineness of the complaint. The statement of the victim must be appreciated in the background of the entire case. Where the evidence of the victim inspires confidence, as is the position in the instant case, the courts are obliged to rely on it. Such cases are required to be dealt with great sensitivity. Sympathy in such cases in favour of the superior officer is wholly misplaced and mercy has no relevance. "*

The law laid down by the apex Court in **Apparel Export Promotion Council** (supra) so far as sexual harassment on women in working place is concerned there is no dispute on that but that ipso facto cannot have any application to the present context, because of the reason that here jurisdiction of the Court is under consideration.

22. In view of the foregoing discussions, the Summary Security Force Court cannot have any jurisdiction to try the offence under Section 354, IPC, considering as civil offence defined under Section 2(d) and clarified under Section 46 of the BSF Act, 1968 and, as such, imposition of punishment of removal from service is absolutely without jurisdiction and nullity in the eye of law. If Section 2(d) defines "civil offences", means the offence which is triable by Criminal Court, and Criminal Court has been defined under Section 2(g), therefore, Section 46 of the BSF Act, 1968 precludes jurisdiction of the Summary Security Force Court. The definition as prescribed under Section 2(d) and (g), do not take away the ordinary and natural meaning of words, but are used: (i) to extend the meaning of a word to include or cover something, which would not normally be covered or included; and (ii) to interpret ambiguous words and words which are not plain or clear. The definition must ordinarily determine the application of the word or phrase defined; but the definition must itself be interpreted first before it is applied. Therefore, a Court should not lay down a rigid definition and crystallize the law, when the legislature, in its wisdom has not done so.

23. In ***Indira Nehru Gandhi v. Raj Narain*****,** (1975) Supp SCC 1, the apex Court held as follows:

> *"A definition clause in a statute is a legislative device with a view to avoid making different provisions of the statute cumbersome. Where a word is defined in the statute and that word is used in a provision to which that definition is applicable, the effect is that wherever the word defined is used in that provision, the definition of the word gets substituted. Where, however, the definition is preceded by the words "unless the context otherwise requires" the connotation is that normally it is the definition given in the section which should be applied and given effect to. This normal rule may, however, be departed from, if there be something in the context to show that the definition should not be applied."*

24. In ***Raval & Co. V. K.G. Ramachandran,*** (1974) 1 SCC 424, the apex Court, while considering the construction of a definition clause, has held as follows:-

> *"A definition clause is not to be taken as substituting one set of words for another or as strictly defining what the meaning of a term must be under all circumstances, but as merely declaring what may be comprehended. It would, therefore, always be a matter of interpretation whether or not a particular meaning given in the definition clause applied to the word as used in the statutory provision. That would depend on the subject and the context. Moreover, it is equally well established that the meaning of words used in a statute is to be found, not so much in strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used and the object which is intended*

to be achieved. The context, the collocation and the object of the words may show that they are not intended to be used in the sense which they ordinarily bear, but are meant to be used in a narrow and limited sense."

25. Applying the same analogy to the present context, if the "civil offence" as defined under Section 2(d) of the definition clearly specifies the offence which is triable by a criminal Court and the criminal Court has been defined in Section 2(g), subsequent meaning or clarifying under Section 46 only to the extent that offence committed by Security Force for simple hurt or theft, the Summary Security Force Court may have jurisdiction but not otherwise.

26. In view of the fact and law discussed above, this Court is of the considered view that the imposition of punishment of dismissal from service in Annexure-4 dated 07.03.2001 by the Summary Security Force Court is without jurisdiction and nullity in the eye of law, and consequential order dated 14.09.2001 in Annexure-7 rejecting the appeal, without assigning any reason and simply stating as "being devoid of merit", cannot sustain in the eye of law and are liable to be quashed and accordingly the same are hereby quashed. As a consequence thereof, the petitioner is entitled to be reinstated in service with full back wages from the date of dismissal from service till date, which shall be implemented within a period of three months from the date of communication of this judgment.

27. The writ petition is thus allowed. No order to costs.

2019 (I) ILR - CUT- 119

DR. B.R. SARANGI, J.

W.P.(C) NO. 12929 OF 2018

THE PRESIDENT, SANJAY MEMORIAL INSTITUTE OF TECHNOLOGY (SMIT) ……..Petitioner

.Vs.

APPELLATE AUTHORITY UNDER THE PAYMENT OF GRATUITY ACT & DY. LABOUR COMMISSIONER, JEYPORE, DIST. KORAPUT & ORS. ...……Opp. Parties

PAYMENT OF GRATUITY ACT, 1972 – Sections 1 and 2 – Provisions under – Definitions vis-a-vis applicability – Claim of gratuity by a Teacher (Welder Instructor in ITI) of a private Educational Institution – The Institute has its own scheme for payment of gratuity – Whether the PG Act applies to Private Educational Institution? – Held, No, the claimant was appointed as Welder (Instructor), who was imparting education to the ITI students of the petitioner institution – If he was discharging duty of a teacher, the P.G. Act, 1972 will not have any application in view of the implementation of the own gratuity scheme by the petitioner and the same having been availed up, the judgments and orders passed by the Controlling Authority as well as appellate authority cannot sustain in the eye of law. (Paras 9 to 11)

Case Laws Relied on and Referred to :-

1. AIR 2004 SC 1426 : (2004) 1 SCC 755 (Ahmedabad Pvt. Primary Teachers' Assn. v. Administrative Officer)
2. 1997 LIC 2543:1998(1) LLJ 181 (AP) : V.Venkateswar Rao v. Chairman of G.B. of SMVM.

For Petitioner : M/s V.Narasingh, R.L.Pradhan, G.Das & J.Samantaray,

For Opp. Parties : Mr. B. Senapati, Addl. Govt. Adv.
M/s B.K.Mohanty, (Mrs) R. Mohanty, S.S.Chhualsingh, G. Sabar & B.Muduli.

JUDGMENT Date of Hearing: 14.12.2018 : Date of Judgment:18.12.2018

DR. B.R. SARANGI, J.

The petitioner; being the president of a registered educational society, namely, Sanjay Memorial Institution of Technology (SMIT), Berhampur; has filed this writ application assailing the judgment and order dated 29.06.2018 passed by the Appellate Authority Under the Payment of Gratuity Act and Deputy Labour Commissioner, Jeypore-opposite party no.1 (communicated to the petitioner vide letter dated 30.06.2018) dismissing P.G. Appeal Case No.01 of 2017 and confirming the judgment and order dated 23.02.2013 passed by the Controlling Authority under Payment of Gratuity Act-cum-Assistant Labour Commissioner, Berhampur allowing claim of opposite party no.3-claimant, directing to pay the amount towards gratuity.

2. The factual matrix of the case, in hand, is that the opposite party no.3-claimant, vide office order dated 14.10.1983, was appointed by the petitioner as a Welder (Instructor) in the scale of pay of Rs.300-470/- per

month with usual D.A. and A.D.A. as admissible to the government servants of Odisha. On attaining age of superannuation, opposite party no.3 retired from service. Soon thereafter, he filed a claim petition in Form-N under Section 4 of the Payment of Gratuity Act, 1972 (for short "P.G. Act, 1972") before the Controlling Authority under Payment of Gratuity Act-cum-Assistant Labour Commissioner, Berhampur-opposite party no.2 against the petitioner stating inter alia that he was appointed and joined as Welder (Instructor) on 04.10.1983; retired from service on 31.07.2008 on attaining age of 58 years and, therefore, entitled to get a total sum of Rs.95,380/- towards gratuity out of which a sum of Rs.30,000/- had already been received by him and balance amount of Rs.65,380/- with interest was to be paid to opposite party no.3 by the petitioner.

2.1 It is further stated that the petitioner is a purely private and unaided educational institution and the government has no control over its management. But opposite party no.2, vide judgment dated 23.02.2013, allowed the claim of opposite party no.3 directing the petitioner to deposit a sum of Rs.65,380/- along with interest of Rs.29,802/- totaling to a sum of Rs.95,182/- within a period of 30 days, failing which 10% interest per annum would be charged over the awarded amount. Challenging the said judgment, the petitioner approached this Court by filing W.P.(C) No. 7306 of 2013, but the same was disposed of by order dated 17.11.2016 directing the petitioner to prefer appeal before the appropriate authority as is available under Section 7(7) of the P.G. Act, 1972. Consequently, P.G. Appeal Case No.01 of 2017 was instituted challenging the judgment and order passed by opposite party no.2, but the appellate authority-opposite party no.1, vide judgment and order dated 29.06.2018 dismissed the appeal and upheld the judgment and order passed by opposite party no.2 by holding that the petitioner institution is an establishment under Section 1(3)(b) of the P.G.Act, 1972; and that even if the petitioner has implemented Death-cum-Retirement Rules, that cannot supersede the applicability of the P.G.Act, 1972, including the amended version, as it is a Central Labour Law passed by the parliament having overriding effect; and that Section 14 clearly mandates that the provisions of the Act or any Rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the said Act. Hence this application.

3. Mr. V.Narasingh, learned counsel appearing for the petitioner contended that the petitioner-SMIT is a private unaided educational institution and opposite party no.3-claimant is a teaching staff appointed by

the managing committee of the said institution. Section 1 of the P.G. Act, 1972 lays down the area of operation of the statute. Sub-section (3) of Section 1 specifies the areas/fields to which the provisions of P.G. Act, 1972 will apply. The said sub-section does not specify educational institutions. Thereby, the petitioner institution does not come within the purview of the P.G. Act, 1972.

It is further contended that clause-6 of sub-section (3) of Section 1 of the P.G. Act, 1972 provides that every shop or establishment within the meaning of any law for the time being in force (in the present case Orissa Shops and Commercial Establishment Act, 1956) in relation to any shop or establishment in a State in which ten or more persons are employed or were employed shall come within the purview of the P.G.Act, 1972. In view of the definition given in Sec.2(4) and 2(8) to the words "Commercial Establishments" and "Establishment", educational institutions in the State do not come within the purview of Orissa Act of 1956. Thereby, the petitioner institution being excluded from the purview of P.G. Act, 1972, the orders so passed by the authorities are without jurisdiction.

It is further contended that the word "employee" has been defined under Section 2(e) of the P.G.Act, 1972. By interpreting the word "employees", the apex Court in its judgment reported in AIR 2004 SC 1426:(2004) 1 SCC 755 (***Ahmedabad Pvt. Primary Teachers' Assn. v. Administrative Officer***) categorically held that teachers of educational institutions are not "employees" and hence they are not covered under the provisions of the P.G. Act, 1972. Thus, the impugned orders are without jurisdiction. It is further contended that the selfsame opposite party no.3-claimant had approached this Court by filing W.P.(C) No. 9492 of 2010 claiming release of differential arrear salary as per the condition of the appointment letter and the learned Single Judge, vide judgment dated 14.03.2018, allowed the benefit to be extended to opposite party no.3-claimant, but the said judgment, having been challenged before the Division Bench in W.A.No. 152 of 2018, has been stayed by order dated 19.04.2018. It is further contended that reliance placed by the authorities in both the impugned orders, on the case of ***V.Venkateswar Rao v. Chairman of G.B. of SMVM***, 1997 LIC 2543:1998(1) LLJ 181 (AP), has no application to the present case. Therefore, seeks for quashing of the impugned orders in Annexure-4 and 5 passed by the Controlling Authority-opposite party no.2 and the appellate authority-opposite party no.1 respectively.

4. Mr. B.Senapati, learned Addl. Government Advocate appearing for the State-opposite parties justifies the orders impugned passed by the competent authorities and has contended that the orders so passed are within the jurisdiction of the authorities concerned and warrant no interference by this Court at this stage.

5. Mr. B.K. Mohanty, learned counsel appearing for opposite party no.3 contended that P.G. Act, 1972 is applicable to opposite party no.3-claimant and as such the impugned orders of determination made by the Controlling Authority and confirmation made by the appellate authority are justified. Consequentially, the opposite party no.3 is entitled to get the benefits, as directed by the authorities concerned, and orders impugned, having been passed well within the jurisdiction of the authorities concerned, may not be interfered with at this stage.

6. This Court heard Mr. V.Narasing, learned counsel for the petitioner; Mr. B.Senapati, learned Addl. Government Advocate appearing for the State opposite parties; as well as Mr.B.K.Mohanty, learned counsel appearing for opposite party no.3; and perused the records. Since it is a certiorari proceeding, as agreed to by the parties, the matter is finally heard and disposed of at the stage of admission.

7. The undisputed fact is that opposite party no.3-claimant was an employee of the petitioner. He was appointed as Welder (Instructor), by virtue of office order dated 14.10.1983 in the scale of pay of Rs.300-470/- with usual D.A. and A.D.A., pursuant to which he joined in service and retired on attaining superannuation at the age of 58 years on 31.07.2008. As per the gratuity scheme prepared by the petitioner, opposite party no.3 was paid a sum of Rs.30,000/- towards gratuity dues. But he approached the Controlling Authority-opposite party no.2 under the P.G. Act, 1972 by filing an application in Form-N under Section 4 of the Act claiming gratuity for an amount of Rs.95,380/-. As opposite party no.3 had, out of Rs.95,380/-, received a sum of Rs.30,000/- from the petitioner towards gratuity, the Controlling Authority, vide judgment and order dated 23.02.2013 in Annexure-4, directed the petitioner to deposit Rs.65,380/- along with interest of Rs.29,802/- totaling to Rs.95,182/- within 30 days from that date. The judgment so passed by the Controlling Authority, being challenged by the petitioner before the appellate authority in P.G. Appeal Case No. 01 of 2017, was confirmed by judgment and order dated 29.06.2018 in Annexure-5.

8. The aforesaid order directing to pay gratuity has been passed by the Controlling Authority-opposite party no.2 on the ground that the petitioner is running an institution in which activity of deputing knowledge is systematically carried on and hence is an "establishment" coming under the purview of P.G.Act, 1972. The opposite party no.3 is an "employee" within the meaning of Section 2 of the P.G. Act, 1972 and thus he is entitled to get payment of gratuity under the said Act. No notification was produced before the Controlling Authority-opposite party no.2 to show that the Government has exempted the petitioner establishment from the purview of payment of gratuity. In absence of such material, direction has been given for payment of gratuity to opposite party no.3-claimant. The findings of the Controlling Authority, as mentioned above, have also been approved by the appellate authority, vide its judgment dated 29.06.2018, while dismissing the appeal, by holding that the petitioner institution is an "establishment" under Section 1(3)(b) of the P.G. Act, 1972. Further, the petitioner's self implemented Death-cum-Retirement Rules cannot supersede the applicability of the P.G.Act, 1972, including its amended version, as it is a Central Labour Law passed by the parliament having overriding effect. The sweep of Sec.14 clearly provides that the right to claim gratuity by an "employee" under the provisions of the Act is not based on any contract, but a right which arises out of the provisions of the statute itself.

9. But fact remains, while coming to the aforesaid findings, the Controlling Authority as well as appellate authority have lost sight of the judgment of the apex Court in the case of ***Ahmedabad Pvt. Primary Teachers' Assn.***, as mentioned supra. A similar question had come up for consideration by the apex Court in the said judgment and in paragraphs 21 and 22 thereof, it has been observed as follows:-

> ***"21.*** *Having thus compared the various definition clauses of the word "employee" in different enactments, with due regard to the different aims and objects of the various labour legislations, we are of the view that even on plain construction of the words and expression used in the definition clause 2(e) of the Act, "teachers" who are mainly employed for imparting education are not intended to be covered for extending gratuity benefits under the Act. Teachers do not answer description of being employees who are "skilled", "semi-skilled" or "unskilled". These three words used in association with each other intend to convey that a person who is "unskilled" is one who is not "skilled" and a person who is "semi-skilled" may be one who falls between the two categories, meaning he is neither fully skilled nor unskilled. The Black's Law Dictionary defines these three words as under:*

> *"Semi-skilled work.—Work that may require some alertness and close attention, such as inspecting items or machinery for irregularities, or guarding property or people against loss or injury.*
>
> *Skilled work.—Work requiring the worker to use judgment, deal with the public, analyze facts and figures, or work with abstract ideas at a high level of complexity.*
>
> *Unskilled work.—Work requiring little or no judgment, and involving simple tasks that can be learned quickly on the job."*
>
> ***22.*** *In construing the abovementioned three words which are used in association with each other, the rule of construction noscitur a sociis may be applied. The meaning of each of these words is to be understood by the company it keeps. It is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them. The actual order of these three words in juxtaposition indicates that meaning of one takes colour from the other. The rule is explained differently: "that meaning of doubtful words may be ascertained by reference to the meaning of words associated with it". [See Principles of Statutory Interpretation by Justice G.P. Singh, 8th Edn., Syn. 8, at p. 379.]"*

Since the "teachers", who are mainly employed for imparting education, are not intended to be covered for extending gratuity benefits under the P.G.Act, 1972, reason being the teachers do not answer the description of being "employees" who are "skilled", "semi-skilled" or "unskilled". Admittedly, opposite party no.3 was appointed as Welder (Instructor), who was imparting education to the ITI students of the petitioner institution. If opposite party no.3 was discharging duty of a teacher, being appointed as Welder (Instructor), then in that case the P.G.Act, 1972 will not have any application.

10. In paragraphs 24 and 25 of the aforesaid judgment the apex Court further observed as follows:-

> ***24.*** *The contention advanced that teachers should be treated as included in the expression "unskilled" or "skilled" cannot, therefore, be accepted. The teachers might have been imparted training for teaching or there may be cases where teachers who are employed in primary schools are untrained. A trained teacher is not described in the industrial field or service jurisprudence as a "skilled employee". Such adjective generally is used for an employee doing manual or technical work. Similarly, the words "semi-skilled" and "unskilled" are not understood in educational establishments as describing nature of job of untrained teachers. We do not attach much importance to the arguments advanced on the question as to whether "skilled", "semi-skilled" and "unskilled" qualify the words "manual", "supervisory", "technical" or "clerical" or the above words qualify the word "work". Even if all the words are read disjunctively or in any other manner, trained or untrained teachers do not plainly answer any of the descriptions of the nature of various employments given in the*

> *definition clause. Trained or untrained teachers are not "skilled", "semi-skilled", "unskilled", "manual", "supervisory", "technical" or "clerical" employees. They are also not employed in "managerial" or "administrative" capacity. Occasionally, even if they do some administrative work as part of their duty with teaching, since their main job is imparting education, they cannot be held employed in "managerial" or "administrative" capacity. The teachers are clearly not intended to be covered by the definition of "employee".*
>
> ***25.*** *The legislature was alive to various kinds of definitions of the word "employee" contained in various previous labour enactments when the Act was passed in 1972. If it intended to cover in the definition of "employee" all kinds of employees, it could have as well used such wide language as is contained in Section 2(f) of the Employees' Provident Funds Act, 1952 which defines "employee" to mean "any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment …". Non-use of such wide language in the definition of "employee" in Section 2(e) of the Act of 1972 reinforces our conclusion that teachers are clearly not covered in the definition.*

A perusal of the aforesaid would go to show that it has been specifically mentioned therein that the teachers are clearly not intended to be covered by the definition of an "employee". Non-use of wide language in the definition of "employee" in Section 2(e) of the P.G. Act, 1972 reinforces the conclusion that teachers are clearly not covered in the definition. Thereby, the provisions contained in P.G.Act, 1972 have no application to such person. In view of such position, if the provisions of the P.G.Act, 1972 are not applicable to opposite party no.3-claimant, any order passed by the Controlling Authority-opposite party no.2, as well as the appellate authority-opposite party no.1, can be construed as without jurisdiction and the same cannot be given effect to.

