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Girish Chandra Tripathy-V- State of Odisha & Anr.

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settled/compromised in the National Level Lok Adalat which passed the award directing payment within 2 months from the date of award failing which the compensation amount would carry interest @ 9% per annum from the date of application till realization – The award amount as per direction supposed to be paid on 11.02.2016 was paid on 18.02.2016 – Claim of interest for the delayed payment – Held, there is no illegality in the order passed by the MACT granting interest as the parties have accepted the order of the Lok Adalat – The amount of interest be recovered from the Officer's salary responsible for such delay.

Oriental Insurance Company Ltd. -V- Laxmi Kamar & Ors.

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Oriental Insurance Company Ltd. -V- Laxmi Kamar & Ors.

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Bhimabai Mahadeo Kambekar (D) Th. LR -V- Arthur Import & Export Company & Ors. (S.C)

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SERVICE LAW – Change of Date of Birth **–** Service Book contained the signature of the appellant where his date of birth was corrected from

01.04.1960 to 01.04.1950 – The appellant did not make any representation or effort to further correct such entry during his service tenure – Only after his retirement he made the representation for change of his date of birth – Whether can be accepted? – Held, no, on the touch stone of the observations of the Hon'ble Apex Court settling the position in this respect, no merit in the present appeal so as to interfere with the findings.

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Rabi Narayan Panda -V- State of Odisha & Ors.

2019 (I) ILR-Cut…… 467

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2019 (I) ILR - CUT- 433 (S.C.)

ABHAY MANOHAR SAPRE, J & R. SUBHASH REDDY, J.

CIVIL APPEAL NO. 1330 OF 2019
(Arising out of S.L.P.(C) No. 9394 of 2012)

SMT. BHIMABAI MAHADEO KAMBEKAR (D) TH. LR .....Appellant(s)

.Vs.

ARTHUR IMPORT AND EXPORT COMPANY & ORS. .....Respondent(s)

REVENUE LAWS – Mutation of a land in the revenue records – Whether creates title? – Held, no, mutation of a land in the revenue records does not create or extinguish the title over such land nor it has any presumptive value on the title – It only enables the person in whose favour mutation is ordered to pay the land revenue in question.

Case Laws Relied on and Referred to :-

1. (1996) 6 SCC 223 : Sawarni(Smt.) Vs. Inder Kaur.
2. (1997) 7 SCC 137 : Balwant Singh & Anr. Vs. Daulat Singh(dead) by L.Rs. & Ors.
3. (2009) 5 SCC 591 : Narasamma & Ors. Vs. State of Karnataka & Ors.

For Appellant : E.C. Agrawala
For Respondent : Mayuri Raghuvanshi, Nishant Ramakantrao, Katreshwarkar, Asha Gopalan Nair.

JUDGMENT Date of Judgment : 31. 01.2019

ABHAY MANOHAR SAPRE, J.

1. Leave granted.

2. This appeal is directed against the final judgment and order dated 30.09.2011 passed by the High Court of Judicature at Bombay in Writ Petition No.6235 of 2011 whereby the Single Judge of the High Court dismissed the writ petition filed by the appellants herein.

3. Few facts need mention *infra* to appreciate the short controversy involved in this appeal.

4. The dispute, which has reached to this Court in this appeal at the instance of one party to such dispute, arises out of and relates to the entries made in the revenue records in relation to the disputed land.

5. The dispute began from the Court of Superintendent of land records. Thereafter it reached to the Deputy Director of Land Records in appeal. It then reached to the State in revision and lastly, in the High Court in writ

petition resulting in passing the impugned order which has given rise to filing of the present appeal by way of special leave in this Court by the appellants.

6. Heard learned counsel for the parties.

7. The law on the question of mutation in the revenue records pertaining to any land and what is its legal value while deciding the rights of the parties is fairly well settled by a series of decisions of this Court.

8. This Court has consistently held that mutation of a land in the revenue records does not create or extinguish the title over such land nor it has any presumptive value on the title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question. (See **Sawarni(Smt.) vs. Inder Kaur,** (1996) 6 SCC 223, **Balwant Singh & Anr. Vs. Daulat Singh(dead) by L.Rs. & Ors.**, (1997) 7 SCC 137 and **Narasamma & Ors. vs. State of Karnataka & Ors.**, (2009) 5 SCC 591).

9. The High Court while dismissing the writ petition placed reliance on the aforementioned law laid down by this Court and we find no good ground to differ with the reasoning and the conclusion arrived at by the High Court. It is just and proper calling for no interference.

10. It is not in dispute that the civil suits in relation to the land in question are pending in the Courts between the parties. Therefore, it would not be proper to embark upon any factual inquiries into the question as to whether the entries were properly made or not and at whose instance they were made etc. in this appeal. It is more so when they neither decide the title nor extinguish the title of the parties in relation to the land.

11. In the light of the foregoing discussion, we are not inclined to entertain the submission of Mr. Naphade, learned senior counsel for the appellants when he urged the issues on the facts.

12. To conclude, we find no merit in this appeal. It fails and is accordingly dismissed.

2019 (I) ILR - CUT- 435 (S.C.)

ASHOK BHUSHAN, J & K. M. JOSEPH, J.

CIVIL APPEAL NO.1052 OF 2019

SHIVNARAYAN (D) BY LRS. .....Appellant(S)

Vs.

MANIKLAL (D)THR. LRS. & ORS. .....Respondent(S)

(A) CODE OF CIVIL PROCEDURE, 1908 – Sections 16 and 17 – Ambit and scope – Indicated.

"Sections 16 and 17 of the C.P.C. are part of the one statutory scheme. Section 16 contains general principle that suits are to be instituted where subject-matter is situate whereas Section 17 engrafts an exception to the general rule as occurring in Section 16. From the foregoing discussions, we arrive at following conclusions with regard to ambit and scope of Section 17 of C.P.C.

(i) The word 'property' occurring in Section 17 although has been used in 'singular' but by virtue of Section 13 of the General Clauses Act it may also be read as 'plural', i.e., "properties".

(ii) The expression any portion of the property can be read as portion of one or more properties situated in jurisdiction of different courts and can be also read as portion of several properties situated in jurisdiction of different courts.

(iii) A suit in respect to immovable property or properties situate in jurisdiction of different courts may be instituted in any court within whose local limits of jurisdiction, any portion of the property or one or more properties may be situated.

(iv) A suit in respect to more than one property situated in jurisdiction of different courts can be instituted in a court within local limits of jurisdiction where one or more properties are situated provided suit is based on same cause of action with respect to the properties situated in jurisdiction of different courts." *(Para 29)*

(B) CODE OF CIVIL PROCEDURE, 1908 – Order 2 Rules 1,2 & 3 – Cause of action – Plea that order II Rule 2 sub-clause (1) provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action – Whether correct? – Discussed.

"Learned counsel for the appellant has also referred to and relied on order II Rule 2 and Order II Rule 3 C.P.C. Learned counsel submits that order II Rule 2 sub-clause (1) provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action.

The cause of action according to Order II Rule 2 sub-clause (1) is one cause of action. What is required by Order II Rule 2 sub-clause (1) is that every suit shall

include the whole of the claim on the basis of a cause of action. Order II Rule 2 cannot be read in a manner as to permit clubbing of different causes of action in a suit. Relying on Order II Rule 3 learned counsel for the appellant submits that joinder of causes of action is permissible. A perusal of sub-clause (1) of Order II Rule 3 provides that plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly. What is permissible is to unite in the same suit several causes of action against the same defendant, or the same defendants jointly. In the present case suit is not against the same defendant or the same defendants jointly. As noticed above there are different set of defendants who have different causes of actions." *(Para 30)*

Case Laws Relied on and Referred to :-

1. AIR 1930 PC 188 : Nilkanth Balwant Natu and Others Vs. Vidya Narasinh Bharathi Swami & Ors.
2. AIR 1936 PC 189 : Nrisingha Charan Nandy Choudhry Vs. Rajniti Prasad Singh & Ors.
3. AIR 1923 Calcutta 501 : Rajendra Kumar Bose Vs. Brojendra Kumar Bose
4. (1908) ILR 30 All. 560 : Kubra Jan Vs. Ram Bali & Ors.
5. AIR 1952 Nag. 303 (Full Bench) : Ramdhin & Ors.Vs. Thakuran Dulaiya & Ors.
6. AIR 1960 Ori. 159 : Basanta Priya Dei and Another Vs. Ramkrishna Das & Ors.
7. AIR 1968 Kant. 82 : Laxmibai Vs. Madhankar Vinayak Kulkarni & Ors.
8. AIR 1972 Delhi 90 : Prem Kumar and Others Vs. Dharam Pal Sehgal & Ors.
9. AIR 1975 All. 91 : Janki Devi Vs. Mannilal & Ors.
10. AIR 1932 PC 172 : Sardar Nisar Ali Khan Vs. Mohammad Ali Khan.
11. AIR 1942 All. 387 : Karan Singh & Ors.Vs. Kunwar Sen & Ors.
12. AIR 1975 All. 91 : Smt. Janki Devi Vs. Manni Lal & Ors.

For Appellant : Akbar Sharma [P-1]
For Respondent : Neha Sharma [R-7]
Neha Sharma [R-8]

JUDGMENT Date of Judgment : 06.02.2019

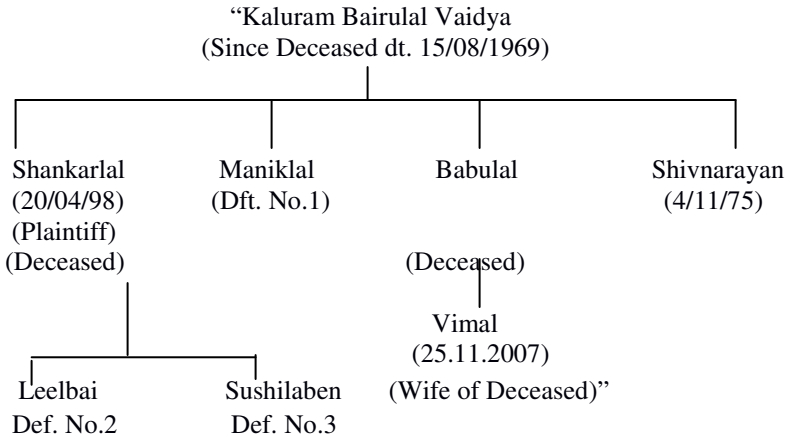
ASHOK BHUSHAN, J.

This appeal has been filed by the appellant against the judgment of High Court of Madhya Pradesh dated 13.11.2013 by which judgment writ petition filed by the appellant challenging the order dated 17.08.2011 of the III Additional District Judge, Indore in Civil Suit No.60-A of 2010 has been upheld dismissing the writ petition.

2. Brief facts of the case necessary to be noticed for deciding this appeal are:-

2.1 The appellant filed Civil Suit No.60-A of 2010 before the District Judge praying for declaring various transfer documents as null and void with regard to suit property mentioned in Para No. 1A and Para No.1B of the plaint. Plaintiff also prayed for declaration that

suit properties mentioned in Para Nos.1A and 1B are Joint Family Property of plaintiff and defendant Nos. 1 to 3 and plaintiff is entitled to receive 1/3rd part of the suit property. A Will executed by one Lt. Smt. Vimal Vaidya was also sought to be declared to be null and void. Certain other reliefs were claimed in the suit. The parties shall be referred to as described in the suit. The plaintiff in Para No.2 of the plaint has set the following genealogy of the parties:-



2.2 In Para No.1 of the plaint, description of the property was mentioned to the following effect:-

1.A) Plot No. SP 79, Sudama Nagar Indore (M.P.) size 30 ft. X 50 ft. area 1500 Sq. Ft. through membership no. 2905 of Shikshak Kalyar Samiti, Sudama Nagar, Indore.

B) Bombay Suburban District S. No. 341, Pt. of Bandra Grant Flat No.C/1/3, Sahitya Sahavas Co-op. Housing Society, Second Floor, building known as "Abhang" Bandra (E), Mumbai- 400 051 situated on the plot bearing no. C.T.S. No. 629, (S. No. 341-A.B.S.D.) Madhusudan Kalekar Marg, Gandhinagar, Bandra (East) Mumbai – 51.

2.3 The plaintiff sought relief with regard to two properties (hereinafter referred to as Indore property, situate at Indore, State of Madhya Pradesh and Mumbai property situate at Mumbai, State of Maharashtra). Plaintiff's case in the plaint was that Indore Property was purchased by plaintiff's father in the year 1968-1969. Plaintiff's father died on 15.08.1969. Thereafter, Indore property was joint family property of the plaintiff and defendant Nos. 1 to 3. Plaintiff's brother Babulal shifted to Pune. Babulal was allotted Mumbai property under a Government Scheme for extraordinary persons like

writers and educationist. Babulal died in the year 1975. Thereafter, the Mumbai property, on the basis of succession certificate issued by Court of Civil Judge (Senior Division), Pune came in the name of widow of Babulal, Smt. Vimal Vaidya. Smt. Vimal Vaidya transferred the Mumbai flat by sale deed dated 15.10.2007 in favour of defendant Nos. 7 and 8. It was further pleaded in the plaint that Smt. Vimal Vaidya also dealt with Indore Property. The name of Smt. Vimal Vaidya was mutated in the year 1986 in the Indore property and thereafter she transferred the Indore property in favour of defendant Nos. 9 and 10. One set of pleadings was with regard to a Will executed in the year 2000 by Smt. Vimal Vaidya in favour of defendant Nos. 4 to 6. On aforesaid pleadings, following reliefs were prayed in Para No. 25 of the plaint:-

"A) The property mentioned in Para No.1 of the Plaint and its deed of transfer documents be declared null and void which is not binding on the part of the plaintiff.

B) The property mentioned in Para No.1B of Plaint and document related to its registered deed to transfer be declared null and void and which is not binding on the part of Plaintiff.

C) The property mentioned in Para No. 1A and 1B of the Plaint is joint family property of the Plaintiff and defendant No. 1 to 3 be declared joint family property and Plaintiffs right to receive 1/3 part of the suit property.

D) Court Commissioner be appointed to make division of suit property and 1/3 part possession be given to the Plaintiff.

E) During the hearing of the suit injunction order be passed in respect of the property not to create third party interest by the Defendants.

F) Plaintiff's suit be declared decreed with the expenses.

G) To grant any other relief which this Hon'ble Court may be fit in the interest of justice.

H) The forged will executed by Late Vimal Vaidya under influence of defendant No. 4 and his associates relatives Defendant No. 5 and 6 and other relatives of Kher family. Because, Late Babulal Vaidya was a member of undivided Hindu family. Therefore, Late. Vimal Vaidya was not authorized to execute that alleged will as per the Law. Therefore, the registered alleged will be declared null and void and be declared that it is not binding on the part of the Plaintiff."

2.4 The defendant Nos. 7 and 8 appeared in suit and filed an application with the heading "application for striking out pleadings

and dismissing suit against defendants No.7 and 8 for want of it territorial jurisdiction and mis-joinder of parties and causes of action." The defendant Nos. 7 and 8 pleaded that for property being situated at Bandra East, Mumbai, the Court at Indore has no territorial jurisdiction. It was further pleaded by the defendant that suit suffers fatally from mis-joinder of parties as well as causes of action. The defendant Nos. 7 and 8 pleaded that there is no nexus at all between the two properties – one situate at Indore and other at Mumbai. Details of different causes of action and nature of the properties, details of purchasers for both different sale transactions have been explained in detail in Para No. 6 of the application. It was further pleaded that Mumbai property does not form asset of any Hindu Undivided Family. Mumbai property was acquired by Babulal in his own name and after his death on the basis of succession, it has come to his sole heir Smt. Vimal Vaidya in the year 1975. It was pleaded that no part of the cause of action for the Mumbai property took place in Indore. In the application, following reliefs has been prayed for by the defendant Nos. 7 and 8:-

"(a) All the pleadings and the relief clauses relating to the property situate at Mumbai may kindly be ordered to be struck off from the plaint, in exercise of powers conferred on this Hon'ble Court under Order 6 Rule 16 of the Civil Procedure Code, and as a consequence the suit against the defendants No.7 and 8 may kindly be dismissed with costs for the answering defendants; while the Suit relating to the Indore property may be continued if otherwise round maintainable under the law;

OR in the alternative,

An order may kindly be passed declining to entertain the part of the suit relating to the property in Mumbai with costs for the answering defendants; and

(b) Such other order may kindly be passed as may be deemed appropriate in the circumstances of the case."

2.5 The trial court after hearing the parties on the application dated 19.03.2011 filed by the defendant Nos. 8 and 9 passed an order dated 17.08.2011 allowed the application. An order was passed deleting the property mentioned In Para No. 1B of the plaint and the relief sought with regard to the said property. The trial court held that separate cause of actions cannot be combined in a single suit.

2.6 Aggrieved by the order of the trial court, a writ petition was filed in the High Court, which too has been dismissed by the High Court

vide its order dated 13.11.2013 affirming the order of the trial court. High Court referring to Section 17 of the Civil Procedure Code, 1908 held that for property situated at Mumbai, the trial court committed no error in allowing the application filed by defendant Nos. 7 and 8. The plaintiffappellant aggrieved by the order of the High court has come up in this appeal.

3. We have heard Shri Vinay Navare for the appellant. Shri Chinmoy Khaladkar has appeared for respondent Nos. 7 and 8.

4. Learned counsel for the appellant submits that High Court did not correctly interpret Section 17 ofthe Code of Civil Procedure. The partition suit filed by the appellant with regard to Mumbai and Indore properties was fully maintainable. He submits that Order II Rule 2 of CPC mandates that the plaintiff must include the whole claim in respect of a cause of action in the suit. The cause of action claimed by the plaintiff was denial of the plaintiff's right to share in the Joint Family Property. Restrictive interpretation of Section 17 will do violence to the mandate of Order II Rule 2. Section 39(1)(c) of the CPC itself contemplate that there can be a decree of an immovable property, which is situated outside the local limits of the jurisdiction. The words "immovable property"' used in Section 17 is to be interpreted by applying Section 13 of the General Clauses Act. It provides that in all Central Acts and Regulations, unless the context and subject otherwise requires, "any singular term shall include plural". In event, it is accepted that with regard to separate properties situated in different jurisdictions, separate suits have to be filed that shall result in conflicting findings of different Courts and shall involve the principles of res judicata.

5. Learned counsel appearing for defendant Nos. 8 and 9 refuting the submissions of learned counsel for the appellant contends that no error has been committed by trial court in deleting the property at Para No.1B in the plaint as well as pleadings and reliefs with regard to said property. It is submitted that Section 17 of the CPC contemplate filing of a suit with respect to immovable property situated in jurisdiction of different courts only when any portion of the property is situated in the jurisdiction of a Court, where suit has to be filed. The word "any portion of the property" indicate that property has to be one whose different portions may be situated in jurisdiction of two or more Courts. He further submits that there is no common cause of action with regard to property situate at Indore and property situate at Mumbai. Transfer deed with regard to Indore Property as well as transfer deeds of Mumbai property are different. The purchasers of

both the properties, i.e. Indore property and Mumbai property are also different. According to pleadings in the plaint itself, the Mumbai property was purchased by Babulal, the husband of Smt. Vimla Vaidya in his own name, which after death of Babulal in the year 1975 was mutated in the name of Smt. Vimla Vaidya. The plaintiff has sought to club different cause of actions in one suit. There is mis-joinder of the parties also in the suit since the defendants pertaining to different transactions have been impleaded in one suit whereas there is no nexus with the properties, transactions and persons. Learned counsel for the defendant Nos. 8 and 9 submits that by order of Court of Civil Judge (Senior Division), Pune, the property is already mutated in the year 1975 in the name of Smt. Vimla Vaidya after death of her husband, which was rightfully transferred by her to defendant Nos. 8 and 9 on 15.10.2007. It is submitted that the Court at Indore might proceed with the property at Indore with the defendants, who are related to Indore property but suit pertaining to Mumbai property, transactions relating thereto and defendants relating to Mumbai property have rightly been struck off from the case.

6. Before we consider the submissions of the learned counsel for the parties, relevant provisions pertaining to place of suing as contained in Code of Civil Procedure needs to be noted. Section 15 to Section 20 contains a heading "place of suing". Section 16 provides that Suits to be instituted where subject-matter situate. Section 16 is as follows:-

> **16. Suits to be instituted where subjectmatter situate.--**Subject to the pecuniary or other limitations prescribed by any law, suits-
>
> (a) for the recovery of immovable property with or without rent or profits,
>
> (b) for the partition of immovable property,
>
> (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,
>
> (d) for the determination of any other right to or interest in immovable property,
>
> (e) for compensation for wrong to immovable property,
>
> (f) for the recovery of movable property actually under distraint or attachment, shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:
>
> Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant, may where the relief sought can be entirely obtained through his personal obedience, be instituted either

in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation.– In this section "property" means property situate in India.

7. Section 17, which falls for consideration in the present case, deals with suits for immovable property situate within jurisdiction of different courts is as follows:-

17. Suits for immovable property situate within jurisdiction of different Courts.--Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Court, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate :

Provided that, in respect of the value of the subject matter of the suit, the entire claim is cognizable by such Court.

8. We need to notice the Scheme under Code of Civil Procedure as delineated by Sections 16 and 17. Section 16 provides that suit shall be instituted in the Court within the local limits of whose jurisdiction the property is situated. Section 16(b) mentions "for the partition of immovable property".

9. Now, we look into Section 17, which deals with suits for immovable property situated within jurisdiction of different Courts. As per Section 17, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situated. What is the meaning of the word "any portion of the property"? There may be a fact situation where immovable property is a big chunk of land, which falls into territorial jurisdiction of two courts in which fact situation in Court in whose jurisdiction any portion of property is situated can entertain the suit. Whether Section 17 applies only when a composite property spread in jurisdiction of two Courts or Section 17 contemplate any wider situation. One of the submissions of the learned counsel for the appellant is that the word "property" as occurring in Section 17 shall also include the plural as per Section 13 of General Clauses Act, 1897. Section 13 of the General Clauses Act provides:-

13. Gender and number.-In all Central Acts and Regulations, unless there is anything repugnant in the subject or context.-

(1) Words importing the masculine gender shall be taken to include females; and

(2) words in the singular shall include the plural, and vice versa.

10. Applying Section 13 of General Clauses Act, the Bombay High Court explaining the word "property" used in Section 17 held that it includes properties. We are also of the same view that the word "property" used in Section 17 can be more than one property or properties.

11. The word "property" under Section 17 of the Civil Procedure code may also be properties, hence, in a schedule of plaint, more than one property can be included. Section 17 can be applied in event there are several properties, one or more of which may be located in different jurisdiction of courts. The word "portion of the property" occurring in Section 17 has to be understood in context of more than one property also, meaning thereby one property out of a lot of several properties can be treated as portion of the property as occurring in Section 17. Thus, interpretation of word "portion of the property" cannot only be understood in a limited and restrictive sense of being portion of one property situated in jurisdiction of two courts.

12. We now look into the decisions of various Courts in reference to Section 17 of Civil Procedure Code. How the word "property" and "portion of the property" occurring in Section 17 has been understood by different High Courts. There are few decisions of the Privy Council also where Section 17 of the Civil Procedure Code came for consideration. In **Nilkanth Balwant Natu and Others Vs. Vidya Narasinh Bharathi Swami and Others, AIR 1930 PC 188**, Privy Council had occasion to consider Section 17 of Civil Procedure Code. The properties in respect of which relief was sought by the plaintiff were situated in Satara, Belgaum and Kolhapur. Although Satara and Belgaum were situated in British India but Kolhapur was not. The Privy Council after noticing the provision of Sections 17 and 16(c) laid down following:-

> "The learned Judge had jurisdiction to try the suit so far as it related to the mortgaged properties situate in Satara; and, inasmuch as the mortgaged properties in Belgaum are within the jurisdiction of a different Court in British India, he had jurisdiction to deal with those properties also."

13. The Privy Council, thus, held that Satara Court had jurisdiction to entertain suit with regard to property situated at Satara and Belgaum whereas it has no jurisdiction to entertain suit pertaining to Kolhapur, which was not in the British India. In another case of Privy Council, **Nrisingha Charan Nandy Choudhry Vs. Rajniti Prasad Singh and Others, AIR 1936 PC 189**, mortgage lands were in the Sonthal Parganas, State of Bihar and also in the Gaya district of State of Bihar. In Paragraph 9, following was laid down:-

> "9. Now, the mortgage deeds include, as already stated, lands situated, not only in the Sonthal Parganas, but also in the Gaya District. What is the ordinary rule for determining the court which can take cognizance of a suit for immovable property situated within the local limits of two or more tribunals? The answer is furnished by Section 17 of the Code of Civil Procedure (Act V. of 1908), which provides that where a suit is to obtain relief respecting immovable property situate within the jurisdiction of different courts, the suit may be instituted in any court within the local limits of whose jurisdiction any portion of the property is situate."

14. Different High Courts have also while interpreting Section 17 of Civil Procedure Code laid down that Section 17 is applicable in case where properties are situated in the jurisdiction of more than one court. In **Rajendra Kumar Bose Vs. Brojendra Kumar Bose, AIR 1923 Calcutta 501**, the Division Bench of the Calcutta High Court noticed following:-

> "Exceptions to the rule that a suit cannot lie for partition of a portion of the family property have been recognised when different portions of the family property are situated in different jurisdictions, aid separate suits for separate portions have sometimes been allowed, where different rules of substantive or adjective law prevail in the differed Courts; Hari v. Ganpat Rao, (1883) 7 Bom. 272; Ramacharia v. Anantacharia, (1894) 18 Bom. 389; Moti Ram v. Kanhaya Lal, AIR 1920 Lah. 474; Panchanon v. Sib Chandra, (1887) 14 Cal. 835; Balaram v. Ram Chandra, (1898) 22 Bom. 922; Abdul v. Badruddin, (1905) 28 Mad. 216; Padmani v. Jagadamba, (1871) 6 B.L.R. 134; Rammohan v. Mulchand, (1906)28 All. 39; Lachmana v. Terimul, 4 Mad. Jur. 241; Subba v. Rama, (1866-67) 3 Mad. H.C.R. 376; Jayaram v. Atmaram, (1879) 4 Bom. 482;"

15. A Full Bench of Allahabad High Court in **Kubra Jan Vs. Ram Bali and Others, (1908) ILR 30 All. 560** had occasion to consider suit, which was filed at Bareilly with regard to Bareilly property as well as Bara Banki property situated in two different districts. The jurisdiction at Bareilly Court was upheld in Paragraph Nos. 1 and 8, in which it was laid down as follows:-

> "**1.** This appeal has been laid before a Full Bench by reason of a conflict in the authorities upon a question raised in the appeal. The suit is one by the daughter of one Bande Ali to recover from her brother Akbar Husain and a number of other defendants, transferees from him, her share in the property of her deceased father. This property is situate in the district of Bareilly and also in the district of Bara Banki in Oudh. It appears that Akbar Husain transferred the Bareilly property to the defendants Nos. 2 to 8 and the Bara Banki property to persons from whom the defendant respondent Ram Bali acquired it by virtue of a decree for pre-emption. The suit in regard to the Bareilly property was compromised, with the result that the claim in respect of that property was abandoned, and the suit proceeded as regards the Bara Banki property only.
>
> **8.** Again, it is said that after the compromise in respect of the Bareilly property the Court ceased to have any jurisdiction to deal with the plaintiff's claim, that is, that

> though the Bareilly Court bad jurisdiction, when the plaint was filed, to deal with the suit, it ceased to have jurisdiction when portion of the property claimed was withdrawn from the litigation. 'It seems to me that once jurisdiction is vested in a Court, in the absence of a provision of law to the contrary, that jurisdiction will not be taken away by any act of the parties. There is no allegation here that the plaint was filed in the Bareilly Court with any intention to defeat the provisions of the Code of Civil Procedure as regards the venue of suits for recovery of immovable property. If any fraud of that kind had been alleged and proved, other considerations would arise. But in this case, as I have said, no such suggestion has been made."

16. Similar view was taken in **Ramdhin and Others Vs. Thakuran Dulaiya and Others, AIR 1952 Nag. 303 (Full Bench); Basanta Priya Dei and Another Vs. Ramkrishna Das and Others, AIR 1960 Ori. 159; Laxmibai Vs. Madhankar Vinayak Kulkarni and Others, AIR 1968 Kant. 82; Prem Kumar and Others Vs. Dharam Pal Sehgal and Others, AIR 1972 Delhi 90 and Janki Devi Vs. Mannilal and Others, AIR 1975 All. 91.**

17. The views of the different High Courts as well as of the Privy Council, as noticed above, clearly indicate that Section 17 has been held to be applicable when there are more than one property situated in different districts.

18. The point to be noticed is that the permissibility of instituting suit in one Court, where properties, which are subject matter of the suit are situated in jurisdiction of different courts have been permitted with one rider, i.e., cause of action for filing the suit regarding property situated in different jurisdiction is one and the same. In a suit when the cause of action for filing the suit is different, the Courts have not upheld the jurisdiction of one Court to entertain suits pertaining to property situated in different courts. In this context, we need to refer to some judgments of High Courts as well as of the Privy Council, which has considered the issue. In **Sardar Nisar Ali Khan Vs. Mohammad Ali Khan, AIR 1932 PC 172**, Privy Council had occasion to consider the case where subject matter of the suit were several properties situated in jurisdiction of different courts. Suit was instituted in Oudh (which later became part of Uttar Pradesh). The Privy Council held that since there was different cause of actions, the same cannot be clubbed together. One of the properties, which was situated in Punjab was referred to in the suit as Khalikabad property. Although, suit with regard to the other three properties had similar cause of action but cause of action with regard to Khalikabad property being found to be different, the Court held that Section 17 Civil Procedure Code was not applicable. Following was laid down in the case by the Privy Council:-

> "There remains the question of the Khalikabad estate. Here the respondent cannot succeed unless he shows that under the terms of the deed creating the wakf he is the trustee. That question depends upon the construction of the deed. It is a separate and different cause of action from these which found the proceedings in respect of the other three properties. Their Lordships are unable to find any jurisdiction for bringing the suit in respect of this property elsewhere than in the Court of the district where the property is situate. Such justification cannot in their Lordships' judgment be found in Section 17, Civil P.C. upon which the respondent relied."

19. A Two-Judge Bench judgment of Allahabad High Court has been heavily relied upon by the learned counsel for the respondent reported in **AIR 1942 All. 387, Karan Singh and Others Vs. Kunwar Sen and Others.** In the above case, suit properties were situated in Haridwar and Amritsar. Suit was filed in the Court of Civil Judge, Saharanpur. An application under Section 22, Civil P.C. was filed to determine as to whether a suit which is pending in the Court of the Civil Judge of Saharanpur should proceed in the corresponding Court having jurisdiction at Amritsar in the Punjab. The Court after noticing Section 17 held that plaintiffs were claiming two properties against two set of defendants, whom they alleged to be trespassers. The Court held that unless suit is filed on one cause of action, two properties situate in different jurisdiction cannot be clubbed. Following was laid down:-

> "Having made these observations I must now return to the question whether in the suit with which we are dealing it can be said that the relief claimed against the Defendants in possession of the property at Hardwar and the Defendants in possession of the property at Amritsar arises out of the same series of acts or transactions and whether the two properties claimed can, for the purposes of Section 17, be described as a single entity. It must be admitted that there is no apparent connection between the transfer of the Amritsar property to Amar Nath under the will executed by Jwala Devi and the subsequent transfers made by him and his successors-in-interest on the one hand and the transfer made by Prem Devi of the Hardwar property on the other hand. It must be admitted also that the Plaintiffs are not claiming the estates of Badri Das as a whole against any rival claimant to the estate. They are claiming two properties against two sets of Defendants whom they allege to be trespassers and who, if they are trespassers, have absolutely no connection with each other. The only connecting link is that the Plaintiff's claim in both the properties arose at the time of the death of Prem Devi and that the claim is based on the assumption that the Defendants are in possession as the results of transfers made by limited owners who were entitled, during their lives, to the enjoyment of the whole estate and the properties comprised within it. It was held many years ago in the case of Mst. Jehan Bebee v. Saivuk Ram (1867) H.C.R. 1. 109, that unconnected transfers by a Hindu widow of properties comprised within the husband's estate did not give rise to one cause of action against the various transferees. The same rule was laid down in the case of Bindo Bibi v. Ram Chandra (1919) 17 A.L.J. 658. In that case a reference was made to the decision in Murti v.