11. In the above facts and circumstances of the case, this Court is of the considered opinion that in view of the implementation of the own gratuity scheme by the petitioner and the same having been availed up, the judgments and orders passed by the Controlling Authority as well as appellate authority cannot sustain in the eye of law. Therefore, the judgment and order dated 23.02.2013 passed by the Controlling Authority in Annexure-4, and the confirming judgment and order dated 29.06.2018 passed by the appellate authority in Annexure-5 are liable to quashed and accordingly the same are hereby quashed. As such, opposite party no.3-claimant is not entitled to get the benefit of gratuity under the P.G.Act, 1972, in view of the law laid down by the apex Court in ***Ahmedabad Pvt. Primary Teachers' Assn.*** (supra).

12. The writ application is thus allowed. No order to cost.

2019 (I) ILR - CUT- 127

D.DASH

R.S.A. NO. 96 OF 2007

SMT. DAMAYANTI PANDA (SINCE DEAD)
SMT. CHANDRASHREE PANIGRAHI …….Appellant

.Vs.

BIJOY TANTI & ORS. …….Respondents

REGISTRATION ACT, 1908 – Section 17 and 49 read with the provisions of the Transfer of Property Act, 1882 – Documents required to be registered, if not registered – Effect of with regard to its admissibility as evidence – Discussed.

"The main provision in Section 49 provides that any document which is required to be registered, if not registered, shall not affect any immovable property comprised therein nor such document shall be received as evidence of any transaction affecting such property. Proviso, however, would show that an unregistered document affecting immovable property and required by 1908 Act or the Transfer of Property Act, 1882 to be registered may be received as an evidence to the contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by registered instrument. By virtue of proviso, therefore, an unregistered sale deed of an immovable property of the value of Rs. 100/- and more could be admitted in evidence as evidence of a contract in a suit for specific performance of the contract. Such an unregistered sale deed can also be admitted in evidence as an evidence of any collateral transaction not required to be effected by registered document. When an unregistered sale deed is tendered in evidence, not as evidence of a completed sale, but as proof of an oral agreement of sale, the deed can be received in evidence making an endorsement that it is received only as evidence of an oral agreement of sale under the proviso to Section 49 of 1908 Act.

In the case of K.B. Saha and Sons Private Limited v. Development Consultant Limited, (2008) 8 SCC 564, the Apex Court noticed the following is the statement of Mulla in his Indian Registration Act, 7th Edition, at page 189:-

> *".....The High Courts of Calcutta, Bombay, Allahabad, Madras, Patna, Lahore, Assam, Nagpur, Pepsu, Rajasthan, Orissa, Rangoon and Jammu & Kashmir; the former Chief Court of Oudh; the Judicial Commissioner's Court at Peshawar, Ajmer and Himachal Pradesh and the Supreme Court have held that a document which requires registration under Section 17 and which is not admissible for want of registration to prove a gift or mortgage or sale or lease is nevertheless admissible to prove the character of the possession of the person who holds under it....."*

The Court then culled out the following principles:-

"1. A document required to be registered, if unregistered is not admissible into evidence under Section 49 of the Registration Act.

2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.

3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.

4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immovable property of the value of one hundred rupees and upwards.

5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose."

To the aforesaid principles, one more principle may be added, namely, that a document required to be registered, if unregistered, can be admitted in evidence as evidence of a contract in a suit for specific performance.

In the backdrop of the above legal proposition, in my considered view, when a person comes to possess the land of another, particularly claiming to have derived the right, title and interest under a transaction evidenced by a document, which is inadmissible in evidence, the same cannot even be looked into for the purpose that the delivery of possession of the land has been made in favour of a person so as to allow him/her to possess the said land as its owner thereunder as admittedly the ownership inspite of said document coming into being continued to remain with the executant. The ownership having not been transferred under a document as is mandatorily required under law, even the owner of the land in question in that way cannot clothe the other with the ownership of the property in question at his desire without being in accordance with law. The possession, even if so delivered, thus can never be said to have been so taken as that of the owner. Therefore, the person coming to possess the land and continuing as such on that basis cannot be said to have possessed the land by disowning the ownership of the vendor. Thus in my considered view, it is in the nature of precarious possession. In such cases, where the transaction is not invalid but is one which is legally not permissible for being looked into for the purpose, there is no question of treating the parties as vendor and vendee. So any further deed/act done pursuant to it, has to be viewed in that light so long it is claimed such. In order to claim that so called possessor as shown in the transaction has acquired title over it by adverse possession, it is then incumbent upon him/her to prove through acceptable evidence that after that initial entry over the land, someday, the possessor having abandoned his/her claim under that document having no value in the eye of law, and shunning that nature of possession altogether, started to possess the land on his own denying the title of the vendor to his knowledge exercising all such rights as

owners openly, peacefully and without any interruption for upwards of the prescribed period. This being not the case of the defendant no.1, this Court finds no such fault in the ultimate result as has been recorded in the suit." (Paras 15 & 16)

For Appellant : M/s.S.P.Mishra, S.Mishra, S.Dash, S.Nanda, B.Mohanty, S.K.Mohanty, A.K.Dash & S.S.Kashyap

For Respondents : M/s.R.K.Mohanty, S.Panigrahi, B.Sahoo

JUDGMENT Date of Hearing :16.08.2018 Date of Judgment: 19.11 .2018

D.DASH, J.

This appeal under section 100 of the Code of Civil Procedure (for short, called as "Code") has been filed by one of the unsuccessful defendants of T.S. No.7 of 2002 on the file of the learned Civil Judge, Senior Division, Rourkela.

The appellant, in this appeal, has called in question the judgment and decree passed by the learned Ad hoc Additional District Judge, Fast Track Court, Rourkela in R.F.A. No.33 of 2014 of 2005-06 whereby the judgment and decree passed by the learned Civil Judge, Senior Division, Rourkela in the suit, as above noted, have been confirmed. The suit filed by the respondent nos.1 to 7 stands decreed directing the appellant to give delivery of vacant possession of the suit land to the respondents (plaintiffs).

2. It is pertinent to state here that the original plaintiff no.1, Birbal Tanti having died during the suit, the present respondent nos.1 and 2 have come to be substituted and pursued the suit as also contested the appeal joining with other plaintiffs, who are the legal heirs of Manobadh Tanti. It may also be stated here that a daughter of Birbal has been arrayed as a defendant as she had not joined with the other legal heirs of the deceased-plaintiff no.1.

3. For the sake of convenience, in order to bring in clarity and avoid confusion, the parties hereinafter have been referred to as they have been arraigned in the trial court.

4. The plaintiff's case is that land under plot under nos.694 and 695 being the Government land had been allotted in favour of Birbal Tanti, the original plaintiff no.1 and his brother Manobadh Tanti dead. In pursuance of the implementation of the rehabilitation scheme floated by the Government of Orissa during establishment of the Steel Plant at Rourkela in or around the year 1959 for extending the benefits to the land losers whose land had been acquired for the purpose, the land under two plots as above had been so

allotted to Birbal and Manobadh. It is stated that the original plaintiff no.1 and his brother Manobadh after said allotment, had put up a Kacha house over there and stayed till the year 1966; whereafter they shifted to the quarters allotted to them by the plant authority. It is next stated that Srinath Panda, the husband of defendant no.1 having the necessity and need, requested the plaintiff no.1 and his brother Manobadh to permit him to occupy said Kacha house, which fell vacant after they shifted to the quarters allotted by the plant authority and that was then permitted. It has also been pleaded that on his request to allow him to construct a building over the suit land, the plaintiff no.1 and his brother had also so permitted to accordingly go ahead with the condition that after occupying the said building for a period of 25 years without payment of any rent/charges, Srinath Panda or his legal representatives, as the case may be, would pay the house rent has as would then be assessed. Agreeing with such terms and condition, Srinath Panda possessed suit land and occupied the Kacha house first and then constructed a pucca house. It is the case of the plaintiffs that after the death of Srinath, his wife stepped into the shoes of her husband and then continued to reside therein as before. In the year 2001, the defendant no.1 instituted Title Suit No.3 of 2001 for declaration of her right, title and interest in so far as the suit land is concerned arraigning the plaintiff no.1 as the defendant. In the said plaint filed in that suit, she had claimed to be armed with an agreement for sale in her favour and accordingly, having remained in possession of the property in question stretching over a long period, it was asserted that title over the property had been acquired by her by way of adverse possession.

It is the case of the plaintiff that no house rent has been paid from the side of the defendant no.1 towards occupation of the said house, as agreed upon and thus there is violation of the condition imposed at the time of grant of permission. In view of that, the plaintiff has sought for a decree directing the defendant no.1 to hand over vacant possession of the suit land with the house standing over.

5. The defendant no.1, by filing written statement, contested the suit. She admitted the allotment of the said house in favour of the plaintiff no.1, Birbal and his brother Manobadh. But while admitting the possession of the suit land by the plaintiff and his brother, it has been stated that the same was upto the month of February, 1960.

6. The trial court analysing the evidence on record, has held the plaintiff's entitlement to a decree for eviction.

The first appeal filed by the unsuccessful defendant no.1 has been dismissed and for that reason, the defendant no.1 has filed the second appeal.

7. The appeal has been admitted on the following substantial questions of law:

> *(i) Whether the learned courts below committed legal error in not considering the provisions of Section 27 read with section 65 of the Limitation Act while deciding the issue of limitation?*
>
> *(ii) Whether learned courts below were in legal error in not taking note of the fact that there was no notice under Section 106 of the T.P.Act before filing the suit for eviction?*
>
> *(iii) Whether the findings of the learned courts below that possession of the defendants over the suit land is permissive in nature, is legally incorrect because of the finding of the said courts that defendants had stopped paying rent as well as had raised permanent structure over the suit land basing on an unregistered document."*

8. Learned counsel for the appellant, in attacking the finding of the courts below on issue no.3, submitted that when the courts below, in clear terms, have not found the plaintiffs to be having the title over the land in suit, such a decree for the eviction of the defendant from the same ought not to have been passed when the defendant no.1 has been found to be in possession of the suit land since long putting up structures over these.

He further submitted that on the face of the evidence of long settled possession of the suit land by the defendant, on the failure of the plaintiffs to establish their title over the same, the plaintiffs suit for eviction is liable to be dismissed, more particularly when both are having same relationship with the original owner, i.e., State with respect to their claim of possession of the suit land and in that view of the matter, anybody other than the rightful owner, has no right to evict the defendant and come to possess.

He, therefore, submitted that the substantial questions of law are to be answered in favour of the defendants and accordingly, he urged for setting aside the judgment and decree passed by the courts below.

9. Learned counsel for the respondent no.1 submitted all in favour of the findings recorded by the courts below. He submitted that the defendant no.1 having projected a case of adverse possession has admitted the antecedent

title of plaintiffs over the suit land and, therefore, in the suit, she having failed to establish the case of acquisition of title by adverse possession is extinguishment of the title of the plaintiffs, the decree for eviction has been rightly passed.

10. In order to search the answers to the substantial questions of law by duly addressing the above rival contentions, first of all it is felt necessary to have a glance at the rival pleadings which are relevant for the purpose.

It has been pleaded in paragraphs 1 and 2 of the plaint:

> *"1. That, the properties, the details of which are more fully given in Schedule-'A' of this plaint and which are hereinafter called "the Suit land" were originally Govt. Lands. During establishment of Rourkela Steel Plant, the suit land was allotted in favour of the Plaintiff No.1 and his deceased brother Manbodh Tanti under the rehabilitation Scheme of Govt. of Orissa. To be more particular, it may be stated here that suit Plot No.694 was allotted in favour of Late Manbodh Tanti and suit Plot No.695 was allotted in favour of the Plaintiff No.1 under the aforesaid scheme. Thus, the plaintiff No.1 and his above named deceased brother lawfully acquired the suit land from the State Government in the year 1954; and*
>
> *2. That, the plaintiff No.2 to 5 are the widow, sons and daughter of Late Manbodh Tanti who died in the year, 2000, hence the Plaintiff No.2 to 5 being the legal heirs of late Manbodh Tanti have lawfully inherited suit Plot No.694 and accordingly all the plaintiffs became the lawful owners of the entire suit land as per law."*

Countering the above plaint averments, it has been pleaded in paragraph 3 and 5 of the written statement that:-

> *"3. That, as regards allegations in paragraph no.3 & 4 of the plaint the defendant begs to state that the plaintiff and his deceased brother Manbodh Tanty possessed the suit land after the same was delivered to them till February, 1960. The allegation regarding construction of Kacha house by the plaintiff is not admitted and hence the plaintiff is put to strict proof thereof. The plaintiff and his deceased brother never remained in possession of any Kacha house over the suit land till 1966 or left the same under the lock and shifted to their allotted quarters of the Rourkela Steel Plan and hence the allegations of the para 3 and 4 are denied.*
>
> *xx xx xx*
>
> *5. That, the defendants strongly denies the allegations made in para no.6, 7 and 8 as false fabricated and concocted. As stated above neither the plaintiff no.1 nor his deceased brother Manbodh Tanty had any right and interest over the suit land. The suit land was only provisionally allotted to them without conveying right, title and interest in respect of the same, when they parted possession of the suit land in favour of the husband of the defendant during 1960's."*

11. On the above rival case projected by the parties, when it stands admitted that the plaintiff no.1 and Manobadh having been provisionally allotted with the land in suit were in possession and had delivered the possession of the same to the defendant no.1; in pursuance of a document coming into being, the plaintiff's case can only be defeated when the defendant proves either a case of acquisition of title by adverse possession in extinguishment the right, title and interest of the plaintiffs or when the defendant establish that she is possession the land in suit on the basis of any such other acquired right to do so which is subsisting, at least standing as a shield sufficient enough to thwart the sword blow from the side of the plaintiffs. In that event, the plaintiff's suit has to fail.

12. The defendants have projected their case as under:

> *"17. That, the facts constituting the issue between the plaintiffs and defendant are set out below:-*
>
> *a) That, the plaintiff No.1 and his deceased brother Manbodh Tanty were allotted with Plot Nos.695 and 604 respectively in Jhirpani Resettlement Colony measuring an area of 11 (eleven) decimals in total. The plaintiff No.1 was employed with R.S.P. on consideration of displaced person quota from his family. During those period the husband of the defendant gained acquaintance with plaintiff No.1 and through him with his brother Manbodh Tanty. The aforesaid brothers used to remain in wants seeking money on credits and they started visiting the house of the defendant seeking credit. The defendant and her husband initially gave hand loans of small quantity to them but on demand of payment both the brothers offered the above stated two plots given to them by the Govt. on rehabilitation scheme. The used to acknowledge the receipt of money in writing in various forms and even offered to execute the registered instruments and plain paper writing evidencing receipt of money from the defendant and her husband. Due to demand of repayment both the plaintiff No.1 and his deceased brother delivered vacant possession of the suit land in favour of the defendant and her husband and that is how the suit land came into the exclusive physical possession of the Defendant and her husband. The plaintiffs and their deceased brother thereafter occupied portions of vacant land in the same locality and started living there with their family since the year 1962-63.*
>
> *b) That, the defendant and her husband, sometime after coming into the occupation over the suit land constructed a pucca house thereon and remained in physical possession thereof peacefully without any hindrance from any quarters, whatsoever, including that of the plaintiffs as well as the Govt. of Orissa, the true and the supreme owner of the suit land.*
>
> *c) That, the defendant along with her husband till his death enjoyed the suit land by occupying the residential house to the conscious knowledge and sight of the whole world including that of the true owner continuously since the year 1962-63*

without any manner of objection or disturbance from any person or authority till today excepting the claim of the plaintiff as on the date of the suit and never prior to that. Hence the defendant has acquired and perfected lawful rights, title and interest over the suit land by her exclusive & unhindered continuous possession for more than 40 (Forty) years by dint of her own right."

13. Coming to the evidence on record, it is seen from the evidence of D.W.1 that he had learnt from Srinath Panda that Birbal and Manbodh delivered absolute possession of the land to the defendant no.1 conveying lawful title under an outright sale of the same for valuable consideration. It has been stated by D.W.2 that he had learnt from his grandfather that Birbal and Manbodh, after taking possession of the land from the Government, did not stay there by constructing house and sold away the same to defendant no.1 in the year 1960.

14. Let us now have a glance at the evidence of defendant no.1. it is stated that her husband, after discussion, decided to purchase the suit land in her name so as to settle at Rourkela. It is further stated that her husband had paid Rs.500/- for each plot to Birbal and Manbodh, who accepted the same and delivered possession thereof to her on 14.02.1960. It is further stated that memorandums had been prepared evidencing such transaction and such memorandums had been scribed by one Dilabar Badnaik. It is her further evidence that after the same, the land in question has been in her possession and she has been continuing as such all through being its owner. These two memorandums have been marked as Exts.A and B and those are dated 14.02.1960. Both being written on plain papers and are said to be the memorandums of sale; first one said to have been executed by Birbal and the second one by Manobadh. So, having proved these two documents, its now clear that the claim of the defendant no.1 in so far as the suit land is concerned is founded upon said on purchase under those two documents. In that view of the matter, the defendant no.1 cannot take the advantage of the absence of any document of title in favour of Birbal and Manbodh. It is thus clear that in the event the defendant no.1 fails to prove her title and as such the right of possession, the only option remains for the court is to pass a decree for eviction. Accepting said case of the defendant no.1; the documents being unregistered are inadmissible in evidence since it is stated that each plot was then valued at Rs.500/-, which was the consideration involved in the each transaction. So, the question now arises as to even assuming the defendant no.1 to have remained in possession of the property pursuant to such transactions which are ipso facto not cognizable by the

Court of law, can she advance a claim of acquisition of title by adverse possession when admittedly by virtue of those documents, no title over the land in question can be said to have passed on to the hands of defendant no.1.

15. Section 17 of the Registration Act, 1908 Act is a disabling section. The documents defined in clauses (a) to (e) therein require registration compulsorily. Accordingly, sale of immovable property of the value of Rs. 100/- and more requires compulsory registration. Part X of the 1908 Act deals with the effects of registration and non- registration.

Section 49 gives teeth to Section 17 by providing effect of non-registration of documents required to be registered. Section 49 reads thus:

> *"S.49.- Effect of non-registration of documents required to be registered. No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall -*
>
> *(a) affect any immovable property comprised therein, or*
>
> *(b) confer any power to adopt, or*
>
> *(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:*
>
> *Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (1 of 1877), or as evidence of any collateral transaction not required to be effected by registered instrument."*

The main provision in Section 49 provides that any document which is required to be registered, if not registered, shall not affect any immovable property comprised therein nor such document shall be received as evidence of any transaction affecting such property. Proviso, however, would show that an unregistered document affecting immovable property and required by 1908 Act or the Transfer of Property Act, 1882 to be registered may be received as an evidence to the contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by registered instrument. By virtue of proviso, therefore, an unregistered sale deed of an immovable property of the value of Rs. 100/- and more could be

admitted in evidence as evidence of a contract in a suit for specific performance of the contract. Such an unregistered sale deed can also be admitted in evidence as an evidence of any collateral transaction not required to be effected by registered document. When an unregistered sale deed is tendered in evidence, not as evidence of a completed sale, but as proof of an oral agreement of sale, the deed can be received in evidence making an endorsement that it is received only as evidence of an oral agreement of sale under the proviso to Section 49 of 1908 Act.

In the case of K.B. Saha and Sons Private Limited v. Development Consultant Limited, (2008) 8 SCC 564, the Apex Court noticed the following is the statement of Mulla in his Indian Registration Act, 7th Edition, at page 189:-

> *".....The High Courts of Calcutta, Bombay, Allahabad, Madras, Patna, Lahore, Assam, Nagpur, Pepsu, Rajasthan, Orissa, Rangoon and Jammu & Kashmir; the former Chief Court of Oudh; the Judicial Commissioner's Court at Peshawar, Ajmer and Himachal Pradesh and the Supreme Court have held that a document which requires registration under Section 17 and which is not admissible for want of registration to prove a gift or mortgage or sale or lease is nevertheless admissible to prove the character of the possession of the person who holds under it....."*

The Court then culled out the following principles:-

> *"1. A document required to be registered, if unregistered is not admissible into evidence under Section 49 of the Registration Act.*
>
> *2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.*
>
> *3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.*
>
> *4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immovable property of the value of one hundred rupees and upwards.*
>
> *5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose."*

To the aforesaid principles, one more principle may be added, namely, that a document required to be registered, if unregistered, can be admitted in evidence as evidence of a contract in a suit for specific performance.

16. In the backdrop of the above legal proposition, in my considered view, when a person comes to possess the land of another, particularly claiming to have derived the right, title and interest under a transaction evidenced by a document, which is inadmissible in evidence, the same cannot even be looked into for the purpose that the delivery of possession of the land has been made in favour of a person so as to allow him/her to possess the said land as its owner thereunder as admittedly the ownership inspite of said document coming into being continued to remain with the executant. The ownership having not been transferred under a document as is mandatorily required under law, even the owner of the land in question in that way cannot clothe the other with the ownership of the property in question at his desire without being in accordance with law. The possession, even if so delivered, thus can never be said to have been so taken as that of the owner. Therefore, the person coming to possess the land and continuing as such on that basis cannot be said to have possessed the land by disowning the ownership of the vendor. Thus in my considered view, it is in the nature of precarious possession. In such cases, where the transaction is not invalid but is one which is legally not permissible for being looked into for the purpose, there is no question of treating the parties as vendor and vendee. So any further deed/act done pursuant to it, has to be viewed in that light so long it is claimed such. In order to claim that so called possessor as shown in the transaction has acquired title over it by adverse possession, it is then incumbent upon him/her to prove through acceptable evidence that after that initial entry over the land, someday, the possessor having abandoned his/her claim under that document having no value in the eye of law, and shunning that nature of possession altogether, started to possess the land on his own denying the title of the vendor to his knowledge exercising all such rights as owners openly, peacefully and without any interruption for upwards of the prescribed period. This being not the case of the defendant no.1, this Court finds no such fault in the ultimate result as has been recorded in the suit.

The substantial questions of law are accordingly answered against the defendant no.1.

17. In the wake of aforesaid, appeal stands dismissed and in the facts and circumstances without cost.

2019 (I) ILR - CUT- 138

D.DASH

RVWPET NO. 190 OF 2015

ABHAYA KUMAR BADJENA & ORS. .....Petitioners

.Vs.

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

CODE OF CIVIL PROCEDURE, 1908 – Order 47, Rule 1 – Review application – Second appeal not admitted as there was no substantial question of law – Plea that while considering the second appeal for admission this Court failed to appreciate the established position of law and that the Court while appreciating the matter has not read the plaint as a whole and only picking out a sentence in isolation and other stray sentences as have been referred to by the learned counsel for the State has been swayed away to pass the order that the appeal does not merit admission – Prayer for review – Scope of – Held, it is settled position of law that a review by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but it only lies when there appears errors apparent on the face of record – A judgment may be open to review, *inter alia*, if there is a mistake or an error apparent on the face of the record – An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record, justifying the court to exercise its power of review – It is not permissible for an erroneous decision to be reheard and corrected – It must be remembered that a review petition has a limited purpose and cannot be allowed to be "an appeal in disguise".

Case Laws Relied on and Referred to :-

1. (1997) 8 SCC 715 : Parsion Devi Vs. Sumitri Devi.
2. AIR 1964 SC 1372 : Thungabhadra Industries Ltd. Vs. Govt. of A.P.
3. (1995) 1 SCC 170 : Meera Bhanja Vs. Nirmala Kumari Choudhury.
4. (1979) 4 SCC 389 : Aribam Tuleshwar Sharma Vs. Aribam Pishak Sharma.
5. (2017) 4 S.C.C. 692): Sasi (Dead) through L.Rs. Vs. Aravindakshan Nair & Ors.

For Petitioners : M/s. B.Pattnaik, S.K.Swain,B.Rath, A.Patnaik.
For Opp.parties : Addl. Standing Counsel.

JUDGMENT Date of Hearing : 20.08.2018 Date of Judgment : 20.11.2018

D.DASH. J.

The petitioner-appellants, by filing this application under section 114 read with Order 47, Rule 1 of the Code of Civil Procedure, has prayed for

review of the order dated 04.09.2015 passed by this Court in Regular Second Appeal No.340 of 2010.

Learned counsel for the petitioners-appellants submits that the order by which this Court has refused to admit the Second Appeal finding involvement of no such substantial question of law in the case, suffers from the vice of error apparent on the face of record.

He further submits that while going for searching out the substantial question of law, this Court has failed to appreciate the established position of law that the Civil Court can go beyond the settlement entry to find out as to who are the real title holders of the land in question. It is also submitted that the Court while appreciating the matter has not read the plaint as a whole and only picking out a sentence in isolation and other stray sentences as have been referred to by the learned counsel for the State has been swayed away to pass the order that the appeal does not merit admission. According to him, for non-consideration of the above aspects, there arises error apparent on the face of the record so as to review to the said order.

Learned counsel for the State submits all in favour of the order. According to him, the grounds taken in the petition as also urged by the learned counsel for the petitioner-appellants for review are untenable.

It is settled position of law that a review by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but it only lies when there appears errors apparent on the face of record.

In **Parsion Devi vs. Sumitri Devi**: (1997) 8 SCC 715, the Apex Court after referring to **Thungabhadra Industries Ltd. vs. Govt. of A.P**.: AIR 1964 SC 1372, **Meera Bhanja v. Nirmala Kumari Choudhury**: (1995) 1 SCC 170 and **Aribam Tuleshwar Sharma vs. Aribam Pishak Sharma**: (1979) 4 SCC 389 has held that under order 47 rule 1 of the Code, a judgment may be open to review, *inter alia*, if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record, justifying the court to exercise its power of review under order 47 rule 1 of the Code. In exercise of the jurisdiction under order 47 rule 1 of the Code, it is not permissible for an erroneous decision to be "reheard and corrected." It must be remembered that a review petition has a limited purpose and cannot be allowed to be "an appeal in disguise".

In case of **Sasi (Dead) through L.Rs. Vrs. Aravindakshan Nair and Others**, *(2017) 4 S.C.C. 692)*, while stating the nature, scope and ambit of power to be exercised, the Apex Court has further stated that the error has to be self-evident and not those being found out by a process of reasoning.

Keeping in view the settled principles of law as aforesaid, now going to consider the submissions made, para-5 and 6 of the order which have the bearing are to be referred to. Given a careful reading to the order, it is seen that at para-5, the substantial questions of law as projected by the appellants for the purpose of admission of appeal have been clearly noted and in the next paragraph-6, the rival case has been examined with reference to the evidence on record and discussion of the same as has been made by the courts below for consideration as to whether those two substantial questions of law noted in para 5 do arise in the case in hand for being so answered upon hearing.

So far as issue no.2 in the suit is concerned, this Court has come to a conclusion that the properties having vested with the State free from all encumbrances as per the provision of the O.E.A. Act and no such right of the plaintiffs or their predecessors having been recognized by the State, further even in the settlement of the year 1973 which has prevailed over the earlier record of right, the findings recorded by the courts below on those scores have been found to be in order.

Going to the next issue, upon detail discussion, it has been found that the findings recorded by the courts below on the score that the suit land is communal, recorded as 'Samsan' as kisam and Sarbasadharan has not been the outcome of perverse of appreciation of evidence and without being the alive to the settled law holding the field.

The decisions cited by the learned counsel for the petitioner-appellants have been noted in the judgment and the same having been gone through, this Court has found that those do not come to the aid of the petitioner-appellants.

For all the aforesaid and keeping in view the settled position of law as discussed, this Court finds no such error apparent on the face of record so as to say that this review application merits acceptance. The RVWPET is accordingly dismissed. No order as to cost.

2019 (I) ILR - CUT- 141

B. RATH, J.

M.A.C.A. NO. 218 OF 2014

THE B. M., BAJAJ ALLIANZ GENERAL INSURANCE COMPANY LTD. & ANR. .....…Appellants

.Vs.

KHIRABATI MAHAKUR & ORS. ……..Respondents

MOTOR VEHICLES ACT, 1988 – Section 173 – Appeal by Insurance Company questioning the liability to make good of the award – Accident occurred on 29.04.2010 – Cheque towards insurance premium was given on 25.03.2010 and cheque got bounced for insufficient fund – Intimation was given by the Bank on 10.04.2010 with intimation of dishonour to both parties – Held, by the date of accident, there was no valid policy – Insurance Company not liable for payment of the award amount.

Case Laws Relied on and Referred to :-

1. 2012 (3) T.A.C. 8 (S.C.): United India Insurance Company Ltd. Vs. Laxamamma & Ors.

For Appellants : M/s. Adam Ali Khan & S.K. Mishra
For Respondent Nos.1 & 7 : None
For Respondent Nos. 2 & 6 : M/s. J. Sahu, J.N. Panda

JUDGMENT Date of Hearing & Judgment : 19.11.2018

B. RATH, J.

This appeal involves a challenge to the impugned judgment and award dated 16.12.2013 passed in M.A.C. Case No.100/81 of 2010-12 by the learned Additional District Judge-cum-M.A.C.T., Balangir directing the Insurance Company to pay compensation of Rs.2,27,400/- to the Claimants-respondents within three months along with interest @ 7% per annum from the date of application, i.e., 21.06.2010 till the actual payment is made.

2. Short background involving the above Motor Accident Claim Case is that the Claimant-Respondent Nos.1 to 6 filed application vide M.A.C. Case No.100/81 of 2010-12 bringing in the facts that on 29.04.2010 at about 5.15 p.m. while the deceased was coming to Rugudikhal Chowk for supply of milk to the hoteliers by his bicycle, the offending vehicle bearing registration No.CG-12C-4111 ran from Balangir side towards Bargarh in a very rash and

negligent manner, dashed him near village- Budhipadar on N.H-201, for which the deceased sustained severe bleeding injury on his head and succumbed to the injury sustained at the spot. It is claimed that at the time of death of the deceased he was a bachelor and he was working as a milkman and was earning a sum of Rs.6000/- per month. It is in the premises of rash and negligent driving by the offending vehicle and death involving the offending vehicle, the Claimants-respondent Nos.1 to 6 claimed financial compensation of Rs.5,00,000/- involving the Insurance Company and bringing a case involving an insured vehicle.

On their appearance, the Insurance Company in filing the written statement vehemently challenged the liability aspect on the premises that grant of policy was subject to realization of the premium amount. It was the specific case of the Insurance Company, the appellant herein was that the premium involving the Insurance was received by way of cheque bearing No.569236 drawn on State Bank of India, Balco Township, dated 25.03.2010 and the same was presented for encasment, but it was dishonoured as per the intimation of the Bank vide letter dated 10.04.2010. On the premises of dishonour of the cheque submitted by the policy holder, the Insurance Company prayed the lower Court for exonerating the Insurance Company from liability. On conclusion of the argument, the learned Additional District Judge-cum-MACT, Balangir however passed an award in favour of the Claimants-Respondents fixing quantum as well as with saddling of liability on the appellants, the Insurance Company.

3. On reiteration of the stand taken in the Court below, Mr. Khan, learned counsel appearing for the appellants-Insurance Company submitted that there has been no proper consideration of the materials available on record and the impugned award even stands contrary to the materials available on record as well as the pleadings of the parties and the award should be interfered on the ground of perversity.

4. In spite of appearance of a set of counsel on behalf of the respondent nos.2 to 6, nobody is present in Court at the time of hearing. There is also no appearance on behalf of the other respondents in spite of sufficient of notice and call as well.

5. Considering the submissions of Mr. Khan, learned counsel appearing for the appellants – Insurance Company and on perusal of the grounds stated in the Memorandum of Appeal as well as the stand taken before the lower Court appearing in paragraph-4 of the impugned award and also the contents

of Exts.A, B, C and D, i.e., the materials documents produced by the appellants-Insurance Company to establish that they have no liability involving the accident, this Court finds, the date of accident remain 29.04.2010 whereas cheque for insurance of the vehicle was submitted on 25.03.2010 and cheque got bounced for no sufficient fund. Intimation in this regard to all concerned was given by the Bank on 10.04.2010 with intimation of dishonor to both the owner as well as the Banker. This Court, accordingly finds, by the date of accident, there was no valid policy involving the offending vehicle. There is clear material establishing that the intimation of lapse of policy was also served on the Insurer well before the accident took place. This Court thus finds, the findings of the Court below remained contrary to the materials available on record. It is at this stage, this Court taking into account a decision of the Hon'ble Apex Court in the case of ***United India Insurance Company Limited vrs. Laxamamma and others,*** reported in ***2012 (3) T.A.C. 8 (S.C.)***, this Court finds, the Hon'ble Apex Court in paragraph-19 observed as follows:-

> "19. In our view, the legal position is this : where the policy of insurance is issued by an authorized insurer on receipt of cheque towards payment of premium and such cheque is returned dishonoured, the liability of authorized insurer to indemnify third parties in respect of the liability which that policy covered subsists and it has to satisfy award of compensation by reason of the provisions of Sections 147(5) and 149(1) of the M.V. Act unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets dishonoured and before the accident of the vehicle occurs, such Insurance Company cancels the policy of insurance and sends intimation thereof to the owner, the Insurance Company's liability to indemnify the third parties which that policy covered ceases and the Insurance Company is not liable to satisfy awards of compensation in respect thereof."

Decision referred to hereinabove has clear application to the case of the Award and thus making the impugned award so far fixation of liability on the Insurance Company becomes bad in law.

6. It is at this stage, since this Appeal is filed by the Insurance Company only challenging the liability aspect, this Court finding no case involving the Insurance Company, interferes in the impugned award to the extent of liability only and in the process while holding that the fixation of liability by the lower Court on the appellants-Insurance Company as bad, directs the owner for making over the compensation amount and also to comply other terms and conditions in the impugned award.

7. This Appeal stands allowed in part with modification of the Award involved herein. The award so far it relates to entitlement and quantum is confirmed. For the modification of the Award by this Court, the modified award will be satisfied by the owner involved. So far other terms and conditions in the impugned award are maintained.

8. Appeal succeeds, but to the extent indicated hereinabove. No costs.

2019 (I) ILR - CUT- 144

B. RATH, J.

W.P.(C) NO. 3189 OF 2018

BASANTI SWAIN ……..Petitioner

.Vs.

SANTILATA PARIDA & ORS. ……..Opp.Parties

ORISSA GRAMA PANCHAYAT ACT, 1964 – Section 31 – Presentation of election petitions – Limitation – Election petition presented after delay of five months – Application under Section 5 of the Limitation Act was filed for condonation of delay – Allowed – Writ petition challenging the said order – Plea that the Election Tribunal has no discretionary power to condone the delay beyond the prescribed period for filing of election dispute – Held, it is true that the presentation of an election petition is permissible even after expiry of 15 days, yet the provision makes it clear that it must be on the finding of sufficient cause existed for the failure to present the petition within the period prescribed – This Court here observes that there is no absolute discretion with the Civil Judge (Jr. Divn) in the matter of condonation of delay and the Civil Judge (Jr. Divn.) must find sufficient cause in failure in presentation of the election dispute in time. (Para 7)

Case Laws Relied on and Referred to :-

1. AIR 1974 S.C. 480: Hukumdev Narain Yadav Vs. Lalit Narain Mishra.
2. AIR 1994 SC 512 : Anwari Basavaraj Patil and Ors Vs. Siddaramaiah & Ors.
3. AIR 2001 S.C 4010 : Union of India Vs. M/s. Popular Construction Co.
4. AIR 2000 M.P 257 : Akhtar Ali Vs. State of M.P. & Ors.
5. AIR 2016 (NOC) 590 (DEL) : Parul Gupta Vs. Siddharth Sareen & Ors.
6. 2006 (1) OLR 432 : Sukanta Kumar Rout Vs. Collector-cum-District Election Officer, Cuttack & Ors.

For Petitioner : M/s. B. Senapati & M.K. Panda
For Opp. Parties : M/s. G. Mukherjee (Sr. Adv.),
A.Panda, S.D.Ray, S.Sahoo & S. Panda

JUDGMENT Date of Hearing: 04.12.2018 Date of Judgment: 12.12.2018

B. RATH, J.

This is a writ petition at the instance of an unsuccessful party in the matter of allowing an application under Section 5 of the Indian Limitation Act, involving Election Case no.15 of 2017 under the provisions of the Grama Panchayats Act, 1964 passed by the Civil Judge (Jr. Divn.), Nimapara vide Annexure-4.