> Bhola Ram (1893) 16 All 165 and it was pointed out that that was a case where a claim was made against one Defendant who had taken possession of different properties in execution of one decree. There is no doubt that that case is clearly distinguishable from the case with which we are dealing……"

20. The above judgment was subsequently relied and explained by Allahabad High Court in **Smt. Janki Devi Vs. Manni Lal and Others, AIR 1975 All. 91.** In Paragraph No.11, following was laid down:-

> "11. Similar view was expressed in Smt. Kubra Jan v. Ram Bali, (1908)ILR 30 All 560 . This Full Bench decision does not appear to have been brought to the notice of the Division Bench hearing the case of Karam Singh v. Kunwar Sen AIR 1942 All 387. However, many observations made therein are not contrary to the law laid down in the above mentioned Full Bench case. The sum and substance of this Division Bench case also is that where in the facts and circumstances of the case all the properties can be treated as one entity a joint trial shall be permissible but not where they are more or less different properties with different causes of action. The material observations are as below:--
>
> "..... and this implies, in my judgment, that the acts or transactions, where, they are different, should be so connected as to constitute a single series which could fairly be described as one entity or fact which would constitute a cause of action against all the defendants jointly. Whether this necessary condition exists in any particular case would, of course, depend upon the nature of the case but I am satisfied that this at least is necessary that the case should be such that it could be said that the Court in which the suit was instituted had local jurisdiction in the first instance to deal with the controversies arising between the plaintiffs and each of the defendants……
>
> The property must, in the particular circumstances of the suit, be capable of being described as a single entity. Whether it can or cannot be so described will depend again upon the nature of the dispute between the parties. If there is a dispute, for instance about a single estate which both parties are claiming as a whole that estate is obviously for the purposes of that particular suit a single entity. If, on the other hand, the owner of an estate has a claim against unconnected trespassers who have trespassed upon different parts of the estate or different properties situated within it, those parts or those properties would not for the purposes of the dispute between him and the trespassers be one entity but several entities and the provisions of Section 17, would not apply"."

21. Thus, for a suit filed in a Court pertaining to properties situated in jurisdiction of more than two courts, the suit is maintainable only when suit is filed on one cause of action.

22. Justice Verma of Allahabad High Court in his concurring opinion in **Karan Singh v. Kunwar Sen (supra)** while considering Section 17 of C.P.C. has explained his views by giving illustration. Following was observed by Justice Verma:

> "I agree, Suppose a scattered Hindu dies possessed of immovable property scattered all over India at Karachi, Peshwar, Lahore, Allahabad, Patna, Dacca, Shillong, Calcutta, Madras and Bombay and is succeeded by his widow who, in the course of 40 or 50 years, transfers on different dates portions of the property situated at each of the places mentioned above, to different persons each of whom resides at the place where the property transferred to him is situated, and the transfers are wholly unconnected with, and independent of one another. Upon the widow's death the reversioner wants to challenge these various transfers. Learned counsel for the plaintiffs has argued that in such a case the reversioner is entitled to bring one suit challenging all the transfers at any one of the places mentioned above, impleading all the transferees, I find it very difficult to hold that such a result is contemplated by the provisions of the Code of Civil Procedure upon which reliance has been placed and which are mentioned in the judgment of my learned brother. I do not consider it necessary to pursue the matter any further. It is clear to my mind that, if the plaintiffs; argument mentioned above is accepted, startling results will follow."

23. Now, we come to submission of learned counsel for the appellant based on Section 39 sub-section (1) (c)of C.P.C. It is submitted that Section 39(1)(c) of C.P.C. is also a pointer to what is intended in Section 17. The scheme as delineated by Section 39 indicates that when a decree is passed by a Court with regard to sale or delivery of immovable property situated outside the local limits of the jurisdiction of that Court it may transfer the decree for execution to another Court. The provision clearly indicates that a decree of Court may include immovable property situate in local limits of that Court as well as property situated outside the local limits of the jurisdiction of the Court passing the decree. Section 39(1)(C) re-enforces our conclusion that as per Section 17 suit may be filed with regard to immovable property situated outside the local limit of the jurisdiction of the Court. We may, however, add that passing a decree by a Court with regard to immovable property situate outside the local jurisdiction of the Court passing the decree may not only confine to Section 17 but there may be other circumstances where such decree is passed. Section 20 of C.P.C. may be one of the circumstances where decree can be passed against the defendant whose property may situate in local jurisdiction of local limits of more than one Court.

24. We may further notice that Section 17 uses the words 'the suit may be instituted in any Court'. The use of word in Section 17 makes it permissive leaving discretion in some cases not to file one suit with regard to immovable property situated in local jurisdiction of more than one court. One of the exceptions to the rule is cases of partial partition where parties agree to keep some property joint and get partition of some of the properties.

25. The partial partition of property is well accepted principle with regard to a joint family. In Mayne's Hindu Law & Usage, 16th Edition in paragraph 485 following has been stated:

> **"485. Partition partial or total.-** Partition may be either total or partial. A partition may be partial either as regards the persons making it or the property divided.
>
> **Partial as to properties.-** It is open to the members of a joint family to severe in interest in respect to a part of the joint estate while retaining their status of a joint family and holding the rest as the properties of an undivided family. Until some positive action is taken to have partition of joint family property, it would remain joint family property."

26. Mulla on Hindu Law, 22nd Edition also refers to partial partition both in respect of the property and or in respect of the persons making it. In paragraph 327 following has been stated:

> "**"327. Partial partition.-**(1) A partition between coparceners may be partial either in respect of the property or in respect of the persons making it.
>
> After a partition is affected, if some of the properties are treated as common properties, it cannot be held that such properties continued to be joint properties, since there was a division of title, but such properties were not actually divided.
>
> (2) Partial as to property.- It is open to the members of a joint family to make a division and severance of interest in respect of a part of the joint estate, while retaining their status as a joint family and holding the rest as the properties of a joint and undivided family."
>
> The issues arising in the present case being not related to subject of partial partition the issue need not to be dealt with any further.

27. Learned counsel for the appellant has also submitted that permitting filing of a separate suit with regard to property situate in different jurisdiction shall give rise to conflicting decision and decision in one suit may also be res judicata in another suit. We in the present case being not directly concerned with a situation where there are more than one suit or a case having conflicting opinion we need not dwell the issue any further.

28. Sections 16 and 17 of the C.P.C. are part of the one statutory scheme. Section 16 contains general principle that suits are to be instituted where subject-matter is situate whereas Section 17 engrafts an exception to the general rule as occurring in Section 16. From the foregoing discussions, we arrive at following conclusions with regard to ambit and scope of Section 17 of C.P.C.

(i) The word 'property' occurring in Section 17 although has been used in 'singular' but by virtue of Section 13 of the General Clauses Act it may also be read as 'plural', i.e., "properties".

(ii) The expression any portion of the property can be read as portion of one or more properties situated in jurisdiction of different courts and can be also read as portion of several properties situated in jurisdiction of different courts.

(iii) A suit in respect to immovable property or properties situate in jurisdiction of different courts may be instituted in any court within whose local limits of jurisdiction, any portion of the property or one or more properties may be situated.

(iv) A suit in respect to more than one property situated in jurisdiction of different courts can be instituted in a court within local limits of jurisdiction where one or more properties are situated provided suit is based on same cause of action with respect to the properties situated in jurisdiction of different courts.

29. Now, we revert to the facts of the present case and pleadings on record. The suit filed by the appellant contained three different sets of defendants with different causes of action for each set of defendants. Defendant Nos. four to six are defendants in whose favour Will dated 15.02.2000 was executed by late Smt. Vimal Vaidya. In the plaint, relief as claimed in paragraph 25(H)is the will executed by late Smt. Vimal Vaidya was sought to be declared as null and void. The second cause of action in the suit pertains to sale deed executed by late Smt. Vimal Vaidya dated 15.10.2007 executed in favour of defendant Nos.7 and 8 with regard to Bombay property. The third set of cause of action relates to transfer documents relating to Indore property which was in favour of defendant Nos.9 and 10. The transfer documents dated 21.10.1986, 21.11.1988 and 20.08.1993 are relating to Indore property. The plaint encompasses different causes of action with different set of defendants. The cause of action relating to Indore property and Bombay property were entirely different with different set of defendants. The suit filed by the plaintiff for Indore property as well as Bombay property was based on different causes of action and could not have been clubbed together. The suit as framed with regard to Bombay property was clearly not maintainable in the Indore Courts. The trial court did not commit any error in striking out the pleadings and relief pertaining to Bombay property by its order dated 17.08.2011.

30. Learned counsel for the appellant has also referred to and relied on order II Rule 2 and Order II Rule 3 C.P.C. Learned counsel submits that order II Rule 2 sub-clause (1) provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action.

The cause of action according to Order II Rule 2 sub-clause (1) is one cause of action. What is required by Order II Rule 2 sub-clause (1) is that every suit shall include the whole of the claim on the basis of a cause of action. Order II Rule 2 cannot be read in a manner as to permit clubbing of different causes of action in a suit. Relying on Order II Rule 3 learned counsel for the appellant submits that joinder of causes of action is permissible. A perusal of sub-clause (1) of Order II Rule 3 provides that plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly. What is permissible is to unite in the same suit several causes of action against the same defendant, or the same defendants jointly. In the present case suit is not against the same defendant or the same defendants jointly. As noticed above there are different set of defendants who have different causes of actions.

31. Learned counsel has lastly submitted that defendant Nos. 7 and 8 in their application having not questioned the cause of action for which suit was filed, the submission raised on behalf of the counsel for the respondent that suit was bad for misjoinder of the causes of action cannot be allowed to be raised.

32. It is relevant to notice in the application filed by defendant Nos. 7 and 8, the heading of the application itself referred to "mis-joinder of parties and causes of action". In Para (1) of the application, it was categorically mentioned that there was mis-joinder of parties and causes of action. The trial court in its order dated 17.08.2011 has also clearly held that plaintiff has clubbed different causes of action which is to be deleted from the present suit. The trial court further held that the plaintiff is not justified in including different properties and separate cause of actions combining in single suit.

33. We, thus, are of the view that the trial court has rightly allowed the application filed by the defendant Nos.7 and 8. The High court did not commit any error in dismissing the writ petition filed by the appellant challenging the order of the trial court.

34. We do not find any merit in this appeal, the appeal is dismissed accordingly.

2019 (I) ILR - CUT- 452

K.S. JHAVERI, C.J & I. MAHANTY, J.

W.A. NO. 35 OF 2015

CHIEF EXECUTIVE OFFICER, CESCO .....Appellant

.Vs.

DANDAPANI BEHERA & ORS. ..……Respondents

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Claim of compensation for electrocution – Single judge allowed the writ petition directing payment of compensation for death of a twenty three years old boy due to electrocution owing to the 11 KV line passing over the roof of the house where the boy was staying – Writ appeal by CESCO – Plea that the prior to construction of the house the 11 KV line was existing and the height of the house raised thereafter – No negligence on the part of CESCO – No material to show that CESCO had taken steps for preventing construction of the house – Direction for payment of compensation cannot be interfered with.

For Appellant : Mr. Debaranjan Ray

For Respondents : M/s Mamata Mishra, G.C.Bhuyan and S.Pradhan, Mr. Sudhir Ku. Patra, R.C.Swain & G.Singh,

JUDGMENT Decided on : 13.08.2018

K.S.JHAVERI, C.J.

By way of this appeal, the appellant has assailed the judgment and order dated 25.11.2014 passed in W.P.(C) No.432 of 2008 whereby the learned Single Judge while considering the matter has granted minimum compensation of Rs.3,00,000/- (Rupees Three Lakhs).

2. Facts of the case of the petitioner are that the petitioner, who is the father of the deceased Raja @ Sagar Kumar Behera, claims compensation for the death of his only son aged about 23 years, who died on 23.8.2007 at about 3.30. P.M. due to electric burnt. On the very same day, the petitioner lodged an F.I.R. before Khandagiri Police Station intimating the death of his son by electric burnt. The said F.I.R. was registered as Khandagiri U.D. Case No.33 of 2007 corresponding to U.D.G.R.Case No.403 of 2007. Consequent upon lodging of the F.I.R., the dead body of the deceased was sent to the Capital Hospital for post mortem. The post mortem report prepared by the competent authority clearly indicates that the injuries are ante mortem and by charge of electric wire. It is further submitted by the

petitioner that there is a drawal of 11 KV electric line over 4' height of the roof of the building and for such drawal of electric line, there is negligence on the part of the opposite parties and on account of such negligence the son of the petitioner came in contact of such live wire and ultimately caused a tragic death. Petitioner further submits that in spite of his repeated approach to the opposite parties for grant of compensation, the opposite parties have not given any attention to the claim of the petitioner compelling him to file the writ petition.

3. Per contra, the opposite parties 1 to 4 on their appearance filed a joint counter affidavit indicating therein that the writ petition is not maintainable as the petitioner has approached the High Court before availing alternative remedy available under law. The writ petition involved disputed question of fact which needs to be proved by oral as well as documentary evidence. Negligence has been seriously disputed by the opposite parties. Unless negligence on the part of the opposite parties is proved with cogent materials, liability cannot be saddled on them. The opposite parties further disputed the fact of son of the petitioner died due to coming in contact with live electric wire on the spot. They claimed that the line in question was drawn over the ground with sufficient height as required under law. Drawal of the line was long before construction of the house. In these premises, the opposite parties claimed that the owner of the house knowing fully well regarding the existence of the electric line raised height of the house where the incident took place. Opposite parties, therefore, claimed that owner of the house, where the petitioner and his son were tenants, is responsible for the tragic incident. Petitioner having fully aware from the date of their occupation in the rented house regarding existence of the live electric wire over and above the roof, had taken the house on rent at his own risk and the son of the petitioner, therefore, died for his own negligence. Under the circumstances, the opposite parties are not liable to pay any compensation. It is also further submitted by the opposite parties that after the tragic incident, the owner of the house by submitting application has applied for shifting of the line intimating therein his willingness for depositing the required expenses.

4. Learned Single Judge while considering the matter has observed as follows:

> "7. From the facts and submissions made by both the parties and the documents attached therein, it is clear that the death is due to electrocution. There is also no denial by the opposite parties that there is existence of live wire with 11 KV line

just 4' top of the roof. The opposite parties even though submitted that they have drawn the line in the locality much ahead of the construction of the building and the building raised to a particular height subsequently, but as it appears they have never taken any step either to prevent the owner of the house to raise his construction to such a level so that they can avoid the danger or making any attempt for diverting the 11 KV line. Therefore, the negligence on the part of the opposite parties cannot be ruled out. That apart, considering the date of death involved in the present case to have taken place on 23.8.2007 and this matter is being taken up for hearing/final disposal in the month of November, 2014, there is no possibility of directing the victim to take resort to the Civil Court as the suit will be grossly barred by time.

8. For the aforesaid reasons and as the institution of suit at this stage will be a futile exercise and taking into consideration the fact of death of a young boy of 23 years on account of electrocution, further in absence of any material to establish the income of the deceased at the relevant point of time, I direct the opposite parties to grant a sum of Rs.3,00,000/- (Rupees three lakhs) as ex-gratia to the father of the deceased with interest at the rate of 8% per annum from the date of filing of the litigation."

5. In view of the above, we do not find any reason to interfere with the impugned judgment of the learned Single Judge.

Hence, the appeal stands disposed of. The amount which is in deposit may be allowed to be withdrawn by the original petitioner-Respondent No.1.

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2019 (I) ILR - CUT- 454

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

W.P.(C) NO. 3035 OF 2009

MAN MOHAN MOHANTY .....Petitioner

.Vs.

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

SERVICE LAW – Ad-hoc promotion – Petitioner while working in the cadre of Senior Civil Judge was promoted on ad-hoc basis as Ad-hoc Additional District Judge against Fast Track Court established under the 11th Finance Commission Award for a period of one year with certain condition with regard to number of disposal of cases – Complaint petition received against the petitioner with regard to his functioning – Plea of petitioner was that non-availability of sufficient

ready cases for disposal found to be not correct – Preliminary enquiry was made and a notice was issued for meeting the performance level – Performance, however, not satisfactory – Petitioner reverted to his substantive post – Plea of petitioner that there was no disciplinary proceeding nor he was given any notice to show cause against such allegations which were enquired into – Held, the preliminary inquiry report, which has been referred by the petitioner, was not referred to in the order of termination as the same didn't form basis of decision of the Full Court in reverting back the petitioner which solely on the basis of the question of performance – Writ petition filed long after his termination and after retirement is held to be an afterthought.

"The very object of establishment of the Fast Tract Court under 11th Finance Commission was to dispose of the old cases as expeditiously as possible and from the record, more particularly affidavit in reply, it is manifest that there was sufficient number of work available with the petitioner, but without making any endeavour for disposal, he adopted a method of shifting of responsibility requesting the Dist. Judge, Cuttack to transfer sufficient number of ready cases. Due to his inefficiency and incapability to achieve the out-turn, the petitioner was given warning vide letter at Annexure-4, looking at his performance. In our considered opinion, when the petitioner is given Ad-hoc promotion and he is not meeting with the object of establishment of Fast Track Court under the 11th Finance Commission, the decision which is taken is required to be approved and the same is approved." (Para 11 & 12)

Case Laws Relied on and Referred to :-

1. (2002) 1 SCC. 520 : Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences & Anr.

For Petitioner : M/s. S.D. Das, Sr. Advocate
H.S. Satpathy, D.R. Bhokta, N. Bisoi,
M. Panda, D. Mohanty, A. N. Sahu & M.M. Swain

For Opp. Parties : Mr. Ramakanta Mohapatra, Govt. Adv.

JUDGMENT Heard & Decided on : 10.01.2019

K.S. JHAVERI, C.J.

By way of this writ petition, the petitioner has challenged the Notification dated 22.08.2008, (Annexure-7), issued by the High Court of Orissa, Cuttack, whereby the Ad-hoc promotion of the petitioner as Ad-hoc Additional District and Sessions Judge (FTC), Jajpur was terminated and he was transferred and posted as Civil Judge (Senior Division), Boudh.

2. The main contention of Shri S.D. Das, learned Sr. Counsel for the petitioner is that the petitioner while working in the cadre of Senior Civil Judge was promoted on ad-hoc basis vide Notification issued by the Home

Department, Govt. of Orissa, dated 27.09.2007 for his appointment as Ad-hoc Additional District Judge against Fast Track Court established under the 11th Finance Commission Award for a period of one year with effect from the date he joins as such and pursuant to the aforesaid notification of the Home Department, he was issued with an order of the High Court of Orissa vide Notification dated 6th/8th October, 2007 (Annexure-2). It is contended that when the petitioner was continuing as an Ad-hoc Additional District and Sessions Judge (FTC), Jajpur, he was issued with a notice of Registrar (I&E) I/C, Orissa High Court dated 11.04.2008 forwarded through proper channel, the relevant portion of which is as under:

"xxx xxx xxx

I am directed to say that while reviewing the out-turn of the Presiding officers of the Fast Tract Courts of the State from the Month of January & February, 2008 the court have been pleased to observe that all the Addl. District & Sessions Judges of the Fast Track Courts working under your Jurisdiction, who have not reached the prescribed yardstick and have not disposed of eight sessions cases per month, be cautioned to improve their performance in future, otherwise it may not be possible to recommended further extension of their tenure of appointment."

3. It is contended that in reply to the above letter, the petitioner immediately requested the learned District & Sessions Judge, Cuttack, vide letter dated 18.4.2008, (Annexure-5), requesting him to transfer sufficient number of ready cases to enable him to meet with the yardstick. The relevant portion of the said reply is quoted below:

"xxx xxx xxx

In the above circumstances, it is very difficult to meet the yardstick with the above number of sessions cases pending in my file, so I request to kindly transfer sufficient number of ready cases to my file enabling me to met the yardstick."

4. Thereafter, the petitioner made several correspondences with the learned District & Sessions Judge, Cuttack, reiterating the above facts, vide Annexures-6 series. However, by virtue of the impugned Notification dated 22.08.2008, the Orissa High Court issued the following order:

"Orissa High Court, Cuttack

NOTIFICATION

Dated, Cuttack, the 22nd August, 2008

No.839/A:- On termination of the Ad-hoc promotion of Shri Man Mohan Mohanty at present Ad-hoc Additional District and Sessions Judge (FTC), Jajpur in the Judgeship and Sessions Divison of Cuttack-Kendrapara-Jajpur-Jagatsinghpur made vide Home Department Notification No.37627/HS dated 14.08.2008 is

transferred and posted as Civil Judge (Senior Divison), Boudh in the cadre of Senior Civil Judge in the Judgeship of Kandhamal-Boudh with headquarters at Boudh vice Shri S.K. Rajguru transferred.

By order of the High Court
(B.K.Rath)
Special Officer (Admn.)"

5. Learned counsel for the petitioner in course of his argument has taken us to paragraph-7 of the counter affidavit filed on behalf of opposite party no.2. The relevant portion of which reads as under:

"7. xxx xxx xxx

Further, during his tenure at Jajpur as Ad hoc A.D.J. an allegation petition was received from the Members of the Bar Association wherein referring to some of the case records corruption allegations was leveled against the petitioner. After receipt, the same was sent to the Dist. Judge, Cuttack to examine and report vide Court's letter No.2261 dtd.25.03.2008. The Dist. Judge, Cuttack visited Jajpur and examined the connected records of the Court of Ad hoc A.D.J., S.D.J.M., Jajpur pertaining to which allegations were made. During his verification he found the orders passed by the petitioner in many cases to be highly suspicious, motivated and beyond jurisdiction. During his personal interview with the Bar Members, almost all the lawyers of different Bar Association of Jajpur spoke ill of the petitioner and made allegations against his integrity. Further, the District Judge, Cuttack had submitted his report mentioning that the conduct of Sri Mohanty is not above board and he withdrew his earlier order passed U/S-10(3) Cr.P.C. authorizing the petitioner to dispose of urgent applications in absence of regular Additional District Judge. The said report was submitted by the District Judge, Cuttack vide Confidential Letter No.27 Dtd.31.05.2008."

As such, learned counsel for the petitioner contended that bare perusal of the aforesaid portion of the counter affidavit filed on behalf of the High Court of Orissa clearly disclose that the petitioner was reverted on the allegation of misconduct, but surprisingly, neither any disciplinary proceeding was initiated against him nor he was given any notice to show cause against such allegations. Thus, the punishment of reversion to the cadre of Senior Civil Judge is not sustainable.

6. In support of his contention, learned counsel for the petitioner has relied upon the following decisions of the Hon'ble Supreme Court, the relevant parts of which are quoted below and contended that the decision of the Full Court to revert the petitioner was the preliminary inquiry and on that basis he was reverted.

(i) Paragraphs-13 to 17 of the decision of the Hon'ble Supreme Court in ***State of Uttar Pradesh and Others v. Sughar Singh,*** (1974) 1 Supreme Court Cases 218:

"13. Since we are concerned in this case with a case of reversion, we propose to confine our attention to the different circumstances in which an order of reversion may be made. An order of reversion is, in its immediate effect bound always to be a reduction in rank. Even a reversion from a higher but temporary or officiating rank to a lower substantive rank is in a sense a reduction. But such orders of reversion are not always reduction in rank within the meaning of Article 311. If the officer is promoted substantively to a higher post or rank, he gets a right to that particular post or rank and if he is afterwards reverted to the lower post or rank which he held before, it is a "reduction in rank" in the technical sense in which the expression is used in Article 311. The real test in all such cases is to ascertain if the officer concerned has a right to the post from which he is reverted. If he has a right to the post then a reversion is a punishment and cannot be ordered, except in compliance with the provisions of Article 311. If, on the other hand, the officer concerned has no right to the post, he can be reverted without attracting the provisions of Article 311. But even in this case, he cannot be reverted in a manner which will show conclusively that the intention was to punish him. The order itself may expressly state that the officer concerned is being reverted by way of punishment. In fact the order may in various other ways cast a stigma on the officer concerned. In all such cases, the order is to be taken as a punishment. Sometimes again, the order of reversion may bring upon the officer certain penal consequences like forfeiture of pay and allowances or loss of seniority in the subordinate rank, or the stoppage or postponement of future chances of promotion: in such cases also the government servant must be regarded as having been punished and his reversion to the substantive rank must be treated as a reduction in rank. In such a case Article 311 will be attracted.

14. In State of Punjab and Another v. Sukh Raj Bahadur*, AIR 1968 SC 1089, Mitter, J., after analysing the decisions of this Court in* Parshotam Lal Dhingra v. The Union of India*, AIR 1958 SC 36,* State of Orissa v. Ram Narayan Das*, AIR 1961 SC 177, R. C. Lacy v. State of Bihar, C.A. No.590 of 1962 (decided on October 23, 1963),* Madan Gopal v. State of Punjab*, AIR 1963 SC 531,* Jagdish Mitter v. Union of India*, AIR 1964 SC 449 and A. G. Benjamin v. Union of India, (1967) 1 Lab LJ 718, has formulated the following propositions:*

"1. The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution.

2. The circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being immaterial.

3. If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.

4. An order of termination of service in unexceptionable form preceded by an enquiry launched by the superior authorities only to ascertain whether the, public servant should be retained in service, does not attract the operation of Article 311 of the Constitution.

5. If there be a full-scale departmental enquiry envisaged by Article 311, i.e. an Enquiry Officer is appointed, a charge. sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract the operation of the said article."

15. In Ram Gopal Chaturvedi v. State of Madhya Pradesh*, (1969) 2 SCC 240, this Court refused to interfere with an order terminating the services of an officer who had been temporarily appointed to the Judicial Service of Madhya Pradesh under rule 12 of the Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules, 1960, without passing any stigma on the officer concerned and merely stating that his services were terminated from a specified date. Even though the order of termination had been preceded in that case by an informal enquiry into the conduct of the officer with a view to ascertain if he should be retained in service, this Court followed the decision in* State of Punjab v. Sukh Raj Bahadur *(supra) and observed:*

"On the face of it the order did not cast any stigma on the appellant's character or integrity nor did it visit him with any evil consequences. It was not passed by way of punishment and the provisions of Article 311 were not attracted."

16. In the Union of India v. Gajendra Singh*, (1973) 3 SCC 797, this Court sustained an order passed by the Union of India reverting an officiating Naib Tehsildar to his permanent post of Kanungo on the ground that he could not pass the departmental examination. This Court clearly held in that case that "appointment to a post on officiating basis is, from the nature of employment, itself of a transitory character and in the absence of any contract or specific rule regulating the conditions of service to the contrary, the implied term of such an appointment is that it is terminable at any time. The Government servant so appointed acquires no rights to the post. But if. the order entails or provides for forfeiture of his pay or allowances or the loss of his seniority in the substantive rank or the stoppage or postponement of his future chances of promotion then that circumstance may indicate that though, in form, the government had purported to exercise its undoubted right to terminate the employment, in truth and reality, the termination was by way of penalty."*

17. Let us now consider whether in the light of the various cases decided by this Court the order of reversion amounted to a reduction in rank within the meaning of Article 311 (2) of the Constitution. We will apply all the different tests laid down by this Court one by one. First, the order is not attended with any stigma. The order merely states that Sughar Singh is reverted and that he is reverted to his substantive post of Head Constable. By no stretch of imagination can this language be construed as casting a stigma on the respondent. Secondly, there is nothing to show that Sughar Singh has lost his seniority in the substantive rank. It is true that some of his colleagues who were also holding the substantive post of head constable and who had also been appointed in an officiating capacity to the post of Platoon Commanders were not reverted on the day when the respondent was reverted. But that cannot be regarded as a penal consequence by way of loss of seniority in the substantive rank. In Divisional personnel Officer v. Raghvendrachar,

AIR 1966 SC 1529this Court has clearly that where a number of employees are placed on a senior list on a provisional basis they do not get-any indefeasible right to retain their seniority on that provisional basis so that the reversion of a person who was in the list does not constitute a reduction in rank merely on the ground that persons lower in the rank have not been reverted. Thirdly, there is no evidence to show and, in fact, it was not contended on behalf of the respondent that there has been any forfeiture of his pay or allowances or any loss in the seniority in the substantive rank which is, one must remember, the rank of Head Constables. On a careful scrutiny of the order of reversion we do not find any indication that it affects the seniority of Sughar Singh in his substantive rank or that it affects his chances of his future promotion from that rank. It is true that Sughar Singh will be deprived by the order of reversion of the post of Platoon Commander but that is not considered a penal consequence. Such deprivation is the usual consequence of any order of reversion from the officiating post which an 'incumbent has no right to hold. Such deprivation has been held by this Court not to be an order attended with penal consequences (see Union of India v. Jeewan Ram*). AIR 1958 SC 905"*

(ii) Paragraph-17 of the decision of the Hon'ble Supreme Court in ***K.H. Phadnis v. State of Maharashtra,*** AIR 1971 SUPREME COURT 998 (V 58 C 201):

"17. The order of reversion simpliciter will not amount to a reduction in rank or a punishment. A Government servant holding a temporary post and having lien on his substantive post may be sent back to the substantive post in ordinary routine administration or because of exigencies of service. A person holding a temporary post may draw a salary higher than that of his substantive post and when he is reverted to his parent department the loss of salary cannot be said to have any penal consequence. Therefore, though the Government has right to revert a Government servant from the temporary post to a substantive post, the matter has to be viewed as one of substance and all relevant factors are to be considered in ascertaining whether the order is a genuine one of "accident of service" in which a person sent from the substantive post to a temporary post has to go back to the parent post without an aspersion against his character or integrity or whether the order amounts to a reduction in rank by way of punishment. Reversion by itself will not be a stigma. On the other hand, if there is evidence that the order of reversion is not "a pure accident of service" but an order in the nature of punishment, Article 311 will be attracted."

(iii) Paragraph-2 of the decision of the Hon'ble Supreme Court in ***Chandra Prakash Sahi v. State of U.P. and others,*** (2000) 5 Supreme Court Cases 152:

2. What is "motive"; what is "foundation"; what is the difference between the two; these are questions which are said to be still as baffling as they were when Krishna Iyer, J. in Samsher Singh vs. State of Punjab, (1974) 2 SCC 831, observed as under : (SCC p.889, para 160)

"Again, could it be that if you summarily pack off a probationer, the order is judicially unscrutable and immune? If you conscientiously seek to satisfy yourself about allegations by some sort of enquiry you get caugh t in the coils of law,

however, harmlessly the order may be phrased. And so, this sphinx-complex has had to give way in later cases. In some cases the rule of guidance has been stated to be `the substance of the matter' and the `foundation' of the order. When does `motive' trespass into `foundation'? When do we lift the veil of `form' to touch the `substance'? When the Court says so. These `Freudian' frontiers obviously fail in the work-a-day world."

(iv) Placitum **C and F** along with paragraphs-31 to 35 of the decision of the Hon'ble Supreme Court in ***Registrar General, High Court of Gujarat and Another v. Jayshree Chamanlal Buddhbhatti,*** (2013) 16 Supreme Court Cases 59, which reads as under:

"c. - Termination of services of Probationary Civil Judge by High Court on grounds of unsuitability for the post-Order actually based on prior discreet inquiry and a later preliminary inquiry conducted into adverse allegations against her without affording her any opportunity of hearing, although inquiry sought to be justified for purpose of ascertaining her suitability for the post-Termination held invalid.

f - Held, High Court on administrative side is required to afford Subordinate Judges minimum protection/opportunity available to civil servants under Art.311(2) of Constitution – No such opportunity was afforded to respondent, even the materials placed on record did not establish any such aspect which would lead to a conclusion of unsuitability – Inference of unsuitability drawn by High Court on administrative side, totally uncalled for – High Court's order on judicial side, setting aside termination order, fully justified – Reinstatement with continuity in service with all consequential benefits and entitlement to seniority directed, as if respondent was never terminated from service – Order for back wages also passed –

31. Having gone through the salient judgments on the issue in hand, one thing which emerges very clearly is that, if it is a case of deciding the suitability of a probationer, and for that limited purpose any inquiry is conducted, the same cannot be faulted as such. However, if during the course of such an inquiry any allegations are made against the person concerned, which result into a stigma, he ought to be afforded the minimum protection which is contemplated under Article 311 (2) of the Constitution of India even though he may be a probationer. The protection is very limited viz. to inform the person concerned about the charges against him, and to give him a reasonable opportunity of being heard.

32. Having noted the facts as they have emerged on the record, can the preliminary inquiry conducted against the respondent in the present case be said to be an innocent one only to assess her suitability? Is it not apparent that certain aspersions were cast on the character of the respondent during the course of the conduct of this inquiry on her suitability? If that was so, was it not expected from a High judicial institution like the High Court to afford her the minimum opportunity to defend herself? In Shamsher Singh v. State of Punjab, (1974) 2 SCC 831, this Court has observed that the Subordinate Judges are under the care and custody of the High Court. This custody and care certainly requires the High Court to afford

the Subordinate Judges the minimum opportunity which is otherwise available to every other civil servant under Article 311 (2).

33. Having noted the aforesaid legal position, we must pay heed to the lament of this Court as expressed in Ishwar Chand Jain v. High Court of P & H in (1988) 3 SCC 370. In that matter, the probationary service of an Additional District and Sessions Judge was terminated on the basis of the High Court's conclusion regarding suitability. This Court, however, found that the action taken against the appellant was basically because of some grievances made by the members of the Bar, and there was no justifiable material available on the record of the Court. The members of the Bar Association had passed a resolution condemning him on a trifling matter, as observed by this court. This Court observed in the end of paragraph 7 in following words:-

"7. .....If the members of the Bar Association pass resolution against the presiding officers working in subordinate courts without there being any justifiable cause it would be difficult for judicial officers to perform their judicial functions and discharge their responsibilities in an objective and unbiased manner. We are distressed to find that the High Court instead of protecting the appellant took this incident into consideration in assessing the appellant's work and conduct."