2. In short, background involving the case is opp. party no.1 filed Election Case no.15 of 2017 seeking relief inter alia for declaring the petitioner therein as elected Sarpanch of Chandradeipur Grama Panchayat and the cost of litigation in favour of the petitioner therein against the opp. Party no.1 and 3 therein. For filing of the election dispute after the expiry of period prescribed in the Orissa Grama Panchayat Act, 1964, the opp. Party no.1 herein as the election petitioner also filed an application under Section 5 of the Indian Limitation Act seeking condonation of delay in filing the Election Dispute. Filing the application under Section 5 of the Indian Limitation Act, the opp. party no.1 to satisfy the delay in filing the election petition contended that the opp. party no.1 was a lady and belonging to backward class. It is also contended therein that the election involved though concluded on 19.02.2017, result was declared thereafter, on counting of votes being closed. The election petitioner finding the present petitioner unable to read and write Odia, being mandatory for a Ward Member in the Panchayat meeting convened on 31.03.2017, filed an application under Section 26 (2) of Orissa Grama Panchayat Act before the Collector and little thereafter, the opp. party no.1 also made an attempt invoking the provisions of Right to Information Act to collect the information regarding the education of the opposite party no.1 and only after receiving information in this regard, was constrained to file the election dispute only on 18.07.2017. To satisfy the ground of delay, while reiterating the stand taken in the Section 5 of the limitation application, the opp. Party no.1 also submitted that the reason in filing the election dispute with delay being bona fide and not intentional, the delay should be condoned in order to have a fair trial of the election dispute. On her appearance, present petitioner, opp. Party no.1 therein filing written objection to the delay condonation application

contended that the opp. Party no.1 herein had several stages of information and cause of actions for filing the election dispute and in the worse, in the event, she could undertake a proceeding under Section 26(2) of the Act before the Collector in the month of March, nothing prevented her from filing the election dispute either on the same day or at least immediately thereafter. It is on the above premises, the opp. Party no.1 herein prayed for rejection of the limitation application. As a consequence, the election petition should have also been rejected as claimed by the opp. party no.1.

3. Trial Court i.e. the Election Tribunal on the basis of the pleading available in the application as well as in the objection at the instance of the respective parties and based on the submissions made therein by the impugned order under Annexure-4 while condoning the delay allowed the application under Section 5 of the Indian Limitation Act.

4. Filing the writ application, the petitioner, the opp. Party therein i.e. the elected candidate apart from raising the ground already raised in the objection at the instance of opp. Party no.1 to the application under Section 5 of the Limitation Act appended at Annexure-2 further submitted that the result of the election being published on 23.02.2017, the opp. Party no.1 being a participant therein was well aware of the limitation in filing the election dispute. Further, looking into the other developments as explained by the opp. Party no.1 in her application under Section 5 of the Limitation Act, particularly, coming to know of the alleged deficiency in the petitioner in the Grama Panchayat meeting held on 31.03.2017 further having been completed, took up a proceeding under Section 26(2) of the Orissa Grama Panchayat Act before the Collector-cum-District Magistrate, Puri. Sri Senapati, learned counsel, appearing for the petitioner contended that there were different stages of information with the opp. Party no.1 and as such the delay remain unexplainable. It is at this stage, Mr. Senapati, learned counsel for the petitioner taking this Court to the statutory provision as contained in Section 31(1) contended that even though there is application of the provision for condonation of delay but for the proviso contained in Proviso 2 Section 31 (1) of the Act, consideration of the delay application is not in the absolute discretion of the Court undertaking such process, it is on the other hand, for the clear provision therein, the Civil Judge (Jr. Divn.) undertaking such process must find sufficient cause existed for failure to present the petition within the stipulated period. Taking this Court to number of decision of the Hon'ble Apex Court as well as of this Court as in

the case of ***Hukumdev Narain Yadav Vs. Lalit Narain Mishra*** reported in ***AIR 1974 S.C. 480***, ***Anwari Basavaraj Patil and others Vs. Siddaramaiah and others***, ***AIR 1994 SC 512, Union of India Vs. M/s. Popular Construction Co., AIR 2001 S.C 4010***, ***Akhtar Ali Vs. State of M.P. & Ors***., **A*IR 2000 M.P 257***, ***Parul Gupta V s. Siddharth Sareen & others***, ***AIR 2016 (NOC) 590 (DEL)*** and result in the case of ***Sukanta Kumar Rout Vs. Collector-cum-District Election Officer, Cuttack & others in 2006 (1) OLR 432***, Sri Senapati, learned counsel appearing for the petitioner submitted that the grounds raised herein have the support of all these decisions and hence prays this Court for interfering in the impugned order for being contrary to provision of the Statute as well as the position of law indicated hereinabove.

5. Sri Gautam Mukherjee, learned counsel appearing for the opp. Party no.1, on the other hand, on reiteration of his clients stand taken into the application under Section 5 of the Limitation Act appearing at page 15 of the brief submitted that for the reason assigned therein, the opp. Party no.1 had a bona fide action in filing the election dispute in the month of July, further filing the election petition not being intentional , it cannot be said that there is improper consideration of the grounds by the trial Court. Sri Mukherjee taking this Court to the grounds involved in the election dispute also contended that for the valid grounds involving the election petition, unless the delay in filing the election dispute be condoned, will result in allowing an unqualified person to continue as Sarpanch.

Sri Mukherjee thus requested this Court for rejecting the writ petition confirming thereby the impugned order herein.

6. Considering the rival contention of the parties, taking into account the narratives made hereinabove, this Court finds the opp. Party no.1 while filing the application under Section 5 of the Indian Limitation Act has taken the following pleadings to justify the ground of delay :-

> *3. That, pertinent to state here that for the aforesaid election the last date of nomination was 17.01.2017 and scrutiny of nomination was 18.01.2017. Petitioner and Opp. Parties had filed their nomination in time. On the date of scrutiny Opp. Party No.1 raised objection to the educational qualification of the petitioner which was rejected by the Election Officer as the same was based on no supporting documents.*
>
> *4. That, after taking charge of the Office while the petitioner is discharging her function smoothly the Opp. Party No.1 without any basis filed an election case before the Civil Judge (Jr. Division), Nimapara much after the limitation period on*

the allegation that the petitioner is not able to read and write Odia and hence disqualified to hold the post of Sarapanch. The said case has been registered as Election Misc. Case No.15/2017.

6. That, after receipt of the notice the application for condonation of delay petitioner filed objection denying the allegations of the Opp. Party No.1. Pertinent to state here that the petitioner was previously an Ward Member of Ward No.01 of said Panchayat from 2002 to 2007. Moreover, opp. Party no.1 has miserably failed to explain the failure in filing the election case beyond statutory period of limitation.

For better appreciation of the objection of the petitioner and the proceedings of Chandradeipur Gram Panchayat of the year 2002 are annexed herewith as ***Annexure-2 and 3*** *respectively.*

7. That, although this Hon'ble Court as well as the Hon'ble Apex Court have laid down the law not to lightly interfere in the election matters and the mandate of people, but the learned Civil Judge in total non-application of mind and on thorough misconception f law illegally entertained the Election Misc. Case filed after 5 months of publication vide Order dtd.12.01.2018, copy of which is annexed as ***Annexure-4****".*

Reading the aforesaid grounds, this Court finds that in fact, opp. Party no.1 was well aware of the date of declaration of result, date of the notification of the election of the Sarapanch candidate. Besides, she could also come to know the alleged efficiency in the opp. party no.1 from the meeting of the Panchayat held on 31.03.2017, this Court, therefore, observes that there is no bona fide action in filing the election petition after five months.

7. It is at this stage, considering the provision at Section 31(1) of the Grama Panchayat Act, 1964, this Court finds the provision reads as hereinunder.

"31. ***Presentation of petitions****- (1) The petition shall be presented on one or more of the grounds specified in Section 39 before the Civil Judge (Junior Division) having jurisdiction over the place at which the office of the Grama Sasan is situated together with a deposit of such amount, if any, as may be prescribed in that behalf as security for costs within fifteen days after the date on which the name of the person elected is published under Section 15:*

Provided that if the office of the Civil Judge (Junior Division) is closed on the last day of the period of limitation as aforesaid the petition may be presented on the next day on which such office is open:

Provided further that if the petitioner satisfies the Civil Judge (Junior Division) that sufficient cause existed for the failure to present the petition within the period

aforesaid the Civil Judge (Junior Division) may in his discretion condone such failure."

Looking to the provision contained therein, this Court finds that though it is true that the presentation of an election petition is permissible even after expiry of 15 days, yet the provision makes it clear that it must be on the finding of sufficient cause existed for the failure to present the petition within the period prescribed. This Court here observes that there is no absolute discretion with the Civil Judge (Jr. Divn) in the matter of condonation of delay and the Civil Judge (Jr. Divn.) must find sufficient cause in failure in presentation of the election dispute in time. From the discussions made hereinabove, this Court finds petitioner has several stages to approach the Election Tribunal and there is no sufficient cause in coming to file the dispute in time. It is at this stage, taking into consideration of the decision in the case of ***Sukanta Kumar Rout Vs. Collector-cum-District Election Officer, Cuttack & Others, 2006 (I) OLR 432***, this Court finds in similar situation, the Division Bench of this Court in paragraph 7 & 8 have held as follows-:

"*7. In Jagdish Sawhney (supra), the appellant in his application for condonation of delay averred that he came to know of the decree when his representative visited the Registrar of Companies and after this knowledge, he filed the appeal. His plea was that since he was not a party to the suit and was unaware of the decree, there was good ground for condo nation of delay. The Court accepting the plea as genuine, condoned the delay. In Gangadeep Pratisthan Pvt. Ltd. (supra), there was a delay of 7 months in presentation of the appeal and explanation of the appellant for part of that period was satisfactory but the explanation offered for rest part was not satisfactory, yet the High Court exercised its discretion and condoned the delay primarily for the reason that the facts alleged by respondent No.1 were of such nature that in the interest of justice, the matter required to be invested. Considering the grave nature of allegations and public interest, the Apex Court declined to interfere with the discretion extended by the High Court. The facts situation of those cases are materially different from the present case. Here opposite party No.3 was himself a candidate for the election of Sarpanch and he was aware of the publication of the result of the election. Though Seciton 31 of the Orissa Grama Panchayat Act provides a period of 15 days only for presentation of any election dispute petition, before the Civil Judge (Junior Division)-cum-Commissioner, he did not file such petition for nearly two and half years and then came up with a plea that he had made some representations to the Collector. Even if the entire contents of his petition under Section 5 of the Limitation Act is accepted, still there is no explanation for the period from 31.05.2002 to 2.4.2004. It is to be remembered that an election dispute petition relates to continuance or otherwise of an elected people's representative in the office and for that reason the Act has provided specific period of limitation for presentation of the petition. In the proviso to Section 31 also it has been specifically indicated that sufficient and satisfactory cause must be shown for any delay that may occur in presentation of the election petition. So, while considering the petition for condonation of delay in the election dispute case, the concerned Court has to meticulously examine the explanation offered for the delay and only on being satisfied about the explanation*

for the entire period of delay that the delay should be condoned. Jurisdiction in that aspect vested with the Court has to be exercised judiciously or else that amounts to illegal exercise of jurisdiction. In the present case, the learned Civil Judge-cum-Commissioner without carefully examining the sufficiency of the explanation offered by opposite party NO.3 for the delay, allowed the petition by simply observing that opposite party No.3 had made some representation to the Collector and that he learned about the number of children of the present petitioner from the people of the locality. The approach of the learned Civil Judge (Junior Division) 1st Curt, Cuttack, was casual and his order does not speak how such plea of the opposite party No.3 was sufficient to explain the delay for the period from dated 31.5.2002 to 2.4.2004. Therefore, the aforesaid finding suffers from illegality.

8. For all the aforesaid reasons, we are of the considered opinion that there was no good ground for condonation of delay in presentation of the election petition by opposite party no.3. Accordingly, we quash the impugned order dated 17.09.2004 passed by the learned Civil Judge (Junior Division) 1st Court, Cuttack."

This decision squarely applies to the case of the opp. party. Here, considering other citations shown by Sri Senapati, learned counsel appearing for the petitioner and reflected hereinabove, this Court observes that since in all these decisions, there is clear finding to the effect that there was no application of Limitation Act at all to such proceedings, all those decisions except this *2006 (1) OLR 432* have no application to the case at hand.

8. For the observation of this Court with the finding that there is no bona fide action and no sufficient cause in filing the election dispute after five months by the Election petitioner and for the application of the decision *2006 (1) OLR 432* to the case at hand, this Court finds there has been no proper appreciation of the material fact as well as appreciation of law of the land and the provision of the Statute at Section 31(1) of the Orissa Gram Panchayat Act, 1964 by the Election Tribunal involving the impugned order by the trial Court, for which the impugned order remain unsustainable. In the circumstances, this Court while interfering in the impugned order, set aside the order at Annexure-4. As a consequence, the election petition will also not survive.

9. The writ petition succeeds. However, there is no order as to costs.

2019 (I) ILR - CUT- 151

B. RATH, J.

W.P.(C) NO.16030 OF 2018

GOURAHARI PRADHAN .....Petitioner

.Vs.

ACHYUTANANDA JENA .....Opp. Party

ORISSA GRAMA PANCHAYAT ACT, 1964 – Section 31 – Election dispute – Upon completion of evidence the election petitioner filed an application for recounting of used ballots – Petition allowed – Writ petition challenging such order – Plea that the order allowing the petition calling for ballots for recounting before the argument amounts to allowing the election petition – Held, not proper – Principles reiterated.

"It is needless to indicate here that the prayer of the petitioner was based on allegations made in paragraphs-5, 6, 7 & 8 therein. Based on the pleadings of the respective parties and upon completion of the evidence from the respective side, the election petitioner filed Misc. Application for direction for production of ballot papers for re-counting purpose. It is at this stage, this Court looking to the impugned order finds, the impugned order was based on mere consideration of the rival contentions of the parties. Since the issue involved therein remains germane in the main application and the order in the Misc. Application was heavily dependent on grant of main relief involving the election dispute itself, this Court is of the opinion that such application needs to be considered may not exactly at the argument of the election dispute but however involving an argument taking into consideration the pleading as well as evidence in support of such pleading. There is no scope for considering such application, independent of evidence involving the election dispute." *(Para 5)*

Case Laws Relied on and Referred to :-

1. 2009(Supp.-I) OLR-513 : Narayan Chandra Nayak .Vs. Harish Chandra Jena & two Ors.
2. 2010(II) CLR-803 : Tarachand Majhi Vs. Lalit Pradhan.
3. 2014(II) OLR-916 : Smt. Bibhuti Nayak Vs. Smt. Basanta Manjari Nayak.

For petitioner : M/s.R.K.Rath, Sr.Advocate, H.N.Mohapatra, A.Samantaray & P.K.Sahoo

For Opp. Party : M/s.B.Mishra, Sr.Advocate,T.K.Biswal, P.Bharadwaj & R.R.Panda

JUDGMENT Date of Hearing : 17.12.2018 Date of Judgment : 21.12.2018

B.RATH, J.

This writ petition is filed assailing the order dated 20.8.2018 passed by the Civil Judge (Jr.Divn.), Tigiria involving Election Misc. Case No.2/2017, vide Annexure-7.

2. Short background involved in the case is that the defeated candidate, the private opposite party as the petitioner initiated an election dispute under the Orissa Gram Panchayat Act involving the elected candidate, the present petitioner seeking thereby a declaration that the respondent therein, the petitioner herein has not received the majority of valid votes, further to declare the election of the sole respondent as Sarapanch of Achalakota to be void and set aside and further to declare the election petitioner, who has received the majority of valid votes elected as Sarapanch of Achalakota Gram Panchayat. Further facts reveal, based on filing of the election case registered as Election Misc. Case No.2/2017 and upon filing of the show cause by the respondent therein, further on completion of evidence from both the sides, the election petitioner, i.e., the private opposite party herein filed Miscellaneous Application requesting therein the trial court to accept the application for re-counting of all valid and rejected ballot papers of Achalakota Gram Panchayat and further for the petitioner therein making a strong prima facie case for re-counting, the Election Officer be directed to produce the Ballot Papers from his custody for re-counting purpose. Upon service of copy of this application, the present petitioner, the respondent therein filed objection resisting the maintainability of the application, taking the ground that such applications cannot be considered by way of interim relief and on the premises of prematureness of application. The respondent therein, i.e., petitioner herein also objected entertainment of any such application on the further submission that such application cannot be considered merely because the evidence is adduced. It was also contended therein that it is on the other hand, such application is required to be considered only during argument involving the evidence. It is on the premises that there is no commencement of argument of the election dispute, the petitioner also objected the stage of consideration of such application.

Considering the rival contentions of the parties, the Civil Judge (Jr.Divn.), Tigiria, vide his order dated 20.8.2018 allowed the application thereby directing the B.D.O.-cum-Election Officer, Tigiria to cause production of the used Ballot Papers in respect of the election for the post of Sarapanch under Achalakota Gram Panchayat under Tigiria Block, which is under challenge in the present writ petition.

3. Resisting the order dated 20.8.2018, Sri R.K.Rath, learned senior counsel appearing for the petitioner being assisted by Sri H.N.Mohapatra, learned Advocate on reiteration of the grounds taken in the objection in the

court below on the maintainability as well as the stage of consideration of such application as reflected herein above submitted that for the settled position of law, no such application should have been entertained in absence of advancement of argument involving the case and further for no dealing with evidence by the trial court, the impugned decision is so otherwise remains unsustainable. Sri Rath, learned senior counsel for the petitioner also contended that even though there is no bar for filing such application, looking to the main prayer involving the election dispute, the trial court remained fundamentally wrong in not understanding the stage of consideration of such application and the materials to be taken into account in considering such application. Sri Rath, learned senior counsel for the petitioner thus prayed this Court for interfering with the impugned order and setting aside the same.

4. Sri B.Mishra, learned senior counsel assisted by Sri P.Bharadwaj, learned counsel appearing for the sole opposite party while resisting the submission of Sri Rath, learned senior counsel for the petitioner contended that for the prima facie disclosure of the grounds involving filing of such application in the application under consideration involving the impugned order and further as the impugned order is based on reason, there is no infirmity in the impugned order requiring interference of this Court. Sri Mishra, learned senior counsel to support his such contentions relied upon three decisions of this Court in the cases of ***Narayan Chandra Nayak vrs. Harish Chandra Jena & two others,*** 2009(Supp.-I) OLR-513, ***Tarachand Majhi vrs. Lalit Pradhan,*** 2010(II) CLR-803 and ***Smt. Bibhuti Nayak vrs. Smt. Basanta Manjari Nayak,*** 2014(II) OLR-916. Taking this Court to the settled position of law involved in the above three reporting cases, Sri B.Mishra, learned senior counsel for the opposite party while justifying his submission and the impugned order further submitted that in the event this Court finds any irregularity in the decision making process, the Court may remand the matter for fresh hearing of the issue keeping the interim application alive.

5. Considering the rival contentions of the parties, this Court finds, the election petitioner, i.e., the sole opposite party filed the Election Misc. Case No.2/2017 before the Civil Judge (Jr.Divn.), Tigiria with the following prayer :-

> "It is therefore prayed this Hon'ble Court may graciously be pleased to admit this Election Petition, issue notice to the sole respondent, call for all relevant election documents as stated in paragraph-14 of the election petition with respect to the

> election-2017 of Sarapanch of Achalkote Gram Panchayat in all 17 booths of Achalkote Gram Panchayat from the custody and possession of the Election Officer-cum-BDO, Tigiria Panchayat Samiti, cause inspection and recounting of all used ballot papers both valid ballots and rejected ballots, declare that the sole respondent has not received majority of valid votes, declare the election of sole respondent to be void and set aside the election of the sole respondent as Sarapanch of Achalkote Gram Panchayat and further declare the election petitioner has received majority of valid votes and is elected as Sarapanch of Achalkote Gram Panchayat……."

It is needless to indicate here that the prayer of the petitioner was based on allegations made in paragraphs-5, 6, 7 & 8 therein. Based on the pleadings of the respective parties and upon completion of the evidence from the respective side, the election petitioner filed Misc. Application for direction for production of ballot papers for re-counting purpose. It is at this stage, this Court looking to the impugned order finds, the impugned order was based on mere consideration of the rival contentions of the parties. Since the issue involved therein remains germane in the main application and the order in the Misc. Application was heavily dependent on grant of main relief involving the election dispute itself, this Court is of the opinion that such application needs to be considered may not exactly at the argument of the election dispute but however involving an argument taking into consideration the pleading as well as evidence in support of such pleading. There is no scope for considering such application, independent of evidence involving the election dispute. It is at this stage, taking into account the decision relied upon by Sri Mishra, learned senior counsel for the contesting opposite party, vide Narayan Chandra Nayak (supra), this Court finds, the Division Bench of this Court in disposal of the Writ Appeal involved therein in paragraph-3 observed as follows :-

> "3.Being aggrieved, Respondent no.1 filed election petition No.2 of 2007 before the Court of learned Civil Judge (Senior Division), Anandpur for declaring that the election of the appellant as void and after recounting of votes, the said respondent No.1 be declared elected. The case was contested by the appellant, issues were framed and parties adduced evidence in support of their case. At that stage, an application was filed by Respondent No.1 for recounting of votes on the ground that due to improper rejection of his valid votes during the recounting process, he was defeated by a margin of one vote only. The said application was resisted by the appellant. The Tribunal after hearing the parties and perusing the pleadings and evidence allowed the application vide order dated 7.3.2008 observing that material facts had been pleaded in the election petition in this regard and the same stood substantiated by oral evidence that the valid votes of the election petitioner were illegally rejected and invalid votes were added in favour of the returned candidate

during the process of recounting. Thus, it was not a roving and fishing inquiry, rather the case was based on material facts. The said order dated 7.3.2008 was challenged by the appellant by filing the writ petition which has been dismissed by the impugned judgment and order dated 30.4.2008. Hence this appeal."

Similarly in the case of Tarachand Majhi (supra) in another Division Bench of this Court in disposal of a different Writ Appeal involving such issue in paragraphs-6 observed as follows :-

"6. We have heard both the learned counsel for the appellant and the learned counsel for the respondent on the merits of the case. After careful consideration of the rival legal contentions urged with reference to the grounds urged in the writ appeal by the appellant's counsel questioning the correctness of the order of the election Tribunal, whose order is affirmed by the learned Single Judge by dismissing the writ petition filed by the appellant, with a view to find out as to whether the order impugned in this appeal or the order of the Tribunal impugned in the writ petition needs interference by this Court on the ground that substantial question of law does arise in the appeal for the reason that the findings which have been recorded by the learned Single Judge in the impugned order by affirming the order of the Election Tribunal suffers from palpable error in law as there is no pleading or issue framed ? It is urged on behalf of the appellant that the said order of the Tribunal is erroneous in law for the reason that the Tribunal has exceeded in its jurisdiction in granting the relief of recounting, as prayed for by the election petitioner (present respondent) before the Election Tribunal, which contention was rejected in its order, whose order is affirmed by the learned Single Judge. The said contention is carefully examined by us. We have carefully examined the order of the Election Tribunal. The Election Tribunal after adverting to the relevant facts and circumstances of the case and also the evidence of the appellant and the respondent adduced in the election petition before it, has examined the claim of the respondent as to whether he is entitled for recounting of votes of certain booths on the basis of acts pleaded, namely, the respondent has secured 1190 votes whereas the appellant secured 1229 votes and while counting the total votes polled the counting officials have added more than 40 invalid votes to the account of the appellant and 24 valid votes of the respondent were rejected. Therefore, the election Tribunal on the basis of the pleadings and the evidence of P.W.1, the respondent herein who has corroborated the averment in the election petition and whose evidence is corroborated by the evidence of P.Ws.2 and 4 regarding addition of invalid votes in favour of the appellant and rejection of valid votes of the respondent in favour of the appellant and that of P.W.5 who has corroborated the evidence of P.W.1 regarding declaration of 19 votes in favour of the appellant by the election officials though the appellant has not secured the same and after satisfying about prima facie case and relevant aspects of the case for ordering recounting of votes has allowed the application of the respondent. The said order was challenged by the appellant before this Court in a writ petition and the same was examined by the learned Single Judge in the impugned order with reference to the legal contentions urged in the writ petition and also afteradverting to the

decisions of the apex Court in the case of T.S.Musthaffa v. M.F.Varghese & others (1999) 8 SCC 692. In support of the contention wherein the apex Court has held that unless pleading contains necessary foundation for raising an appropriate issue, no amount of evidence is sufficient for raising the issue and granting the relief sought for by the respondent and considering the evidence that 40 invalid votes were added to the credit of the appellant herein and 24 valid votes of the respondent were rejected illegally, the learned Single Judge held that there was improper addition of votes in favour of the appellant and rejection of valid votes in favour of respondent and the case of the respondent is that the appellant was illegally elected as Sarpancha of Lingamarani Gram Panchayat. After referring to the case of the apex Court in the case of Ram Sarup Gupta (dead) by L.Rs. v. Bishun Narain Inter College & Ors., AIR 1987 SC 1242 the apex Court has observed that some times pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the Court to ascertain the substance of the pleadings to determine the question and that of Bhagwati Prasad v. Chandramaul, AIR 1966 SC 735, wherein it was held that the general rule for that relief should be founded on the pleadings of the parties, but where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is : Did the parties know that the matter in question was involved in the trial and did they lead evidence about it, the learned Single Judge held that there were sufficient materials in the pleading showing rejection of valid votes and acceptance of invalid votes. The learned Single Judge has further placed reliance upon the Division Bench decision of the Bombay High Court in Appa Babaji Misal Patil & Ors. V. Dagdu Chandru Misal & Ors., AIR 1995 Bombay 333, the learned Single Judge has accepted the conclusion arrived at by the learned election Tribunal in allowing the application of the respondent. The learned Single Judge has examined all the legal contentions urged on behalf of the parties to find out as to whether the Election Tribunal's order is vitiated on account of erroneous reasoning or error in law and found that the said order is perfectly legal and valid as the same is based on the pleadings, evidence on records and legal principle laid down by the apex Court and Bombay High Court in the cases referred to supra and rightly held that the order impugned in the writ petition does not call for interference. In our considered view, the said view of the learned Single Judge is perfectly legal and valid and does not call for interference by this Court in this appeal as we find that there is no palpable error present in the order or there is no compelling circumstances to interfere with the same. Therefore, the writ appeal is devoid of merit and is accordingly dismissed.

In the third decision in Smt. Bibhuti Nayak (supra) once again another Division Bench of this Court in disposal of another Writ Appeal in paragraph-20 observed as follows :-

> "20. In our estimate, the election petition read with the evidence adduced by the election petitioner did provide a factual foundation to project a prima facie case for ordering recount of the ballot papers of Nuagaon Gram Panchayat used for election to the post of Member, Basudevpur Panchayat Samiti."

6. Taking into account the decision of this Court in all the above three decisions, this Court finds, this Court in its Division Bench is of one view that consideration of the request for calling for ballot papers and order of re-counting should be based on consideration of the pleading along with the evidence adduced by the parties concerned. It is in the circumstances, this Court considering the impugned order finds, the Tribunal though finally allowed the application for calling for the ballot papers for re-counting purpose but has not at all considered the evidence vis-à-vis the pleading for the purpose. This Court, therefore, observes, there is no proper consideration by the Tribunal in considering such application. The decision of the Tribunal also remains opposed to the settled provision of law.

7. In the circumstance, this Court interfering with the impugned order dated 20.8.2018 passed by the Civil Judge (Jr.Divn.), Tigiria sets aside the same but however since the application is required to be considered at proper stage and giving due importance to evidence, while keeping it open directs the Tribunal to reconsider the application afresh by giving opportunity of hearing to the respective parties. The writ petition succeeds but however there is no order as to cost.

2019 (I) ILR - CUT- 157

S.K. SAHOO, J.

CRLMC NO. 956 OF 2009

MUKESH KUMAR WADHWA .....Petitioner

.Vs.

STATE OF ORISSA .....Opp. Party

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power – Prayer for quashing of the Order taking cognizance of offences under sections 506/34 of the Indian Penal Code and section 6 of the Indecent Representation of Women (Prohibition) Act, 1986 – No

Material found during course of investigation, neither any mobile phone nor any camera nor any nude photographs of the victim were seized to substantiate the accusation leveled by the victim against the petitioner – The order taking cognizance under section 6 of Indecent Representation of Women (Prohibition) Act, 1986 quashed.

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power – Prayer for quashing of the Order taking cognizance – Scope of – Test to be applied – Indicated.

"Law is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations as made prima facie establish the offence. The Court can take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. The Court cannot be utilized for any oblique purpose and where in the opinion of the Court, chances of ultimate conviction are bleak and no useful purpose is likely to be served by allowing a criminal prosecution to continue, the Court may while taking into consideration the special facts of a case can quash the proceedings even though it may be at a preliminary stage. The Inherent Jurisdiction under section 482 of Cr.P.C. though wide has to be exercised sparingly, carefully and with caution."

For Petitioner : Mr. Bijaya Kumar Ragada

For State : Mr. Priyabrata Tripathy, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment: 23.04.2018

S. K. SAHOO, J.

The petitioner Mukesh Kumar Wadhwa has filed this application under section 482 of the Criminal Procedure Code challenging the impugned order dated 09.03.2009 of the learned S.D.J.M., Jharsuguda passed in G.R. No.1939 of 2008 in taking cognizance of offence under sections 506/34 of the Indian Penal Code and section 6 of the Indecent Representation of Women (Prohibition) Act, 1986 (hereafter '1986 Act') and issuance of process against him. The said case arises out of Jharsuguda P.S. Case No.724 of 2008.

Mr. Bijaya Kumar Ragada, learned counsel for the petitioner submitted that as per the first information report lodged by the victim on 31.12.2008 before the Inspector in charge, Jharsuguda police station, though the case was registered under sections 376(2)(g)/506 and section 6 of the 1986 Act against the petitioner and others but during course of investigation, it was found that there are materials for commission of offences under

sections 376/506 against co-accused Brundaban Naik. So far as the petitioner and other co-accused persons are concerned, they were charge sheeted under section 506 of the Indian Penal Code and section 6 of the 1986 Act. It is further submitted that the victim was serving in the shop of the petitioner where the co-accused Brundaban Naik was also serving and when the petitioner came to know about the illicit relationship between the victim and the co-accused Brundaban Naik, he asked the victim to leave the service for which a false case has been foisted against the petitioner. It is further contended that the ingredients of offence under section 6 of 1986 Act are not attracted and though it is alleged in the 161 Cr.P.C. statement of the victim that the petitioner and others took her nude photographs in the camera and mobile phone but nothing was seized during course of investigation to substantiate such aspect and therefore, it is a fit case where this Court should invoke its inherent power under section 482 of Cr.P.C. to quash the impugned order of cognizance. Learned counsel for the petitioner placed the 161 Cr.P.C. statement of the victim as well as charge sheet.

Mr. Priyabrata Tripathy, learned Addl. Standing Counsel on the other hand supported the impugned order and contended that there is no such palpable error in the order so as to be interfered with invoking inherent power under section 482 of Cr.P.C.

In the first information report lodged by the victim, it is mentioned that the petitioner and co-accused Brundaban Naik and others committed gang rape on her. However, in the 161 Cr.P.C. statement, the victim alleged that it is only co-accused Brundaban Naik who committed rape on her. So far as the petitioner and other co-accused persons are concerned, it is alleged that while the co-accused Brundaban Naik was committing rape on her, the petitioner and others took nude photographs in the camera and mobile phone and when the victim prevented them, they threatened her with dire consequence asking her not to inform the matter before any body.

During course of investigation, the Investigating Officer found the materials under sections 376/506 of the Indian Penal Code against co-accused Brundaban Naik only. So far as the petitioner and other co-accused persons are concerned, the Investigating Officer found materials under sections 506/34 of the Indian Penal Code and section 6 of 1986 Act and accordingly, submitted charge sheet.

Section 6 of 1986 Act deals with punishment for contravention the provisions under sections 3 or 4 of 1986 Act. Section 3 of 1986 Act prohibits advertisement or publication containing indecent representation of women in any form. Section 4 of 1986 Act prohibits of publication or sending by post of books, pamphlets etc, selling, hiring, distributing and circulating any material that contains indecent representation of women in any form.

During course of investigation, neither any mobile phone nor any camera nor any nude photographs of the victim were seized to substantiate the accusation leveled by the victim against the petitioner. There is no material on record regarding any publication or any exhibition or any advertisement relating to the alleged nude photographs of the victim. Similarly, there are also no materials which would attract the provision under section 4 of 1986 Act.

Law is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations as made prima facie establish the offence. The Court can take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. The Court cannot be utilized for any oblique purpose and where in the opinion of the Court, chances of ultimate conviction are bleak and no useful purpose is likely to be served by allowing a criminal prosecution to continue, the Court may while taking into consideration the special facts of a case can quash the proceedings even though it may be at a preliminary stage. The Inherent Jurisdiction under section 482 of Cr.P.C. though wide has to be exercised sparingly, carefully and with caution.

Since there is no material that the petitioner has contravened either the provisions of section 3 or section 4 of 1986 Act and nothing incriminating material was found from the possession of the petitioner and except the statement of the victim, there is no material that any nude photographs were taken either by the petitioner or by any of the co-accused persons, I am of the view that the ingredients of offence under section 6 of 1986 Act is not attracted.

So far as the offence under section 506 of the Indian Penal Code is concerned, the victim has stated about the threat given by the petitioner and others at the time of occurrence and the accused persons telling her not to

report the matter before police or else she would face dire consequence. Therefore, prima facie case for taking cognizance of the offence under section 506 of the Indian Penal Code is made out.

In view of the forgoing discussions, I am inclined to quash the impugned order of taking cognizance under section 6 of the 1986 Act so far as the petitioner is concerned. This order will not be a bar to proceed against the other co-accused persons for the offences as per the impugned order so also against the petitioner for the offence under section 506 of the Indian Penal Code. Accordingly, the CRLMC application is disposed of.

2019 (I) ILR - CUT- 161

S.K. SAHOO, J.

BLAPL NO. 574 OF 2018

HAFIZ @ FIROZ MAHAMMED …….. Petitioner

.Vs.

STATE OF ORISSA ……Opp. Party

(**A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Bail application – Offences alleged are under sections 498-A, 304-B, 306 read with section 34 of the Indian Penal Code and section 4 of the Dowry Prohibition Act – Bail rejected keeping in view the nature and gravity of the accusation, the role played by the petitioner in torturing the deceased both physically and mentally, the manner in which a young bride had lost her valuable life at the early stage of marriage, the supporting materials on record relating to the offences under which charge sheet has been submitted, the punishment prescribed for the offences and the chance of tampering with the evidence when the investigation is under progress.**

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Bail application – Offences alleged are under sections 498-A, 304-B, 306 read with section 34 of the Indian Penal Code and section 4 of the Dowry Prohibition Act – Investigation appears to be not in order regarding demand of dowry – Direction to reinvestigate with guidelines.

"Keeping in view the definition of 'dowry' as per section 2 of the Dowry Prohibition Act, while recording the statements of the witnesses in dowry related offences, it becomes the paramount duty of the investigating officer to elicit from the witnesses about the nature of demand made by the accused, the time period of demand, the fulfillment or otherwise of the demanded articles and also to collect the documents, if any relating to the fulfillment of demand of dowry. The casual manner of recording statements of the witnesses relating to demand of dowry is likely to have a far-reaching consequences in the result of the trial. The family members, close relatives of the bride and the mediator of the marriage are supposed to be aware about the nature of demand. Since presents which are given at the time of a marriage either to the bride or to the bride-groom without any demand having been made in that behalf are excluded from 'dowry' as per section 3(2) of the Dowry Prohibition Act, it is also the duty of the investigating officer to specifically question the relevant witnesses in that respect as to which of the articles given were the presents and which were as per demand. An outsider may believe the presents received by the bride and bridegroom to be 'dowry' and while giving statement before police, it is expected of him to use the word 'dowry' in respect of all the articles received by the bridegroom side. Therefore, a careful approach at the time of investigation is very much necessary not only in the interest of the prosecution but also for a fair trial of the accused and also to arrive at the truth." (Para 6)

For Petitioner : Mr. Soura Chandra Mohapatra
For Opp. Party : Mr. Arupananda Das, Addl. Govt. Adv.
For Informant : Mr. P.R. Singh

JUDGMENT Date of Argument: 25.07.2018 Date of Order: 01.08.2018

S. K. SAHOO, J.

The petitioner Hafiz @ Firoz Mahammed has filed this application under section 439 of Cr.P.C. in connection with G.R. Case No.861 of 2017 pending in the Court of learned J.M.F.C., Salipur which arises out of Jagatpur P.S. Case No.275 of 2017 in which charge sheet has been submitted under sections 498-A, 304-B, 306 read with section 34 of the Indian Penal Code and section 4 of the Dowry Prohibition Act.

The petitioner moved an application for bail in the Court of learned Sessions Judge, Cuttack in BLAPL No.33 of 2018 which was rejected vide order dated 16.01.2018.

2. On 16.12.2017 Abdul Rahim Khan of Mahasingh Patna under Salipur police station in the district of Cuttack lodged the first information report before the Inspector in charge of Jagatpur police station wherein he alleged that his daughter Sabiha Sehnani (hereafter 'the deceased'), aged about nineteen years was given in marriage with the petitioner on 12.11.2017 as per Muslim rites and customs. At the time of marriage, all the house hold articles and gold ornaments were given to the deceased. Seven days after the marriage, the petitioner started torturing the deceased by assaulting her frequently. The other in-laws family members of the deceased also subjected her to physical and mental torture demanding more dowry. Since the deceased was unable to bear the pain of torture by her husband and the in-laws family members, she came back to the paternal place within ten days of marriage. The petitioner started abusing the deceased over phone. Subsequently, the informant and his family members convinced the deceased and sent her back to her in-laws house with the petitioner. The petitioner used to take liquor everyday in the night and assault the deceased. On 15.12.2017 at about 5.00 p.m., the elder brother-in-law of the deceased intimated the informant over phone that the health condition of the deceased was not good. Getting such message, the informant and his family members reached at the house of the petitioner and found the deceased lying dead on a cot and saliva was dribbling from her mouth. When the informant asked the in-laws family members about the cause of death, they intimated that the deceased had committed suicide. After seeing the dead body, the informant firmly believed that the petitioner and the other in-laws family members of the deceased killed her and in order to suppress the incident, they had taken recourse to falsehood. Since the mental condition of the informant was not good after the death of the deceased, there was delay in lodging the first information report.