In this matter, the Bar Association passed a resolution against the Additional Sessions Judge for not detaining a witness on the request of the counsel for the party to enable him to bring summons for effecting service on him, without there being any requisition from the court of the Chief Judicial Magistrate. This Court noted that if such resolutions are passed, it will be difficult for the judicial officers to perform their function in an objective and unbiased manner. This Court was constrained to observe that the High Court had failed to protect the appellant. What had distressed this Court was that the High Court, instead of protecting the appellant had taken into account the unjustified allegation made by the bar, while assessing the work and conduct leading to discontinuation of his probation services. The same appears to be the situation in the present case.

34. High Court of Judicature of Bombay v. Shashikant S. Patil, (2000) 1 SCC 416 was altogether a different case. That was a matter where a full-fledged departmental inquiry was conducted against the respondent. It is true that the inquiry report had exonerated the respondent, and the disciplinary committee had reversed that decision. The High Court on the judicial side had interfered with the decision of the disciplinary committee. It is this decision of the High Court which came to be upturned in this case, and it was in this context that this Court observed:

"24. When such a constitutional function was exercised by the administrative side of the High Court, any judicial review thereon should have been made not only with great care and circumspection, but confining strictly to the parameters set by this Court."

The present case can not be said to be one where the High Court on judicial side has erred as in Shashikant S. Patil (supra) in exercising its powers as claimed by the appellants.

> *35. As held by this Court time and again, it is the responsibility of the High Court to protect honest judicial officers. As the facts in this case indicate, apart from the fact that no opportunity was afforded to the respondent, even the material placed on record did not establish any such aspect which would lead to a conclusion of unsuitability. The disposal of the respondent was very good, and the complaints by the subordinate staff were clearly motivated. There was no involvement of the respondent in the suicide by the wife of Shri N.P. Thakker, and all that the High Court administration could lay hand on was the telephonic conversations which the respondent had with Mr. Thakker. The inference of unsuitability drawn by the High Court administration was therefore totally uncalled for. The impugned judgment setting aside the termination order dated 14.12.2007 issued on the ground of unsuitability is, therefore, fully justified."*

7. It is contended that the consideration which has met with the Full Court was the preliminary inquiry and on that basis, the petitioner was terminated. Thus, in view of the observations made by the Hon'ble Apex Court in the case of *Registrar General, High Court of Gujarat and Another* (supra), the petitioner is required to be restored back to the post of Ad-hoc Additional District and Sessions Judge (FTC), Jajpur and all consequential benefits be granted in his favour.

8. Learned Govt. Advocate for the opposite parties has taken us to the reply in affidavit and contended that the petitioner was working as a judicial officer and the expectations from a judicial officer are on a different footing than the other public servants. It was an Ad hoc promotion for a Fast Tract Court, where the very object of the Finance Commission was to adjudicate Cases which are pending for a long time. Establishment of Fast Track Courts were meant for cleaning up the backlogs by disposing of the old cases pending for pretty long period. Further, it is submitted that the specific allegations against the petitioner that although the petitioner had sufficient number of cases on his board/Court, as would reveal from Annexure-B/2 to the Counter Affidavit, he did not take appropriate steps for early disposal of those cases. Further, in order to shift his responsibility for which he was appointed, he communicated the Dist. Judge, Cuttack to transfer more ready cases to meet with his yardstick. Due to his incapability and inefficiency to dispose of sufficient number of cases, although available on his board, he was not recommended for further extension and that being the subjective satisfaction of the appointing authority, the same is beyond the scope of judicial review. The preliminary inquiry report, which has been referred, was not referred in the order impugned herein as the same didn't form basis of decision of the Full Court. It is also very clear from the contents of the counter affidavit relevant portion of which reads as follows:

"xxx xxx xxx

From the periodical statements submitted by the petitioner to the Court, it is found out that he had disposed of only 05. 04, 04. 05, 04, 02, 03 and 04 Sessions Cases in the month of January, Februry, March, April, May, June, July and August, 2008 respectively though in those months 48,56,56,51,47,64,61 and 60 Sessions Cases respectively were pending in his Court. Apart from Sessions Cases a good number of T.S., T.A., Misc. Appeal, Civil Revision, Misc. Cases, Criminal Appeal and Criminal Revision Cases though were also pending in his Court the petitioner had disposed of only a few number of cases out of them. A detail Chart of pending and disposed of cases is filed herewith as Annexure-B/2"

9. In that view of the matter, it is submitted that in view of the well settled principle of law, the impugned notification is not a punishment as no stigma is attached to the order of termination of Ad-hoc promotion. Further, the said order under Annexure-7 was challenged only after the retirement of the petitioner on 31.01.2009 and the writ petition was filed on 25.02.2009. It seems that the petitioner has accepted the termination of Ad-hoc promotion and thus, it is only an after though of the petitioner to take a chance in challenging the impugned order, which should not be encouraged. Therefore, learned Govt. Advocate contended that the writ petition deserves to be dismissed.

10. We have heard learned Sr. Counsel for the petitioner and learned Govt. Advocate for the opposite parties.

11. The very object of establishment of the Fast Tract Court under 11th Finance Commission was to dispose of the old cases as expeditiously as possible and from the record, more particularly affidavit in reply, it is manifest that there was sufficient number of work available with the petitioner, but without making any endeavour for disposal, he adopted a method of shifting of responsibility requesting the Dist. Judge, Cuttack to transfer sufficient number of ready cases. Due to his inefficiency and incapability to achieve the out-turn, the petitioner was given warning vide letter at Annexure-4, looking at his performance.

12. In our considered opinion, when the petitioner is given Ad-hoc promotion and he is not meeting with the object of establishment of Fast Track Court under the 11th Finance Commission, the decision which is taken is required to be approved and the same is approved.

13. The main contention of learned counsel for the petitioner taking support of the affidavit in reply is that neither the preliminary inquiry report

was supplied to the petitioner nor he was asked to show cause on the allegations made against him. But on perusal of the order impugned it reveals that no such reference has been made to the preliminary inquiry, as alleged and the impugned order is not an outcome of such allegations.

14. In the case of ***Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences and another,*** reported in (2002) 1 Supreme Court Cases 520, it has been held as follows:

> *"**29.** Before considering the facts of the case before us one further, seemingly intractable, area relating to the first test needs to be cleared viz. what language in a termination order would amount to a stigma? Generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic. The decisions cited by the parties and noted by us earlier, also do not hold so. In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job.*
>
> ***30.** As was noted in Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, (1999) 3 SCC 60:(SCC p.73, para 28)*
>
> *"28. At the outset, we may state that in several cases and in particular in State of Orissa v. Ram Narayan Das, AIR 1961 SC 177, it has been held that use of the word 'unsatisfactory work and conduct' in the termination order will not amount to a stigma."*
>
> ***31.** Returning now to the facts of the case before us. The language used in the order of termination is that the appellants "work and conduct has not been found to be satisfactory". These words are almost exactly those which have been quoted in Dipti Prakash Banerjees (supra) case as clearly falling within the class of non-stigmatic orders of termination. It is, therefore safe to conclude that the impugned order is not ex facie stigmatic.*
>
> ***32.** We are also not prepared to hold that the enquiry held prior to the order of termination turned this otherwise innocuous order into one of punishment. An employer is entitled to satisfy itself as to the competence of a probationer to be confirmed in service and for this purpose satisfy itself fairly as to the truth of any allegation that may have been made about the employee. A charge sheet merely details the allegations so that the employee may deal with them effectively. The enquiry report in this case found nothing more against the appellant than an inability to meet the requirements for the post. None of the three factors catalogued above for holding that the termination was in substance punitive exist here.*
>
> ***33.** It was finally argued by the appellant that the intention of the respondents to punish him was clear from the following statement in the affidavit filed on their behalf:*

"It is important to mention herein that even honesty and integrity of the petitioner was also under cloud as he took undue favours by misusing his position, from the suppliers and maligned the reputation of the institute."

34. *That an affidavit cannot be relied on to improve or supplement an order has been held by a Constitution Bench in Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi,* (1978) 1 SCC 405: (SCC p.417, para 8).

"[when] a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise".

35. *Equally, an order which is otherwise valid cannot be invalidated by reason of any statement in any affidavit seeking to justify the order. This is also what was held in State of U.P. v. Kaushal Kumar Shukla, (1991) 1 SCC 691: (SCC p.705, para 13)*

"The allegations made against the respondent contained in the counter-affidavit by way of a defence filed on behalf of the appellants also do not change the nature and character of the order of termination".

36. *Having held against the appellant on all counts, we dismiss the appeal but without any order as to costs."*

15. It is the order of termination of Ad-hoc promotion (Annexure-7), which is under scanner and not the affidavit filed by the State to examine, as to whether the order of action taken by the appointing authority was punitive. Applying the ratio of *Paranendra* (supra), it can be safely said that the order of termination of Ad-hoc promotion was not punitive. Hence, no opportunity of hearing, as alleged, is required to be afforded to the petitioner before passing the order. The case laws cited by learned Sr. Counsel for the petitioner, is therefore, not applicable to the case at hand, which deal with different situations other than the present one.

16. In that view of the matter, we are of the considered opinion that where the petitioner has not met with the requirement, i.e. the out-turn as an Ad-hoc Additional District Judge of a Fast Track Court, we see no reason to interfere with the order of termination of his Ad-hoc promotion and more particularly when the order was not challenged immediately after it was passed and the petitioner has challenged the same only after his retirement, after serving as Senior Civil Judge, pursuant to the impugned order under Annexure-7.

In view of the above, we see no reason to interfere with the impugned order under Annexure-7. Hence, the petition being devoid of any merits, deserves to be dismissed and the same is accordingly dismissed. No cost.

2019 (I) ILR - CUT- 467

K.S. JHAVERI, C.J & BISWAJIT MOHANTY, J.

W.P.(C) NO. 16921 OF 2010

RABI NARAYAN PANDA .....Petitioner

.Vs.

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

SERVICE LAW – Disengagement – Petitioner was appointed temporarily as peon in an existing vacancy for a period of 89 days or till regular appointment is made by Collector, Ganjam whichever is earlier – By a subsequent order the petitioner who was working on ad-hoc basis temporarily appointed as messenger against the vacant post with a rider that he can be terminated at any time without assigning any reason thereof – Petitioner was disengaged from service with effect from 31st May, 2007 – OA filed with the plea that before passing the order of disengagement no opportunity was given – OA dismissed as the appointment of petitioner was irregular – Writ petition challenging the order passed in OA – Held, it appears from the records that the petitioner was never appointed on regular basis – No order of regularization has been filed by the petitioner – Throughout his service period, he has worked on temporary/ad-hoc basis – Further the petitioner was never appointed with concurrence of the Finance Department and was appointed in violation of Article 16 of the Constitution of India – Thus, he was a backdoor entrant, who has been rightly shown the door – So far as Article 311 of the Constitution is concerned, the case of the petitioner is not coming under the purview of same as he has neither been removed nor dismissed nor any stigma has been attached to his conduct. (Para 12)

Case Laws Relied on and Referred to :-

1. AIR 1990 SC 307 : Shridhar S/o Ram Dular Vs. Nagar Palika, Jaunpur & Ors.
2. 2009 (II) OLR 89 : Somanath Mohapatra and Anr. Vs. State of Orissa and 3 Ors.
3. AIR 2006 SC 1806 : Secretary, State of Karnataka & Ors vs. Umadevi & Ors.

For Petitioners : M/s. S.K. Swain, D.R. Rath, S.K. Rout, & S.C. Bairiganjan.

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

JUDGMENT Heard & Decided on : 24.01.2019

K.S. JHAVERI, C.J.

Heard Mr. S.K. Swain, learned counsel for the petitioner and Shri M.S. Sahoo, learned Additional Government Advocate for the State opposite parties.

2. By way of this writ petition, the petitioner has challenged the judgment and order dated 08.01.2010 passed by the learned Odisha Administrative Tribunal, Bhubaneswar in O.A. No.593 of 2008, whereby the learned Tribunal has dismissed the original application.

3. Shri Swain, learned counsel for the petitioner has contended that the petitioner was originally appointed vide order dated 20.06.1989 (Annexure-1) and subsequently vide order dated 29.01.1999 (Annexure-4) issued by the General Manager, DIC, Ganjam, Berhampur. The relevant portions of the said orders are extracted hereinbelow:

> "Sri Rabinarayana Panda, S/o. Sri Anata Panda, At-Anka Street, P.O. Parlakhemundi, Dist-Ganjam is appointed temporarily as peon in the existing vacancy for a period of 89 days or till regular appointment is made by Collector, Ganjam whichever is earlier."
>
> xx xx xx
>
> "Sri Rabinarayana Panda, S/o. Sri Anata Panda, At-Anka Street, P.O. Parlakhemundi, Dist-Ganjam who belongs to Gen. Category and now working on adhoc basis is here by temporarily appointed as messenger against the vacant post in the scale of pay of Rs.2550-55-2660-60-3200/- with usual D.A. and other allowances as admissible by the Govt. from time to time.
>
> The appointment is purely temporary and can be terminated at any time without assigning any reason there of."

Subsequently his service book and GIS Pass Book were opened and he was allowed annual increments. But the General Manager, DIC, Gajapati passed the impugned order dated 31.05.2007 by which the petitioner was disengaged from service with effect from 31st May, 2007.

4. The main contention of learned counsel for the petitioner is that in view of the above facts and circumstances, the petitioner has acquired a right under Article 311 of the Constitution which reads as under:

> "**311.Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.**-
>
> (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.
>
> (2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

> Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:
>
> Provided further that this clause shall not apply-
> (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or
>
> (b) where the authority empowered to dismiss or remove a person or to reduce him in rank ins satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or
>
> (c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State, it is not expedient to hold such inquiry.
>
> (3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

Therefore, the petitioner had a right to be heard before termination/disengagement from service. In support of his contention, learned counsel for the petitioner has strongly relied upon para-8 of the decision of the Hon'ble Supreme Court in the case of *Shridhar S/o Ram Dular vs. Nagar Palika, Jaunpur and ors., reported in AIR 1990 SC 307,* wherein the Hon'ble Court has held as under:

> "8. The High Court committed serious error in upholding the order of the Government dated 13.2.80 in setting aside the appellant's appointment without giving any notice or opportunity to him. It is an elementary principle of natural justice that no person should be condemned without hearing. The order of appointment conferred a vested right in the appellant to hold the post of Tax Inspector, that right could not be taken away without affording opportunity of hearing to him. Any order passed in violation of principles of natural justice is rendered void. There is no dispute that the Commissioner's Order had been passed without affording any opportunity of hearing to the appellant therefore the order was illegal and void. The High Court committed serious error in upholding the Commissioner's Order setting aside the appellant's appointment. In this view, Orders of the High Court and the Commissioner are not sustainable in law."

5. He also relied upon para-13 of a Division Bench decision of this Court in the case of *Somanath Mohapatra and Anr. vrs. State of Orissa and 3 Ors., 2009 (II) OLR 89*, wherein this Hon'ble Court has held as under:

> 13. So far as fourth question is concerned, law is well settled that any order passed by an authority/tribunal/court must be supported by reasons.

In Krishna Swami v. Union of India and Ors. : AIR 1993 SC 1407, the Apex Court observed that reasons are the links between the material, the foundation for these erections and the actual conclusions. They would also administer how the mind of the marker was activated and there rational nexus and syntheses with the facts considered and the conclusion reached. Least it may not be arbitrary, unfair and unjust, violate Article 14 or unfair procedure offending Article 21 of the Constitution.

It is the settled proposition of law that even in administrative matters the reasons should be recorded, as it is incumbent upon the authorities to pass a speaking and reasoned order. In Kumari Shrilekha Vidyarthi and Ors. v. State of U.P. and Ors. : AIR 1991 SC 537, the Apex Court has observed as under:

"Every such action may be informed by reason and if follows that an act un-informed by reason is arbitrary, the rule of law contemplates governance by law and not by humour, whim or caprice of the men to whom the governance is entrusted for the time being. It is the trite law that 'be you ever so high, the laws are above you.' This is what a man in power must remember always."

In State of West Bengal v. Atul Krishna Shaw and Anr. : 1991 (Suppl.) 1 SCC 414, the Hon'ble Supreme Court observed that 'giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review.

In the present case, notice dated 10.3.2003 under Annexure-10 has been issued by the opposite parties not to run Somanath Hat in view of Notification No. 1662 dated 18.01.1982 issued in pursuance of Section 4 and Notification No. 8105 dated 05.06.1994 and provisions contained in Section 4 (3) of the Act 1956. This notice was received by the petitioner on 10.03.2003. Immediately thereafter on 13.03.2003, petitioners submitted reply contending therein that nowhere they had violated the provisions of the Act, 1956 and the allegations were totally unfounded. In the said reply, the petitioners also requested the Chairman, RMC, Jagatsinghpur to call them for a meeting so as to enable them to explain the matter and doubts, if any. As it appears, no opportunity was offered to the petitioners. In paragraph 11, we have already held that the petitioners have not violated the provisions of Section 4 (3) of the Act 1956.

Subsequently, opposite party No. 2 vide notice dated 16.03.2003 (Annexure-12) directed the petitioners to pay market fees to the tune of Rs. 13,46,978/- for the years 1994-2003 by 31.03.2003. In the said notice, no basis was also indicated as to how the Hat days are fixed and market fee per day is determined. No opportunity of hearing was also afforded to the petitioners before assessing the petitioners for such huge amount of market fees for the year 2002-2003 so also for the preceding eight years. No reason whatsoever was assigned as to why the opposite party No. 2 had not taken any step for collection of such market fee during past eight years. The opposite party No. 2 could not able to satisfy us as to under which provision of the law such amount of fees was demanded from the petitioners. Section 11 of the Act 1956 authorizes the market committee only to levy and collect market fees from

> purchaser of agricultural produce and not from owner of any Hat. In absence of any statutory provision for levying and collecting such fees from the owner of a Hat, the levy is not sustainable in law."

6. Learned counsel for the petitioner also relied upon another decision of the Hon'ble Supreme Court in the case of *Secretary, State of Karnataka & Ors vs. Umadevi & Ors.,* reported in AIR 2006 SC 1806. He put strong emphasis upon para-44 of the said decision, which reads as under:

> "44. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa (supra), R.N. Nanjundappa (supra), and B.N. Nagarajan (supra), and referred to in paragraph 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 courts or of tribunals. The question of regularization 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 regularize 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 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 regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.

7. Learned counsel for the petitioner relying on the aforesaid decision of the Hon'ble Supreme Court as well as this Court vehemently contended that the services of the petitioner has been terminated without due process of law which is illegal and arbitrary.

8. We have heard learned counsel for the parties and perused the record.

9. The learned Tribunal, while considering the Original Application filed by the petitioner-applicant, has observed in paragraph-6, which reads as under:

> "6. We have considered the submissions made by the learned counsels. We have also perused the documents enclosed. It is a fact that the applicant was appointed as a Peon against an existing vacancy for a period of 89 days or till regular appointment is made by Collector, Ganjam on 20.6.1989. His appointment on ad hoc basis was continued with breaks till he was regularly appointed as a Messenger

against a vacant post in order dated 29.1.1999 (Annexure-4). He was disengaged from service in order dated 31.5.2007 of respondent No.4 (Annexure-6). Respondents have submitted that the appointment of the applicant along with a few others by respondent No.4 was without following the prescribed procedure of recruitment. The engagement was beyond Government Rules and procedures and also contrary to the Government instructions in this regard. Further the appointments were made without concurrence of the Finance Department. The applicant has also not tried to establish in the O.A. that his appointment was as a result of due procedure of recruitment prescribed under Rules in which he was selected on merit while competing with other applicants. In view of the order of Hon'ble Apex Court in Uma Devi''s case (AIR 2006 SC 1806), employees recruited without following prescribed procedure under applicable Rules through open competition do not have any vested right for continuance in service. Similarly in Nazira Begum Lashkar vs. State of Assam (2001 SCC 143), the Hon'ble Apex Court held that the initial appointment having been made contrary to the statutory rules, the continuance of such appointees must be held to be totally unauthorized and no right would accrue to the incumbent on that score. The Court had also held that it cannot be said that the principles of natural justice were violated or full opportunity was not given to the employees concerned to have their say in the matter before their appointments were recalled and terminated in such a case. Under the circumstances, we are unable to endorse the reliefs sought for.

The O.A. is, therefore, dismissed."

10. Apart from that pursuant to the notice of this Hon'ble Court, the opposite parties has filed counter affidavit. In paras-4 & 8, the opposite parties have stated as under:

"4. That with regard to the averments made in para-3 of the writ petition, it is humbly submitted that the petitioner was engaged temporarily as a peon/Messenger on adhoc basis for a period of 89 days/44 days against the leave vacancy post and suspension vacancy with breaks by the then General Manager, D.I.C. Ganjam without concurrence of Finance Department. The appointment of the petitioner by the then General Manager was in gross violation of Govt. instruction imposing restriction on appointment of DLR/NMR/Adhoc posting vide their circular No.17815 (45)/F dt. 12.4.1993, Circular No.32916/F dt. 8.8.1997, Circular No.11172/F dt. 20.3.1998, Circular No.11804/F dt. 25.3.1998, Circular No.24021/F dt. 2.6.1998, Circular No.45318/F dt. 29.10.1998, Circular No.577/F dt. 5.1.1999 and Circular No.31271/F dt. 16.7.1999. The engagement of the petitioner by the then General Manager D.I.C., Ganjam was beyond his authority and the Government Rules and procedure, hence the same was illegal.

xx xx xx

8. That the submissions made in para-7 of the writ petition is totally misconceived and incorrect. It is a fact that the petitioner was appointed temporarily as Messenger against vacant post vide order No.505 dt. 29.1.1999 by the then General Manager, DIC, Ganjam but the same was not done following any process of law, at least inviting application through either the employment exchange or through open

> advertisement keeping in view the Rules governing the field and Article 16 of the Constitution of India."

11. Responding to paragraphs-4 & 8 of the counter affidavit, the petitioner has replied in his rejoinder affidavit, which reads as under:

> "4. That, in reply to paragraph-4 of the counter affidavit, it is submitted here that, the appointment of this petitioner as a Peon/messenger on adhoc basis for 89 days/44 days was made against existing vacancy by the General Manager, DIC, Ganjam from time to time vide different orders, which are facts on record on due adherence to the relevant government instructions in this regard and the General Manager, DIC, Ganjam, who appointed the petitioner in the above post was the competent authority under law to do so. In this view of the facts, the allegations, made in the counter affidavit to the effect that, the appointment of the petitioner by the G.M., DIC, Ganjam was beyond his authority and was made without adherence to government rules and procedures is not correct.
>
> xx xx xx
>
> 6. That, in reply to paragraph-8 of the counter affidavit, it is submitted here that, the General Manager, DIC, Ganjam appointed the petitioner by adhering to all the relevant recruitment procedure to meet the exigency for filling up of the vacant post in temporary manner."

12. A perusal of paras-4 and 8 of the counter affidavit and the response of the petitioner to the same as quoted above in his rejoinder would show that the response of the petitioner has been vague. It appears from the records that the petitioner was never appointed on regular basis. No order of regularization has been filed by the petitioner. Throughout his service period, he had worked on temporary/adhoc basis. Further the petitioner was never appointed with concurrence of the Finance Department and was appointed in violation of Article 16 of the Constitution of India. Thus, he was a backdoor entrant, who has been rightly shown the door vide Annexure-6.

13. So far as Article 311 of the Constitution is concerned, the case of the petitioner is not coming under the purview of same as he has neither been removed nor dismissed nor any stigma has been attached to his conduct. The judgment of the Hon'ble Supreme Court which has been relied upon by the petitioner i.e. *Shridhar S/o Ram Dular (supra)* is factually distinguishable. It was a case where the High Court had rendered a judgment under Article 226 of the Constitution, but in the present case the scope of this Court under Article 227 of the Constitution while considering the legality of the order of the Tribunal is very limited particularly when the petitioner was engaged in violation of Article 16 of the Constitution of India. Further *Shridhar S/o Ram Dular* case (supra), the appellant was appointed pursuant to an open advertisement and selection which is not the case here.

14. The ratio decided by this Court in the case of *Somanath Mohapatra (supra)* is also not applicable to the facts of the present case.

Similarly, *Umadevi case (supra)* no way helps the cause of the petitioner as it has been made clear there 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 (emphasis supplied).

15. In the present case, the petitioner was knowing that he was appointed on adhoc basis and was engaged in an irregular manner. In that view of the matter, the order dated 08.01.2010 passed by the learned Odisha Administrative Tribunal, Bhubaneswar in O.A. No.593 of 2008 is just and proper. No interference is called for.

16. The petition is devoid of any merit and deserves to be dismissed and the same is accordingly dismissed. All connected Misc. Cases/I.As are disposed of accordingly. No costs.

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2019 (I) ILR - CUT- 474

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

W.P.(C) NO. 14114 OF 2018

AND

W.P.(C) Nos. 15581, 16137, 16212, 18202, 18353, 18377, 19241, 19411, 19453, 19474, 19802, 21402, 21746, 22836 & 22875 of 2018.

In W.P.(C) No.14114 of 2018

DINABANDHU SAHOO ……..Petitioner

.Vs.

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

For Petitioner : M/s. B.M. Sarangi

For Opp.Parties : Mr. Bimbisar Dash, CGC [For O.P. No.1]
Addl. Govt. Advocate [For O.P. No.2]
Mr. B.K. Sharma [For O.P. Nos.3 & 4]

In W.P.(C) No.15581 of 2018

AJAYA KUMAR ROUT ……...Petitioner

.Vs.

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

For Petitioner : M/s. K.C. Majhi
For Opp.Parties : Mr. M.K. Pradhan, CGC [For O.P. No.1]
Mr. B.K. Sharma [For O.P. Nos.2 & 3]

In W.P.(C) No.16137 of 2018
VIJAY KUMAR AGARWAL ……Petitioner
.Vs.
UNION OF INDIA & ORS. ……Opp. Parties
For Petitioner : M/s. Ramesh Kumar Sahu, P.K. Satapathy & M. Das.
For Opp.Parties : Mr. M.K. Pradhan, CGC [For O.P. No.1]
Addl. Govt. Advocate [For O.P. No.2]
Mr. B.K. Sharma [For O.P. Nos.3 & 4]

In W.P.(C) No.16212 of 2018
CHANDRAMANI BEHERA ……..Petitioner
.Vs.
UNION OF INDIA & ORS. ……...Opp. Parties
For Petitioner : M/s. K.C. Dash,

For Opp.Parties : Mr. M.K. Pradhan, CGC [For O.P. No.1]
Addl. Govt. Advocate [For O.P. No.2]
Mr. B.K. Sharma [For O.P. Nos.3 & 4]

In W.P.(C) No.18202 of 2018
MURALIDHAR PALAI ……Petitioner
.Vs.
UNION OF INDIA & ORS. …….Opp. Parties
For Petitioner : M/s. B.M. Sarangi,
For Opp.Parties : Mr. M.K. Pradhan, CGC [For O.P. No.1]
Addl. Govt. Advocate [For O.P. No.2]
Mr. B.K. Sharma [For O.P. Nos.3 & 4]

In W.P.(C) No.18353 of 2018
MANMOHAN MOHAPATRA ……..Petitioner
.Vs.
UNION OF INDIA & ORS. ……..Opp. Parties
For Petitioner : M/s. Chandan Mishra, K.C. Majhi.

For Opp.Parties : Mr. Bimbisar Dash, CGC [For O.P. No.1]
Mr. B.K. Sharma [For O.P. Nos.2 & 3]

In W.P.(C) No.18377 of 2018
DURYODHAN SAMAL ……..Petitioner
.Vs.
UNION OF INDIA & ORS. ……Opp. Parties
For Petitioner : M/s. S.M. Singh, S. Nayak.
For Opp.Parties : Mr. Bimbisar Dash, CGC [For O.P. No.1]
Mr. B.K. Sharma [For O.P. Nos.2 & 3]

In W.P.(C) No.19241 of 2018
RABINARAYAN PATTNAIK ……Petitioner
.Vs.
UNION OF INDIA & ORS. ……..Opp. Parties

For Petitioner : M/s. Biswanath Behera, & D.P. Das.
For Opp.Parties : Central Govt. Counsel [For O.P.No.1]
Addl. Govt. Advocate [For O.P. No.2]
Mr. B.K. Sharma [For O.P. Nos.3 & 4]

In W.P.(C) No.19411 of 2018
NAMITA NAYAK ……Petitioner
.Vs.
UNION OF INDIA & ORS. ……Opp. Parties

For Petitioner : M/s. K.C. Dash,
For Opp.Parties : Mr. M.K. Pradhan, CGC [For O.P. No.1]
Addl. Govt. Advocate [For O.P. No.2]
Mr. B.K. Sharma [For O.P. Nos.3 & 4]

In W.P.(C) No.19453 of 2018
PRAHALLAD SWAIN ……Petitioner
.Vs.
UNION OF INDIA & ORS. ……Opp. Parties

For Petitioner : M/s. Debadutta Das, S.R. Pati & A.K. Parida
For Opp.Parties : Mr. Bimbisar Dash, CGC [For O.P. No.1]
Addl. Govt. Advocate [For O.P. No.2]
Mr. B.K. Sharma [For O.P. Nos.3 & 4]

In W.P.(C) No.19474 of 2018
RINA MOHAPATRA ……Petitioner
.Vs.
UNION OF INDIA & ORS. ……...Opp. Parties

For Petitioner : M/s. A.K. Behera,
For Opp.Parties : Central Govt. Counsel [For O.P. No.1]
Addl. Govt. Advocate [For O.P. No.2]
Mr. B.K. Sharma [For O.P. Nos.3 & 4]

In W.P.(C) No.19802 of 2018
RUDRASEN MOHANTA ……Petitioner
.Vs.
UNION OF INDIA & ORS. ……Opp. Parties

For Petitioner : M/s. D.P. Dhalsamanta, N.M. Rout, C. Mohanta
For Opp.Parties : Central Govt. Counsel [For O.P. No.1]
Addl. Govt. Advocate [For O.P. No.2]
Mr. B.K. Sharma [For O.P. Nos.3 & 4]

In W.P.(C) No.21402 of 2018
TRINATH BARIK ……..Petitioner
.Vs.
UNION OF INDIA & ORS. ……..Opp. Parties

For Petitioner : M/s. B.C. Pradhan, P.K. Nayak & N.K. Das
For Opp.Parties : Central Govt. Counsel [For O.P. No.1]
Mr. B.K. Sharma [For O.P. Nos.2 & 3]

In W.P.(C) No.21746 of 2018
RASHMIRANJAN MOHAPATRA ……Petitioner
.Vs.
UNION OF INDIA & ORS. ……Opp. Parties

For Petitioner : M/s. D. Mishra, S.K. Baral, A. Das & S. Kanhar
For Opp.Parties : Mr. M.K. Pradhan, CGC [For O.P. No.1]
Mr. B.K. Sharma [For O.P. Nos.2 & 3]

In W.P.(C) No.22836 of 2018
KABITA SAHU ……Petitioner
.Vs.
UNION OF INDIA & ORS. ……Opp. Parties

For Petitioner : M/s. P.S. Das,
For Opp.Parties : Mr. M.K. Pradhan, CGC [For O.P. No.1]
Addl. Govt. Advocate [For O.P. No.2]
Mr. B.K. Sharma [For O.P. Nos.3 & 4]

In W.P.(C) No.22875 of 2018
ISWAR KUMAR BARIK ……Petitioner
.Vs.
UNION OF INDIA & ORS. ……Opp. Parties

For Petitioner : M/s. P.C. Parida,
For Opp.Parties : Mr. M.K. Pradhan, CGC
Mr. B. Dash, CGC [For O.P. No.1]
Mr. B.K. Sharma [For O.P. Nos.2 & 3]

CENTRAL MOTOR VEHICLES RULES, 1989 – Rule 81 – Amendment – Petitioners, who are owners of vehicles, have challenged the Notification issued by the Ministry of Road Transport and Highways, Government of India amending Rule 81 of the Central Motor Vehicle Rules, 1989 levying additional fees of fifty rupees for renewal of fitness certificate for each day of delay after expiry of fitness certificate which was incorporated at Column No.3 at Sl.No.11 of the table – Similar writ petitions challenging the same notification have been allowed by Madras High Court on the ground that the levy of additional fee under various heads as per the impugned notification is without authority and such levy of additional fee is therefore, liable to be struck down –

SLP against the judgment pending – Held, in view of the above, the impugned Notification is traveling beyond the scope of Act and the same is without authority of law – Therefore, the contentions of the petitioners are required to be accepted and the same is accepted in view of the fact that the notification has already been quashed and set aside by the Madras High Court – In view of operation of law the same is applicable to the State of Odisha also – The parties are directed to abide by the decision of the Hon'ble Supreme Court – Since the Central Government has already challenged the impugned judgment of Madras High Court, they are not required to challenge this order – However, if the petitioners want to intervene in the application pending before the Hon'ble Supreme Court, it is open to the petitioners to intervene and prefer appropriate application to plead the case before the Supreme Court. (Para 11)

Case Laws Relied on and Referred to :-

1. AIR 2004 SC 2321 : (2004) 6 SCC 254 : Kusum Ingots and Alloys Ltd. Vs. Union of India (UOI) and Ors.
2. 2018 (5) SCJ 545 : All India Jamiatul Quresh Action Committee vs. Union of India.
3. AIR 2016 Mad 177 : T. Rajakumari and Ors. Vs. The Government of Tamil Nadu and Ors.
4. AIR 2014 Kant 73 : Mr. Shiv Kumar vs. Union of India, represented by Secretary Ministry of Law and Justice and Ors.
5. (2011) ILLJ 297 : MadTextile Technical Tradesmen Association and Ors. Vs. Union of India and Ors.