3. On the basis of the first information report, Jagatpur P.S. Case No.275 of 2017 was registered on 16.12.2017 under sections 498-A, 304-B, 302 read with section 34 of the Indian Penal Code and section 4 of the Dowry Prohibition Act.

During course of investigation, the investigating officer examined the witnesses and recorded their statements, seized the nikahnama, ligature material from the spot, conducted inquest over the dead body of the deceased in presence of her family members and relatives and sent the dead body for post mortem examination. The doctor conducting the post mortem examination opined that the cause of death was on account of combined

effect of asphyxia and venous congestion due to hanging. The doctor examined the ligature and found that it was strong and tensile enough to bear the weight and jerk of the body when used for hanging and could produce the mark as noticed. The investigating officer seized the wearing apparels of the deceased, the dowry articles and left the same in the zima of the informant. He arrested the petitioner on 17.12.2017 and forwarded him to Court along with his father. On 12.04.2018 charge sheet was submitted under section 498-A, 304-B, 306 read with section 34 of the Indian Penal Code and section 4 of the Dowry Prohibition Act keeping the investigation open as five other co-accused persons were found absconding since the date of occurrence.

4. Mr. Soura Chandra Mohapatra, learned counsel for the petitioner contended that there is nothing in the first information report that there was any demand of dowry either prior to the marriage or at the time of marriage. He argued that in the F.I.R. as well as in the statements of the witnesses, it is mentioned that after the marriage, more dowry was demanded and due to non-fulfillment of the same, the deceased was subjected to physical and mental torture. It is contended that the definition of 'dowry' as per section 2 of the Dowry Prohibition Act, 1961 relates to any property or valuable security given or agreed to be given and the expression 'valuable security' has got the same meaning as in section 30 of the Indian Penal Code. It is contended that since there is no specification about the nature of demand, simply by saying that more dowry was demanded would not attract the definition of 'dowry' as defined under section 2 of the Dowry Prohibition Act and therefore, submission of charge sheet under section 304-B of the Indian Penal Code and section 4 of the Dowry Prohibition Act was not proper and justified. It is further contended that even though the death has taken place a month after the marriage but there is no clinching material to show that the petitioner abetted the commission of suicide by the deceased. The allegations of torture are vague and omnibus in nature. Since no other external injury except the ligature mark around the neck of the deceased was noticed during post mortem examination, it falsifies that the deceased was subjected to any kind of physical assault prior to her death. It is further contended that there is no chance of absconding or tampering with the evidence and therefore, keeping in view the period of detention of the petitioner in judicial custody, the bail application may be favourably considered.

Mr. Arupananda Das, learned Additional Govt. Advocate on the other hand opposed the prayer for bail and he placed the statements of the informant and other family members of the deceased and contended that prima facie materials for the commission of offences under which charge sheet has been submitted are clearly made out. He argued that the time gap between the date of marriage and date of death of the deceased was so short that unless there would have been any kind of physical and mental torture, the deceased would not have taken such an extreme step to end her life at the threshold of her marital life. It is contended that all the witnesses including the informant in their statements recorded under section 161 Cr.P.C. have stated that there was demand of dowry not only at the time of marriage but also after marriage and further stated that the deceased was subjected to physical and mental torture in connection with demand of dowry. It was argued that even though the investigating officer has not specifically collected the nature of demand of dowry from the witnesses but the investigation is still under progress and he might collect specific materials in that respect from the witnesses and merely because of the fault of the investigating officer in recording the statements in a proper manner keeping in view the definition of 'dowry' as per the Dowry Prohibition Act, at this stage, it would be premature to hold that the ingredients of the offences under section 304-B of the Indian Penal Code and section 4 of the Dowry Prohibition Act are not attracted. It is further contended that the co-accused persons are yet to be arrested and the release of the petitioner at this stage may hamper further investigation which is under progress and there is every chance of tampering with the evidence and therefore, it would not be proper to release the petitioner on bail.

Mr. P.R. Singh, learned counsel appearing for the informant vehemently opposed the prayer for bail and contended that the petitioner is the main accused and not only he was torturing the deceased physically and mentally after taking liquor every night but also demanding dowry. It is contended that false information was given to the informant over phone regarding the ailment of the deceased even though by that time the deceased had already died.

5. Adverting to the contentions raised by the learned counsels for the respective parties, it is not disputed that the marriage of the petitioner with the deceased was solemnized on 12.11.2017 and the deceased died on 15.12.2017 and cause of her death was on account of combined effect of asphyxia and venous congestion resulting from hanging and it was a case of

suicidal hanging as per charge sheet. The statements of the witnesses particularly the family members of the deceased indicate that within ten days of marriage, the deceased had to come back to her father's place as she was unable to bear the pain of physical and mental torture which was given to her by the petitioner and other in-laws family members in connection with demand of dowry. There are ample materials on record that the petitioner was taking liquor every night and used to physically assault the deceased.

It is said that a good husband makes a good wife and a bad husband creates hell for his wife forgetting promises made before the marriage alter. According to Hinduism, marriage between two souls is a very sacred affair that stretches beyond one lifetime and continues up to seven lives. The bride puts her first step on the doors of her life partner carrying with her sweet dreams and expectation from the new world. When she finds hostile atmosphere in the in-laws house, she feels insecure. She tries to tolerate and sacrifice her expectations but when limit of tolerance reaches its pinnacle and her patience shows no sign of improvement in the situation or in the behaviour of the dowry greedy groom's family, she decides to close her tearing eyes forever.

6. Keeping in view the definition of 'dowry' as per section 2 of the Dowry Prohibition Act, while recording the statements of the witnesses in dowry related offences, it becomes the paramount duty of the investigating officer to elicit from the witnesses about the nature of demand made by the accused, the time period of demand, the fulfillment or otherwise of the demanded articles and also to collect the documents, if any relating to the fulfillment of demand of dowry. The casual manner of recording statements of the witnesses relating to demand of dowry is likely to have a far-reaching consequences in the result of the trial. The family members, close relatives of the bride and the mediator of the marriage are supposed to be aware about the nature of demand. Since presents which are given at the time of a marriage either to the bride or to the bride-groom without any demand having been made in that behalf are excluded from 'dowry' as per section 3(2) of the Dowry Prohibition Act, it is also the duty of the investigating officer to specifically question the relevant witnesses in that respect as to which of the articles given were the presents and which were as per demand. An outsider may believe the presents received by the bride and bridegroom to be 'dowry' and while giving statement before police, it is expected of him to use the word 'dowry' in respect of all the articles received by the bridegroom side. Therefore, a careful approach at the time of investigation is

very much necessary not only in the interest of the prosecution but also for a fair trial of the accused and also to arrive at the truth.

7. Mr. Rakesh Kumar Behera, S.I. of Police, Jagatpur police station was present in Court as per the order dated 23.07.2018 with the case records and he fairly submitted that inadvertently while recording statements of the witnesses, he has not asked them regarding the nature of demand made by the petitioner as well as the other in-laws family members of the deceased. Since the statements relating to demand of dowry by the accused persons have been recorded casually, it is expected that during course of further investigation which is under progress, the investigating officer shall re-examine the witnesses particularly on the point of dowry.

8. In view of the materials available on record, the nature and gravity of the accusation, the role played by the petitioner in torturing the deceased both physically and mentally, the manner in which a young bride had lost her valuable life at the early stage of marriage, the supporting materials on record relating to the offences under which charge sheet has been submitted, the punishment prescribed for the offences and the chance of tampering with the evidence when the investigation is under progress, I am not inclined to release the petitioner on bail.

Accordingly, the bail application filed by the petitioner sans merit and stands dismissed. The learned trial Court shall not be influenced by any observations made in this order as I have not expressed any opinion on the merits of the case.

9. Let a copy of the order be forwarded to the Director General of Police, Odisha in order to intimate the Inspector in charge/Officer in charge of all the police stations of the State of Odisha to keep in mind the observation made in paragraph 6 of this order while recording the statements of the witnesses during investigation in dowry related cases.

2019 (I) ILR - CUT- 168

S.K. SAHOO, J.

CRLMC NO. 42 OF 2012

AGANI CHARAN BEHERA .....Petitioner

.Vs.

STATE OF ORISSA .....Opp. Party

CODE OF CRIMINAL PROCEDURE,1973 – Section 239 – Discharge – Scope and Object of – Duty of the court while considering the petition for discharge – Discussed.

"The object of discharge is to save the accused from unnecessary and prolonged harassment and therefore, the mechanical approach at the stage of consideration of discharge petition by the trial Judge is impermissible as the next step i.e. the framing of charges substantially affects the person's liberty. For exercising the power of discharge under section 239 of Cr.P.C., it is not necessary even for the accused to file a petition for discharge. Bereft of the fact whether discharge petition is filed or not, the learned trial Judge is not absolved of his duty at that stage to decide whether the charge against the accused to be groundless. For arriving at such a conclusion, the Court has to consider the police report, the documents sent with it under section 173 of Cr.P.C. and also if necessary, by examining the accused. After giving opportunity of hearing to the prosecution as well as to the accused, if the Court decides to discharge the accused then reasons are to be recorded. However, if the Court is of the opinion that there is ground for presuming that the accused has committed an offence which can be tried under Chapter-XIX then under section 240 of Cr.P.C., the Court shall frame charge in writing against the accused. The truth, veracity and effect of the materials proposed to be adduced by the prosecution during trial are not to be meticulously adjudged. The likelihood of the accused in succeeding to establish his probable defence cannot be a ground for his discharge. At the stage of framing charge, it is to be seen whether a prima facie case has been made out. The Court would not delve deep into the matter for the purpose of appreciation of evidence." *(Para 5)*

For Petitioner : Mr. Aditya Ku. Mohapatra,H.K. Ratsingh

For Opp. Party : Mr. Prasanna Ku. Pani, Addl. Standing Counsel (Vigilance Department)

JUDGMENT Date of Argument: 13.08.2018 Date of Judgment: 16.08.2018

S. K. SAHOO, J.

The petitioner Agani Charan Behera has filed this application under section 482 of the Code of Criminal Procedure, 1973 for quashing the charge sheet and the entire criminal proceeding against the petitioner in V.G.R. Case No.39 of 2001 arising out of Cuttack Vigilance P.S. Case No.39 of 2001

pending on the file of learned Chief Judicial Magistrate, Cuttack (hereafter 'the trial Court'). In the said case, the learned trial Judge as per order dated 07.09.2013 framed charges under sections 406/120-B of the Indian Penal Code against the petitioner and co-accused persons Debadatta Das and Saroj Kumar Mishra.

2. On 15.10.2001 Sri P.K. Routray, Inspector of Police, Vigilance, Cuttack Division, Cuttack presented the first information report before the Superintendent of Police, Vigilance, Cuttack Division, Cuttack stating therein that he received reliable information on 12.10.2001 at 3.00 p.m. that the rice allotted under 'Food for work programme' to Saline Embankment Division, Cuttack stored at Jagatpur Godown, without being given to the labourers, are being disposed of at Malgodown, Cuttack in truck no.OSC 6731. The informant along with other police officials proceeded to Malgodown to verify the information. On reaching at Malgodown, they found truck no. OSC 6731 had been parked near the godown of M/s. Patra Traders being loaded with rice bags. The driver and helper of the truck so also the labourers who were unloading the rice bags from the truck fled away leaving the truck. On search, 200 bags of rice weighing 50 Kg. each were seized along with the vehicle. The vehicle was given in the zima of one B.K. Mohanty in presence of witnesses.

It is the further case of the prosecution as per the F.I.R. that during verification, Sri Debendra Nayak, driver of the truck no. OSC 6731 was traced, who disclosed that the rice belonged to co-accused Saroj Kumar Mishra of Rajnagar of district Kendrapada who took delivery of the said rice from the store situated at Jagatpur on 12.10.2001 and as per his direction, he brought the rice in his truck on hire from Jagatpur to Malgodown for disposal. Co-accused Saroj Kumar Mishra was traced who disclosed that he had taken ten numbers of creek works at Kanak Nagar under Saline Embankment Division, Cuttack. He completed the works in the month of May 2001 but due to non-availability of rice in the store, he could not lift the stock.

It is the further case of the prosecution as per the F.I.R. that on verification of the records, it was found that co-accused Saroj Kumar Mishra was awarded to execute different area works vide F2 Agreement No.56, 57, 58, 59, 60, 61, 63, 65, 142 and 143 under 'Food for work programme' for Rs.4,74,970/- by the Executive Engineer, Saline Embankment Division, Cuttack. The works were to be executed under the direct supervision of the

petitioner who was the J.E., Talchua Irrigation Section. The records further disclosed that 1400 MT of rice under 'Food for work programme' were received on 30.6.2001 by the Saline Embankment Division, Cuttack and the those rice bags were stored in three godowns at Jagatpur, Sikharpur and Rajnagar for distribution purpose. Though the works were completed during the month of May, the departmental officers without any reason kept rice unsupplied and undistributed to the labourers for whom alone it was meant for, for four long months and ultimately when it was decided to supply the rice, instead of supplying rice from Rajanagar store, the rice was supplied from Jagatpur store with an ulterior motive.

It is the further case of the prosecution as per the F.I.R. that on 12.10.2001 the co-accused contractor Saroj Kumar Mishra took delivery of 216 bags of rice from co-accused Debadatta Das, J.E. in charge of store at Jagatpur godown on the strength of authorisation slip issued by the petitioner of Talchua Irrigation Section. Both the contractor and the co-accused J.E. Debadatta Das could not offer any valid explanation about the transportation of rice from Jagatpur store to Malgodown, Cuttack and about shortage of sixteen bags of rice. Co-accused J.E. Debadatta Das also kept stock and issue register pending without making up-to-date entries with an ulterior motive.

It is further stated in the F.I.R. that the Government officials by making conspiracy with contractor without distributing the rice, supplied by the Government under 'Food for work programme' at Rajnagar, diverted the same to Malgodown, Cuttack for disposal for their pecuniary gain as a result the very purpose of the Government was defeated causing loss to the State Exchequer for which the petitioner who was J.E., Talchua, co-accused Debadatta Das, J.E., Store, both of Saline Embankment Division, Cuttack and co-accused Saroj Kumar Mishra, contractor are liable under sections 406, 409 read with section 120-B of the Indian Penal Code and 7 of Essential Commodities Act.

3. This CRLMC petition was filed on 03.12.2012 annexing the F.I.R., copy of letter dated 01.06.2001 issued by the Executive Engineer, Saline Embankment Division, Cuttack to the District Manager, FCI, Cuttack and copies of hand receipts and charge sheet dated 27.09.2002. This Court vide order dated 05.11.2013 in Misc. Case No.28 of 2012 granted interim stay of further proceeding of the case before the trial Judge. During the midst of hearing, a Misc. Case was filed by the learned counsel for the petitioner for amendment of the petition annexing the order dated 27.01.2004 by virtue of

which cognizance of offences under sections 406/120-B of the Indian Penal Code was taken on receipt of charge sheet, the order dated 20.05.2011 by virtue of which the discharge petition filed by the petitioner under section 239 of Cr.P.C. was rejected and the order dated 07.09.2013 by virtue of which charges were framed by the learned trial Judge. The Misc. Case was allowed and a consolidated petition was filed.

4. Mr. Aditya Kumar Mohapatra, learned counsel for the petitioner challenging the rejection of discharge petition, order of framing charge and the continuance of the criminal proceeding against the petitioner contended that the prosecution case in its entirety does not make out any offence against the petitioner. It is argued that the role of the petitioner as a Junior Engineer was confined to supervision of work and measurement of work executed by the contractor. After completion of work, the petitioner had measured the work which had been countersigned by the Asst. Engineer and it was recommended for payment. It is further contended that when the work was executed, at that relevant point of time no rice grains were available at any of the stores of the department and as per the standard practice of the department, the petitioner issued a hand receipt in favour of the contractor asking him to lift the stock as soon as it is made available in the nearby Govt. Stores. It is argued that there was no entrustment of rice stocks with the petitioner for distribution to the labourers and no breach of trust as alleged has been committed by the petitioner. There is no element of criminal conspiracy with the co-accused persons. It is contended that when the J.E., Stores, Jagatpur being the custodian of Govt. godown released 216 bags of rice on 12.10.2001 in favour of the contractor and there is no material that the petitioner had knowledge about the lifting of the rice stock from Jagatpur godown, it was not proper on the part of the investigating officer to submit charge sheet against the petitioner. It is submitted that after completion of work and its measurement, the measurement book was countersigned by the S.D.O. and authorisation was issued in favour of the contractor for taking the rice and for final payment of his bill and the contractor had not received the final payment of the work as he had not submitted the distribution receipts of the rice under the 'Food for work programme'.

Mr. Prasanna Ku. Pani, learned Addl. Standing Counsel for the Vigilance Department on the other hand submitted that the work was completed on 30.05.2001 and even though at that point of time the stock of rice was not available in the godowns but it was made available on

30.06.2001 and stored in three godowns i.e. Jagatpur, Sikharpur and Rajnagar and therefore, there was no justification for allowing the contractor to take delivery of rice of 216 bags at a belated stage on 12.10.2001. It is submitted that as per Clause 4 of Orissa Public Works Department/Electricity Department Contractors Labour Regulations, wages due to every worker has to be paid to him directly and as per Clause 5, no wages shall exceed one month and wages of every workman employed on the contract shall be paid before the expiry of ten days, after the last day of the wages period in respect of which wages are payable. It is argued that the last date as per the aforesaid regulation was expiring on 10.07.2001 for labour payment and during that period the required rice was available in all godowns including Rajnagar, however it was not lifted at that point of time but lifted only on 12.10.2001 which is more than three months after the availability of the stock of rice under 'Food for work programme' in the godowns. It is contended that deliberately the rice was not lifted from Rajnagar godown though the works were done at Kanaknagar under Rajnagar Block. It is further contended that the National Food for Work Programme (NFFWP) guidelines issued by the Govt. of India, Ministry of Rural Development in Chapter-II indicates that the foodgrains should be given as a part of wages under NFFWP to the rural poor at the rate of 5 kgs. per manday. The State Govt. will take into account the cost of foodgrains paid as part of wages, at a uniform BPL rate. In Chapter-IV of NFFWP which deals with allocation and release of resources, Clause 4.14.1 states that the full benefit of wages to be paid should reach the workers and cost of works should not involve any commission charges payable to such contractors, middleman or intermediate agency. It is argued that there is no rule, regulation or agreement which empowers the J.E. to release the rice meant for the purpose of 'Food for work programme' in favour of the contractor and the contractor after receiving the said rice to sale in the open market. It is contended that it was not proper to issue hand receipt in favour of the contractor which was misutilised in lifting rice stock from Jagatpur godown and taking it to Malgodown for sale. It is contended that in view of the difference of costs of rice issued under BPL rate and market rate, there is possibility that unscrupulous persons with vested interest might divert grain to sale at higher rate. It is further contended that there is no illegality in the orders of rejection of the discharge petition and framing of charges and therefore, this Court should not interfere with the same invoking its inherent power under section 482 of Cr.P.C.