JUDGMENT Heard & Decided on 01.02.2019

K.S. JHAVERI, C.J.

By way of all these writ petitions, the petitioners, who are owners of the respective vehicles, have challenged the Notification No.1183 (E) dated 29/12/2016 issued by the Ministry of Road Transport and Highways, New Delhi, Government of India amending Rule 81 of the Central Motor Vehicle Rules, 1989 (for short 'the Rules') levying additional fees of fifty rupees for renewal of fitness certificate for each day of delay after expiry of fitness certificate which was incorporated at Column No.3 at Sl.No.11 of the table.

2. Learned counsels for the petitioners submit that the levy of additional fee of fifty rupees for each day of delay after expiry of certificate of fitness for renewal has been introduced by way of amendment of the Motor Vehicle Rules, particularly the entry at Sl.No.11, Column No.3 of the Table of Rule 81 issued by the Government of India. It is vehemently argued that the aforesaid notification is illegal, arbitrary, unreasonable, excessive and

unconstitutional and the same violates Article 14 of the Constitution of India, therefore, the same is liable to be struck down to the extent of imposition of additional fee as stated above and the same may be declared to be void in the interest of justice. Learned counsel for the parties also argue that in view of Hon'ble Madras High Court decision, the charging of additional fees is also required to be declared void and struck down.

2.1. It is also submitted that the Government may, if it considers necessary so in public interest, by general or special order, exempt any class of persons from payment of any such fees either in part or in full. The power of Section 211 of the Motor Vehicles Act is restricted on levy of fees alone and does not extend to levy of additional fee as proposed in the impugned notification.

2.2. In support of the contentions, learned counsel for the petitioners have relied upon the following decisions of the Hon'ble Supreme Court as well as different High Courts:

(i) *Kusum Ingots and Alloys Ltd. Vs. Union of India (UOI) and Ors., reported in AIR 2004 SC 2321 : (2004) 6 SCC 254.*

(ii) *All India Jamiatul Quresh Action Committee vs. Union of India, reported in 2018 (5) SCJ 545.*

(iii) *T. Rajakumari and Ors. Vs. The Government of Tamil Nadu and Ors., reported in AIR 2016 Mad 177.*

(iv) *Mr. Shiv Kumar vs. Union of India, represented by Secretary Ministry of Law and Justice and Ors., reported in AIR 2014 Kant 73.*

(v) *Textile Technical Tradesmen Association and Ors. Vs. Union of India and Ors., reported in (2011) ILLJ 297 Mad.*

(vi) *Chennai City Auto Ootunargal Sangam and Ors., vs. The Secretary, Ministry of Road Transport and Highways decided on 03.04.2017 by Hon'ble Madras High Court in W.P.No.1598 of 2017.*

(vii) *Order dated 04.09.2017 and 21.02.2018 passed by the Hon'ble Supreme Court in Diary No.22817 of 2017 and Civil Appeal No.(s) 11216 of 2017.*

(viii) *Ayodhya Yadav, S/o. Siyaram Yadav vs. Union of India and another decided on 30.11.2018 by the Hon'ble Chhatisgarh High Court in W.P.(C) No.841 of 2018.*

2.3. Learned counsel for the petitioners contended that in view of the decisions as stated above, levy of additional fees cannot be held to be justified and valid. The Hon'ble Supreme Court in ***Kusum Ingots and Alloys Ltd.*** *(supra)*, more particularly, in paragraphs 21, 22, 28 and 29 has held as under:

"21. A parliamentary legislation when receives the assent of the President of India and published in an Official Gazette, unless specifically excluded, will apply to the entire territory of India. If passing of a legislation gives rise to a cause of action, a writ petition questioning the constitutionality thereof can be filed in any High Court of the country. It is not so done because a cause of action will arise only when the provisions of the Act or some of them which were implemented shall give rise to civil or evil consequences to the petitioner. A writ court, it is well settled would not determine a constitutional question in vacuum.

22. The court must have the requisite territorial jurisdiction. An order passed on writ petition questioning the constitutionality of a Parliamentary Act whether interim or final keeping in view the provisions contained in Clause (2) of Article 226 of the Constitution of India, will have effect throughout the territory of India subject of course to the applicability of the Act.

xx xx xx

28. Lt. Col. Khajoor Singh Vs. The Union of India and Another [(1961) 2 SCR 828] whereupon the learned counsel appearing on behalf of the appellant placed strong reliance was rendered at a point of time when clause (2) of Article 226 had not been inserted. In that case the Court held that the jurisdiction of the High Court under Article 226 of the Constitution of India, properly construed, depends not on the residence or location of the person affected by the order but of the person or authority passing the order and the place where the order has effect. In the latter sense, namely, the office of the authority who is to implement the order would attract the territorial jurisdiction of the Court was considered having regard to Section 20(c) of the Code of Civil Procedure as Article 226 of the Constitution thence stood stating :

"...The concept of cause of action cannot in our opinion be introduced in Art. 226, for by doing so we shall be doing away with the express provision contained therein which requires that the person or authority to whom the writ is to be issued should be resident in or located within the territories over which the High Court has jurisdiction. It is true that this may result in some inconvenience to person residing far away from New Delhi who are aggrieved by some order of the Government of India as such, and that may be a reason for making a suitable constitutional amendment in Art. 226. But the argument of inconvenience, in our opinion, cannot affect the plain language of Art. 226, nor can the concept of the place of cause of action be introduced into it for that would do away with the two limitations on the powers of the High Court contained in it."

29. In view of clause 2 of Article 226 of the Constitution of India now if a part of cause of action arises outside the jurisdiction of the High Court, it would have jurisdiction to issue a writ. The decision in Khajoor Singh (supra) has, thus, no application."

2.4. Learned counsel for the parties have also taken us to an order of the Hon'ble Supreme Court in ***All India Jamiatul Quresh Action Committee*** *(supra),* wherein the Hon'ble Supreme Court in paras-1 and 2 has observed as under:

"1. The challenge through the bunch of writ petitions, which are the subject matter of consideration, is to the validity of the Prevention of Cruelty to Animal (Regulation of Live Stocks, Markets) Rules, 2017, and the Prevention of Cruelty to Animals (Care and Maintenance of Case Property Animals) Rules, 2017. Both the above Rules, we are informed, were challenged before the Madurai Bench of the Madras High Court, which has stayed the operation of the said Rules. Mr.P.S.Narasimha, learned Additional Solicitor General, informs this Court, that the Union of India is not seeking modification of the aforestated interim order. We accordingly record the statement of the learned Additional Solicitor General. We understand the position to be that the interim order shall apply across the whole country. It is also the contention of the Union of India, that a large number of representations depicting the allegedly unworkable and unacceptable provisions of the Rules have been received, and a number of writ petitions have been filed in different High Courts, besides those which have been filed before this Court. It is pointed out, that the issues of challenge raised in the representations and writ petitions are the subject matter of a fresh consideration by the Government of India. It is pointed out, that the Ministry of Environment and Forests, is presently seized of the matter, and after an appropriate determination, changes if any, as may be considered appropriate will be introduced after which the amended Rules, shall be re-notified. We record the above statement made to this Court on behalf of the Government of India.

2. We are of the view and accordingly direct that as and when the amended Rules are notified, sufficient time be granted to all stake holders before they are implemented, so that they have a sufficient opportunity, if aggrieved, to assail them in consonance with law. In the above view of the matter, as of now, we find no justification to retain these writ petitions on our board. The same are accordingly disposed of. As a sequel to the above, pending interlocutory applications also stand disposed of."

2.5. They have also taken us to a Division Bench order of the High Court of Madras decided on 03.08.2016 in ***T. Rajakumari*** *(supra),* wherein the Madras High Court in paragraphs-2, 3 and 4 has observed as under:

"2. The accepted undisputed position is that the Hon'ble Supreme Court has not stayed the operation of the Delhi High Court order dated 17.02.2016 striking down Section 2(p) of Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, Act (hereinafter called "PNDT Act"). Consequently, Rule 3(3)(1)(b) of the PNDT Act have also been struck down as ultra vires the Act. We reproduce the operative portion of the order as under:

"98.We accordingly dispose of these petitions with the following declarations / directions:

(i) that Section 2(p) of the PNDT Act defining a Sonologist or Imaging Specialist, is bad to the extent it includes persons possessing a postgraduate qualification in ultrasonography or imaging techniques - because there is no such qualification recognised by MCI and the PNDT Act does not empower the statutory bodies

constituted thereunder or the Central Government to devise and coin new qualification;

(ii) We hold that all places including vehicles where ultrasound machine or imaging machine or scanner or other equipment capable of determining sex of the foetus or has the potential of detection of sex during pregnancy or selection of sex before conception, require registration under the Act;

(iii) However, if the person seeking registration (a) makes a declaration in the form to be prescribed by the Central W.P.(C) Nos.6968/2011, 2721/2014 & 3184/2014 Page 81 of 83 Supervisory Board to the effect that the said machine or equipment is not intended for conducting pre-natal diagnostic procedures; (b) gives an undertaking to not use or allow the use of the same for pre-natal diagnostic procedures; and, (c) has a "silent observer" or any other equipment installed on the ultrasound machines, as may be prescribed by the Central Supervisory Board, capable of storing images of each sonography tests done therewith, such person would be exempt from complying with the provisions of the Act and the Rules with respect to Genetic Clinics, Genetic Laboratory or Genetic Counselling Centre;

(iv) If however for any technical reasons, the Central Supervisory Board is of the view that such "silent observer" cannot be installed or would not serve the purpose, then the Central Supervisory Board would prescribe other conditions which such registrant would require to fulfil, to remain exempt as aforesaid;

(v) however such registrants would otherwise remain bound by the prohibitory and penal provisions of the Act and would further W.P.(C) Nos.6968/2011, 2721/2014 & 3184/2014 Page 82 of 83 remain liable to give inspection of the "silent observer" or other such equipment and their places, from the time to time and in such manner as may be prescribed by the Central Supervisory Board; and,

(vi) Rule 3(3)(1)(b) of the PNDT Rules (as it stands after the amendment with effect from 9th January, 2014) is ultra vires the PNDT Act to the extent it requires a person desirous of setting up a Genetic Clinic / Ultrasound Clinic / Imaging Centre to undergo six months training imparted in the manner prescribed in the Six Months Training Rules. No costs."

3. In view of the aforesaid position, it is accepted that the law would be finally laid down by the Hon'ble Supreme Court and thus there is no point in keeping this petition pending and whatever the declaration of law by the Hon'ble Supreme Court would be equally applied. The only question is as to what would happen till the Hon'ble Supreme Court examines the issue. In this behalf, if the Hon'ble Supreme Court had stayed or would stay the operation of the Judgment, then only could those provisions struck down again come in force.

4. It is trite to say that once a High Court has struck down the provisions of the Central Act, it cannot be said that it would be selectively applied in other States. Thus, there is no question of applicability of provisions struck down by the High Court as of now until and unless the Hon'ble Supreme Court upsets the Judgment or stays the operation of the Judgment."

2.6. Learned counsel for the petitioners have also relied upon a decision of the Division Bench of Karnataka High Court in ***Mr. Shiv Kumar*** *(supra),* wherein the Hon'ble Court has, in para-6, held as under:

> *"6. Having heard learned counsel and on perusal of the judgment of the Kerala High Court in Soumya Ann Thomas, as well as the judgment of the Apex Court in Kusum Ingots and Alloys Ltd., what follows is that Section 10A(1) of the Act has been held to be unconstitutional being violative of Articles 14 and 21 of the Constitution. However, to save it from the vice of unconstitutionality, the expression of 'two years' has been read down to 'one year' in sub-section (1) of Section 10A of the Act. The Kerala High Court's pronouncement on the constitutionality of a provision of a Central Act would be applicable throughout India. This is made clear by Hon'ble Supreme Court in Kusum Ingots and Alloys Ltd., wherein it has been stated that an order passed on a Writ Petition questioning the constitutionality of a Parliamentary Act whether interim or final keeping in view the provisions contained in Clause (2) of Article 226 of the Constitution, would have effect throughout the territory of India subject of course to the applicability of the Act. In that view of the matter, this Writ Petition would not call for any specific orders with regard to holding constitutionality or otherwise of sub-section(1) of Section 10A of the Act. Keeping in mind the pronouncement of the Division Bench of the Kerala High Court and reading the same in the context of Kusum Ingots and Alloys Ltd, the position of law with regard to sub-section (1) of Section 10A of the Act is now been made clear, particularly, insofar as State of Karnataka is concerned. With the aforesaid observations, the Writ Petition is disposed of.*

2.7. Learned counsel for the petitioners have also relied upon another decision of the Madras High Court in the case of ***Textile Technical Tradesmen Association*** *(supra)*, wherein the learned Single Judge has reiterated the decisions of the Hon'ble Supreme Court in ***Kusum Ingots and Alloys Ltd*** (supra). Keeping in mind the said decision of the Hon'ble Supreme Court, the Madras High Court, in paragraphs-23, 24 and 25, has held as under:

> *"23. As held by the Hon'ble Supreme Court, in view of clause (2) of Article 226 of the Constitution of India, if once it is adjudged by a High Court that a particular Parliamentary Act or a provision of the said Act is unconstitutional, in effect, it is as if the said Act/provision had never been in force. As a matter of fact, in D.D.Basu's Commentary on the Constitution of India edited by Hon'ble Mr.Justice Y.V.CHANDRACHUD, it has been summed up succinctly as follows;-*
>
> *"Where a Statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it and no one can be punished for having refused obedience to it before the decision was made. 'And what is true of an Act void in toto is true also as to any part of an*

Act which is found to be unconstitutional and which consequently has to be regarded as having never at any time been possessed of any legal force."

24. Of course, it is true that the question under consideration in these Writ Petitions was not directly raised and argued before the Hon'ble Supreme Court and answered in Kusum Ingots' case. It is obiter dicta of the Hon'ble Supreme Court. But, such obiter dicta is also expected to be followed by the High Courts. In this regard, I may refer to a Judgment of the Hon'ble Supreme Court Sarwan Singh Lamba v. Union of India reported in AIR 1995 SC 1729, wherein it has been held by a Constitution Bench that "normally even an "Obiter Dictum" is expected to be obeyed and followed". Recently, in Oriental Insurance Co Ltd., vs. Meena Variyal reported in 2007 (5) SCC 428, the Hon'ble Supreme Court, in Paragraph No.26, has held as follows;-

"An Obiter Dicutm of this Court may be binding only on the High Courts in the absence of a direct pronouncement on that question elsewhere by this Court. But, as far as this Court is concerned, though not binding, it does have clear persuasive authority."

25. In the light of the above legal position, applying the principles stated in Kusum Ingots case, cited supra, I am of the view that the impugned provision viz., Section 17-A of the Industrial Disputes Act, 1947, is no more in force in the Union Territory of Puducherry also in pursuance of the Judgment of the High Court of Andhra Pradesh in Telugunadu Workcharged Employess v. Government of India, cited supra. There can be no doubt that the Judgment of the High Court of Andra Pradesh, in which it has been adjudged that Section 17-A of the Act is unconstitutional, will have effect throughout the Territory of India."

3. Learned Central Government Counsel appearing for the opposite party No.1-Union of India has filed counter affidavit denying the claim of the petitioners. Relevant portions of the said counter affidavit are reproduced hereunder:

"1. That the present petition filed on behalf of the petitioner is not maintainable on the ground that the petitioner has challenged the Notification No.GSR 1183 dated 29.12.2016, which is a policy decision made by the Ministry. Through the said notification, the Rule 81 of Central Motor Vehicles Rules, 1989 was amended and the fees charged by the authorities for services being provided by the respective Regional Transport Offices have been revised. Hence, this petition is liable to be dismissed on this ground alone.

xx xx xx

4. That on the basis of the recommendation of the above said committee the Ministry has notified draft rules vide Notification No.GSR 744 (E) dated 28.07.2016 in the Official Gazette of India and invited objection/suggestion from the public/stakeholders. The copy of the said notification is an annexed herewith as **Annexure-2.**

5. That thereafter on 29.12.2016 the draft rules were finalized vide notification GSR 1183 (E) dated 29.12.2016 after considering suggestions and objection received. By this Notification the fees charged by the Authorities for service as provided by the respective Regional Transport Offices were revised. The copy of the said notification is annexed herewith as **Annexure-3**.

6. That it is further submitted that on 02.02.2017 the Ministry has issued letter of clarification vide letter No.RT-11017/12/2013-MVL dated 02.02.2017 with respect to notification GSR 1183 (E) dated 29.12.2017 to the Principal Secretaries (Transport)/the Transport Commissioner of all the States/UT Administrations that "It is clarified that the revised rates for Delay fees can be changed at the new rates from the date of publication of the notification i.e. 29th December, 2016 and not retrospectively." The copy of the letter dated 02.02.2017 is annexed herewith as **Annexure-4.**

7. That it is further submitted that on 21.03.2017 the Ministry again has issued notification vide No.GSR 271 (E) dated 21.03.2017 by which the State Government were empowered to lower the fees as they may decide. The copy of the said notification dated 21.03.2017 is annexed herewith as ***Annexure-5.***

8. That the averments made in paragraph-11 is true that the Hon'ble Madras High Court vide order dated 03.04.2017 passed in the writ petition No.1598 of 2017 filed by Chennai City Auto Ootunargal Sangam vs. Union of India and others, the order is as follows:

"17. In view of foregoing discussions, we find that the levy of additional fee under various heads as per the impugned notification is without authority and such levy of additional fee is therefore, liable to be struck down.

18. In the result, the Writ Petitions are partly allowed and the impugned notification i.e. GSR 1183 (E) dated 29.12.2016 of the first respondent amending Rule 32 and 81 of the Central Motor Vehicle Rule, 1989 to the extent of the imposition of additional fee is declare void and consequently the same if to that extent struck down. No costs."

The Ministry of Road Transport and Highways (Union of India, Opposite party No.1) has challenged the above order dated 03.04.2017 passed in the writ petition No.1598 of 2017 before the Supreme Court of India by filing the Special Leave Petition No.023648 of 2017, which is pending for hearing.

In view of the above the present petition filed by the petitioner be kept in abeyance and without taking any decision till the SLP disposed of by the Hon'ble Supreme Court."

4. Mr. Sharma, learned Standing Counsel for the State Transport Authority filed counter affidavit in a similar writ petition bearing W.P.(C) No.6636 of 2018, the averments of which are adopted in these writ petitions. He also supported the contentions raised by learned Central Government Counsel for the Union of India in their counter affidavit, the averments of

which have also been adopted in these writ petitions. The relevant portions of the counter affidavit filed in W.P.(C) No.6636 of 2018 are reproduced hereunder:

"xx xx xx

3. That in reply to the averments made in paragraph-1 of the writ petition, it is submitted that as provided under Rule 22(6) of Orissa Motor Vehicles Rules 1993, application for renewal of Certificate of Fitness shall be made in Form-II not less than 30 days before the date of expiry of Certificate of Fitness and the owner or the person in control of the vehicle shall cause the vehicle to be produced for inspection on such date and at such time and place as appointed under sub-rule 4 of the said Rules. Since the petitioner has failed to apply for renewal of Certificate of Fitness in consonance with the sub-rule 6 of Rule 22 of Orissa Motor Vehicle Rules, the petitioner is liable to pay the additional fees of Rs.50.00 for each day of delay after expiry of Certificate of Fitness. As per Rule 81 of the Central Motor Vehicles Rules, 1989, the additional fee levied by the Opp.Party under Rule 81 of the Central Motor Vehicles Rules, 1989 is nothing, but a fee which is payable by the petitioner and the opposite party No.1 is competent to levy such fee under the statute. The petitioner cannot escape from the liability payment of additional fees with some plea or the other. Instances have been brought to the notices of this authority that Transport Vehicles are being plied on road without valid Fitness Certificate, which poses threat to the road safety. Besides, when the Certificate of Fitness is not renewed, registration certificate of the vehicles shall become invalid. If a transport vehicle without having valid fitness, causes any accident, the victim will not get any compensation from the Insurance Company. Therefore, the plying of vehicle without Valid Fitness Certificate should be discouraged at any cost.

4. That in reply to the averments made in paragraph-4 of the writ petition are concerned, it is humbly submitted that as provided under Section 64(o) of the Motor Vehicles Act, 1988, the Central Government is competent to make Rules to prescribe fee to be charged for issue or renewal or alteration of Certificate of Registration and also for Certificate of Fitness.

5. That, it is submitted that fees for issue and renewal of Certificate of fitness was last revised by the Government of India on 28.03.2001. After more than 15 years, the fee was revised and additional fees has been sought to be levied by way of an amendment to the said Rule on 29.12.2016. It is submitted that in the year 2001, there were 18 number of Regional Transport Offices in the State, whereas, as of now there are 35 Regional Transport Offices, which are functioning in the State providing services to the general public. The State Government has deployed manpower and infrastructure facilities have been provided across the State in the office of Regional Transport Offices, for which huge amount has been spent in every year at increased rate. The State Government is providing different citizen centric services across the State to public at large including the petitioner. The amount of additional fees sought to be levied to Rule 81 of the Central Motor Vehicles Rules, 1989 for delay in making application for renewal of Fitness Certificate is aimed to compensate expenditure incurred by the State Government

on quid pro quo basis and the Government of India has legislative competence to levy such additional fee, which is nothing but a fee. The additional fee so levied is a part of deterrent measure, so that the vehicle owner should be more careful in making application for renewal of Fitness Certificate. In this process only genuine vehicles for Fitness Certificate ply on the road. The Motor Vehicle Act has been enacted to take into account and to provide for road and transport Technology, pattern of passenger and freight movements, development of road network in the country and improved techniques in motor vehicle management.

6. That before amending Rule 81 of the Central Motor Vehicles Rules, 1989, draft notification was published in the Gazette of India vide Notification No.GSR 744(E) dtd. 28.07.2016 inviting objections and suggestions from all persons likely to be affected. Since no objections and suggestions were received from the public including the petitioner in respect of the said draft rules, the same has been made final. Therefore, the petitioner cannot challenge the levy of additional fees contained in the said Notification dtd. 29.12.2016 at this belated stage and he is stopped to challenge the same as he has not filed any objection to the draft notification published by opposite party No.1.

xx xx xx

9. That, so far as averments made in paragraph-9 of the writ petition are concerned, it is submitted that levy of additional fee of Rs.50/- per day from the date of expiry of Fitness Certificate is extremely nominal and is not applicable to Transport Vehicle owners, who are renewing Fitness Certificate within the prescribed time. The applicant is paying fee for testing of his vehicle and which is being tested, as per mandate of the statute and after inspection of vehicle, Fitness Certificate is issued on realization of separate fee for issue of Fitness Certificate.

10. That in reply to the averments made in Paragraph-10 of the writ petition, it is submitted that under Rule 22(7) of the Orissa Motor Vehicles Rules, 1993, in cases where the owner of a vehicle fails to apply for renewal of Certificate of Fitness before 30 days of its expiry as provided under sub-rule 6, he shall have to pay penalty of Rs.500/-, which is related to filing for application for renewal of certificate of fitness only. The legislative intention for levy of additional fee of Rs.50/- per day in Sl.No.11 of the table under Rule 81 of the Central Motor Vehicles Rules, 1989 payable by vehicle owners, who had not applied for renewal of Certificate of Fitness before its expiry.

11. That in reply to the averments made in paragraphs-11 to 13 are concerned, it is submitted that since the petitioner has not filed application for renewal of Fitness Certificate 30 days before its expiry, he is liable to pay additional fee of Rs.50 per day, as prescribed under Rule 81 of the Central Motor Vehicles Rules, after the date of expiry of the Fitness Certificate."

5. Learned Additional Government Advocate for the opposite party-State Government has also supported the submissions of learned Central Government Counsel for the Union of India as well as the submission of learned Standing Counsel for the Transport Department.

6. Learned counsel for the petitioners have mainly contended that the decision of Madras High Court dated 03.04.2017 rendered in the case of ***Chennai City Auto Ootunargal Sangam*** *(supra)* against which Civil Appeal No.11216 of 2017 has been preferred by the Department of the Central Government before the Hon'ble Supreme Court, in which delay has been condoned but the Hon'ble Supreme Court has not stayed the order of the Madras High Court. As such, unless the provision in question is struck down, there will be different application of the same provision in the State of Tamil Nadu and the State of Odisha, which is not permissible in view of Clause (2) to Article 226 of the Constitution of India and case law decided in ***Kusum Ingots and Alloys Ltd*** *(supra).*

7. In that view of the matter, the impugned notification is required to be quashed so far as levy of additional fee is concerned. The opposite parties are required to be restrained from operating the Notification No.1183 (E) dated 29/12/2016 issued by the Government of India, more particularly, entry at Sl.No.11, Column No.3 of the table to Rule 81 of the Rules, otherwise the poor litigants have to approach the High Court and pursue the litigation unnecessarily and public exchequer will also suffer. On that basis, not only the petitioners have to pay cost of the petition but also the State Government as well as the Central Government has to pay the expenses and bear the cost of frivolous litigation.

8. In that view of the matter and in view of the decisions referred to hereinabove, the Notification No.1183 (E) dated 29/12/2016, more particularly, entry at Sl.No.11, Column No.3 of the table to Rule 81, which is under challenge in all theses writ petitions, is either required to be quashed and set aside or the opposite parties are required to be restrained from implementing the same till a decision is rendered by the Hon'ble Supreme Court in the pending civil appeal.

9. The same view has been taken by the Chhatisgarh High Court in the case of *Ayodhya Yadav (supra),* wherein the Division Bench of Chhatisgarh High Court, in paragraphs-3, 4, 5 and 6 has observed as under:

> "3. In the present cases, we are not concerned about the other fees which have been notified. The issue is limited to Sr. No.11 which deals with grant or refusal of fitness certificate for which the fees fixed is Rs. 200/-, however, the note adds that additional fees of Rs.50/- for each day of delay after expiry shall be levied, which is subject matter of challenge.

> 4. Reliance has been placed by counsel representing the various petitioners on a decision rendered by the Division Bench of High Court of Madras in case of ***Chennai City Auto Ootunagral Sangam represented by its Secretary Tamilnadu Driving School owners deferation represented by its General Secretary, Madra Metro Auto Drivers Association (Affiliated with AITUC) represented by its General Secretary, Vada Chennai Maavatta Auto Ottunargal Padugappu Nalasangam, represented by its General Secretary, Tamilnadu Lorry Owners Federation represented by its President vs. Secretary, Ministry of Road Transport and Highways, Secretary, Home (Transport), Transport Commissioner,*** reported in **2017 (3) Mad LJ 769.**
>
> 5. Vide the above decision dated 03.04.2017, the said notification has been quashed in part and the matter is now awaiting adjudication by the Hon'ble Apex Court in Civil Appeal No.011216 of 2017.
>
> 6. In view of the above situation and position, since the final word in relation to the validity of the central notification is yet to come from the Apex court, this writ application stands disposed off with an observation that the additional fees in terms of Sr. No.11 in relation to the fitness certificate to be levied after its expiry shall remain in abeyance, however, the obligation and the liabilities to pay the same will depend upon the final opinion which may be rendered by the Apex Court in Civil Appeal No.011216 of 2017."

10. We have heard learned counsel for the parties and perused the materials available on record.

11. In view of the fact stated above, the impugned Notification No.1183 (E) dated 29/12/2016, more particularly, entry at Sl.No.11, Column No.3 of the table to Rule 81, which has been issued by the Central Government, is travelling beyond the scope of Act and the same is without authority of law. Therefore, the contentions of the petitioners are required to be accepted and the same is accepted in view of the fact that the notification has already been quashed and set aside by the Madras High Court. In view of operation of law the same is applicable to the State of Odisha also.

Further, in view the observations made by the Madras High Court in its order/judgment delivered in *Textile Technical Tradesmen Association (supra) and Chennai City Auto Ootunargal Sangam (supra),* the notification is required to be quashed and set aside, therefore, the same is quashed and set aside.

12. The parties are directed to abide by the decision of the Hon'ble Supreme Court. Since the Central Government has already challenged the impugned judgment of Madras High Court, they are not required to challenge this order. However, if the petitioners want to intervene in the application

pending before the Hon'ble Supreme Court, it is open to the petitioners to intervene and prefer appropriate application to plead the case before the Supreme Court.

13. Taking into consideration the huge filing of writ petitions by the litigants only on this issue and more than 1000 matters are pending and, in every week, hundreds of new matters are coming on the Board, the Division Bench has to engross in these matters. In view of the observations made by Madras High Court in *Chennai City Auto Ootunargal Sangam (supra)* and since, the Hon'ble Supreme Court has not stayed the judgment, we are of the opinion that the impugned notification, particularly, entry at Sl.No.11, Column No.3 (Note) of the table to Rule 81 shall not be implemented at present within the State of Orissa. Keeping in mind the litigation policy and to avoid unnecessary litigation cost, these matters are required to be decided in the interest of justice to avoid any further litigation in the matter.

14. It is clarified that if ultimately the Government succeeds in the Supreme Court, it will be open for them to recover the amount of additional fees from the petitioners.

15. The writ petitions stand disposed of to the extent indicated above. All connected Misc. Cases/I.As are also disposed of accordingly. No order as to costs.

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2019 (I) ILR - CUT- 490

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

O.J.C. NO. 3398 OF 2002

GENERAL SECRETARY,
NORTH ORISSA WORKER'S UNION, ROURKELA ……..Petitioner

.Vs.

THE SUPERINTENDENT,
PROSPECTING DIVISION & ANR. ……Opp. Parties

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the award passed in an industrial dispute – Interference by writ court – Scope of – Principles – Discussed.

"Therefore, this Court, in exercise of its power under Articles 226 and 227 of the Constitution of India should not interfere with the findings of fact recorded by the Tribunal unless there is an apparent error on the face of the award and the findings given in the award are perverse or unreasonable either based on no evidence or based on illegal/unacceptable evidence or against the weight of evidence or outrageously defies logic so as to suffer from irrationality. If the Tribunal erroneously refused to admit admissible evidence, or had erroneously admitted inadmissible evidence which had influenced a finding, the same can be interfered by a writ of certiorari. Adequacy of evidence cannot be looked into in the writ jurisdiction but consideration of extraneous materials and non-consideration of relevant materials can certainly be taken into account. Findings of fact of the Tribunal should not be disturbed on the ground that a different view might possibly be taken on the said facts. Inadequacy of evidence or the possibility of reading the evidence in a different manner, would not amount to perversity." *(Para 9)*

(B) INDUSTRIAL DISPUTES ACT, 1947 – Section 25 F – Benefits under upon termination of employment of a workman – Plea of the Management that the nature of service was conditional and not continuous – Materials available to the contrary – Appreciation of Tribunal not proper – Held, it appears that the workmen had worked for more than two hundred and forty days continuously during a period of twelve calendar months preceding their disengagement/termination on 01.04.1993 – At the time of their disengagement, even when they had continuous service for such period, they were not given any notice or pay in lieu of notice as well as retrenchment compensation – Thus, mandatory pre-condition of retrenchment in paying the aforesaid dues in accordance with section 25F of the 1947 Act was not complied with – That is sufficient to render the termination as illegal – Therefore, we are of the view that the observation of the learned Tribunal that the work was contractual in nature and it was not continuous and therefore, the benefits under section 25F is not applicable, is perverse and contrary to the evidence on record. (Para 10)

(C) INDUSTRIAL DISPUTE – Mass termination – Dispute raised by the Union where the workmen are members – Whether maintainable? – Held, Yes – Reasons indicated,

"Adverting to the observation made by the learned Tribunal that the petitioner Union has no locus standi to represent the workmen in the case, it is seen that W.W.1 Bhabani Sankar Pati who was the General Secretary of North Orissa Workers' Union has stated that as per clause 3 of the bye-law of the Union, the General Secretary is authorized to raise the dispute and also to represent any workman who is a member of the Union and clause 4 of the bye-law authorizes the office bearers to represent a worker who is not a member of the Union if approached by him. He proved Exts.1 to 3 which lend support to his oral evidence. W.W.3 has stated that they became members of North Orissa Workers' Union before

termination of their service. W.W.5 stated that they authorized North Orissa Workers' Union to fight their case and they were the members of the said Union since 1991. W.W.6 stated that they became the members of North Orissa Workers' Union in 1992. Section 36(1)(c) of 1947 Act states, inter alia, that a workman who is a party to a dispute shall be entitled to be represented in any proceeding under the Act by any member of the executive or other office bearer of any trade union connected with the industry in which the worker is employed even if the worker is not a member of any trade union. In view of the evidence of P.W.1, the General Secretary of North Orissa Workers' Union and the documents exhibited by the said witness, there cannot be any dispute that North Orissa Workers' Union is connected with the industry of opposite party no.1. Even if some of the workers have given prevaricating statements relating to their year of joining of North Orissa Workers' Union but that by itself would not debar such Union to represent the workmen in view of the provision under section 36(1)(c) of 1947 Act. Therefore, the observation made by the Tribunal regarding the locus standi of the petitioner Union to represent the workmen is not sustainable in the eye of law. We are of the view that there is no illegality on the part of the petitioner Union in representing the workmen."

Case Laws Relied on and Referred to :-

1. A.I.R. 2010 S.C. 1236 : Director, Fisheries Terminal Division .Vs. Bhikubhai Meghajibhai Chavda.
2. A.I.R. 2014 S.C. 1188 : B.S.N.L. .Vs. Bhurumal.
3. A.I.R. 2010 S.C. 2140 : Senior Superintendent .Vs. Santosh Kumar Seal.
4. 2017 (1) OLR 58 : Mrinal Kanti Hazara .Vs. Assistant Divisional Manager.
5. 1964 S.C. 477 : Syed Yakoob .Vs. K.S. Radhakrishan.
6. (1986) 4 SCC 447 : Chandavarkar Sita Ratna Rao .Vs. Ashalata S. Guram.
7. (2015) 4 SCC 270 : M/s. Pepsico India Holding Pvt. Ltd. .Vs. Krishna Kant.
8. (2006) 1 SCC 106 : R.M. Yellatty .Vs. Assistant Executive Engineer.

For Petitioner : Mr. S.C. Samantaray.

For Opp. Party : Mr. Sarada Prasanna Sarangi, D.K. Das, P.K. Dash.

JUDGMENT Date of Hearing: 17.01.2019 Date of Judgment: 29.01.2019

S. K. SAHOO, J.

The petitioner General Secretary, North Orissa Workers' Union representing forty five workmen in this writ application has challenged the award dated 19.12.2000 passed by the learned Presiding Officer, Industrial Tribunal, Rourkela in Industrial Dispute Case No.51 of 1997 (C) in holding the reference made by the Government of India in the Ministry of Labour in exercise of power under clause (d) of sub-section (1) and sub-section (2A) of section 10 of the Industrial Disputes Act, 1947 (hereafter '1947 Act') as not maintainable and the workmen are not entitled to the relief.

2. The reference made vide no.L-26011/7/94-IR(Misc.) dated 25.11.94 was as follows:

> "*Whether the action of the Management of Geological Services, Tata Iron & Steel Co. Ltd., At/P.O.:- Joda, in terminating the services of Sri Sukulal Sandil and 44 others (list enclosed) w.e.f. 1.4.93 is justified? If not, to what relief the workmen are entitled to*?"

In the proceeding before the Industrial Tribunal, the petitioner was the 2nd party and the opp. party no.1 was the 1st party.

3. It is the case of the 2nd party workmen that they joined their duties in different months and years as temporary workers under the 1st party Management with some artificial break in service for few days and lastly, they were denied work w.e.f. 01.04.1993 without any written order. On enquiry by the 2nd party workmen as to why they were not given work, the Officer in-charge of the site informed them that their files had been sent to the headquarter at Jamshedpur and on receipt of the order from the headquarter, they would be taken back in service permanently under the 1st party Management and they were advised to wait. Since after waiting for some time, the workmen did not receive any order from the 1st party Management, they approached the Union for taking up their matter with the authority for their reinstatement in service with full back wages and accordingly, the Union raised the dispute before the authority which was referred to the Tribunal by the Central Government for adjudication. It is the specific case of the 2nd party workmen that they had completed about twenty years of service under the 1st party Management and that the action of the 1st party Management in terminating their services was illegal, arbitrary, violation of natural justice and also amounted to unfair labour practice and therefore, the 2nd party workmen were entitled to be reinstated with full back wages.

4. The 1st party Management submitted its written statement stating therein that the petitioner Union did not have any locus standi to represent the workmen. The outdoor section of Geological Services Department of the 1st party Management was undertaking the assignment related to prospecting/drilling project job only wherever and whenever it was necessary on the requisition of the mines Management at any location/unit/establishment of Raw Materials Division of M/s. Tata Iron & Steel Company Ltd. The very nature of work was temporary and intermittent and not perennial. The opening and closure of any project assignment was carried out for a temporary period in any mining establishment on the need

and requirement of the Steel Company. The local person were engaged on casual/temporary basis for a specific period only and whenever the project work was completed/suspended, the labourers so engaged on temporary/contractual service automatically ceased to be in employment. The action of the Management was in conformity with the terms of contract and conditions of services proposed by the proposer (employer) and accepted by the promisee (workmen). The Management was offering temporary contractual engagement, depending upon its requirement. The 1st party Management relied upon memorandum of agreement dated 28.07.1980 between the Tata Iron & Steel Company Ltd. and the Tata Workers' Union, representing the outdoor staff of Geological Services Department of the Company. The workmen according to the Management fell under section 2(oo)(bb) of the 1947 Act. The cessation of contractual temporary employment of such person as per terms of contract of services did not amount to retrenchment. The relevant clauses of temporary employment issued to the workmen were relied upon to show that such employment was for a fixed period in the project job. There was no violation of the provisions of 1947 Act by the 1st party Management or principle of natural justice. Forty five workmen were engaged on temporary contractual basis from August 1992 to March 1993 and they were terminated w.e.f. 01.04.1993 as the project work came to end on 31.03.1993. It is stated that none of the workmen was in continuous service for even one year and none had completed two hundred and forty days in any calendar year and they are not entitled for any relief whatsoever and their claim petition should be rejected.

5. The learned Tribunal framed the following issues:-

i. Whether the reference is maintainable?

ii. Whether the action of the Management in terminating the services of Sri Sukulal Sandil and 44 others w.e.f. 01.04.1993 is justified?

iii. If not, to what relief the workmen are entitled?

6. On behalf of the workmen, six witnesses were examined and twenty five documents were proved as Exts.1 to 25. On behalf of the Management, two witnesses were examined.

7. The learned Tribunal after assessing the oral as well as documentary evidence came to hold that the workmen were given work in projects which were taken up for fixed period to find out minerals for mining purpose and with closure of the project work, their work also ceased and when another

project work was taken up in that area, another appointment order was being issued and that it was not possible that different project works were taken up one after another without any gap of period between each project and therefore, the workmen must be sitting idle or doing work privately somewhere else during each break periods and it cannot be said that the work was continuous in nature. It was further held that the nature of work of the workmen was not continuous one and they were not given artificial breaks and their work was contractual in nature and therefore, the workmen are not entitled to be benefits under section 25F of 1947 Act. It was further held that there is no evidence to hold that the 2nd party workmen were members of the Union before 01.04.1993 and therefore, the Union has no locus standi to represent the workmen in the case and accordingly, the reference was held to be not maintainable.

8. Mr. S.C. Samantaray, learned counsel appearing for the petitioner contended that the findings arrived at by the learned Industrial Tribunal is perverse and it has failed to appreciate the material on record in its proper perspective. The workmen were continuously working in different projects at different places and appointment orders proved on behalf of the workmen indicated that artificial breaks were given to deprive the benefit under section 25F of 1947 Act. It was argued that the Tribunal erred in law in interpreting section 36(1)(c) of 1947 Act and therefore, the award passed should be quashed and the workmen be either reinstated with back wages or given compensation. He relied upon the decisions of the Hon'ble Supreme Court in case of **Director, Fisheries Terminal Division -Vrs.- Bhikubhai Meghajibhai Chavda reported in A.I.R. 2010 S.C. 1236**, **B.S.N.L. -Vrs.- Bhurumal reported in A.I.R. 2014 S.C. 1188, Senior Superintendent -Vrs.- Santosh Kumar Seal reported in A.I.R. 2010 S.C. 2140** and **of this Court in Mrinal Kanti Hazara -Vrs.- Assistant Divisional Manager reported in 2017 (1) Orissa Law Reviews 58**.

Per contra, Mr. Sarada Prasanna Sarangi, learned counsel appearing for the 2nd party Management on the other hand supported the impugned award and contended that the learned Tribunal assessed the evidence properly and there is no perversity in the finding. He further submitted that in view of section 2(oo)(bb) of 1947 Act, retrenchment cannot be said to have been done in the termination of service of workmen as a result of non-renewal of contract of employment between the employer and the workmen. The workmen in the present case were offered with appointments for a definite period with the condition that it might be terminated earlier due to

suspension/completion of work or for any other reason on seventy two hours advanced written intimation by the officer or officer in-charge. The nature of appointment was in fixed tenure which the workmen knew well and after accepting the terms and conditions, they resumed their duties on each and every offer of appointment. According to Mr. Sarangi, section 25F of 1947 Act would not be applicable in view of the specific condition mentioned in the offer of appointment. He emphasized that since the scope of interference in the findings of fact arrived at by the Tribunal by way of appreciation of evidence is limited and no such grave error has been committed while passing the impugned award, the writ petition should be dismissed. Reliance was placed upon the decisions of the Hon'ble Supreme Court in case of **Syed Yakoob -Vrs.- K.S. Radhakrishan reported in 1964 S.C. 477**, **Chandavarkar Sita Ratna Rao -Vrs.- Ashalata S. Guram reported in (1986) 4 Supreme Court Cases 447** and **M/s. Pepsico India Holding Pvt. Ltd. -Vrs.- Krishna Kant reported in (2015) 4 Supreme Court Cases 270**.

9. Adverting to the contentions raised at the bar regarding the scope of interference of this Court in exercise of powers under Articles 226 and 227 of the Constitution of India with an award passed by the Industrial Tribunal, a five-Judge Constitution Bench of the Hon'ble Supreme Court in case of **Syed Yakoob** (supra) held as follows:-

> "7. The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 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 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 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 sufficiencies of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

8. It is, of course, not easy to define or adequately describe what an error of law apparent on the face of the record means. What can be corrected by a writ has to be an error of law; it must be such an error of law as can be regarded as one which is apparent on the face of the record. Where it is manifest or clear that the conclusion of law recorded by an inferior Court or tribunal is based on an obvious misinterpretation of the relevant statutory provision, or sometimes in ignorance of it, or may be, even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of certiorari. In all these cases, the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record. It may also be that in some cases, the impugned error of law may not be obvious or patent on the face of the record as such and the Court may need an argument to discover the said error; but there can be no doubt that what can be corrected by a writ of certiorari is an error of law and the said error must, on the whole, be of such a character as would satisfy the test that it is an error of law apparent on the face of the record. If a statutory provision is reasonably capable of two constructions and one construction has been adopted by the inferior Court or tribunal, its conclusion may not necessarily or always be open to correction by a writ of certiorari. In our opinion, it is neither possible nor desirable to attempt either to define or to describe adequately all cases of errors which can be appropriately described as errors of law apparent on the face of the record. Whether or not an impugned error is an error of law and an error of law which is apparent on the face of the record, must always depend upon the facts and circumstances of each case and upon the nature and scope of the legal provision which is alleged to have been misconducted or contravened."

In case of **Chandavarkar Sita Ratna Rao** (supra), it is held as follows:-

"21. It is true that in exercise of jurisdiction under Article 227 of the Constitution, the High Court could go into the question of facts or look into the evidence if justice so requires it, if there is any misdirection in law or a view of fact taken in the teeth of preponderance of evidence. But the High Court should decline to exercise its jurisdiction under Articles 226 and 227 of the Constitution to look into

> the fact in the absence of clear cut down reasons where the question depends upon the appreciation of evidence. The High Court also should not interfere with a finding within the jurisdiction of the inferior tribunal except where the findings were perverse and not based on any material evidence or it resulted in manifest of injustice."

In case of **M/s. Pepsico India Holding Pvt. Ltd.** (supra), it is held that the High Court in the guise of exercising its jurisdiction normally should not interfere under Article 227 of the Constitution and convert itself into a Court of appeal.

In case of **B.S.N.L.** (supra), it is held that the findings of fact by the Central Government Industrial Disputes -cum- Labour Court (CGIT) are not be interfered with by the High Court under Article 226 of the Constitution. Interference is permissible only in cases where the findings are totally perverse or based on no evidence. Insufficiency of evidence cannot be a ground to interdict the findings as it is not the function of the High Court to reappreciate the evidence.

In case of **Mrinal Kanti Hazara** (supra), the same principle relating to scope of interference in the award of Industrial Tribunal has been reiterated.

Therefore, this Court, in exercise of its power under Articles 226 and 227 of the Constitution of India should not interfere with the findings of fact recorded by the Tribunal unless there is an apparent error on the face of the award and the findings given in the award are perverse or unreasonable either based on no evidence or based on illegal/unacceptable evidence or against the weight of evidence or outrageously defies logic so as to suffer from irrationality. If the Tribunal erroneously refused to admit admissible evidence, or had erroneously admitted inadmissible evidence which had influenced a finding, the same can be interfered by a writ of certiorari. Adequacy of evidence cannot be looked into in the writ jurisdiction but consideration of extraneous materials and non-consideration of relevant materials can certainly be taken into account. Findings of fact of the Tribunal should not be disturbed on the ground that a different view might possibly be taken on the said facts. Inadequacy of evidence or the possibility of reading the evidence in a different manner, would not amount to perversity.

10. Keeping in view the above principles, if the nature of dispute is analysed, we find that the crux of the matter is the applicability of section 25F of 1947 Act which deals with conditions precedent to retrenchment of

workmen. The qualification for relief under section 25F is that one should be a workman employed in an industry and has been in continuous service for not less than one year under an employer. What is 'continuous service' has been defined and explained in section 25B of the 1947 Act. The provision which is of relevance in the present case is section 25B(2)(a)(ii) which provides that a workman who is not in continuous service for a period of one year shall be deemed to be in continuous service for a period of one year if he, during a period of twelve calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than two hundred and forty days. The expression which we are required to construe is 'actually worked under the employer'. This expression, must necessarily comprehend all those days during which the workman was in the employment of the employer and for which he had been paid wages either under express or implied contract of service or by compulsion of statute, standing orders etc. The construction of the expression 'actually worked under the employer' as given under the explanation to section 25B of 1947 Act is only clarificatory as all explanations are, and cannot be used to limit the expanse of the main provision. The welfare legislation introduced in the statute book is for the purposes of eradication of social malady and therefore, it is the duty incumbent on the Court to offer a much broader interpretation.

Adverting to the factual aspect, it is the case of the petitioner that the workmen were continuously working in different projects at different places. Appointment orders were proved on behalf of the workmen to indicate that artificial breaks were given. There is no dispute that the burden of proof is on the petitioner to show that the workmen had worked for two hundred and forty days in preceding twelve months prior to their alleged retrenchment. The burden can be discharged by adducing cogent evidence, both oral and documentary. If the workman discharges his burden that he had worked for two hundred and forty days in preceding twelve months period prior to his termination without following section 25F of 1947 Act, the termination would be illegal. In case of **R.M. Yellatty -Vrs.- Assistant Executive Engineer reported in (2006) 1 Supreme Court Cases 106**, it is held that in case of termination of service of daily-waged earners, there will be no letter of appointment or termination. There will also be no receipt of proof of payment. In most cases, the workman can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance

register etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case. In case of **Director, Fisheries Terminal Division** (supra), it is held the workman would have difficulty in having access to all the official documents, muster rolls etc. in connection with his service. When the workman has come forward and deposed, the burden of proof shifts to the employer to prove that he did not complete two hundred and forty days of service in the requisite period to constitute continuous service.

The learned counsel appearing for the petitioner while arguing that material evidence adduced on behalf of the workmen has been overlooked by the Tribunal resulting perversity in the finding, placed the relevant evidence. W.W.2 Bhagaban Majhi stated that he joined in TATA Company as a worker in 1973 March and all the forty five workers were working in TATA Company and they all worked till 31.03.1993 continuously with a break up of six to seven days each time after working for three to four months and on 01.04.1993 they were stopped from doing their work without any termination notice and no compensation was paid to any of them. He proved his own bonus slip vide Ext.4 as well as the bonus slips of other workmen as Exts.5 to 18. In the cross-examination, he has stated that they were all local persons and given employment as local persons.

W.W.3 Sukalal Saudil stated that all the workers joined the service in the year March 1973 and they worked till 1980. After working for three months, they were disengaged from service for four to six days and again they were given appointment for three months and again there was interruption and in that way, they continued till 1980 and in 1981, they were given regular appointment and they continued to work till 31.03.1985 and after 31st, they were disengaged from service for one month and again given appointment in May 1985 and worked till December 1985 and then they were disengaged from service for a long period till 19.07.1992 and given appointment from 20.07.1992 and again from 01.04.1993, they were not allowed to work. They were not given any termination order or paid any compensation and they were being supplied with bonus payment slips each year. In his cross-examination, the Management proved the appointment orders of some workmen. He stated that they were working in prospecting project and doing drilling job and that the workmen received the appointment orders several times having terms and conditions.

W.W.4 Padma Kishor Patra stated that he and the other 2nd party workmen joined in work in different years between 1972 to 1975 and they

worked till 31.03.1991 and from 01.04.1991, they were denied work and again they were allowed to work from 20.07.1992 and continued till 31.03.1993 and from 01.04.1993 they were denied work. He proved the list of 2nd party workmen with their designation, date of appointment and date of termination marked as Ext.25 and the data was supplied to them by the conciliation officer. He specifically stated that they were not issued with any termination order nor paid any compensation and whenever they were joining work, they were being issued with appointment orders. In the cross-examination, he has stated that he was local person of Joda and he was working in prospecting division.

W.W.5 Amar Kumar Mohanty has also stated like other workmen that since 01.04.1993 they were not given any further appointment and no termination notice was served on any of them and no termination benefit was given to them and every year they have worked for more than two hundred and forty days. In the cross-examination, he stated that he joined in 1973 and denied the suggestion of the Management that he never worked as temporary from 1981 to 1990.

W.W.6 Rasananda Patra stated that he joined as a casual mazdoor in 1973 under the Management in prospecting division at Malda and they became temporary worker in 1981 and they were getting bonus and they were disengaged in 1986 for two months and again given work as temporary worker and again after one year, they were disengaged and again in July 1992, they were given work and they worked continuously till 31.03.1993 and from 01.04.1993, they were not given any work. He further stated that no termination notice was given and no compensation was paid. In the cross-examination, he stated that he worked as a local man and after completing two hundred and forty days of work as a casual mazdoor, they were made temporary. He denied the suggestion of the Management that he had not worked in project division before 1982.

It appears from the impugned award that the learned Tribunal has not discussed the evidence of the workmen carefully as to whether during a period of twelve calendar months preceding the date with reference to which the calculation is to be made, they had actually worked under the employer for not less than two hundred and forty days which shall be deemed to be in continuous service for a period of one year as envisaged under section 25F read with section 25B(2)(a)(ii) of 1947 Act. The bonus slips which were proved by the workmen have not been challenged by the Management. The

materials on record indicate different project works of the employer were continuing during the relevant period and the workmen were engaged in such projects but artificial breaks were given in their appointment for some period. The Management witness no.1 has stated that all the workmen might have worked for two hundred and forty days in a year but not continuously and they had worked with intermittent breaks. The observation made by the learned Tribunal that it was not possible that different project work were taken up one after another without any gap of period between each project and that after closure of one project work, the Management must be taking some days or months to decide to take up the next project and that the workmen must be sitting idle or doing work privately elsewhere during break periods, are based on assumption without any clinching evidence in that respect. There are enough material on record that when the workmen were finally disengaged by the Management from their work since 01.04.1993, they had actually worked under the employer for not less than two hundred and forty days during a period of twelve calendar months preceding the date with reference to which the calculation is to be made. Law is well settled that by creating artificial breaks in the employment, protection under section 25F of 1947 Act cannot be frustrated. Being conscious of scope of interference in a writ of certiorari, we find that the Tribunal has ignored the relevancy of the admissible evidence adduced on behalf the workmen which has influenced his finding in the award. It appears that the workmen had worked for more than two hundred and forty days continuously during a period of twelve calendar months preceding their disengagement/termination on 01.04.1993. At the time of their disengagement, even when they had continuous service for such period, they were not given any notice or pay in lieu of notice as well as retrenchment compensation. Thus, mandatory pre-condition of retrenchment in paying the aforesaid dues in accordance with section 25F of the 1947 Act was not complied with. That is sufficient to render the termination as illegal. Therefore, we are of the view that the observation of the learned Tribunal that the work was contractual in nature and it was not continuous and therefore, the benefits under section 25F is not applicable, is perverse and contrary to the evidence on record.

11. Adverting to the observation made by the learned Tribunal that the petitioner Union has no locus standi to represent the workmen in the case, it is seen that W.W.1 Bhabani Sankar Pati who was the General Secretary of North Orissa Workers' Union has stated that as per clause 3 of the bye-law of the Union, the General Secretary is authorized to raise the dispute and also to

represent any workman who is a member of the Union and clause 4 of the bye-law authorizes the office bearers to represent a worker who is not a member of the Union if approached by him. He proved Exts.1 to 3 which lend support to his oral evidence. W.W.3 has stated that they became members of North Orissa Workers' Union before termination of their service. W.W.5 stated that they authorized North Orissa Workers' Union to fight their case and they were the members of the said Union since 1991. W.W.6 stated that they became the members of North Orissa Workers' Union in 1992. Section 36(1)(c) of 1947 Act states, inter alia, that a workman who is a party to a dispute shall be entitled to be represented in any proceeding under the Act by any member of the executive or other office bearer of any trade union connected with the industry in which the worker is employed even if the worker is not a member of any trade union. In view of the evidence of P.W.1, the General Secretary of North Orissa Workers' Union and the documents exhibited by the said witness, there cannot be any dispute that North Orissa Workers' Union is connected with the industry of opposite party no.1. Even if some of the workers have given prevaricating statements relating to their year of joining of North Orissa Workers' Union but that by itself would not debar such Union to represent the workmen in view of the provision under section 36(1)(c) of 1947 Act. Therefore, the observation made by the Tribunal regarding the locus standi of the petitioner Union to represent the workmen is not sustainable in the eye of law. We are of the view that there is no illegality on the part of the petitioner Union in representing the workmen.

12. In view of the foregoing discussions, after holding the termination of the workmen to be illegal in view of non-compliance of section 25F of 1947 Act, now it is to be seen what relief can be granted to the workmen in the facts and circumstances of the case. The workmen were disengaged in a distant past i.e. on 01.04.1993. The termination is held to be illegal only on a technical ground of not adhering to the provisions of section 25F of the Act. It is stated at the bar that most of workmen have crossed the age of sixty years and some of them are dead. On these facts, it would be difficult to give the relief of reinstatement to the workmen. In case of **Senior Superintendent** (supra), it is held by the Hon'ble Supreme Court that in last few years, it has been consistently held by this Court that relief by way of reinstatement with back wages is not automatic, even if termination of an employee is found to be illegal or is in contravention of the prescribed procedure and that monetary compensation in lieu of reinstatement and back wages in cases of such nature may be appropriate

In the case of **BSNL** (supra), it is held as follows:-

"20. The learned Counsel for the appellant referred to two judgments wherein this Court granted compensation instead of reinstatement. In the case of **BSNL -Vrs.- Man Singh: (2012) 1 SCC 558**, this Court has held that when the termination is set aside because of violation of Section 25-F of the Industrial Disputes Act, it is not necessary that relief of reinstatement be also given as a matter of right. In the case of **Incharge Officer and Anr. -Vrs.- Shankar Shetty: (2010) 9 SCC 126**, it was held that those cases where the workman had worked on daily wage basis, and worked merely for a period of 240 days or 2-3 years and where the termination had taken place many years ago, the recent trend was to grant compensation in lieu of reinstatement. In this judgment of **Shankar Shetty** (supra), this trend was reiterated by referring to various judgments, as is clear from the following discussion.

"Should an order of reinstatement automatically follow in a case where the engagement of a daily wager has been brought to end in violation of Section 25-F of the Industrial Disputes Act, 1947 (for short "the ID Act")? The course of the decisions of this Court in recent years has been uniform on the above question.

In **Jagbir Singh -Vrs.- Haryana State Agriculture Mktd. Board: (2009) 15 SCC 327**, delivering the judgment of this Court, one of us (R.M. Lodha, J.) noticed some of the recent decisions of this Court, namely, **U.P. State Brassware Corpn. Ltd. -Vrs.- Uday Narain Pandey: (2006) 1 SCC 479**, **Uttaranchal Forest Department Corpn. -Vrs.- M.C. Joshi: (2007) 9 SCC 353**, **State of M.P. -Vrs.- Lalit Kumar Verma: (2007) 1 SCC 575**, **M.P. Admn. -Vrs.- Tribhuban: (2007) 9 SCC 748**, **Sita Ram -Vrs.- Moti Lal Nehru Farmers Training Institute: (2008) 5 SCC 75**, **Jaipur Development Authority -Vrs.- Ramsahai: (2006) 11 SCC 684**, **GDA -Vrs.- Ashok Kumar: (2008) 4 SCC 261** and **Mahboob Deepak -Vrs.- Nagar Panchayat, Gajraula: (2008) 1 SCC 575** and stated as follows: (Jagbir Singh case, SCC pp. 330 & 335 paras 7 & 14)

"It is true that the earlier view of this Court articulated in many decision reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in a long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention of the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice.

It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-F although may be set aside but an award of reinstatement should not, however, automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee."

Jagbir Singh has been applied very recently in **Telegraph Deptt. -Vrs.- Santosh Kumar Seal: (2010) 6 SCC 773**, wherein this Court stated: (SCC p. 777, para 11)

"In view of the aforesaid legal position and the fact that the workmen were engaged as daily wagers about 25 years back and they worked hardly for 2 or 3 years, relief of reinstatement and back wages to them cannot be said to be justified and instead monetary compensation would subserve the ends of justice".

xx xx xx xx xx xx

23. It is clear from the reading of the aforesaid judgments that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal is not applied mechanically in all cases. While that may be a position where services of a regular/permanent workman are terminated illegally and/or malafide and/or by way of victimization, unfair labour practice etc. However, when it comes to the case of termination of a daily wage worker and where the termination is found illegal because of procedural defect, namely in violation of Section 25-F of the Industrial Disputes Act, this Court is consistent in taking the view in such cases reinstatement with back wages is not automatic and instead the workman should be given monetary compensation which will meet the ends of justice. Rationale for shifting in this direction is obvious.

24. Reasons for denying the relief of reinstatement in such cases are obvious. It is trite law that when the termination is found to be illegal because of non-payment of retrenchment compensation and notice pay as mandatorily required under Section 25-F of the Industrial Disputes Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the retrenchment compensation. Since such a workman was working on daily wage basis and even after he is reinstated, he has no right to seek regularization (See: **State of Karnataka -Vrs.- Uma Devi: (2006) 4 SCC 1**). Thus when he cannot claim regularization and he has no right to continue even as a daily wage worker, no useful purpose is going to be served in reinstating such a workman and he can be given monetary compensation by the Court itself inasmuch as if he is terminated again after reinstatement, he would receive monetary compensation only in the form of retrenchment compensation and notice pay. In such a situation, giving the relief of reinstatement, that too after a long gap, would not serve any purpose".

13. Applying the aforesaid principles, taking into account the period of work of the workmen under the employer, the nature of work assigned to the workmen, the amount of wages paid to them during the relevant period, the age of the workmen at present, the purpose behind the enactment of a welfare legislation like 1947 Act, we are of the view that ends of justice would be best served by granting compensation of Rs.1,00,000/- (rupees one lakh) to each of the workmen which is to be paid by the opposite party no.1 within a period of eight weeks from today, failing which the workmen would be entitled to additional interest @ 12% per annum on such amount from such

date till the date of actual payment. In case any of the workmen is found dead, the legal heirs shall be given such monetary compensation in equal share. Accordingly, the writ petition is disposed of. No costs.

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2019 (I) ILR - CUT- 506

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

O.J.C. NO. 16823 OF 2001

SUBALA TARAI .....Petitioner

.Vs.

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

O.J.C. NO. 16824 OF 2001

DIRIBA SWAIN .....Petitioner

.Vs.

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

ORISSA GOVERNMENT LAND SETTLEMENT ACT, 1962 – Section 7- A – Provisions under – Exercise of Revisional jurisdiction – Limitation – Lease of land was granted in 1975-76 – Revision cases initiated in 1999 on the ground that fraud has been committed while granting lease – Plea of the petitioners that the revision cases filed beyond the period of limitation not maintainable – Whether can be accepted – Held, No.

"The period of limitation of fourteen years which was there for initiating the revision proceeding by the Collector against an order passed by its subordinate authority was taken away by the Amendment Act of 2013. Since at the relevant point of time, the limitation of fourteen years was applicable, it is to be seen whether in fact there was any limitation at all. It is the case of the petitioners that lease was granted in the year 1975-76. The particular date on which such lease was granted has not been indicated. Since the revision cases were initiated in the year 1999, it cannot be said with certainty that the power of revision was exercised beyond the prescribed period of fourteen years. Moreover, since it is the case of the opposite parties that fraud was committed at the time of obtaining lease, in such a situation, it is to be seen whether any limitation period for exercise of revision is applicable or not. Section 17 of the Limitation Act, 1963 prescribes that the limitation will start running only when the plaintiff or applicant got knowledge of the fraud or discovered fraud committed by the defendant or respondent or his agent. It is a continuing wrong and therefore, the period of limitation would begin to run at every moment of time during which such wrong continues. In such a situation, the principles

enshrined in section 22 of the Limitation Act will apply and an action initiated on discovery of fraud cannot be held to be barred by limitation. When a fraud is practised on a Court or on an authority to get an order, the same is rendered a nullity. In a case of nullity, even the principles of natural justice are not required to be complied with. By reason of commission of a fraud, an order or a decree is rendered to be void rendering all subsequent proceedings taken pursuant thereto also nullity. However, delayed exercise of revisional jurisdiction is frowned upon because if actions or transactions were to remain forever open to challenge, it will mean endless uncertainty in human affairs, which is not the policy of law. Even in cases where the orders sought to be revised are fraudulent, the exercise of power must be within a reasonable period of the discovery of fraud. Simply describing an act or transaction to be fraudulent will not extend the time for its correction to infinity; for otherwise the exercise of revisional power would itself be tantamount to a fraud upon the statute that vests such power in an authority. In view of the foregoing discussions, since fraud is stated to have been committed at the time of obtaining lease, we are of the view that the contention of the learned counsel for the petitioners that the revision proceedings which were initiated under section 7-A(3) of the O.G.L.S. Act in the year 1999 were beyond the prescribed period of limitation and therefore, it is illegal, cannot be accepted." (Para 5)

Case Laws Relied on and Referred to :-

1. (2015) 3 SCC 695 : Joint Collector Ranga Reddy .Vs. D. Narsing Rao.
2. (1976) 2 SCC 181 : S.B. Gurbaksh Singh .Vs. Union of India.
3. (2003) 7 SCC 667 : Ibrahimpatnam Taluk .Vs. K. Suresh Reddy.

For Petitioner : Mr. Kali Prasanna Misra, J.K. Khandayatray & S. Dash
For Opp. Parties : Mr. Kishore Kumar Misra Addl. Govt. Advocate

JUDGMENT Date of Hearing: 24.01.2019 : Date of Judgment: 06.02.2019

S. K. SAHOO, J.

The petitioner Subala Tarai in O.J.C. No. 16823 of 2001 and the petitioner Diriba Swain in O.J.C. No. 16824 of 2001 have prayed to quash the impugned common order dated 01.10.2001 of the Addl. District Magistrate, Puri passed in O.G.L.S. Revision No.92 of 1999 and O.G.L.S. Revision No.113 of 1989 respectively invoking power under section 7-A(3) of the Orissa Government Land Settlement Act, 1962 (hereafter 'O.G.L.S. Act') in cancelling the leases sanctioned in favour of the petitioners by the Tahasildar, Puri.

2. It is the case of the petitioners that they were landless persons and belonged to scheduled caste community. The forefathers of the petitioners were in possession of Government land for last sixty to seventy years. The Tahasildar, Puri (opposite party no.3) with the aid of his staff verified the eligibility of the petitioners for grant of lease of the land in the year 1974 in

Lease Case No.5465 of 1974 and Lease Case No.5462 of 1974. It was duly proclaimed by beat of drum and the local Gram Panchayat was also consulted. Public objection was invited by the Tahasildar but there was no objection from any quarter whatsoever. Consequently in the year 1975-76, Ac. 02.00 dec. of land in Mouza-Jagadal, P.S.-Brahmagiri, Tahasil-Puri Sadar, Dist.-Puri was settled in favour of each of the petitioners by the Tahasildar which were subsequently recorded in the names of the petitioners through mutation by the Tahasildar.