5. The trial of the offences under which charges have been framed is to be dealt with in accordance Chapter-XIX of Cr.P.C. Section 239 Cr.P.C. deals with the discharge of an accused and section 240 Cr.P.C. deals with framing of charge by the trial Court in cases which are instituted on a police report. When the Court considers the charge against the accused to be groundless which means without any basis or foundation, the accused can be discharged under section 239 of Cr.P.C. The object of discharge is to save the accused from unnecessary and prolonged harassment and therefore, the mechanical approach at the stage of consideration of discharge petition by the trial Judge is impermissible as the next step i.e. the framing of charges substantially affects the person's liberty. For exercising the power of discharge under section 239 of Cr.P.C., it is not necessary even for the accused to file a petition for discharge. Bereft of the fact whether discharge petition is filed or not, the learned trial Judge is not absolved of his duty at that stage to decide whether the charge against the accused to be groundless. For arriving at such a conclusion, the Court has to consider the police report, the documents sent with it under section 173 of Cr.P.C. and also if necessary, by examining the accused. After giving opportunity of hearing to the prosecution as well as to the accused, if the Court decides to discharge the accused then reasons are to be recorded. However, if the Court is of the opinion that there is ground for presuming that the accused has committed an offence which can be tried under Chapter-XIX then under section 240 of Cr.P.C., the Court shall frame charge in writing against the accused. The truth, veracity and effect of the materials proposed to be adduced by the prosecution during trial are not to be meticulously adjudged. The likelihood of the accused in succeeding to establish his probable defence cannot be a ground for his discharge. At the stage of framing charge, it is to be seen whether a prima facie case has been made out. The Court would not delve deep into the matter for the purpose of appreciation of evidence.

6. The materials available on record indicate that as per tender and the measurement book, the work i.e. C.D.R. to Nallah on Kanakanagar commenced on 21.05.2001 and it was completed on 30.05.2001. The record reveals that the stock position of paddy (rice) in the godown of Rajnagar Saline Sub-Division Office under 'Food for work programme' from 01.05.2001 to 31.05.2001 was nil and no paddy was lifted during the month of May 2001. The first information report and other documents reveal that 1400 MT of rice under 'Food for work programme' were received on 30.06.2001 by the Saline Embankment Division, Cuttack and the said rice

bags were stored in three godowns i.e. Jagatpur, Sikharpur and Rajnagar. Therefore, when the rice stock was not available in any of the three godowns when the work in question was under progress or completed, the question of distribution of rice to the labourers does not arise. After the rice was made available a month after the conclusion of work and its measurement, it seems no immediate steps were taken to lift the rice from the godown and distribute it to the labourers. It is needless to say that the contractor would only be entitled to get the final payment towards the work after submission of distribution receipts of rice under the 'Food for work programme' and in the present case the contractor had failed to produce the receipts and therefore, he had not received the final payment. The petitioner seems to have issued hand receipt for lifting of rice stock in favour of the contractor as per prevailing practice but there is nothing on record to show that the petitioner had asked the co-accused Saroj Kumar Mishra to lift rice from Jagatpur godown instead of Rajnagar godown. If the contractor co-accused produced the hand receipt and allowed to lift the rice from Jagatpur godown by the in charge of the godown and after receiving the rice bags, he carries it to Malgodown, Cuttack in a truck, it cannot be presumed that there was any criminal conspiracy of the petitioner with the co-accused persons. The petitioner was not in charge of Jagatpur godown nor was the rice stocked in that godown entrusted to him in any manner. Production of hand receipt issued by the petitioner at Jagatpur godown, entertaining such hand receipt, delivering the rice stock and carrying it to Malgodown in a truck seems to have got no nexus with the petitioner. Those acts have been alleged against the other two co-accused persons but not to the petitioner. Merely because the hand receipt for lifting of rice stock was issued by the petitioner as per prevailing practice in favour of the contractor a few months after it was made available in the godown, cannot be a factor for fixing any criminal liability on the petitioner.

7. In view of the forgoing discussions, I am of the considered opinion that there is no ground for presuming that the petitioner has committed offence of criminal breach of trust. There are no surrounding circumstances or any conduct of the petitioner from which it can be inferred that he was a party to criminal conspiracy and therefore, the order of rejection of the discharge petition filed by the petitioner was neither proper nor justified. The learned trial Court has committed illegality in framing charge against the petitioner under sections 406/120-B of the Indian Penal Code.

Therefore, the CRLMC application is allowed. The criminal proceeding in V.G.R. Case No.39 of 2001 in respect of the petitioner stands quashed.

2019 (I) ILR - CUT- 175

S.K. SAHOO, J.

JCRLA NO. 53 OF 2002

BIRASINGH SAY .....Appellant

.Vs.

STATE OF ORISSA .....Respondent

INDIAN PENAL CODE, 1860 – Section 307 – Offence under – Conviction – Appellant, a jail inmate and allegation against him is that he assaulted to another under trial prisoner by means of a brick – No motive proved by the prosecution – The presence of the brick inside the ward appears to be a doubtful feature as the seizure list only indicates that the brick was produced by the jailor before the investigating officer – The evidence of Jailor is silent as to where from he brought the brick and produced it before the investigating officer – Held, even though the doctor's evidence has remained unchallenged and the medical examination report indicates that the injured had sustained number of injuries on his right ear, nose but since from the evidence of the injured relating to assault being not clinching, it would not be proper and justified to accept the solitary evidence of injured to convict the appellant – Order of conviction set aside. (Para 8)

For Appellant : Mr. Dibya Jyoti Sahoo
For State : Mr. Anupam Rath, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment: 15.11.2018

S. K. SAHOO, J.

The appellant Birasingh Say has challenged the impugned judgment and order dated 02.11.2002 passed by the learned Adhoc Addl. Sessions Judge, Fast Track Court No.II, Puri in S.T. Case No.22/214 of 2002 in convicting him for the offence under section 307 of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for a period of five years.

2. The prosecution case as per the first information report lodged by the Superintendent, District Jail, Puri on 30.11.2001 before the Officer in charge of Kumbharpada police station is that the appellant was confined in ward no.13 of the District Jail, Puri and he assaulted another under trial prisoner namely Partha Sarathi Mishra (P.W.6) with a broken brick over his head while the later was sleeping, as a result of which P.W.6 sustained fatal head injury and was shifted to District Headquarters Hospital, Puri.

On receipt of the first information report, Kumbharpada P.S. Case No.192 of 2001 was registered under section 307 of the Indian Penal Code against the appellant by the Officer in charge and P.W.7 Makar Hota, S.I. of police was entrusted to investigate the matter by the Officer in charge. During course of investigation, P.W.7 visited the spot, examined the witnesses, sent injury requisition for the injured. He also seized lungi, napkin, brick stained with blood as per the seizure list Ext.4 and further seized the discharge certificate, brain scanning report, report of the neurologist of the injured as the injured was hospitalized at S.C.B. Medical College and Hospital, Cuttack as per seizure list Ext.5. After completion of investigation, charge sheet was submitted on 10.04.2002 under sections 307/326 of the Indian Penal Code.

3. After submission of charge sheet, the case was committed to the Court of Session for trial after observing due committal procedure where the learned trial Court charged the appellant under section 307 of the Indian Penal Code and since the appellant refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

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

P.W.1 Sunil Kumar Mohanty was the Superintendent, District Jail, Puri and on getting information about the assault on P.W.6, he rushed to the jail and then came to the District Headquarters Hospital, Puri where the injured was in a critical condition and then arranged for his shifting to S.C.B. Medical College and Hospital, Cuttack. He is the informant in the case.

P.W.2 Surendra Kumar Pattnaik was the Jailor, District Jail, Puri. He is a post occurrence witness who also stated to have noticed injuries on the person of P.W.6 and shifted him to the hospital.

P.W.3 Ranjan Jena was the night watchman in ward no.13 and found the injured with head injury and he also stated about the presence of the appellant inside ward no.13 at the relevant time with a brick.

P.W.4 Bhagat Prasad Parida was a U.T.P. in District Jail, Puri at the relevant point of time in ward no.13. He also stated to have noticed bleeding injuries on the head of the injured and also shifting of the injured to the hospital.

P.W.5 Dr. Sarbeswar Acharya was the Asst. Surgeon, D.H.H., Puri who examined the injured (P.W.6) and noticed some injuries and he proved the injury report marked as Ext.2.

P.W.6 Partha Sarathi Mishra is the injured.

P.W.7 Makar Hota was the S.I. of police attached to Kumbharpada police station who was the Investigating Officer.

The prosecution exhibited six documents. Ext.1 is the written report submitted by P.W.1, Ext. 2 is the medical examination report, Ext.3 is the formal F.I.R., Exts. 4 and 5 are the seizure lists and Ext.6 is the injury requisition.

The prosecution also proved three material objects. M.O.I is the seized lungi, M.O.II is the seized napkin and M.O.III is the seized broken brick.

5. The defence plea of the appellant is one of denial.

6. The learned trial Court after assessing the evidence on record has been pleased to hold that the evidence of P.W.6 is clear to the effect that a blow was given on his head and he looked up and found the accused was raising the brick for the second time and there is nothing to disbelieve such statement of P.W.6. It is further held that accepting the evidence of P.W.3 and P.W.6, it can be safely concluded that the prosecution has been able to adduce satisfactory evidence to believe that it is the appellant who gave the blow on the head of P.W.6. The learned trial Court further held that the medical evidence corroborates the ocular testimony and accordingly holding that the appellant not only attempted to cause death but his act was likely to cause death of P.W.6, found him guilty under section 307 of the Indian Penal Code.

7. Mr. Ramesh Chandra Swain-2 who was engaged by the High Court Legal Services Committee to argue the appeal is not present in Court and therefore, Mr. Dibya Jyoti Sahoo was engaged for the appellant as amicus curiae to assist the Court and he was supplied with paper book and given time to prepare the case. After going through the case records, he placed the evidence on record and impugned judgment.

Mr. Sahoo argued that nobody has seen the actual assault on P.W.6 by the appellant and the evidence adduced by the prosecution is shaky in nature and the impugned judgment is not sustainable in the eye of law and there is no clinching material to establish the charge against the appellant.

Mr. Anupam Rath, learned Addl. Standing Counsel appearing for the State on the other hand argued that even though the injured has not seen the actual assault on him but the presence of the appellant in the vicinity with a brick at the time of assault which has been stated by the injured is sufficient to hold him liable for the offence. It is further stated that the doctor has noticed number of injures on the person of the injured on the vital part of the body like head and there is nothing to disbelieve the prosecution case and therefore, the appeal should be dismissed.

8. After going through the evidence of the witnesses placed by the Mr. Sahoo, it appears that the star witnesses on behalf of the prosecution is none else than P.W.6, the injured.

P.W.6 has stated that on 29.11.2001 he was confined in District Jail, Puri in connection with a case under section 307 of the Indian Penal Code in ward no.13 and while he was sleeping, he had covered his body with a blanket. He further stated that the appellant was confined in that very ward and at about 9.30 p.m. while he was sleeping, the appellant assaulted him with a brick on his head and when he looked up, he found that the appellant was raising a brick to assault him for the second time but in the meantime he lost his sense and when he regained his sense after two days, he found himself in S.C.B. Medical College and Hospital, Cuttack. He further stated that he was treated at S.C.B. Medical College and Hospital for about five days and thereafter, he was discharged.

In the cross-examination, P.W.6 has stated that he had not seen the first blow given by the appellant as he had covered his face by the blanket but after the first blow, when he removed the blanket, he found the appellant had raised the brick for the second time to give another blow.

Admittedly the prosecution has not proved any motive behind the assault on the injured (P.W.6) by the appellant. Though there were other U.T.Ps inside ward no. 13 and two of them have been examined as P.W.3 and P.W.4 but their evidence is silent regarding the actual assault made by the appellant to P.W.6. The injured has stated about only one blow on him which according to him he had not seen. P.W.3 has also stated that he had not seen the first assault and his evidence is silent about the subsequent assault on P.W.6. Therefore, the only evidence relevant is that the appellant was standing with a brick near P.W.6 and immediately P.W.6 lost his sense. The presence of the brick inside the ward no.13 appears to be a doubtful feature in as much as Ext.4 which is the seizure list of the brick indicates that the brick was produced by the jailor Surendra Kumar Patnaik (P.W.2) before the investigating officer. The evidence of P.W.2 is silent as to where from he brought the brick (M.O.III) and produced it before the investigating officer. Even though the doctor's evidence has remained unchallenged and the medical examination report indicates that the inured had sustained number of injuries on his right ear, nose but since from the evidence of the injured (P.W.6), the evidence relating to the assault by the appellant is not clinching, in my humble view, it would not be proper and justified to accept the solitary evidence of P.W.6 to convict the appellant for an offence under section 307 of the Indian Penal Code. There are certain glaring infirmities in the prosecution case which have not been properly assessed by the learned trial Court and therefore, the impugned judgment and order of conviction of the appellant under section 307 is not sustainable in the eye of law and accordingly, the same is hereby set aside and the appellant is acquitted of the charge. It seems that the appellant has not been granted bail Peither during trial or during pendency of this appeal. If he is still in judicial custody in connection with this case, he shall be released forthwith if his detention is not required in any other case.

Before parting with the case, I would like to put on record my appreciation to Mr. Dibya Jyoti Sahoo, 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.5,000/- (rupees five thousand only). The JCRLA is allowed.

2019 (I) ILR - CUT- 180

J.P. DAS, J.

CRLMC NO. 587 OF 2016

RAMESH KUMAR MOHANTY .....Petitioner

Vs.

STATE OF ORISSA (VIGILANCE) .....Opp. Party

PREVENTION OF CORRUPTION ACT, 1988 – Section 19 read with Section 197 of the Code of Criminal Procedure – Sanction – Offence alleged against public servant under IPC and P.C. Act – No sanction was given under either of the provisions – Upon submission of charge sheet cognizance was taken for all the offences against the petitioner – Prayer for quashing of the order of cognizance – Allowed.

"Section 19 of the P.C. Act mandates that no court shall take cognizance of offences punishable under Sections 7, 10, 11, 13 and 15 allegedly to have been committed by a public servant except with the previous sanction. It was further submitted that the prosecuting agency has sought for sanction in respect of the entire case against the petitioner and the sanction was refused after careful consideration of the materials placed before the sanctioning authority. Thus, it could not have been said by the learned trial court that the sanction for prosecuting for offences under the Indian Penal Code was separate from sanction for the offence under Section 13 of the P.C. Act. That apart, by the impugned order, learned trail court has taken cognizance of all the offences against the petitioner, which is not sustainable in the eye of law. I am of the view that the leaned trial court exceeded its jurisdiction by taking cognizance of the offences against the petitioner in absence of required sanction mandated under the statute." *(Paras 4 & 5)*

For Petitioner : M/s. Tanmay Mishra, B.K. Mishra & S. Mishra.
For Opp. Party : Mr. Prasanna Kumar Pani. Addl. Standing Counsel (Vig.).

JUDGMENT Date of Hearing : 03.05.2018 Date of Judgment : 08.05.2018

J.P. DAS, J.

This is an application under Section 482 of the Criminal procedure Code (for short 'the Cr.P.C') assailing the order dated 26/24.08.2015 passed by the learned Special Judge (Vigilance), Cuttack in T.R. Case No.28 of 2015 corresponding to Cuttack Vigilance P.S. Case No.57 of 2008 taking cognizance of the offences punishable under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (in short 'the P.C. Act') and Sections 468/420/120-B of the Indian Penal Code (for short 'the I.P.C.') against the petitioner and others.

2. The present petitioner was working as a Superintendent Engineer in Cuttack Development Authority (in short 'the C.D.A.') during the period 2000 to 2003. One writ application was filed before this Court vide O.J.C. No.9721 of 1999 alleging that there was misappropriation of public money by the officials of the C.D.A. in connivance with the contractors, who were entrusted with certain works by way of paying enhanced labour wages. This court after calling for affidavits from the concerned authorities observed by the order dated 02.01.2008 that no irregularity was found out calling for any investigation. Thereafter, on 17.11.2008, D.S.P. (Vigilance) Cell, Cuttack lodged one F.I.R. with similar allegation of payment of escalated labour wages during the year 2000-2003 by the officials of C.D.A. in connivance with the concerned contractors. Pursuant to the said F.I.R., Cuttack Vigilance Case No.47 of 2008 was registered and the investigation was taken up. Shortly thereafter on 30.11.2008, the Inspector of Police (Vigilance) Cell, Cuttack lodged another F.I.R. (the present one) alleging corruption in the execution of works by the officials of C.D.A. during the period from 1999 to 2002. The present petitioner, who was an accused in the first F.I.R. challenged the registration of the said F.I.R. before this Court in CRLMC No.2815 of 2008. This Court by order dated 19.02.2010 quashed the said F.I.R. with the observation that there was no material to sustain the allegation of execution of sub-standard work or unauthorized payment. The Vigilance Department approached the Hon'ble Apex Court challenging the said

order but the Hon'ble Apex Court refused to interfere with the order of this Court by its judgment dated 03.05.2011. Thereafter, the investigation was taken up in respect of the second F.I.R. where the present petitioner was also an accused and charge-sheet was submitted on 31.03.2015 for the offences as aforesaid with the submission that the present petitioner was not sent up for trial since the sanction for prosecution against the present petitioner was refused by the Government.

3. It is alleged that despite refusal of sanction and non-submission of charge-sheet against the petitioner, learned Special Judge (Vigilance), Cuttack by the impugned order dated 26/24.08.2015 took cognizance of all the offences against the present petitioner and other accused persons observing that the overt-acts allegedly committed by the petitioner had no nexus with the performance of his official duty and hence, no sanction order was necessary either under Section 19 of the P.C. Act or under Section 197 of the Cr.P.C.