It is the further case of the petitioners that at the behest of some of the staff of the office of the Tahasildar (opposite party no.3), the Addl. District Magistrate (opposite party no.2) issued show cause notices to the petitioners by initiating lease revision cases bearing O.G.L.S. Revision No.92 of 1999 and O.G.L.S. Revision No.113 of 1989 under section 7-A(3) of the O.G.L.S. Act. No specific reason was assigned in the show cause notices regarding the initiation of the revision cases. The petitioners submitted their written notes of objection in the said lease revision cases and pleaded that invoking of provision under sub-section (3) of section 7-A of the O.G.L.S. Act after expiry of fourteen years from the date of grant of lease is hopelessly barred by law of limitation. The notices were in cyclostyled format, vague and it did not disclose the reasons/grounds which necessitated to the authority to initiate such proceeding. The opp. party no.2 without proper application of mind and in a preconceived and predetermined manner, cancelled the leases already granted in favour of the petitioners.

3. Mr. Kali Prasanna Misra, learned counsel appearing for the petitioners contended that the grounds taken by the Addl. District Magistrate, Puri in cancelling the leases are based on no materials and no reasonable opportunity of hearing as provided under the proviso to sub-section (3) of section 7-A of 1962 Act was granted and on surmise and suspicion, the opposite party no.2 has passed the impugned order. The notices were defective and the petitioners were kept in darkness about the nature of the proceedings and they were not supplied with the relevant documents which have resulted in causing serious prejudice to the petitioners. According to Mr. Misra, it is stipulated in the second proviso to sub-section (3) of section 7-A of the O.G.L.S. Act that no proceeding under this sub-section shall be initiated after the expiry of fourteen years from the date of the order passed by the subordinate authority and therefore, the initiation of the revision proceeding in the year 1999 is illegal. It is contended that since the impugned order

violates the fundamental rights guaranteed under Articles 14 and 21 so also Article 300-A of the Constitution of India, it should be quashed.

Mr. Kishore Kumar Misra, learned Addl. Govt. Advocate refuting the submissions of the learned counsel for the petitioners on the other hand supported the impugned order and contended that after receipt of the notices, the petitioners engaged their counsel who submitted written note of argument and therefore, the non-compliance of opportunity of hearing as contended by the learned counsel for the petitioners is not acceptable. He further submitted that gross irregularities were committed while granting lease of lands to the petitioners. The eligibility of the lessees for grant of lease was not enquired into, no public objection was invited by beat of drum, the signature of Tahasildar was found to be fictitious, the proclamation copy was not available in the case records and the lease orders were passed in cyclostyled formats. In the order sheet, it was found that neither the marginal date has been given nor the Presiding Officer has given the date while signing the order sheet. It is contended that when fraud has been committed in obtaining the lease, limitation aspect cannot be taken into consideration and therefore, the writ petitions should be dismissed.

4. Adverting to the submissions made by the learned counsel for the parties and on perusal of the records, the following issues need to be addressed:-

(a) Whether power of revision was exercised by the Additional District Magistrate, Puri beyond the prescribed period of limitation?

(b) Whether reasonable opportunity of hearing was provided to the petitioners in the revision proceedings?

(c) Whether the impugned order is legally sustainable?

Whether power of revision was exercised beyond the prescribed period of limitation:

5. There is no dispute that the revision cases under section 7-A (3) of O.G.L.S. Act were initiated on the basis of the report submitted by Tahasildar, Puri in the year 1999 and the common impugned order was passed on 01.10.2001. At the relevant point of time, sub-section (3) of section 7-A read as follows:

"**S.7-A(3)**. The Collector may, on his own motion or otherwise, call for and examine the records of any proceeding in which any authority, subordinate to it has passed an order under this Act for the purpose of satisfying himself that any such

> order was not passed under a mistake of fact or owing to a fraud or misrepresentation or on account of any material irregularity of procedure and may pass such order thereon as he thinks fit;
>
> Provided that no order shall be passed under this sub-section unless the person affected by the proposed order has been given a reasonable opportunity of being heard in the matter.
>
> Provided further that no proceeding under this sub-section shall be initiated after the expiry of fourteen years from the date of the order."

By virtue of the Odisha Government Land Settlement (Amendment) Act, 2013, for sub-section (3), the following sub-section was substituted.

> "**S.7-A(3)**. Notwithstanding anything contained in this Act or any other law, the Collector may, on his own motion or otherwise, call for and examine the records of any proceeding, in which any authority subordinate to him has passed an order under this Act, for the purpose of satisfying himself that any such order was not passed under a mistake of facts or owing to a fraud or misrepresentation or on account of any material irregularity of procedure and may pass such order thereon as he thinks fit:
>
> Provided that no order shall be passed under this sub-section unless the person affected by the proposed order has been given a reasonable opportunity of being heard in the matter."

Therefore, the period of limitation of fourteen years which was there for initiating the revision proceeding by the Collector against an order passed by its subordinate authority was taken away by the Amendment Act of 2013. Since at the relevant point of time, the limitation of fourteen years was applicable, it is to be seen whether in fact there was any limitation at all. It is the case of the petitioners that lease was granted in the year 1975-76. The particular date on which such lease was granted has not been indicated. Since the revision cases were initiated in the year 1999, it cannot be said with certainty that the power of revision was exercised beyond the prescribed period of fourteen years. Moreover, since it is the case of the opposite parties that fraud was committed at the time of obtaining lease, in such a situation, it is to be seen whether any limitation period for exercise of revision is applicable or not.

Section 17 of the Limitation Act, 1963 prescribes that the limitation will start running only when the plaintiff or applicant got knowledge of the fraud or discovered fraud committed by the defendant or respondent or his agent. It is a continuing wrong and therefore, the period of limitation would begin to run at every moment of time during which such wrong continues. In

such a situation, the principles enshrined in section 22 of the Limitation Act will apply and an action initiated on discovery of fraud cannot be held to be barred by limitation. When a fraud is practised on a Court or on an authority to get an order, the same is rendered a nullity. In a case of nullity, even the principles of natural justice are not required to be complied with. By reason of commission of a fraud, an order or a decree is rendered to be void rendering all subsequent proceedings taken pursuant thereto also nullity. However, delayed exercise of revisional jurisdiction is frowned upon because if actions or transactions were to remain forever open to challenge, it will mean endless uncertainty in human affairs, which is not the policy of law. Even in cases where the orders sought to be revised are fraudulent, the exercise of power must be within a reasonable period of the discovery of fraud. Simply describing an act or transaction to be fraudulent will not extend the time for its correction to infinity; for otherwise the exercise of revisional power would itself be tantamount to a fraud upon the statute that vests such power in an authority.

In case of **Joint Collector Ranga Reddy -Vrs.- D. Narsing Rao reported in (2015) 3 Supreme Court Cases 695**, it is held as follows:-

> "25. The legal position is fairly well settled by a long line of decisions of this Court which have laid down that even when there is no period of limitation prescribed for the exercise of any power, revisional or otherwise, such power must be exercised within a reasonable period. This is so even in cases where allegations of fraud have necessitated the exercise of any corrective power."

In case of **S.B. Gurbaksh Singh -Vrs.- Union of India reported in (1976) 2 Supreme Court Cases 181**, Hon'ble Supreme Court held that exercise of suo motu power of revision must also be within a reasonable time and that any unreasonable delay in the exercise may affect the validity. But what would constitute reasonable time would depend upon the facts of each case.

In case of **Ibrahimpatnam Taluk -Vrs.- K. Suresh Reddy reported in (2003) 7 Supreme Court Cases 667**, it is held as follows:-

> "9..... In cases of fraud, this power could be exercised within a reasonable time from the date of detection or discovery of fraud. While exercising such power, several factors need to be kept in mind such as effect on the rights of the third parties over the immovable property due to passage of considerable time, change of hands by subsequent bona fide transfers, the orders attaining finality under the provisions of other Acts (such as the Land Ceiling Act)."

It appears that after receipt of the report of Tahasildar, Puri relating to grant of leases in contravention of the provisions of O.G.L.S. Act and without following the mandatory provisions of law, the revisional power was exercised within a reasonable period.

In view of the foregoing discussions, since fraud is stated to have been committed at the time of obtaining lease, we are of the view that the contention of the learned counsel for the petitioners that the revision proceedings which were initiated under section 7-A(3) of the O.G.L.S. Act in the year 1999 were beyond the prescribed period of limitation and therefore, it is illegal, cannot be accepted.

Whether reasonable opportunity of hearing was provided to the petitioners in the revision proceedings:

6. It is not disputed that the first proviso to sub-section (3) of section 7-A of the O.G.L.S. Act prescribes for giving reasonable opportunity of hearing to the affected person before passing any order. It is contended that the notice which was issued to the petitioners was in a format and it merely indicates the date and time of hearing. There is nothing in the notice as to on what point, the petitioners were to be heard. Such type of notice, according to Mr. Mishra, was a surprise to the petitioners and they could not know the nature of proceeding before the authority and thereby they were precluded from defending the cases properly. It is argued that issuance of such type of notice smacks of arbitrariness and the relevant documents sought for by the petitioners were not supplied to them which have caused serious prejudice to the petitioners.

The purport of the notice was to give a reasonable opportunity of hearing to the petitioners. The date, time and place of appearance and the name of the authority before whom to appear were indicated. It is not blurred or made unintelligible and therefore, the notice cannot be termed as bad. On a plain reading of the impugned order, it appears that after receipt of the notice, the petitioners engaged their counsel who submitted written note of objection and participated in the hearing of revision proceeding. The written note of objection annexed to the writ petitions as Annexure-4 clearly indicates that the petitioners were very much aware about the nature of proceeding initiated against them and they have raised objections on different points. The Addl. District Magistrate has also taken note of the contentions raised by the counsel for the petitioners. There is no averment in the writ petitions as to what sort of documents were sought for by the petitioners and on what date.

Such petition copy has also not been annexed to the writ petitions. The written note of objection filed by the petitioners before the Addl. District Magistrate is also silent in that respect. Therefore, we are of the view that the contention of the learned counsel for the petitioners that the documents sought for by the petitioners were not supplied to them appears to be an afterthought story and further contention that no reasonable opportunity of hearing was provided to the petitioners in the revision proceedings cannot be accepted.

Legality of the impugned order:

7. The impugned order indicates that the Addl. District Magistrate, Puri perused the written notes of argument filed by the learned counsel for the petitioners as well as learned Addl. Government Pleader appearing on behalf of the State. He also verified the lower court record. He found that the served copy of proclamation was not available in the case records. The orders were passed in a cyclostyle carbon copy. No date has been given in the order sheet and no date is mentioned below the signature of the Presiding Officer. The signature of the officer appeared to be fictitious. It was further found that the leases were granted in violation of the mandatory provisions of law which vitiated the proceeding.

There is no dispute that procedure has been laid down for grant of lease of Government land in O.G.L.S. Act and the Orissa Government Land Settlement Rules, 1974 which was in force at the relevant time. When the authority exercising revisional jurisdiction found that there were gross irregularities in settling the land with the lessees petitioners, he was justified in cancelling the leases and directing the Tahasildar to make necessary corrections in the relevant register and in the record of rights. Lease of government land obtained fraudulently and surreptitiously and without following due procedure of law, rob such grant of all its legal effect and cannot found a claim to valid possessory rights.

There is no apparent error on the face of the impugned order. It cannot be said that the findings arrived at by the Addl. District Magistrate, Puri are either perverse or unreasonable or based on no materials and therefore, we are not inclined to interfere with the same in a writ of certiorari. Accordingly, both the writ applications being devoid of merits, stand dismissed.

2019 (I) ILR - CUT- 514

S. K. MISHRA, J.

CRIMINAL MISC. CASE NO.1403 OF 2018

GHASANA MAHAPATRA ……..Petitioner

.Vs.

STATE OF ORISSA ……..Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 457 – Application under – Petitioner's vehicle was seized in connection with an excise offence – Petitioner being the owner is neither arrayed as an accused nor allegation has been leveled against him by the Excise Department in the prosecution report – Application rejected by the Magistrate on the ground that Section 72 of the Orissa Excise Act bars the criminal court from entertaining the petition without ascertaining as to whether actually the vehicle has been produced before the learned Collector or the Authorized Officer and a confiscation proceeding has been started – Provisions of Orissa Excise Act, 2008 relating to the procedure for initiating confiscation proceeding – Discussed and the court held, if within a month, vehicle is not produced before the learned Collector or authorized officer and the confiscation proceeding is not completed within a reasonable period of three months from appearance of the owner of the vehicle after receiving notice as envisaged under Sub-section (4) and Section 71 of the Orissa Excise Act, then in-spite of proviso to Sub-section (7), the criminal courts shall have jurisdiction to entertain the application under Sections 451 and 457 of the Cr.P.C. and pass appropriate orders – But it is confined to cases where the owner of the vehicle is not an accused.

"However, perusal of the order reveals that the learned S.D.J.M., Boudh has rejected the petition only on the ground that Section 72 of the Orissa Excise Act bars the criminal court from entertaining the petition. It was not ascertained by him whether actually the vehicle has been produced before the learned Collector or the Authorized Officer and a confiscation proceeding has been started. The law is very well settled that whenever valuable property like vehicle is seized then it should be produced before the officer, so authorized. In this case, Collector or Authorized Officer duly notified, should be produced within a reasonable time and confiscation proceeding should be started. Since right to property under Article 300-A of the Constitution of India is a legal right, though it is not a fundamental right, it is incumbent on the part of the Government Functionary to see that the confiscation proceeding is taken up as early as possible, especially, when there is a protection given to the innocent owner of the vehicle etc. In a case involving provision of Narcotic Drugs and Psychotropic Substances Act, 1985, a Bench of this Court having taking into consideration various judgments of this Court, in the case of ***Kishore Kumar Choudhury Vs. State of Orissa****, (2017) 66 OCR 1124, has*

allowed interim release of vehicle seized. So, in that view of the matter, the CRLMC is allowed in part. The order dated 29.03.2018 passed by the learned S.D.J.M., Boudh rejecting the application is hereby set aside and the matter is remanded back to the lower court for fresh hearing. The learned S.D.J.M., Boudh shall first call for a report from the Investigating Agency whether the vehicle has been produced before the learned Collector, Boudh or the designated Authorized Officer within a reasonable time and whether a confiscation proceeding has been initiated. If within a month, vehicle is not produced before the learned Collector or authorized officer and the confiscation proceeding is not completed within a reasonable period of three months from appearance of the owner of the vehicle after receiving notice as envisaged under Sub-section (4) and Section 71 of the Orissa Excise Act, then in-spite of proviso to Sub-section (7), the criminal courts shall have jurisdiction to entertain the application under Sections 451 and 457 of the Cr.P.C. and pass appropriate orders. But it is confined to cases where the owner of the vehicle is not an accused." *(Para 8 & 9)*

Case Laws Relied on and Referred to :-

1. (2003) 24 OCR (SC) 444 : Sundarbhai Ambala Desai Vs. State of Gujurat.
2. (2003) 25 OCR-840 : 2014 (Supplementary-I) OLR-569 : Sk. Nur Hosen Vs. State of Orissa.
3. (2003) 25 OCR-840 : Soubhagya Kumar Panda Vs. State of Orissa.
4. (2017) 66 OCR 1124 : Kishore Kumar Choudhury Vs. State of Orissa.

For Petitioner : M/s. Niranjan Panda, D.R. Mishra, & J.K. Rout.
For Opp. Party : Mr. Anil Kumar Nayak, Addl. Standing Counsel

JUDGMENT Date of Judgment: 04.01.2019

S.K.MISHRA, J.

The petitioner, in this application under Section 482 of Cr.P.C. has assailed the order passed by the learned S.D.J.M., Boudh on 29.03.2018 in Misc. Case No.17 of 2018, arising out of 2(a) C.C. No.14 of 2018, thereby rejecting application filed by the petitioner under Section 457 of Cr.P.C. seeking the interim release of vehicle bearing Registration No.OD-27-8277 in favour of the petitioner, who happens to be the owner of the vehicle.

2. It is alleged by the prosecution that on 13.03.2018 the Sub-Inspector of Excise, Harbhanga arrested one Jitendra Kumar Mishra, who is driver of the vehicle and recovered 24 liters of Beer and 8.640 liters of I.M.F.L. kept in a paper cartoons and a case under Section 52(a) (i) of the Odisha Excise Act, 2008 was initiated. The Sub-Inspector of Excise also seized the aforesaid vehicle. The seized vehicle is in the custody of the said officer.

3. It is claimed by the petitioner that he being the owner of the vehicle had no idea of the alleged crime. The owner is neither arrayed as an accused nor allegation has been leveled against her by the Excise Department in the prosecution report submitted.

4. It is also argued by the learned counsel for the petitioner that the vehicle is kept in open condition and it may be decayed due to vagaries of nature and unless it is left in zima of the present petitioner, the vehicle will be damaged and it will be against the ratio decided by the Hon'ble Supreme Court in the case of ***Sundarbhai Ambala Desai Vs. State of Gujurat***, (2003) 24 OCR (SC) 444. The Hon'ble Supreme Court in very clear term has laid down that the vehicle seized by the Investigating Agency like Police should not be kept in open space in Police Station premises, which may be exposed to rain and sun. Therefore, directions were issued that such application shall be disposed of as expeditiously as possible.

5. The learned counsel for the petitioner, Mr. Panda developing his argument relying upon the reported case of ***Sk. Nur Hosen Vs. State of Orissa***, 2014 (Supplementary-I) OLR-569, wherein this Court, a case involving alleged violation of the provisions of the Bihar and Orissa Excise Act, 1915 was considered and taking into consideration and relying upon the judgment of the Division Bench of this Court in the case of ***Soubhagya Kumar Panda Vs. State of Orissa***, (2003) 25 OCR-840, held that the provision of Section 66 of the Bihar and Orissa Excise Act shows that unless the owner of the conveyance is proved to have been implicated in the commission of the offence, the conveyance even though used in carrying the intoxicant will not be liable to confiscation. However, in the meantime, the Orissa Excise Act, 2008 has come into force with effect from 1st April, 2017 and the present case arises out of a criminal proceeding for punishable under Section 52 of the Orissa Excise Act, 2008. The Orissa Excise Act was passed by the Assembly in the year, 2008. Section 1 of the said Act provides that it shall come into force on such date as the State Government may, by notification, appoint and the State Government published it in the Official Gazette on 10.03.2017 i.e. almost after nine years of the Assembly passing the Act. The law relating to confiscation and interim release of vehicle has been made stringent. It is appropriate to take note of Section 71 of the Orissa Excise Act, it reads as follows:

> "Seizure of property liable to confiscation-(1) (a) When there is reason to believe that any offence under this Act has been committed, the intoxicant, materials, stills,

utensils, implements, apparatus, receptacles, package, coverings, animals, carts, vessels, rafts, vehicles, or any other conveyances or articles or materials used in committing any such offence may be seized by the Collector or any officer of the Excise, Police, Customs or Revenue Departments.

(b) any intoxicant lawfully imported, transported, manufactured in possession or sold along with, or in addition to, any intoxicaht which is liable to seizure under clause (a) and the receptacles, packages and coverings in which any such intoxicants as aforesaid, or any such materials, stills, utensil, implement or apparatus as aforesaid, is found and the other contents, if any , of such receptacles orpackages, and the animals, carts, vessels, rafts, vehicles or other conveyances used in carrying the same, shall likewise be liable to seizure.

(2) Every officer seizing any property under this section shall, except where the offender agrees in writing to get the offence compounded under Section 75, produce the property seized before the Collector, or an officer, not below the rank of a Superintendent of Excise, authorized by the State Government in this behalf by notification (hereinafter referred to as the 'authorized officer').

xxx xxx xxx xxx xxx xxx xxx xxx"

6. A plain reading of the said provision reveals that the Sub-section (2) provide that the Officer seizing any property under Section 71 of the Orissa Excise Act shall except where the offender agrees in writing to get the offence compounded under Section 75, produce the property seized before the Collector, or an authorized officer, not below the rank of a Superintendent of Excise, authorized by the State Government in this behalf by notification (hereinafter referred to as the 'authorized officer').

7. Sub-section (3) provided that whether the Collector or the authorized officer seized any property under Sub-section (1) or where the property seized is produced before him under Sub-section (2) and he is satisfied that an offence under this Act has been committed in respect thereof, he shall without prejudice to any other punishment to which the offender is liable under this Act, order confiscation of the property so seized or produced together with all other materials, article, vehicles or conveyances used in committing such offences, whether or not a prosecution instituted for the commission of such an offence. The Sub-section 4 provides for the process of confiscation and the principles of natural justice have been enshrined in it in view of the fact that notice has to be given and reasonable of opportunity of being heard should be given. The Sub-section (5) provides that without prejudice to the provisions of Sub-section (4), no order of confiscation under Sub-section (3) of any articles, materials, vehicles or conveyances shall be made if the owner thereof proves to the satisfaction of the Collector or the authorized officer, as the case may be, that it was used without his knowledge

or connivance or the knowledge or connivance of his agent, if any, or the person in charge of such property, in committing the offence and that each of them had taken all reasonable and necessary precautions against such use. The proviso to Sub-section (7) laid down that the seized property shall not be released during the pendency of the confiscation proceedings even on the application of the owner of the property. So, the law has become very stringent even with regard to the confiscation of property and incorporating a bar for interim release of the vehicle etc. during the pendency of the confiscation proceeding. The learned Additional Standing Counsel very vehemently opposes the contention raised by the learned counsel for the petitioner and submits that there is a specific bar under Section 72 of the Orissa Excise Act from entertaining an application, where the confiscation proceeding is pending. Hence, in view of the provisions there is hardly any scope for this Court to interfere in the matter.

8. However, perusal of the order reveals that the learned S.D.J.M., Boudh has rejected the petition only on the ground that Section 72 of the Orissa Excise Act bars the criminal court from entertaining the petition. It was not ascertained by him whether actually the vehicle has been produced before the learned Collector or the Authorized Officer and a confiscation proceeding has been started. The law is very well settled that whenever valuable property like vehicle is seized then it should be produced before the officer, so authorized. In this case, Collector or Authorized Officer duly notified, should be produced within a reasonable time and confiscation proceeding should be started. Since right to property under Article 300-A of the Constitution of India is a legal right, though it is not a fundamental right, it is incumbent on the part of the Government Functionary to see that the confiscation proceeding is taken up as early as possible, especially, when there is a protection given to the innocent owner of the vehicle etc.

9. In a case involving provision of Narcotic Drugs and Psychotropic Substances Act, 1985, a Bench of this Court having taking into consideration various judgments of this Court, in the case of ***Kishore Kumar Choudhury Vs. State of Orissa***, (2017) 66 OCR 1124, has allowed interim release of vehicle seized. So, in that view of the matter, the CRLMC is allowed in part. The order dated 29.03.2018 passed by the learned S.D.J.M., Boudh rejecting the application is hereby set aside and the matter is remanded back to the lower court for fresh hearing. The learned S.D.J.M., Boudh shall first call for a report from the Investigating Agency whether the vehicle has been produced before the learned Collector, Boudh or the designated Authorized

Officer within a reasonable time and whether a confiscation proceeding has been initiated. If within a month, vehicle is not produced before the learned Collector or authorized officer and the confiscation proceeding is not completed within a reasonable period of three months from appearance of the owner of the vehicle after receiving notice as envisaged under Sub-section (4) and Section 71 of the Orissa Excise Act, then in-spite of proviso to Sub-section (7), the criminal courts shall have jurisdiction to entertain the application under Sections 451 and 457 of the Cr.P.C. and pass appropriate orders. But it is confined to cases where the owner of the vehicle is not an accused. With such observation, the CRLMC is disposed of.

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2019 (I) ILR - CUT- 519

S. K. MISHRA, J.

CRLA NO.104 OF 2014

HEMLAL CHANDRAKAR .....Appellant.

.Vs.

STATE OF ORISSA .....Respondent.

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 20(b)(ii)(C) – Offence under – Conviction – Appeal – Plea that the Ganja was not recovered from conscious and exclusive possession of the Appellant – Conscious and exclusive possession – Distinction – All the independent witnesses in essence who are not official either police or otherwise have not supported the case of the prosecution, but they have been cross-examined by the prosecution with respect to their previous statement after taking permission of the court under Section 154 of the Indian Evidence Act, 1872 – Learned Special Judge, has come to the conclusion that the contraband Ganja was in conscious and exclusive possession of the appellant basing on the statements of the official witnesses – Whether correct? – Held, law is very well settled that on a fact situation, if two interpretations are reasonably possible, then the Court has to give due weightage to the interpretation that favours the accused – This Court is of the opinion that there is reasonable doubt in the case of prosecution regarding conscious and exclusive possession and the benefit of the same should be extended to the appellant.

For appellant : M/s J.R. Dash, K.L. Dash, S.C. Samal & N Sahoo.
For Respondent : Addl. Govt. Adv.

JUDGMENT Date of Judgment: 01.02.2019

S. K. MISHRA, J.

In this CRLA, the convict has assailed the correctness of the judgment of conviction and order of sentence dated 28.01.2014 passed by the learned Special Judge, Nuapada in Special Act Case No.01 of 2013, whereby he has been convicted and sentenced to undergo R.I. for eleven years and to pay a fine of Rs.1,00,000 (rupees one lakh only), in default, to suffer further R.I. for one year for commission of offence under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the N.D.P.S. Act" for brevity).

02. Shorn off unnecessary details, the prosecution case in short is that on 13.02.2013 the Inspector-In- Charge, Jonk Police Station (P.W.14) received a telephonic information from an unknown source that the accused was in possession of huge quantity of Ganja in his house at village Sareipali. He was going to dispose of the same. P.W. 14 to that effect making an entry in the station diary vide entry No.314 dated 13.02.2013 directed the Sub-Inspector (P.W.13) to proceed to the spot along with available staff to verify the information and workout the clue. Accordingly, P.W.13 along with staff proceeded to the spot by the Police Jeep. On the way, P.W.13 picked up two witnesses to assist her in the investigation. On arrival in the occurrence village, P.W.13 contacted the source who identified the accused and his house to her. To avoid of delay without any search warrant, P.W.13 along with her staff searched the house of the accused. The accused attempted to escape, but he was caught and when asked, he denied possessing of the Ganja. Search being conducted in his house, 13 numbers of polythene bags containing Ganja were recovered from the first room of the up-stair of his house. P.W. 13 procured the weighman P.W.3 and his weighing machine through the Havildar P.W.6. She arranged the plastic sheet (Dari) through P.W.10, the Homeguard. She also procured the investigation kit, weighman and polythene sheet to the accused. She got the polythene sheet spread on the floor of the spot room. She opened the polythene bags and dumped the contents of those 13 bags on the polythene sheet and mixed all the Ganja homogeneously and took weighment of bulk Ganja through P.W.3 weighman. The bulk Ganja was found to be 260 kgs. On being asked, the accused failed to produce any license or authority for possession of Ganja.

She drew two samples each weighing 25 grams from the Bulk Ganja in two separate polythene packets which she sealed by heat process inserting paper slips containing her signature and that of the witnesses, weighman and the accused. Then, she sealed all 13 bags containing Ganja. She also kept the paper slips containing her signature and that of the witness, weighman and the accused in a paper envelop under seal. She got those polythene bags wrapped with white cloth by stitching process and got those sealed with her personal brass seal taking signatures of the accused and other witnesses on those bags. She seized the recovered Ganja of 260 Kgs. in 13 bags, prepared seizure list, left her personal brass seal in the custody of the witness Rajendra Agrawal (PW2) and seized the weighing machine left it in the custody of the P.W.3. She arrested the accused, removed him in her custody to the Police Station and removed the seized Ganja in 13 polythene bags to the Police Station by arranging a Mini Truck.

On her arrival at the Police Station, she lodged a written report with P.W.14, who got it registered and took up investigation, received the seized 13 bags of Ganja, made entry in the Malkhana register, examined the witnesses and the accused, visited the spot, prepared spot map and produced the sample in the court which was dispatched to Regional Foreignsic Scientific Laboratory, Berhampur for examination. He got the seized Ganja bags deposited in Malkhana of the Special Court, sent intimation to Sub-Divisional Police Officer, Nuapada, for lodging of FIR by P.W.13 in this case and sent a copy to the Director General Narcotics Control Bureau, New Delhi about the seizure of Ganja and to other higher Police Authorities. He seized the Record of Rights of the occurrence house and left the same in zimma of the wife of the accused and subsequently, he received Chemical Examination Report and submitted charge sheet against the accused to face his trial.

03. The defence took the plea of denial and false implication. The appellant also examined two witnesses i.e. D.Ws. 1 and 2 to prove that the house from which the seized contraband Ganja recovered was inhabited by two of his brothers along with their family. In other words, the appellant took the plea that the Ganja was not recovered from his conscious and exclusive possession.

04. In order to prove its case, prosecution examined as many as fourteen witnesses, out of which, P.W.13-K. Priyanka Routray is the S.I. of police. She raided the house of the appellant and seized the Ganja owing 260 Kgs. After seizure and returned to the police station, he drew plain paper F.I.R.

and she also the informant of the case. P.W.2-Rajendra Kumar Agrawal is the witness to the search and seizure. P.W.3-Rabi Behera is the weighman who weight the contraband Ganja after the seizure or at the time of seizure. P.W.4-Purna Chandra Majhi is the witness to the seizure of Malkhana register and Station Diary Book of Jonk Police Station. P.W.1-Biju Nial is Homeguard in whose presence the ROR of the house in question has been seized. P.W.5- Kumaraj Nial is the witness to the seizure of intimation and original letter to the Inspector-In-Charge and to Sub-Divisional Police Officer, Nuapada. P.W.6, Havildar, Abhimanyu Goud; P.W.7- Devi Chandra Jain; P.W.8, Homeguard Prekhanlal Sahu; P.W.9-Constable Nanak Chandra Sahu; P.W.10, Homeguard Hiralal Satnami; P.W.11, A.S.I. Biseswar Panda and P.W.12, A.S.I., Abhimanyu Swain are the police personnel who participated in the raid of the house of the accused, recovery and seizure made thereof. P.W.14-Jaya Kumar Pattanaik is the Inspector-In-Charge of Jonk Police Station, who happens to be the Investigating Officer. He took over charge from P.W.13 after lodging of the F.I.R. and after completion of investigation placed charge-sheet against the appellant.

05. As described above, the accused examined two of his younger brothers as D.W.1-Omprakash Chandrakar and D.W.2-Chetanlal Chandrakar.

06. Learned Special Judge, Nuapada framed the point of determination as to:-

Whether on 13.01.2013 at about 7.15 AM at village Sareipali the accused illegally possessed Ganja weighing about 260 Kgs. in thirteen polythene bags?

07. In this case, though all the independent witnesses in essence they are not official either police or otherwise have not supported the case of the prosecution, but they have been cross-examined by the prosecution with respect to their previous statement after taking permission of the court under Section 154 of the Indian Evidence Act, 1872 (hereinafter referred to as "the Act" for brevity).

08. Learned Special Judge, Nuapada has come to the conclusion that the contraband Ganja was in conscious and exclusive possession of the appellant basing on the statements of the official witnesses that seizures were made from the rooms situated in the first floor of the house and D.W.2 has admitted that the rooms in the first floor were in the occupation of the appellant.

09. Placing much emphasis on the question of inability of the prosecution to establish the conscious and exclusive possession of the contraband by the appellant, learned counsel for the appellant argued that the prosecution must stand on its own legs and it cannot take help of the witnesses of the defence.

10. Learned Additional Government Advocate submitted that from a reading of the testimonies of different official witnesses and D.W.2, it is amply clear that the contraband Ganja was in conscious and exclusive possession of the appellant and, therefore, he has rightly been convicted and sentenced by the learned Special Judge, Nuapada. Learned Additional Government also submitted that there is no requirement of interference in this matter by the Appellate Court.

11. The question of conscious and exclusive possession of the contraband Ganja has been discussed by the learned Special Judge, Nuapada in paragraphs 9 and 10 of the impugned judgment. Learned Special Judge, Nuapada has taken into consideration the evidence of P.W.13 and other witnesses including the Investigating Officer, P.W.14. P.W.13 has stated that from the room in the up-stair the seizure of Ganja was taken place. Also, he has taken into consideration the statement of P.W.14 to the effect that the appellant and his brothers are living in the house in question which is supported by the other official witnesses. The Record-of-Rights has been seized by P.W.14 which shows that the ROR stands in the names of all the three brothers i.e. the appellant and the two defence witnesses D.Ws.1 and 2. As stated by the D.W.2, the ROR was in possession of the appellant and he was paying the rent. The learned Special Judge has kept in mind that the house was in the occupation of the family members of the appellant and that two brothers. However, on reading of the evidence of D.W.2 in cross-examination, learned Special Judge has taken into consideration the fact that the up-stair was vacant and it was in the occupation of the appellant. Thus, taking into this evidence, learned Special Judge has held that evidence of D.W.2 has exposed the truth that it is none but the accused was in occupation of the up-stair and other parts of the house were occupied by D.Ws.1 and 2. He further observed that occupation of the accused of the up-stair proved that he was aware of the stock of Ganja or he himself had kept the Ganja in the up-stair. The learned Special Judge has further recorded which in my opinion is appropriate to quote as follows:

> "10. Xx xx xx The joint recording in the Record of Rights and joint living of the accused and his brothers in the facts and circumstances never create any doubt

> about the possession of Ganja by the accused in the up-stair of the house. The plea of the accused that he was not in exclusive and conscious possession of the seized Ganja does not sustain since presumption can be drawn that he was in possession of the contraband Ganja and such presumption leads to the conclusion that it is the accused, who illegally kept the huge quantity of Ganja in his house without any authority and license."