4. It was submitted by learned counsel for the petitioner that previous sanction of the appropriate authority is mandatory for prosecuting a person under Section 13 of the P.C. Act as per Section 19 of the said Act. It was further submitted that in this case, the sanction according authority after calling for the relevant records and discussing the matter with the concerned Investigating Agency refused to accord sanction by its letter dated 06.01.2015, which is annexed to the application vide Annexure-6. The correspondences calling for the records and clarifications made by the sanctioning authority have also been annexed as Annexures-7, 8, 9 and 10 showing that the entire allegations were thoroughly scrutinized and the materials were examined before refusing the sanction to prosecute the present petitioner. It was further submitted on behalf of the petitioner that it is the position of law that sanctioning authority is the best person to assess and decide as to whether necessary sanction should be granted for the prosecution or not. It is submitted that especially on the back drop of the present case that this Court has repeatedly observed in earlier applications that no irregularity was found out as to the allegation of payment of enhanced wages or approval of sub-standard works, the leaned trial court definitely erred in law by observing that the alleged acts had no nexus with the official performance of the present petitioner, even though, he was working as Superintendent Engineer during the relevant

period and allegedly made excess payment and ignored sub-standard works. Section 19 of the P.C. Act mandates that no court shall take cognizance of offences punishable under Sections 7, 10, 11, 13 and 15 allegedly to have been committed by a public servant except with the previous sanction. It was further submitted that the prosecuting agency has sought for sanction in respect of the entire case against the petitioner and the sanction was refused after careful consideration of the materials placed before the sanctioning authority. Thus, it could not have been said by the learned trial court that the sanction for prosecuting for offences under the Indian Penal Code was separate from sanction for the offence under Section 13 of the P.C. Act. That apart, by the impugned order, learned trail court has taken cognizance of all the offences against the petitioner, which is not sustainable in the eye of law.

5. Considering the submissions and the materials placed before the Court, I am of the view that the leaned trial court exceeded its jurisdiction by taking cognizance of the offences against the petitioner in absence of required sanction mandated under the statute.

6. Accordingly, it is directed that the impugned order dated 26/24.08.2015 passed by the leaned Special Judge (Vigilance), Cuttack in T.R. Case No.28 of 2015 taking cognizance as aforesaid so far as the present petitioner is concerned stands quashed.

2019 (I) ILR - CUT- 183

J.P. DAS, J.

CRIMINAL APPEAL NO. 99 OF 2012

SANIA PANDA .....Appellant

.Vs.

STATE OF ORISSA .....Respondent

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 20(b)(ii)(C) – Conviction – Prosecution case suffered from serious factual discrepancies and deficiencies – Nothing at all has

been brought on record as to whether the properties were duly kept in safe custody and when it was produced before the court – Malkhana Register of the Police Station has not been produced before the court – Brass seal used by the officer should have been given in zima of an independent witness but it was not done so despite availability of the independent witness – Non compliance of section 42 – Held, as per settled position of law in a case under the N.D.P.S. Act, the safe custody of the properties during transit is an important factor to be taken care of while considering the case of prosecution and in this case, this was not at all established on the admitted positions thereby giving the benefit of doubt to the accused as this was a serious lacuna suffered by the prosecution case and it needs no citation of case law that failure of compliance of the mandates of the Section 42 of the N.D.P.S. Act entitles the accused-appellant for a clean acquittal.

(Paras 7 & 8)

For Appellant : M/s. Durga Prasad Pradhan,
S. Prusty, & P.P. Nayak.
For Respondent : Addl. Standing Counsel.

JUDGMENT Date of Hearing : 13.07.2018 Date of Judgment : 26.07.2018

J.P. DAS, J.

This appeal is directed against the judgment dated 13.01.2012 passed by the learned Sessions Judge-cum-Special Judge, Ganjam, Berhampur in 2(a) C.C. Case No.09 of 2009 (N) convicting the accused-appellant under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act (in short 'the N.D.P.S. Act') and sentencing him to undergo R.I. for ten years and to pay a fine of Rs.1,000/- in default to undergo further R.I. for three years.

2. The prosecution case was that on 28.12.2009 at about 8.30 A.M. while the Inspector of Excise, Excise Intelligence and Enforcement Bureau, Berhampur along with his staff was performing patrolling duty near Haridakhandi Chouk, Berhampur received a reliable information about transportation of contraband Ganja. He immediately reported the facts to the Deputy Commissioner of Excise, his immediate superior officer, and kept watch on the road. After sometime, the present appellant was found coming on a motorcycle with one attaché and one air bag tied to the backside of the motorcycle. The Inspector of Excise detained the accused on suspicion and enquired about the contents of those bags. On

enquiry, the accused preferred to be searched by the Excise Inspector and accordingly, the search was conducted. It is alleged that on search 11 Kgs. of contraband Ganja was recovered from the attaché and 9 Kgs. 500 grams of contraband Ganja was recovered from the air bag for which the accused did not have any authority to possess. The Excise Officer weighed the Ganja, took sample therefrom, seized the materials, left the brass seal in zima of the accompanying Excise Constable and arrested the accused. Then he made a request to the I.I.C of the nearest Baidyanathpur Police Station for keeping the seized properties in the police Malkhana and after completion of investigation, final prosecution report was submitted against the accused-appellant under Section 20(b)(ii)(C) of the N.D.P.S. Act.

3. In course of trial, the accused took the plea of complete denial and the prosecution examined two witnesses in support of its case as against none, preferred by the accused in defence. Learned trial court, relying upon the evidence of the two witnesses, who were Inspector of Excise and one Excise Constable, accepted the prosecution case and passed the impugned judgment of conviction and sentence.

4. It has been submitted in the appeal that the learned trial court seriously erred in law by holding the appellant guilty of the offence ignoring the glaring discrepancies and deficiencies in the prosecution case apart from failing to consider the settled positions of law. It was submitted by learned counsel for the appellant that the prosecution case not only suffered from factual deficiencies but also from serious legal lacuna and the impugned judgment is absolutely unsustainable in the eye of law.

5. On the factual side, it was submitted that although one independent witness was cited in the prosecution report to have witnessed the search and seizure, still he was declined by the prosecution to be examined. Secondly, although the alleged detention was on a public road with traffic as admitted, still no other independent witness was cited by the prosecution to support its case. Thirdly, the P.W.1, the accompanying constable, stated to have weighed the Ganja whereas P.W.2, the Inspector of Excise claimed to have weighed the Ganja. Fourthly, no effort was made by the Investigating Officer to find out the ownership of the motorcycle and further no document was seized from the possession of

the appellant to show that he had any relationship with the said motorcycle. Fifthly, as per the prosecution case after the detection and seizure, the Inspector of Excise made a request to the I.I.C., Baidyanathpur Police Station to keep the seized materials in safe custody but excepting the copy of the letter written by the Inspector of Excise to the I.I.C., Baidyanathpur Police Station, nothing has been brought on record to show that the properties were received at the concerned Police Station or were kept in safe custody till those were produced before the trial court. There is absolutely no material on record to show that the properties were actually kept in the Police Malkhana or for what period it was kept and when it was produced before the trial court. It was also submitted that the Inspector of Excise stated in his evidence that he drew sample of Ganja recovered from the two containers at the spot but, he has again made a request to the Special court for drawal of sample. Thus, it was submitted that if the materials were kept in Police Malkhana after the seizure and drawl of sample then it was not known as to why further request was made to the court for drawl of sample and if so, from what it was to be drawn. On legal side, it was submitted by learned counsel for the appellant that the mandates under Section 42 of the N.D.P.S. Act have not been complied with by the Investigating Officer. According to the P.W.2, he received the information while performing the patrolling duty and immediately informed his superior authority vide Ext.5. It was submitted that Ext.5 is a copy of the letter written by the P.W.2 but it was neither stated to nor was proved as to who carried the letter to the addressed authority or whether that was received in the office and if received, at what time and on what date. It was also submitted that as per the position of law, the brass seal used by the officer for sealing the properties should have been left in custody of the independent witness but as per prosecution case, it was left in zima of P.W.1 the accompanying constable of Excise Department.

6. Per contra, it was submitted on behalf of the State that the material discrepancies as pointed out were minor in nature and the learned trial court was justified in reaching the conclusion of guilt against the accused-appellant basing on the evidence of P.Ws. 1 and 2 two official witnesses, whose evidence did not suffer from any inconsistency. It was also submitted that as per settled position of law, non-availability of independent evidence or independent corroboration to the evidence of

official witnesses, does not always affect the case of the prosecution, if the evidence of the official witnesses are wholesome and acceptable as has been in this case.

7. Going through the impugned judgment along with the materials available on LCR, taken together with the depositions of two official witnesses, the submissions as made on behalf of the appellant glared at the prosecution case with doubt and disbelief. As submitted on behalf of the appellant, the prosecution case suffered from serious factual discrepancies and deficiencies. No effort was made to find out the ownership of the motorcycle and its relation with the accused. Although the place of detection was a public road, having traffic, still the detecting officer opted to cite only one independent witness and again the said witness has been declined by the prosecution to be examined. Further as stated earlier, the Investigating Officer made a request to the I.I.C., Baidyanathpur Police Station to keep the properties in safe custody. But nothing at all has been brought on record as to whether the properties were duly kept in safe custody and if so, as to for what period it was kept and when it was produced before the court. The relevant Malkhana Register of the Police Station has not been produced before the court. As per settled position of law in a case under the N.D.P.S. Act, the safe custody of the properties during transit is an important factor to be taken care of while considering the case of prosecution and in this case, this was not at all established on the admitted positions thereby giving the benefit of doubt to the accused.

8. Now coming to the legal aspects, the brass seal used by the officer should have been given in zima of an independent witness but it was not done so despite availability of the independent witness. As regards compliance of Section 42 of the N.D.P.S. Act, the prosecution simply proved the office copy of the letter written by the detecting authority. As submitted on behalf of the appellant, it has not at all been tried to be proved as to whether the letter was actually dispatched and was received at the office of the superior authority. That became more doubtful for the reasons that the original letter was not seized and it was not known as to who carried the letter or how it was sent to the superior authority since as per prosecution case, the P.W.2 received the information about the illegal transportation of Ganja while he was on patrolling duty and not in the office. This was a

serious lacuna suffered by the prosecution case and it needs no citation of case law that failure of compliance of the mandates of the Section 42 of the N.D.P.S. Act entitles the accused-appellant for a clean acquittal.

9. In view of the aforesaid facts added with the absence of independent evidence made me reluctant to accept the findings reached by the learned trial court that the prosecution was successful in establishing the alleged offence under Section 20(b)(ii)(C) of the N.D.P.S. Act against the accused-appellant beyond all reasonable doubts.

10. Accordingly, the impugned judgment dated 13.01.2012 passed by the learned Sessions Judge-cum-Special Judge, Ganjam, Berhampur in 2(a) C.C. Case No.09 of 2009 (N) is set aside and the accused-appellant stands acquitted of the charge under Section 20(b)(ii)(C) of the N.D.P.S. Act. The accused-appellant be set at liberty forthwith, if he is not required to be detained in custody for some other reasons.

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J.P. DAS, J.

L.A.A. NO.16 OF 2011

ASUTOSH GIRI .....Appellant

.Vs.

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

LAND ACQUISITION ACT, 1894 – Section 54 – Appeal – Challenge is made to the award granting compensation in lieu of land acquisition – Plea of enhancement of award amount – Principles – Discussed.

"It is the settled position of law that the price of a small patch of land cannot be considered while awarding compensation for larger area of similar variety. In the instant case, admittedly there was no other homestead land in the case village. The appellant claimed different amounts, such as purchase of bricks, construction materials, transportation cost etc. for development of his land. But it may be mentioned that the valuation of the land has been assessed as homestead land after being developed by the appellant and hence, cost of

developments could not have been separately considered. The amount of award as has been made in respect of the construction of houses and boundary wall, boring of tube-well and plantation of trees etc. have been assessed taking into consideration the expert opinions and I find no compelling reason to interfere with the same. It has also been observed by the leaned trial court that the petitioner did not produce the registered sale deed in respect of his land which could have thrown light on the actual valuation of the property during the year 2004 when the appellant had purchased the same. However, the learned trial court in paragraph-6 of the impugned judgment has observed that the Land Acquisition Collector awarded the compensation @ of Rs.12,000/- per decimal considering the land of the petitioner as homestead land but in fact, the award has been made @ of Rs.9,000/- per decimal. It is the case of the appellant that some agricultural lands were sold @ of Rs.15,000/- per decimal at or about the period of notification. It is a common knowledge that when any proposed acquisition of lands comes to the knowledge of the local people, some documents are prepared showing higher valuations to get a higher rate of compensation. There was also no other transaction of homestead land in the adjacent village excepting the one as mentioned earlier. Taking into consideration all these facts, I am of the view that the compensation of the acquired land of the appellant should be fixed assessing @ of Rs.12,000/- (rupees twelve thousand) per decimal, which would serve the interest of justice"

(Para 6)

For Appellant : M/s. Samir Kumar Mishra, J.Pradhan, P. Prusty, D.K.Pradhan & D. Samal.

For Respondent : Addl. Standing Counsel.

JUDGMENT Date of Hearing : 10.08.2018 Date of Judgment : 24.08.2018

J.P. DAS, J.

This appeal is directed against the order dated 04.04.2011 passed by the learned Civil Judge (Sr. Division), Jaleswar in L.A. No.12 of 2010 answering the reference made under Section 18 of the Land Acquisition Act confirming the awards granted by the Land Acquisition Collector in respect of the land of the present appellant acquired by the Government of Odisha.

2. The Government of Odisha pursuance to the notification dated 19.05.2006 under Section 4(1) read with Section 17 of the Land Acquisition Act acquired Ac.28.066 decimals of land comprising of several plots situated in village Padhiharipur under Jaleswar Police Station in the district of Balasore for re-location of one check gate. Two plots measuring to an extent Ac.0.57 decimals of the land of the appellant were within the said acquired lands. The Land Acquisition Collector made an award under Section 11 of the Land Acquisition Act fixing Rs.15,13,000/- as compensation for the land,

i.e., @ Rs.9,000/- per decimals, Rs.4,92,623/- as compensation for the houses, Rs.22,000 for the trees besides other statutory benefits, totaling to an amount of Rs.15,31,496/-. The appellant received the compensation under protest and made a request for reference claiming higher rate of compensation. In the reference, he submitted that his two plots situated adjoining National High Way No.60 and with an intention of setting up an hotel, the appellant had purchased the said land in the year 2004. It was an agricultural land and after getting his name mutated, the appellant got the land converted to homestead variety by depositing the required premiums. He filled up the land with sand and earth, constructed pucca boundary wall, constructed accommodation for care taker and watchman and also bore a tube-well. He further submitted that he purchased the required materials for construction of boundary wall, care taker houses and other materials spending huge amount of money. Thereafter, he also planted different varieties of costly fruit bearing and other trees on his land. He also made an application to a Branch of United Bank of India for sanctioning of loan for his proposed hotel and the Bank had agreed to advance the loan of Rs.1,60,00,000/- for the said purpose. He also pleaded that the said land being on the side of the National High Way, the hotel business was supposed to earn huge profit since thousands of vehicles are passing on the road every day. He further submitted that the village, where the acquired land situated, did not have any inhabitants and all the lands except the land of the appellant were agricultural land admittedly. But, homestead land in the adjoining village, namely, Santia was sold at Rs.46,136/- per decimals before publication of the notification and that was not considered by the Land Acquisition Collector while awarding the compensation. The appellant had also filed the certified copy of the said registered sale deed. On the aforesaid submissions, he claimed Rs.20,29,752/- towards the price of land, i.e., @ Rs.46,136/- per decimals, Rs.20,00,000/- towards development, Rs.2,00,000/- towards cost of the trees, Rs.2,50,000/- towards cost of the building, Rs.6,00,000/- towards cost of the boundary wall, Rs.40,000/- towards loss of his current and proposed business, these totaling to an amount of Rs.76,19,752.

3. In course of hearing, oral as well as documentary evidences were placed on behalf of both the sides before the learned trial court and considering the materials placed before the court along with the circumstances and submissions, the leaned trial court refused to enhance the compensation amount and confirmed the awards made by the Land Acquisition Collector.

4. It was submitted by leaned counsel for the appellant that the Land Acquisition Collector as well as the leaned trial court did not consider the valuation of the properties in proper perspective. It was submitted that admittedly, one plot of homestead land was sold in the adjacent village at the rate of Rs.46,136/- per decimal and agricultural land in the case village were also sold at the rate of Rs.15,000/- per decimal during the period of notification. It was also submitted that the Land Acquisition Collector as well as the learned trial court did not take into consideration, the huge amount spent by the appellant in developing the land for converting the same from agricultural to homestead land, apart from construction of houses and boundary wall, boring of tube-well as well as plantation of different varieties of valuable trees.

5. Per contra, it was submitted on behalf of the State-respondents that all the materials have been well taken care of by the Land Acquisition Collector as well as by the leaned trial court. It was also submitted that the appellant has put up imaginary amounts for the materials collected by him and examined some witnesses in support of some receipts, which were prepared for the purpose of the case. It was further submitted that admittedly, there was no other homestead land in the case village and one small piece of homestead land measuring about four decimals was shown as sold from the adjacent village @ Rs.46,136 per decimal, which was rightly not taken into consideration by the learned court below. It was further submitted that after assessing the valuation of the constructions as well as of all the trees by proper experts, the amount of compensation has been awarded, thus, needing no interference.

6. Perused the materials as placed before the Land Acquisition Collector as well as the leaned trial court. Learned trial court has discussed the materials in detail vis-à-vis the awards made by the Land Acquisition Collector. It is the settled position of law that the price of a small patch of land cannot be considered while awarding compensation for larger area of similar variety. In the instant case, admittedly there was no other homestead land in the case village. The appellant claimed different amounts, such as purchase of bricks, construction materials, transportation cost etc. for development of his land. But it may be mentioned that the valuation of the land has been assessed as homestead land after being developed by the appellant and hence, cost of

developments could not have been separately considered. The amount of award as has been made in respect of the construction of houses and boundary wall, boring of tube-well and plantation of trees etc. have been assessed taking into consideration the expert opinions and I find no compelling reason to interfere with the same. It has also been observed by the leaned trial court that the petitioner did not produce the registered sale deed in respect of his land which could have thrown light on the actual valuation of the property during the year 2004 when the appellant had purchased the same. However, the learned trial court in paragraph-6 of the impugned judgment has observed that the Land Acquisition Collector awarded the compensation @ of Rs.12,000/- per decimal considering the land of the petitioner as homestead land but in fact, the award has been made @ of Rs.9,000/- per decimal. It is the case of the appellant that some agricultural lands were sold @ of Rs.15,000/- per decimal at or about the period of notification. It is a common knowledge that when any proposed acquisition of lands comes to the knowledge of the local people, some documents are prepared showing higher valuations to get a higher rate of compensation. There was also no other transaction of homestead land in the adjacent village excepting the one as mentioned earlier.

7. Taking into consideration all these facts, I am of the view that the compensation of the acquired land of the appellant should be fixed assessing @ of Rs.12,000/-(rupees twelve thousand) per decimal, which would serve the interest of justice. Hence, the amount of compensation of Rs.5,13,000/- awarded by the Land Acquisition Collector towards the cost of the land is enhanced to Rs.6,84,000/-, i.e., @ of Rs.12,000/- per decimal, the enhanced amount to be paid to the appellant with 6% simple interest from the date of award. The other statutory benefits will be calculated accordingly as per percentage of the enhanced compensation. So far as the compensation awarded in respect of the other claims, I do not find any merit in the contentions made on behalf of the appellant, since those have been well discussed and confirmed by the learned trial court. Accordingly, the appeal is disposed of with the modification as aforesaid.