12. In this connection, the learned Special Judge has committed two mistakes while he held that the occupation of the up-stair rooms by the appellant proves that he was aware of the stock of Ganja and/or he himself kept the Ganja in the up-stair. Law is very well settled that on a fact situation, if two interpretations are reasonably possible, then the Court has to give due weightage to the interpretation that favours the accused. In this case, the learned Special Judge, Nuapada has held that either the appellant knew the Ganja was stored in the up-stair or he himself kept the Ganja in the up-stair. In such a situation, the interpretation that the appellant knew the Ganja was stored in the up-stair has to be accepted. The other interpretation that the appellant himself kept the Ganja in the up-stair has to be discarded. The inference should be that he was aware of the stock of the Ganja. The second presumption will not arise. The second error has been committed by the learned Special Judge in holding that since presumption can be drawn that the accused was in possession of the contraband Ganja and such presumption leads to the conclusion that it is the accused who illegally kept huge quantity of Ganja in his house without any authority or license. In law there is no such presumption even if Section 114 of the Act provides for presumption of existence of certain facts which reads as follows:

> "The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

13. So, in this case, the important aspect that is seen in common course of natural events and human conduct. In this context, the evidence of D.W.2 has been relied upon heavily by the learned Special Judge while coming to the conclusion that the appellant was in conscious and exclusive possession of the Ganja. I considered it appropriate to take note of the entire evidence of D.W.2. He stated that *the accused is his elder brother. Along with the accused, he and his younger brother Omprakash are living in one house premises at Sareipali. The land on which the dwelling house stands has been recorded in favour of them jointly. He had marked the ROR as Ext.A for reference. He further stated that his family consists of four members, so also*

the family of his younger brother consists of four members besides the accused has three members in his family and there is only one common passage for use of all the families of their brothers. Since much weightage has been given on the cross-examination, I find it apt to quote the exact words of the of D.W.1 stated in course of his cross-examination.

> "I have not received any notice from the court for giving evidence. I have no knowledge about the nature of offence and the occurrence which took place in the month of February, 2013 relating to seizure of Ganja. But, I do not know where from Ganja was seized. The Ext.A comprises of two plots. The house has been constructed on both the plots and the family members were staying in the house of both the plots. There is a first floor having rooms in the occupation of accused but lying vacant. I am in visiting term with the accused and with good terms. It is not a fact that I have stated false hood as the accused is my elder brother and he is staying in the first floor of the house alone. We all are living separately. The accused is paying in the rents of the disputed house."

14. However, P.W.13 stated in oath that during her search, thirteen bags of Ganja containing in big polythene bag were found at the up-stair of the house. She does not state that it was stored in a room. So, there appears to be some confusion in this aspect of the case and once doubt is raised, the accused shall get the benefit of the same. P.W.11-Bijeswar Panda, the ASI of Jonk Police Station states that during search thirteen bags were found on the floor of the first room of the house of the accused.

In view of this contradiction, the case of the prosecution became suspect.

15. Thus, conspectus of the material available on record and in view of the discussion resorted to above, this Court is of the opinion that there is reasonable doubt in this case of the prosecution and the benefit of the same should be extended to the appellant. Hence, I grant the benefit of doubt to the appellant and hold that the prosecution has failed to prove its case of conscious and exclusive possession of contraband Ganja owing 260 Kgs. by the appellant beyond all reasonable doubt.

16. Resultantly, the criminal appeal is allowed. The impugned judgment of conviction and order of sentence dated 28.01.2014 passed by the learned Special Judge, Nuapada in Special Act Case No.01 of 2013 convicting the appellant for commission of offence under Section 20 (b)(ii)(C) of the N.D.P.S. Act and sentencing him to undergo R.I. for eleven years and to pay a fine of Rs.1,00,000 (rupees one lakh only), in default, to suffer further R.I. for one year is set aside. The appellant is acquitted of the said charge.

Since the appellant, namely, Hemlal Chandrakar is in jail custody, he be set at liberty forthwith, unless his detention is required in connection with any other case.

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2019 (I) ILR - CUT-526

S. K. MISHRA, J & J.P. DAS, J.

W.A. NO. 42 OF 2019

SRIDHAR BEHERA ……..Appellant

.Vs.

SMT. SEBATI BEHERA & ANR. ……..Respondents

LETTERS PATENT APPEAL – Election dispute – Civil Judge (Junior Division), Anandapur directed for re-counting of the ballot papers – Writ petition filed challenging the order – No interference by Learned Single Judge – Plea in the Intra-court appeal that the evidence as well as the pleadings have to be discussed and this has not been done either by the learned Civil Judge, (Junior Division), Anandapur nor by the learned Single Judge – Principles on the issue – Indicated.

"(i) The Court must be satisfied that a prima facie case is established;

(ii) The material facts and full particulars must have been pleaded stating the irregularities in counting of votes;

(iii) A roving and fishing inquiry should not be directed by way of an order to recount the voters;

(iv) An opportunity should be given to file objection;

(v) Secrecy of the ballot requires to be guarded." *(Para 5)*

Case Laws Relied on and Referred to :-

1. (W.P.(C) No.16030 of 2018 on 21.12.2018 : Gourahari Pradhan .Vs. Achyutananda Jena.
2. 2009 (Supp.-I) OLR 513 : Narayan Chandra Nayak .Vs. Harish Chandra Jena & two Ors.
3. AIR 1975 SC 403 : Chanda Singh .Vs. Choudhary Shiv Ram Verma.

For appellant : M/s. Bidyadhar Mishra, B.C. Panda, S. Mishra, J. N.Panda, L. Das, T.K. Biswal & P. Bharadwaj.

For respondents : Dr. A.K. Mohapatra, B. Panda, J Dash, S. Sarangi & A Pati Addl. Govt Adv.

JUDGMENT Date of Hearing & Judgment : 06.02.2019

S.K. MISHRA, J.

In this Intra Court Appeal, the appellant assails the order dated 28.01.2019 passed by the learned Single Judge in W.P.(C) No.6886 of 2018, thereby refusing to interfere with the order dated 18.04.2018 passed by the learned Civil Judge (Junior Division), Anandapur in Election Misc. Case No.1 of 2017.

02. As per the order dated 18.04.2018, the learned Civil Judge (JuniorDivision), Anandapur directed for re-counting of the ballot papers. The said order was challenged in W.P.(C) No.6886 of 2018. Learned Single Judge has held that even though there is no prayer in the election petition for recounting of the ballot papers and even though there is no elaborate discussion on the allegation of the election petitioner involving recounting, he held that there is clear foundation for re-counting of votes and refused to interfere with the matter. It is also seen that the learned Single Judge considering the rival contentions of the parties, on perusal of the pleadings involving the election dispute and from the pleadings at paragraph nos.7, 9, 10, 11, 12 and 13, come to the conclusion and found that there is sufficient pleading involving the claim for illegal counting as well as duplicacy in casting of votes. But learned Single Judge has not given any reason for coming to such conclusion, nor there has been any discussion about the pleadings which were considered by him to be sufficient.

03. Learned counsel for the appellant, at the outset, draws attention of this Court to an un-reported judgment of this Court i.e. the judgment passed in the case of **Gourahari Pradhan –vrs.- Achyutananda Jena** (W.P.(C) No.16030 of 2018 on 21.12.2018, wherein this Court has held as follows:

> "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 the 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, therefore, observers, there is no proper consideration by the Tribunal in considering such application. The decision of the Tribunal also remains opposed in the settled provision of law."

04. So, as per the judgment in the aforesaid case, the evidence as well as the pleadings have to be discussed and this has not been done either by the learned Civil Judge, (Junior Division), Anandapur nor by the learned Single Judge.

05. Learned counsel for the appellant further relies upon the reported judgment of this Court i.e. in the case of **Narayan Chandra Nayak –vrs.- Harish Chandra Jena and two others** : 2009 (Supp.-I) OLR 513, wherein after taking into consideration of plethora of judgments of the Hon'ble Supreme, it has been held as follows:

> "(i) The Court must be satisfied that a *prima facie* case is established;
>
> (ii) The material facts and full particulars must have been pleaded stating the irregularities in counting of votes;
>
> (iii) A roving and fishing inquiry should not be directed by way of an order to recount the voters;
>
> (iv) An opportunity should be given to file objection;
>
> (v) Secrecy of the ballot requires to be guarded."

06. In **Narayan Chandra Nayak** (supra), the reported judgment in the case of **Chanda Singh –vrs.- Choudhary Shiv Ram Verma**: AIR 1975 SC 403 has been relied upon, wherein the Supreme Court have held as follows:

> "A democracy runs smooth on the wheels of periodic and pure elections. The verdict at the polls announced by the Returning Officers leads to the formation of Governments. A certain amount of stability in the electoral process is essential. If the counting of the ballots are interfered with by too frequent, and flippant recounts by courts a new threat to the certainty of the poll system is introduced through the judicial instrument. Moreover, the secrecy of the ballot which is sacrosanct becomes exposed to deleterious prying if recount of votes is made easy. The general reaction, if there is judicial relaxation on this issue, may well be a fresh pressure on luckless candidates, particularly when the winning margin is only of a few hundred votes as here, to ask for a recount Micawberishly looking for numerical good fortune or windfall of chance discovery of illegal rejection or reception of ballots. This may tend to a dangerous disorientation which invades the democratic order by injecting widespread scope for reopening of declared returns, unless the Court

restricts recourse to recount to cases of genuine apprehension of miscount or illegality or other compulsions of justice necessitating such a drastic step."

07. Thus, keeping in view the aforesaid settled principles of law, we have examined the pleadings appearing at paragraph nos.7, 9, 10, 11, 12 and 13 of the election petition. To have a proper appreciation of the same, we find it apt to reproduce the same:

"7. That, during the course of election, counting and re-counting and after the election was over, the petitioner noticed large scale irregularities in counting of votes and casting of votes in different booths in favour of the opposite party no.1 to ensure his win, the details of which are stated hereunder.

xx xx xx xx xx xx xx xx xx xx xx xx xx xx xx

9. That, during the course of counting / re-counting 3 (three) ballot papers in booth no.7, though indicated casting of votes in favour of the petitioner were rejected on the ground that likewise, 2(two) votes in booth no.3 and one vote in booth no.8, though were cast in favour of the petitioner, were rejected on the ground that the respective voters have put their thumb impression instead of putting the seal.

Furthermore, though 1 (one) vote each in booth no.8 and 11, though were cast in favour of the petitioner, the same were rejected on the ground that the voter had also put his seal in respect of another symbol for which no candidate is contesting.

The rejected votes have also not been property scrutinized.

10. That, apart from the above irregularities, the petitioner has noticed that large number of voters who have cast votes in favour of the opposite party no.1, have exercised their franchise in two different booths of same village Bishnupur under Salaria Grama Panchayat, the details of whom are furnished hereunder:

l. No.	Name	Sl. No. in Booth No.7	Sl. No.in Boo No.6	House N
1.	Prasanta Kumar Behera, S/O Judhistira Behera	196	209	13
2.	Manasi Behera, W/o Deepak Behera	197	210	13
3.	Chandana Behera, W/o Purusottam Behera	199	211	13
4.	Purusottam Behera, S/o Krushna Behera	200	212	13
5.	Shantilata Behera, W/o Judhistira Behera	201	213	13
6.	Akhaji Saha, W/o Sagara Saha	203	217	29
7.	Jula Saha, W/o Sadhu Saha	204	218	29
8.	Babuli Kumar Saha, S/o Sagar Saha	205	219	29
9.	Sudhansu Sekhar Sethi, S/o Ballabha Sethi	352	223	22
10.	Biswaranjan Patra, S/o Babaji Patra	377	224	15

> 11. That, one Nirupama Jena, D/o Basudeva Jena of village Bramhanikala has cast her vote in favour of opposite party no.1 i.e. "Open Book" in booth no.2. Said Nirupama Jena has also cast her vote as Rita Jena, W/o of Nirakar Jena of village Dhaipokhari in ward no.2 (booth No.2) of Habeleswara G.P.. It is humbly submitted that Smt. Nirupama Jena and Smt. Rita Jena are one and same person.
>
> 12. That, two voters of village Brahmanikela namely, Pitei Jena, W/o Ananta Jena and Ananda Jena, S/o Madhu Jena have cast their vote in favour of the opposite party no.1 in booth no.2 and they have again cast their vote in village- Padakana, ward no.12, booth no.12 of Padanapada G.P. in the district of Bhrdrak. One Smt. Anita Sethi, W/o Anirudha Sethi, whose name finds place in the voters list at serial no.62, house no.12 of ward no.10 of village Balabhadrapur has cast her vote in favour of the opposite party no.1 and she has also cast her vote in favour of another candidate in Rajendrapur G.P., Village- Saro, Ward No.11, in the district of Bhadrak.
>
> 13. That, one Rabindra Sethi, S/o Dhoi Sethi and another Kanchan Sethi, W/o Rabindra Sethi have cast their vote in favour of the opposite party no.1 in booth number 10 having house no.21 and serial no.119 and 117 respectively. They have also cast their votes in Bhagabanpur G.P., Ward No.7, Sl. No.338, House No.59, S.L. No.339, House No.59 in district- Bhadrak respectively."

08. It is seen that paragraph 7 of the election petition does not disclose any specific case of irregularity. Paragraph 9 speaks about rejection of votes because the voters put their thumb impression instead of putting the seal and though one vote each in booth nos.8 and 11, were cast in favour of the election petitioner, the same were rejected on the ground that the voter had also put his seal in respect of another symbol for which no candidate is contesting. So far as this paragraph is concerned, there is no need to re-count of the ballot papers. It is well settled principles of law that ballot papers have to be stamped with the seal and not with the thump impression as s result of which the thump impression given in one ballot paper has to be discarded. Then, coming to the paragraph 10, it is seen that the election petitioner has enumerated the names of ten persons who have cast their votes in two different booths i.e. booth nos.6 and 7. This aspect cannot be determined by re-counting the ballot papers. This aspect can only be proved by leading evidence.

09. Coming to the paragraph 11 of the election petition, it is alleged by the election petitioner that one Nirupama Jena has cast her vote twice describing herself as Nirupama Jena, D/o Basudeva Jena of village Bramhanikala and as Rita Jena, W/o Nirakar Jena. This aspect could also not be determined by re-counting the ballot papers. This aspect has to be considered by leading evidence.

10. In paragraph 12 of the election petition, it was pleaded by the election petitioner that two voters of village Brahmanikela, namely, Pitel Jena, W/o Ananta Jena and Ananda Jena, S/o Madhu Jena have cast their votes in favour of the opposite party no.1 in booth no.2 and they have again cast their votes in village Padakana, ward no.12, booth no.12 of Padanapada G.P. in the district of Bhadrak. This aspect could also not be considered and determined by the election tribunal by re-counting of the ballot papers. All these pleadings can be established by leading cogent evidence to establish the facts.

11. So, we are of the opinion that learned Civil Judge (Junior Division), Anandapur has erred in allowing the re-counting of the ballot papers holding that the question to be determined is who has got more votes? He has also taken into consideration of the paragraph 15 of the election petition, which does not show any specific pleading regarding any corrupt practice.

12. In course of argument, Dr. A. Mohapatra, learned Senior Advocate appearing for the respondent no.1 submits that learned Civil Judge (Junior Division), Anandapur taking into consideration of the fact that at the time of polling in booth no.7, though 351 number of ballot papers were used, but at the time of recounting on 23.02.2017, 348 number of ballot papers were found from the ballot box, which itself shows that there is some irregularities. However, this plea has never been raised in the election petition and that can only be asked for a recount Micawberishly looking for numerical good fortune or windfall of chance discovery of illegal rejection or reception of ballots, as observed in the case of **Chanda Singh** (supra).

13. In that view of the matter, we are inclined to allow this W.A. Accordingly, the order dated 28.01.2019 passed by the learned Single Judge in W.P.(C) No.6886 of 2018 and the order dated 18.04.2018 passed by the learned Civil Judge (Junior Division), Anandapur in Election Misc. Case No.1 of 2017 are set aside.

14. The W.A. is disposed of, accordingly. There shall be no order as to costs.

2019 (I) ILR - CUT- 532

S. K. MISHRA, J & J.P. DAS, J.

WRIT APPEAL NO. 66 OF 2014

PAREMESWAR JENA ……..Appellant.

.Vs.

STATE OF ODISHA & ORS. ……..Respondents.

SERVICE LAW – Change of Date of Birth – Service Book contained the signature of the appellant where his date of birth was corrected from 01.04.1960 to 01.04.1950 – The appellant did not make any representation or effort to further correct such entry during his service tenure – Only after his retirement he made the representation for change of his date of birth – Whether can be accepted? – Held, no, on the touch stone of the observations of the Hon'ble Apex Court settling the position in this respect, no merit in the present appeal so as to interfere with the findings.

Case Laws Relied on and Referred to :-

1. AIR 2006 SC 2735 : State of Gujarat & Ors .Vs. Vali Mohmed Dosabhai Sindhi.
2. (1993 Supp. (1) SCC 763) : Executive Engineer, Bhadrak (R & B) Division, Orissa and Ors. .Vs. Rangadhar Mallik
3. (1994 (6) SCC 302) : State of Tamil Nadu .Vs. T.V. Venugopalan
4. (1997 (5) SCC 181) : State of Orissa and Ors. .Vs. Ramanath Patnaik

For Appellant : M/s. H.N.Tripathy, B.P.Tripathy, B.P.Rath, S.R.Tripathy, Miss M.Dhal & S.K.Swain.

For Respondents : Addl . Govt. Adv.

JUDGMENT Date of Hearing : 28.01.2019 : Date of Judgment : 08.02.2019

J.P. DAS, J.

This intra-court appeal is directed against the order dated 30.01.2014 passed by the learned single Judge in W.P.(C) No.3291 of 2013 rejecting the same which was filed by the present appellant to correct his date of birth in his Service Roll.

2. The appellant was working as Khalasi under Work Charged Division of Rengali Dam Project. In service roll, his date of birth was originally entered as 01.04.1960. Subsequently, the said entry was corrected and mentioned as 01.04.1950 with the seal and signature of the appointing authority. The signature of the appellant also appeared on the page. Consequently, the appellant was retired from the service on 31.03.2010 on attaining the age of superannuation of sixty years. Therefore, he made a representation before the appointing authority that his actual date of birth was

01.08.1954 and the date mentioned as 01.04.1950 was made behind his back and without his knowledge since because as per School Leaving Certificate his date of birth was 01.08.1954. Since his representation did not yield any result, he approached this Court in W.P.(C) No.3291 of 2013 assailing the said act of the appointing authority in entering the wrong date of birth in his service roll and consequential early retirement.

3. The writ petition has been dismissed by the learned Single Judge with the observation that the page of the Service Roll wherein the date of birth of the appellant-petitioner was corrected from 1960 to 1950, also carried signature of the appellant-petitioner, and further as per the settled position of law as reported in ***AIR 2006 SC 2735*** in the case of ***State of Gujarat & Ors v Vali Mohmed Dosabhai Sindhi***, the date of birth entered in the service record cannot be corrected at a belated stage. It has also been observed by the learned Single Judge that although the appellant-petitioner claimed his date of birth to be 01.08.1954 as per his School Leaving Certificate, still he did not raise any objection earlier rather continued in service and made a representation before the concerned authority only after his retirement.

4. It was contended by the learned counsel for the appellant that the learned Single Judge has failed to appreciate the fact that the actual date of birth of the petitioner was in the year 1954 and the correction in the Service Roll by changing the year from 1960 to 1950 was done by the concerned authority without his knowledge and without any basis.

5. Submitting impugned order to be erroneous, it was further contended that the appellant-petitioner was not at fault in making his prayer for correction of the date of birth since he could only come to know that after his retirement and when his prayer was not considered by the concerned authority, he approached this Court.

6. Per contra, it was submitted on behalf of the respondents that the appellant joined in his service on 10.01.1974 whereafter his Service Roll was opened and the date of birth was entered as 01.04.1960. Finding that basing on such date, the petitioner was only 13-year-9 month-old by the time of his appointment, the matter was enquired into and on the basis of the date of birth supplied by the appellant, it was corrected to be 01.04.1950. It has also been submitted that even after correction of the said date, the appellant had five years to approach the authority for further correction, but he remained silent and availed all service benefits basing on his date of birth as

01.04.1950 till his retirement. It has also been submitted that the appellant after his retirement claimed his date of birth to be 01.08.1954 on the basis of a photo copy of School Leaving Certificate even without producing the original one. It was further submitted that before one month prior to his retirement on 31.03.2010, the appellant was noticed but did not supply relevant information for preparation of his pension papers and the appellant also did not raise any objection at that point of time before the concerned authority and only more than one year thereafter, he made a representation before the Engineer-in-Chief, Respondent No.1 to correct his date of birth. It has also been submitted in counter affidavit filed on behalf of the respondent that after appointment of the appellant along with others as Work Charged Employees and after their engagement, a common seniority list was prepared and the same was notified on 07.12.1992 giving their respective dates of birth. Even at that time also the appellant had neither raised any objection nor had produced any School Leaving Certificate seeking for correction. It has been submitted that as per the government circular, correction of date of birth is permissible within five years of the entry in the Service Roll.

7. In the case of ***Executive Engineer, Bhadrak (R & B) Division, Orissa and Ors. v Rangadhar Mallik (1993 Supp. (1) SCC 763),*** Rule 65 of the Orissa General Finance Rules, was examined which provides that representation made for correction of date of birth near about the time of superannuation shall not be entertained. In the said case the Hon'ble Apex Court took note of the delay in representation made by the employee concerned. Similarly, in the cases of ***State of Tamil Nadu v. T.V. Venugopalan (1994 (6) SCC 302)*** and ***State of Orissa and Ors. v Ramanath Patnaik (1997 (5) SCC 181)*** the Hon'ble Apex Court observed that when the entry was made in the service record and when the employee was in service, he did not make any attempt to have the service record corrected, any amount of evidence produced subsequently is of no consequence. All these observations of the Hon'ble Apex Court were taken note of and considered in the case of ***State of Gujarat & Ors. v Vali Mohmed Dosabhai Sindhi*** (supra) as has been relied upon by the learned Single Judge.

8. In the instant case, the Service Book contained the signature of the appellant where his date of birth was corrected from 01.04.1960 to 01.04.1950. The appellant did not make any representation or effort to further correct such entry during his service tenure. Only after his retirement he made the representation. On the touch stone of the observations of the Hon'ble Apex Court settling the position in this respect, as quoted

hereinbefore, we find absolutely no merit in the present appeal so as to interfere with the findings as has been reached by the learned Single Judge. Accordingly, the writ appeal stands dismissed for being devoid of any merit.

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2019 (I) ILR - CUT- 535

DR. A.K.RATH, J.

CMP NO. 974 OF 2018

JITENDRA NAIK .....Petitioner

.Vs.

RADHYASHYAM NAIK & ORS. .....Opp. Parties

CONSTITUTION OF INDIA, 1950 – Article 227 – Writ petition under – Challenge is made to the order rejecting an application under section 5 of the Limitation Act filed for condoning the delay in filing a First Appeal – Whether maintainable? – Held, no, since the order rejecting a memorandum of appeal or dismissing an appeal following rejection of an application under Sec.5 of the Limitation Act for condonation of delay is a decree under section 2(2) of CPC, the petition under Article 227 of the Constitution is not maintainable – It is open to file the second appeal. (Para 5 & 6)

Case Laws Relied on and Referred to :-

1. 2015 (II) CLR 599 : Fakira Mishra .Vs. Biswanath Mishra & Ors.

For Petitioner : Mr. Prasanna Ku. Parhi.

JUDGMENT Date of Hearing & Date of Judgment : 10.12.2018

DR. A.K.RATH, J.

This petition challenges the order dated 24.11.2017 passed by the learned Addl. District Judge, Karanjia in I.A No.3 of 2017 whereby and whereunder the learned appellate court dismissed the application under Sec. 5 of the Limitation Act for condonation of delay in filing RFA No.04 of 2016.

2. Plaintiffs-opposite parties 1 to 11 instituted C.S No.165 of 2009 for partition in the court of the learned Senior Civil Judge, Karanjia impleading petitioner and opposite parties 12 to 16 as defendants. The suit was decreed preliminarily. Aggrieved by the judgment and decree, the petitioner, who was defendant no.2 in the suit, filed RFA No.04 of 2016 before the learned

District Judge, Mayurbhanj, Baripada. Since there was a delay in filing the appeal, an application being I.A No.03 of 2017 under Sec. 5 of the Limitation Act for condonation of delay was filed. The appeal was transferred to the court of learned Addl. District Judge, Karanjia. Learned appellate court dismissed the application for condonation of delay. Consequently the appeal was dismissed.

3. Mr. Parhi, learned counsel for the petitioner submits that the petitioner was prevented by sufficient cause in not filing the appeal on time. He filed an application under Sec. 5 of the Limitation Act for condonation of delay in filing the appeal. But then, learned appellate court dismissed the same on an untenable and unsupportable ground.

4. The seminal question that hinges for consideration of this Court is that an order rejecting a memorandum of appeal or dismissing an appeal following rejection of an application under Sec.5 of the Limitation Act for condonation of delay in preferring the appeal is a decree or order ?

5. The subject-matter of dispute is no more res integra. An identical matter came up for consideration before this Court in the case of Fakira Mishra v. Biswanath Mishra & others, 2015 (II) CLR 599. This Court held as follows :

> "**3.** A Full Bench of this Court, in the case of Ainthu Charan Parida v. Sitaram Jayanarayan Firm represented by Ramnibas and another, 58 (1984) CLT 248 (F.B), held that an order rejecting a memorandum of appeal or dismissing an appeal following the rejection of an application under Section 5 of the Limitation Act for condonation of delay in preferring the appeal is not a decree within the meaning of Section 2(2) of the Code of Civil Procedure. But then, the apex Court, in the case of Shyam Sunder Sarma v. Pannalal Jaiswal and others, AIR 2005 SC 226, held that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal.
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> **4.** In Shyam Sunder Sarma (supra), the view of the Full Bench of the Calcutta High Court, in the case of Mamuda Khateen and others v. Beniyan Bibi and others, AIR 1976 Calcutta 415, that an order rejecting a time barred memorandum of appeal consequent upon refusal to condone the delay in filing that appeal was neither a decree nor an appellable order, was held to be not laying down a correct law.
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> **5.** Further, the Full Bench decision of the Kerala High Court, in the case of Thambi v. Mathew, 1987 (2) KLT 848, that an appeal presented out of time was nevertheless an appeal in the eye of law for all purposes and an order dismissing

the appeal was a decree that could be the subject of a second appeal, was approved by the apex Court.

Be it noted that the aforesaid decision of the Calcutta High Court was approved by the Full Bench of the Orissa High Court in the case of Ainthu Charan Parida (supra).

6. In view of the authoritative pronouncement of the apex Court in the case of Shyam Sunder Sarma (supra), the Full Bench decision of this Court in the case of Ainthu Charan Parida (supra) has been impliedly overruled, the same being contrary to the enunciation of law laid down by the apex Court.

7. Thus the logical sequitur of the analysis made in the preceding paragraphs is that an appeal filed along with an application for condonation of delay in filing that appeal when dismissed on refusal to condone the delay is a decree within the meaning of Section 2(2) of the Code of Civil Procedure."

6. In view of the authoritative pronouncement of this Court in the case of Fakira Mishra (supra), the petition under Article 227 of the Constitution is not maintainable. It is open to the petitioner to file the second appeal.

7. Certified copy of the impugned order be returned to the learned counsel for the petitioner by substituting the photostat copy thereof.

2019 (I) ILR - CUT- 537

DR. A.K.RATH, J.

CMP NO.1331 OF 2018

BINOD KISHORE MOHANTY .....Petitioner

.Vs.

HIRAMANI MOHANTY & ORS. .....Opp. Parties

PRACTICE AND PROCEDURE – Whether after closure of evidence, an application seeking to exhibit certain documents can be permitted? – Principles – Discussed.

"If there is abuse of the process of the court, or if interests of justice require the court to do something or take note of something, the discretion to do those things does not disappear merely because the arguments are heard, either fully or partly. The convention that no application should be entertained once the trial or hearing is concluded and the case is reserved for judgment is a sound rule, but not a

straitjacket formula. There can always be exceptions in exceptional or extraordinary circumstances, to meet the ends of justice and to prevent abuse of process of court, subject to the limitation recognized with reference to exercise of power under Sec.151 Code. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. K.K. Velusamy v. N. Palanisamy, 2011 AIR SCW 2296 followed." (Para 6)

Case Laws Relied on and Referred to :-

1. 2011 AIR SCW 2296 : K.K. Velusamy .Vs. N. Palanisamy.
2. AIR 1964 SC 993 : Arjun Singh .Vs. Mohindra Kumar & Ors.
3. 2015 (II) OLR 1118 : Smt. Gajalaxmi Chhotray .Vs. M/s.Tripty Drinks (Pvt.) Ltd. & Ors.

For Petitioner : Mr. Sanjeev Udgata.
For Opp Parties : Mr. B.D. Das.

JUDGMENT Date of Hearing &Date of Judgment : 12.12.2018

DR. A.K.RATH, J.

This petition challenges the order dated 24.8.2018 passed by the learned Civil Judge (Senior Division), Berhampur in C.S. No.62 of 2005 whereby and whereunder the learned trial court has rejected the application of the plaintiff to mark the documents as exhibits after closure of evidence.

2. This is the third journey of the petitioner before this Court. The dispute lies in a very narrow compass. Suffice it to say that the petitioner instituted a suit for partition. The defendants entered contest and filed a written statement denying the assertions made in the plaint. After closure of evidence, the plaintiff filed an application to exhibit the letter dated 14.10.1974 of E.S. Mohanty issued in favour of Binodini Mohanty and the letter dated 30.10.1976 of Binodini Mohanty to D.E. Mohanty. The same having been rejected, the petitioner filed WPC No.773 of 2012 before this Court. Learned Single Judge dismissed the petition on 12.8.2013. Assailing the same, the petitioner filed Writ Appeal No.439 of 2013. The petitioner did not press the writ appeal. Accordingly, the writ appeal was disposed of as not pressed. In the interregnum witnesses were examined on behalf of the defendants. Thereafter, another application seeking self-same relief was filed. Learned trial judge came to hold that earlier petition was rejected. The order

was confirmed by this Court. The documents are no way connected to the present suit. Evidence from both the sides has been closed. In the event the documents are marked as exhibits, the same will cause prejudice to the defendants. Held so, he dismissed the application.

3. Heard Mr. Sanjeev Udgata, learned counsel for the petitioner and Mr. B.D. Das, learned counsel for the opposite parties.

4. Mr. Udgata, learned counsel for the petitioner submits that pursuant to the order of this Court, after closure of evidence of the plaintiff, the will was exhibited with objection. In the changed circumstance, the petition was filed. He further submits that if there is abuse of process of the court, or if interest of justice requires the court to do something or take note of something, the discretion to do those things does not disappear merely because the arguments are heard. The convention that no application should be entertained once the trial or hearing is concluded and the case is reserved for judgment is not a straitjacket formula. There can always be exceptions in exceptional or extraordinary circumstances, to meet the ends of justice and to prevent abuse of process of court. No prejudice shall be caused to the defendants, since they will get the chance of rebuttal. To buttress the submission, he relies on the decision of the apex Court in the case of K.K. Velusamy v. N. Palanisamy, 2011 AIR SCW 2296.

5. Per contra, Mr. Das, learned counsel for the opposite parties submits that the matter has attained finality. The petitioner earlier filed an application. After closure of evidence, the plaintiff filed an application to exhibit the letters dated 14.10.1974 and 30.10.1976. The same having been rejected, the petitioner filed WPC No.773 of 2012 before this Court. Learned Single Judge dismissed the petition. Assailing the same, the petitioner filed Writ Appeal No.439 of 2013. He withdrew the writ appeal. There is no changed circumstance. The application has been filed to protract the litigation. In the meantime the suit has been posted for judgment.

6. In K.K. Velusamy (supra), the apex Court held thus;

> "12. The amended provisions of the Code contemplate and expect a trial court to hear the arguments immediately after the completion of evidence and then proceed to judgment. Therefore, it was unnecessary to have an express provision for re-opening the evidence to examine a fresh witness or for recalling any witness for further examination. But if there is a time gap between the completion of evidence and hearing of the arguments, for whatsoever reason, and if in that interregnum, a party comes across some evidence which he could not lay his hands earlier, or

some evidence in regard to the conduct or action of the other party comes into existence, the court may in exercise of its inherent power under section 151 of the Code, permit the production of such evidence if it is relevant and necessary in the interest of justice, subject to such terms as the court may deem fit to impose.

13…..if there is abuse of the process of the court, or if interests of justice require the court to do something or take note of something, the discretion to do those things does not disappear merely because the arguments are heard, either fully or partly. The convention that no application should be entertained once the trial or hearing is concluded and the case is reserved for judgment is a sound rule, but not a straitjacket formula. There can always be exceptions in exceptional or extraordinary circumstances, to meet the ends of justice and to prevent abuse of process of court, subject to the limitation recognized with reference to exercise of power under Sec.151 Code.

16. We may add a word of caution. The power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs. If the application is allowed and the evidence is permitted and ultimately the court finds that evidence was not genuine or relevant and did not warrant the reopening of the case recalling the witnesses, it can be made a ground for awarding exemplary costs apart from ordering prosecution if it involves fabrication of evidence. If the party had an opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract the proceedings, the court should reject the application. If the evidence sought to be produced is an electronic record, the court may also listen to the recording before granting or rejecting the application.

7. In Arjun Singh v. Mohindra Kumar and others, AIR 1964 SC 993, the apex Court held that where the hearing is completed, the parties have no further rights or privileges in the matter and it is only for the convenience of the Court that the Order XX Rule 1 CPC permits judgment to be delivered after an interval after the hearing is completed. There is no hiatus between the two stages of reservation of judgment and pronouncing the judgment. Taking a cue from Arjun Singh (supra), this Court in the case of Smt. Gajalaxmi

Chhotray v. M/s. Tripty Drinks (Pvt.) Ltd. & others, 2015 (II) OLR 1118, held thus;

> "…..there is no hiatus between the two stages of reservation of judgment and pronouncing the judgment. It is only for the convenience of the court that the pronouncing the judgment may be deferred. Thus no application for amendment could be moved after the arguments were heard and suit was closed for judgment."

8. The matter may be examined on the anvil of the decisions cited supra. After closure of evidence, the plaintiff filed an application to exhibit the letter dated 14.10.1974 of E.S. Mohanty issued in favour of Binodini Mohanty and the letter dated 30.10.1976 of Binodini Mohanty to D.E. Mohanty. The same having been rejected, he filed WPC No.773 of 2012 before this Court, which met with the same fate. Thereafter, he filed Writ Appeal No.439 of 2013. The reasons best known to him, he withdrew the same. Again an application has been filed seeking the self-same relief. There is no exceptional or extraordinary circumstance to admit the documents as exhibits after rejection of the first petition. The documents are not relevant to the matter in issue. The application has been filed to cover up the lacunae. The same is a ruse.

9. Since the suit is posted for judgment, no direction can be issued to the learned trial court to mark the documents as exhibits. The petition is dismissed.

2019 (I) ILR - CUT- 541

DR. A.K.RATH, J.

C.M.P. NO.1420 OF 2018

ANUPAMA JENA & ORS. ……Petitioners

.Vs.

BANSIDHAR JENA & ANR. …..….Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Section 80 – Notice under – Suit against Administrator of Shree Jagannath Temple – Question arose as to whether prior notice under section 80 of CPC is essential – Held, no, since the State or any public officer in respect of any act purporting to be done by such officer in his official capacity is not a party to the suit – The Administrator of Sri Sri Jagannath Mahaprabhu is a creature of the statute, namely, Shree Jagannath Temple Act, 1955 and the Act does not contemplate for issuance of notice to the Administrator before institution of the suit – Thus, Sec. 80 CPC shall not come into play in a suit instituted against the Administrator of Sri Sri Jagannath Temple. (Para 7)

Case Laws Relied on and Referred to :-

1. AIR 1984 SC 1043 : Bihari Chowdhary & Anr. Vs. State of Bihar & Ors.

For Petitioners : Mr. A.P. Bose.

JUDGMENT Date of Hearing: 07.12.2018 : Date of Judgment: 14.12.2018

DR. A.K.RATH, J.

This petition challenges the order dated 19.9.2018, passed by the learned Civil Judge (Junior Division), Puri, in C.S. No.164 of 2018, whereby and whereunder, the learned trial Court has returned the plaint for non-compliance notice under Sec.80(1) CPC.

2. Plaintiffs-petitioners have instituted the suit for eviction of defendant no.1 from the suit house and delivery of possession. Sri Sri Jagannath Mahaprabhu bije, Sri Jagannath Temple, Puri, has been arrayed as proforma defendant. In paragraph-2 of the plaint it is stated that the property appertaining to Plot No.903, Khata No.392 of Mouza-Kumbharapada has been wrongly recorded in the name of Sri Sri Jagannath Mahaprabhu. The plaintiffs do not seek any relief against defendant no.2 and as such defendant no.2 has been arrayed as proforma defendant. The office has pointed out defect that notice under Sec. 80 CPC has not been complied with.

3. Placing reliance on the decision of the Apex Court in the case of *Bihari Chowdhary and another Vs. State of Bihar and others*, AIR 1984 SC 1043 and Secs.16 and 21 of Shree Jagannath Temple Act, 1955, the learned trial Judge held that the plaintiffs have not filed any application to waive notice under Sec.80(2) CPC. The land has been recorded in the name of Sri Sri Jagannath Mahaprabhu. The mandatory provision enumerated in Sec.80 CPC has not been complied with. Held so, it returned the plaint.

4. Mr. A. P. Bose, learned counsel for the petitioners submits that neither the State nor its functionaries are parties to the suit. Learned trial Court committed manifest illegality in holding that notice under Sec.80 CPC has not been complied with and as such the impugned order is bad in law.

5. Before adverting to the contentions raised by the learned counsel for the petitioners, it will be necessary to set out Sec.80 CPC. Sub-Sec.(1) of Sec. 80 CPC reads thus:-

> "80.(1) No suits shall be instituted against the Government including the Government of the State of Jammu & Kashmir or against a public officer in respect

> of any act purporting to be done by such officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of –
>
> (a) in the case of a suit against the Central Government, except where it relates to a railway, a Secretary to that Government;
>
> (b) in the case of a suit against the Central Government where it relates to railway, the General Manager of that railway;
>
> (bb) in the case of a suit against the Government of the State of Jammu and Kashmir, the Chief Secretary to that Government or any other officer authorised by that Government in this behalf;
>
> (c) in the case of a suit against any other State Government, a Secretary to that Government or the Collector of the district;
>
> and, in the case of a public officer, delivered to him or left at this office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left."

6. On a bare reading of Sub-Sec.(1) of Sec.80 CPC, it is evident that no suit shall be instituted against the Government including the Government of the State of Jammu & Kashmir or against a public officer in respect of any act purporting to be done by such officer in his official capacity, until the expiration of two months next after notice in writing, has been delivered to, or left at the office of the Central Govt., Railway, State of Jammu & Kashmir or State Govt., as has been mentioned in clauses (a) to (c) hereinabove.

7. Admittedly, neither the State nor any public officer in respect of any act purporting to be done by such officer in his official capacity is parties to the suit. The Administrator of Sri Sri Jagannath Mahaprabhu is a creature of the statute, namely, Shree Jagannath Temple Act, 1955 (in short "Act"). The Act does not contemplate for issuance of notice to the Administrator before institution of the suit. Secs. 16(1) and 21(1) of the Act, on which reliance has been placed by the learned trial Judge, are operating in different fields. Sec.16 of the Act deals with alienation of temple properties, whereas Sec.21 of the Act deals with powers and duties of the Administrator. The Act does not contemplate any issuance of notice to the Administrator before institution of a suit. Thus, Sec. 80 CPC shall not come into play in a suit instituted against the Administrator of Sri Sri Jagannath Temple.

8. In the case of *Bihari Chowdhary (supra),* the State of Bihar was a defendant in the suit. Prior to institution of suit, the plaintiffs had issued notice to the defendant under Sec.80 CPC, but then, without waiting for the

statutory period of two months, the plaintiffs instituted a suit. In the written statement filed by the State of Bihar, it was contended, inter alia, that the suit was not maintainable for want of proper notice under Sec.80 CPC. This contention was upheld by the trial Court. The First Appellate Court to which the matter was carried in appeal by the plaintiffs dismissed the appeal on the ground that the plaintiffs suit was not maintainable, inasmuch as, due notice under Sec.80 CPC has not been given. The Second Appeal was preferred by the appellant before the High Court at Patna did not meet with any success and it was dismissed in limini. The Apex Court held that :

> "6. It must now be regarded as settled law that a suit against the Government or a public officer, to which the requirement of a prior notice under Section 80 CPC is attracted, cannot be validly instituted until the expiration of the period of two months next after the notice in writing has been delivered to the authorities concerned in the manner prescribed for in the section and if filed before the expiry of the said period, the suit has to be dismissed as not maintainable."

The case is distinguishable on facts inasmuch as neither the State Government nor any public officers in respect of any act purporting to be done by such officer in his official capacity are parties to the suit.

9. As a sequel to the above discussion, the impugned order is quashed. The petition is allowed. Learned trial Court shall admit the suit and proceed with the suit.

2019 (I) ILR - CUT- 544

DR. A.K.RATH, J.

C.M.P. NO. 1362 OF 2018

SUBASH @ SUBHASH CHANDRA SHARMA .....Petitioner

.Vs.

KISHANLAL SHARMA & ORS. .....Opp. parties

CODE OF CIVIL PROCEDURE, 1908 – Order 7 Rule 11 – Application under – Prayer for rejection of the plaint on the ground of res judicata – Principles – Enunciated – The decision in Kamala and others v. K.T. Eshwara SA and others, AIR 2008 SC 3174 followed.

Case Laws Relied on and Referred to :-

1. AIR 2008 SC 3174 : Kamala & Ors. v. K.T. Eshwara SA & Ors.
2. AIR 2015 SC 3357 : Vaish Aggarwal Panchayat v. Inder Kumar & Ors.

For Petitioner : Mr. Rudra Narayan Parija

JUDGMENT Date of Hearing & Date of Judgment:12.12.2018

DR.A.K.RATH, J.

By this petition under Article 227 of the Constitution of India, challenge is made to the order dated 1.8.2016 passed by the learned Civil Judge (Sr.Division), Jharsuguda in C.S.No.80 of 2014. By the said order, the learned trial court has rejected the application of the defendants under Order 7 Rule 11 CPC to reject the plaint on the ground that the suit is barred by res judicata.

2. The plaintiff-opposite party no.1 instituted the suit for declaration of title, the Will dated 10.9.1997 is void, the order passed by the Tahasildar, Jharsuguda in Mutation Case No.2366 of 2006 is void, permanent injunction and certain other ancillary reliefs impleading the petitioner as well as opposite parties 3 to 15 as defendants.

3. Pursuant to issuance of summons, defendant no.1- petitioner entered contest and filed written statement denying the assertions made in the plaint. While the matter stood thus, defendant no.1 filed an application under Order 7 Rule 11 CPC to reject the plaint on the ground that the plaintiff had filed T.S.No.68 of 1993 in the court of the learned Sub-Judge, Sambalpur seeking identical reliefs. The suit schedule property in both the suits is same. Parties in both the cases are identical. In both the suits the main issue is with regard to sale deed no.336 dated 24.12.1990 which was registered in favour of the father of the plaintiff. The plaintiff has no cause of action to institute the suit. On 2.11.1999 the earlier suit was dismissed for non-prosecution. The suit is hit by principle of res judicata. The learned trial court came to hold that the defendant has not produced any document with regard to disposal of the earlier suit. The earlier suit was dismissed for nonprosecution. The defendant failed to prove that the suit was finally decided by the learned Judge, Sambalpur. Held so, it rejected the petition.

4. Heard Mr.Rudra Narayan Parija, learned Advocate for the petitioner.

5. Mr.Parija, learned Advocate for the petitioner submits that the plaintiff had earlier instituted T.S.No.68 of 1993 in the court of the learned Sub-Judge, Sambalpur seeking the identical reliefs. The suit schedule property in both the suits is same. The parties are almost identical. The earlier suit was dismissed under Order 9 Rule 8 CPC. Thus, the present suit is hit by under Order 9 Rule 9 CPC. In view of the same, the plaint is liable to be rejected under Order 7 Rule 11 CPC.

6. In Kamala and others v. K.T. Eshwara SA and others, AIR 2008 SC 3174, while dealing with the principle engrafted under Order VII Rule 11(d) CPC, the apex Court held :

> "21. Order 7 Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7, Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various subclauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7, Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7, Rule 11 of the Code is one, Order 14, Rule 2 is another.
>
> 22. For the purpose of invoking Order 7, Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject-matter of an order under the said provision."
>
> 23. The principles of res judicata, when attracted, would bar another suit in view of Section 12 of the Code. The question involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit may be taken up either as a preliminary issue or at the final hearing, but, the said question cannot be determined at that stage.
>
> 24. It is one thing to say that the averments made in the plaint on their face discloses no cause of action, but it is another thing to say that although the same discloses a cause of action, the same is barred by a law.
>
> 25. The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact or law. In the event, the jurisdiction of the court is found to be barred by any law, meaning thereby, the subject-matter thereof, the application for rejection of plaint should be entertained."

7. Taking a cue from Kamala (supra), the apex Court in the case of Vaish Aggarwal Panchayat v. Inder Kumar and others, AIR 2015 SC 3357 held :

> 14."In this regard a reference to a three-Judge Bench decision in Balasaria Construction (P) Ltd. v. Hanuman Seva Trust and others would be frutiful. Be it noted the said case was referred to a larger Bench vide Balasaria Construction (P) Ltd. v. Hanuman Seva Trust. The order of reference reads as follows:-
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> "4. This case was argued at length on 30-8-2005. Counsel appearing for the appellant had relied upon a judgment of this Court in N.V. Srinivasa Murthy v. Mariyamma for the proposition that a plaint could be rejected if the suit is ex facie barred by limitation. As against this, counsel for the respondents relied upon a later

judgment of this Court in Popat and Kotecha Property v. State Bank of India Staff Assn. in respect of the proposition that Order 7 Rule 11(d) was not applicable in a case where a question has to be decided on the basis of fact that the suit was barred by limitation. The point as to whether the words "barred by law" occurring in Order 7 Rule 11(d) CPC would include the suit being "barred by limitation" was not specifically dealt with in either of these two judgments, cited above. But this point has been specifically dealt with by the different High Courts in Mohan Lal Sukhadia University v. Priya Soloman, Khaja Quthubullah v. Govt. of A.P., Vedapalli Suryanarayana v. Poosarla Venkata Sanker Suryanarayana, Arjan Singh v. Union of India wherein it has been held that the plaint under Order 7 Rule 11(d) cannot be rejected on the ground that it is barred by limitation. According to these judgments the suit has to be barred by a provision of law to come within the meaning of Order 7, Rule 11, CPC. A contrary view has been taken in Jugolinija Rajia Jugoslavija v. Fab Leathers Ltd., National Insurance Co. Ltd. v. Navrom Constantza, J. Patel & Co. v. National Federation of Industrial Coop. Ltd. and State Bank of India Staff Assn. v. Popat & Kotecha Property. The last judgment was the subject-matter of challenge in Popat and Kotecha Property v. State Bank of India Staff Assn. This Court set aside the judgment and held in para 25 as under:

"25. When the averments in the plaint are considered in the background of the principles set out in Sopan Sukhdeo case the inevitable conclusion is that the Division Bench was not right in holding that Order 7, Rule 11, CPC was applicable to the facts of the case. Diverse claims were made and the Division Bench was wrong in proceeding with the assumption that only the non-execution of lease deed was the basic issue. Even if it is accepted that the other claims were relatable to it they have independent existence. Whether the collection of amounts by the respondent was for a period beyond 51 years needs evidence to be adduced. It is not a case where the suit from statement in the plaint can be said to be barred by law. The statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7, Rule 11. This is not so in the present case."

5. Noticing the conflict between the various High Courts and the apparent conflict of opinion expressed by this Court in N.V. Srinivasa Murthy v. Mariyamma and Popat and Kotecha Property v. State Bank of India Staff Assn. the Bench referred the following question of law for consideration to a larger Bench:

"Whether the words 'barred by law' under Order 7, Rule 11 (d) would also include the ground that it is barred by the law of limitation.""

15. The three-Judge Bench opined that there was no conflict of opinion and thereafter the matter came back to the Division Bench for adjudication. The Division Bench reproduced what has been stated by the three-Judge Bench.
It is as under:-

"Before the three-Judge Bench, counsel for both the parties stated as follows:

"…It is not the case of either side that as an absolute proposition an application under Order 7 and Rule 11(d) can never be based on the law of limitation. Both sides state that the impugned judgment is based on the facts of this particular case

and the question whether or not an application under Order 7, Rule 11(d) could be based on law of limitation was not raised and has not been dealt with. Both sides further state that the decision in this case will depend upon the facts of this case."

8. Reverting to the facts of this case and keeping in view the enunciation of law laid down by the apex Court in the decisions cited supra, this Court finds that parties are not same in both the suits. The prayer in both the suits are not same. Issues are not identical. In view of the same, there should have been a trial with regard to all the issues framed.

9. In the wake of aforesaid, the petition, sans merit, is dismissed. No costs.

2019 (I) ILR - CUT- 548

DR. A.K.RATH, J.

CMP NO.1243 OF 2018

MRS. INDIRA S. NAIR ……..Petitioner

.Vs.

MRS. CHINMAYEE PATTNAIK ……..Opp. Party

ARBITRATION AND CONCILIATION ACT,1996 – Section 8 – Application under for referring a dispute between a Landlord and Tenant as per the House rent agreement – Allowed by the learned court below – The question arose as to whether the arbitrator has jurisdiction to decide the dispute between the landlord and the tenant? – Held, No.

For Petitioner : Mr. Rajjet Roy.
For Opp Party : None

JUDGMENT Date of Hearing & Date of Judgment : 07.01.2019

DR. A.K.RATH, J.

This petition challenges the order dated 23.07.2018 passed by the learned Civil Judge (Senior Division), Bhubaneswar in C.S. No.1737 of 2017 whereby learned trial court allowed the application filed by the defendant under Sec. 8 of the Arbitration and Conciliation Act, 1996 ('the Act') and referred the matter to the arbitrator.

2. The dispute lies in a very narrow compass. The facts need not be recounted in detail. Suffice it to say that the plaintiff-petitioner instituted a suit for eviction of the defendant. There was a house rent agreement between the parties. Defendant entered contest and filed a written statement. While the matter stood thus, defendant filed an application under Sec. 8 of the Act stating that there was a stipulation in the house rent agreement that in case

dispute arises between the parties, the same shall be referred to the arbitrator. The plaintiff filed an objection. The Learned trial judge allowed the application.

3. Heard Mr. Rajjeet Roy, learned counsel for the petitioner. None appears for the opposite party in spite of valid service of notice.

4. The seminal question that hinges for consideration of this Court is whether the arbitrator has jurisdiction to decide the dispute between the landlord and the tenant ?

5. The subject-matter of dispute is no more res integra. This Court in Choudhury Srikanta Das v. The Cuttack Central Co-operative Bank Ltd., represented through its Secretary, Cuttack (CMP No.636 of 2018 disposed of on 19.12.2018) held :

> "08. The subject-matter of dispute is no more res integra. An identical matter came up for consideration before the apex Court in the case of Natraj Studios (P) Ltd. vs. Navrang Studios, 1981 (1) SCC 523. In the said case, the landlord instituted a civil suit against the tenant in the Small Causes Court, Bombay for eviction from the leased premises. The tenant was inducted pursuant to "leave and license" agreement executed between the landlord and tenant. The tenant filed an application under Sec.8 of the Arbitration Act, 1940 stating therein that since the "leave and license" agreement contained an arbitration clause, the dispute could be resolved by the arbitrator. The civil suit was not maintainable. The apex Court held that the disputes of such a nature cannot be referred to the arbitrator. The civil suit filed by the landlord was maintainable.
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> 09. In Booz Allen & Hamilton Inc.v. SBI Home Finance Ltd., (2011) 5 SCC 532, the apex Court went in-depth into the matter and laid down the following proposition of law:-
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> "36. The well-recognised examples of non-arbitrable disputes are:(i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;(iii) guardianship matters;(iv) insolvency and winding-up matters; (v) testamentary matters (rant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes." (Emphasis supplied)
>
> 10. In view of the authoritative pronouncement of the apex Court in the decisions cited supra, the inescapable conclusion is that the dispute between the landlord and the tenant cannot be decided by the arbitrator. Even if there is an arbitration clause in the agreement, the civil court has jurisdiction to decide the same."

6. Admittedly the plaintiff is the landlord. Defendant is the tenant. Thus the dispute between the parties is non-arbitrable. The same cannot be referred to the arbitrator.

7. Resultantly, the impugned order 23.7.2018 passed by the learned Civil Judge (Senior Division), Bhubaneswar in C.S. No.1737 of 2017 is quashed. Learned trial judge shall proceed with the matter. There shall be no order as to costs.

2019 (I) ILR - CUT- 550

DR. A.K.RATH, J.

W.P.(C) NO. 22122 OF 2014

KAMPAL BEHERA (SINCE DEAD) THROUGH LRS. .....Petitioners

.Vs.

COMMISSIONER OF CONSOLIDATION & SETTLEMENT, KENDRAPARA & ORS. ..……Opp. Parties

ORISSA SURVEY AND SETTLEMENT ACT, 1958 – Section 15 (b) – Application under for correction of Record of Right impleading the predecessor in interest of the petitioners as opposite parties – Commissioner remitted the matter back to the Tahasidlar for adjudication – The question arose as to whether the Commissioner can remand the matter instead of deciding the petition filed under Section 15 (b) of the OSS Act, 1958 on merit? – Held, no, the Commissioner de-hors its power in remitting the matter back – The Commissioner is a creature of statute, namely, Orissa Survey and Settlement Act. – He has been vested with power to decide the matter finally – He cannot travel beyond the statute.

Case Laws Relied on and Referred to :-

1. 82 (1996) CLT 321 : Sarat Chandra Sahu Vrs. Commissioner of Land Records and Settlement, Orissa, Cuttack & Ors.
2. 2000 (II) OLR – 349 : Smt. Bijaya Chatterjee Vrs. Commissioner, Land Records & Settlement, Orissa & Ors.

For Petitioner : Mr. Shyam Sundar Das.
For Opp. Party : Mr. Swayambhu Mishra, A.S.C. & Mr. Soumya Mishra.

JUDGMENT Date of Hearing and Judgment : 26.02.2019

DR. A.K.RATH, J.

This writ petition challenges the order dated 02.08.2013 passed by the Commissioner for Consolidation and Settlement, Odisha, Cuttack, opposite party no.1 ('Commissioner'), in Revision Petition No.616 of 2008, whereby

and whereunder, opposite party no.1 remitted the matter back to Tahasildar, Pattamundai to give effect to unregistered partition deed of the year 1941 and conduct field enquiry on the basis of allotment of plots as per the deed for correction of map.

2. Since the dispute lies in a very narrow compass, facts need not be recounted in details. Suffice it to say that opposite party no.3 and predecessor of interest opposite party no.4 filed an application under Section 15(b) of the Orissa Survey and Settlement Act, 1958 (for short 'the OSS Act') for correction of Record of Right impleading the predecessor in interest of the petitioner nos.1 and 2, 1(a) and opposite party nos.5 and 6 as opposite parties. By order dated 02.08.2013, the Commissioner remitted the matter back to the Tahasidlar, Pattamundai.

3. Heard Mr. Shyam Sundar Das, learned counsel for the petitioners, Mr. Swayambhu Mishra, learned A.S.C. for opposite party nos.1 and 2 and Mr. Soumya Mishra, learned counsel for the opposite party nos.3 and 4.

4. Mr. Das, learned counsel for the petitioner submits that the Commissioner de hors its jurisdiction in remitting the matter back to Tahasildar, Pattamundai, opposite party no.2 for de novo enquiry, He places reliance in the decisions of this Court in 82 (1996) CLT 321 and 1998 (II) OLR 495.

5. Per contra, Mr. Mishra, learned counsel for the opposite party nos.3 and 4 submits that the matter has been remitted back to the Tahasildar, Pattamundai to cause an enquiry. The Commissioner has not remitted the matter back to the Tahasildar for final adjudication. Learned Additional Standing Counsel supports the same.

6. The question does arise as to whether the Commissioner, Land Records and Settlement can remit the matter back to the Tahasildar, Pattmundai for adjudication, instead of deciding the petition filed under Sec.15(b) of the OSS Act, 1958 on merit ?

7. The subject matter of dispute is no more res integra. This Court in *Sarat Chandra Sahu Vrs. Commissioner of Land Records and Settlement, Orissa, Cuttack and others,* 82 (1996) CLT 321, the Division Bench of this Court held :

> "Under Section 15(b) the Commissioner has been given the authority to decide the grievance of the parties in relation to final publication of record-of-rights. A

statutory power by a statutory authority has to be exercised in a proper manner so that the litigants have a sense of satisfaction that their grievance, have been appropriately dealt with. The Commissioner should have done well to address himself on the merits of the case. But instead of doing so he passed the order of remand. While we are of the view that the operative portion of the impugned order relating to remand is absolutely unsustainable, yet we feel in the interest of justice the claim of the revisionist should be considered by the revisional authority within the parameter of revisional jurisdiction."

8. In *Smt. Bijaya Chatterjee Vrs. Commissioner, Land Records and Settlement, Orissa and others,* 2000 (II) OLR – 349, this Court held that in subsequent decision it has been clarified that though such remand is not contemplated, the Commissioner can call for a report from the Tahasildar.

9. In the instant case, the matter was finally disposed of by the Commissioner with a direction to the Tahasildar, Pattamundai to cause an enquiry. The Commissioner de hors its power in remitting the matter back. The Commissioner is a creature of statute, namely, Orissa Survey and Settlement Act. He has been vested with power to decide the matter finally. He cannot travel beyond the statute.

10. In the result, the impugned order dated 02.08.2013 is quashed. The matter is remitted back to the Commissioner for de novo hearing. To avoid further delay, the parties shall appear before the Commissioner on 20.03.2019, on which date, the Commissioner shall fix the date of hearing and dispose of the same within a period of three months thereafter. It is open to the Commissioner to call for the report from the Tahasildar, Pattamudani. The petition is disposed of.

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2019 (I) ILR - CUT- 552

BISWAJIT MOHANTY, J.

W.P.(C) NO. 22977 OF 2018

ORIENTAL INSURANCE COMPANY LTD. ……..Petitioner

.Vs.

LAXMI KAMAR & ORS. ..……Opp. Parties

(A) MOTOR ACCIDENT CLAIMS – Award – The claim was settled/compromised in the National Level Lok Adalat which passed the award directing payment within 2 months from the date of award

failing which the compensation amount would carry interest @ 9% per annum from the date of application till realization – The award amount as per direction supposed to be paid on 11.02.2016 was paid on 18.02.2016 – Claim of interest for the delayed payment – Held, there is no illegality in the order passed by the MACT granting interest as the parties have accepted the order of the Lok Adalat – The amount of interest be recovered from the Officer's salary responsible for such delay.

(B) MOTOR ACCIDENT CLAIMS – Award – The claim was settled/compromised in the National Level Lok Adalat which passed the award directing payment within 2 months from the date of award failing which the compensation amount would carry interest @ 9% per annum from the date of application till realization – The award amount as per direction supposed to be paid on 11.02.2016 was paid on 18.02.2016 – Claim of interest for the delayed payment – Plea of the Insurance Company that the award amount having been accepted the claimant cannot claim interest – Such a plea which was not taken before the MACT cannot be taken in the writ petition.

For Petitioner : M/s. G.P. Dutta, S.K. Mohanty, B.K.Sahoo, S.Parween and R.Mahananda
For Opp. Parties : None

JUDGMENT Date of Judgment: 15.02.2019

B. MOHANTY, J.

The present writ application has been filed by the Insurance Company praying for quashing of the order dated 25.11.2017 under Annexure-3 whereby the Additional District Judge-cum-3rd M.A.C.T., Jharsuguda has directed the petitioner to pay interest to the claimants on account of delayed payment of compensation amount.

The opposite party no.1 along with others filed M.A.C. No.50 of 2014 on 25.08.2014 praying for award of compensation. On 12.12.2015 the matter being settled/compromised between the petitioner and opposite party no.1 and other claimants, the National Level Lok Adalat passed the award directing payments in the shape of account payee cheque/demand draft within 2 months from the date of award failing which the compensation amount would carry interest @ 9% per annum from the date of application till realization. The petitioner never challenged such award. The attested copy of the relevant portion of the award so passed has been filed by the learned

counsel for the petitioner along with a memo in the court on 8.2.2019. On 15.12.2015 copy of the award was handed over to the learned counsel for the petitioner, who in turn sent the same to the petitioner, which received the copy on 19.12.2015. As per the award though the payments should have been made on or before 11.2.2016, however, the deposits were made only on 18.2.2016. Complaining delay on deposits, a petition under Section 174 of the Motor Vehicles Act, 1988 was moved before the learned 3rd M.A.C.T., Jharsuguda vide Annexure-1 praying for issuance of a certificate for realizing the interest amount on delayed payment. Vide Annexure-2, the petitioner filed its show cause taking the plea that as it received the award of Lok Adalat on 19.12.2015, therefore by depositing the cheques on 18.2.2016, they have complied with the direction of Lok Adalat within the time period fixed by the Lok Adalat. Thus, there has been no delay in carrying out the award of Lok Adalat. Accordingly, the petitioner denied its liability to pay interest. Considering all these factors and relying on the language used in the award, the learned 3rd M.A.C.T. Jharsuguda rejected the plea of the petitioner and directed it to pay interest @ 9% from the date of application i.e. 25.08.2014 to 18.2.2016 to claimants.

Challenging the same, the present writ application has been filed. Mr. Dutta, learned counsel for the petitioner contended that the learned Tribunal has gone wrong in awarding interest as in the factual background there has been no delay in depositing the compensation. In this context, he pointed out that though the award was passed on 12.12.2015, but a copy of the same was received by the petitioner only on 19.12.2015. Since, the two months period granted by the award was to expire on 18.2.2016, on the said date the deposits were made. Thus, there has been no delay in making deposits. Secondly, he submitted that the claimants having accepted the deposits without any objection, cannot now pray for interest. In this context, he relied upon a decision of this Court dated 30.11.2016 passed in W.P.(C) No.12084 of 2015 in the case of **Nityananda Bag and another** –v- **Branch Manager, Oriental Insurance Company and others**.

So far as 1st submission of the learned counsel for the petitioner is concerned, the same is liable to be rejected for the following reasons. The language of the Lok Adalat award which was passed on compromise/settlement between the claimants and the petitioner is very clear. The relevant portion of the award is quoted hereunder:-

> "xxx xxx xxx
> Out of the awarded amount of Rupees Rs.7,50,000/- (Rupees Seven Lakh Fifty Thousand) only, a sum of Rs.3,00,000/- (Rupees Three Lakhs Thousand) only shall

> be kept in shape of fixed deposit in the name of the petitioner No-2 Ganesh Kamar for a period of Fifteen (15) years, an amount Rs.2,50,000/- (Rupees Two Lakh Fifty Thousand) only shall be kept in shape of fixed deposit in the name of petitioner No-1 Laxmi Kamar in any Nationalised Bank without facility of withdrawal in any manner and Rest of the amount Rs.2,00,000/- (Rupees Two Lakhs) only shall be paid in cash to the petitioner No.1 by the insurance company in shape of A/c payee Cheque/D.D. (Demand Draft) within two months from the date of award failing which the compensation amount shall carry interest @ 9% (Nine Per cent) per annum from the date of application till realization in accordance with law."

The above noted para makes it clear that the petitioner therein had agreed that payments would be made within two months "from the date of award" failing which the compensation amount would carry interest @ 9% per annum from the date of application till realization in accordance with law. As indicated above, the date of award is 12.12.2015. Therefore, the period of two months is to be calculated from the said date i.e. 12.12.2015 not from the date of receipt of the copy of award. When a calculation is made on these basis, the cheques should have been deposited on or before 11.2.2016 by the petitioner. In fact, from the date of receipt of copy of award i.e. 19.12.2015 to 11.2.2016, the petitioner had got enough time i.e. around 54 days for depositing the compensation amount. However, it made the deposits on 18.2.2016. Therefore, without any semblance of doubt, there has been delay in making payment. In such background, the petitioner having agreed for payment of interest in case of delay cannot refuse to pay the same.

Now coming to the 2nd contention of Mr. Dutta, learned counsel for the petitioner that since the claimants received the compensation without objection, now they cannot claim interest; it may be stated here that this ground was never taken in the show cause filed by the petitioner under Annexure-2. Had such a ground been taken, the claimants could have got an opportunity to have their say on the said issue and this Court would have the benefit of perusing a reasoned order of the Tribunal also on the said issue. Since the petitioner never raised this plea, they should not be permitted to raise such a plea now. Besides, the petitioner has not pointed out any jurisdictional error in the impugned order as the same has been passed in tune with the mandate of Section 171 of the Motor Vehicles Act, 1988 Moreover, the decision relied by the petitioner in the case of Nityananda Bag (Supra) is factually distinguishable. In that case there is nothing to show that the same involved an award passed by Lok Adalat based on compromise and settlement. Here as indicated earlier the petitioner itself has agreed that payments be made within 2 months from the date of award, failing which the

compensation amount would carry interest @ 9% per annum from the date of application till realization in accordance with law. Here since admittedly there has been a delay in making deposits, the petitioner cannot be permitted to resile from its own commitment for paying interest. Further, as indicated earlier in the present case the petitioner has never pleaded about claimants accepting the deposits without any objection in Annexure-2.

Thus there exists no error apparent on the face of the impugned order.

For all these reasons, this Court is not inclined to interfere with the impugned order under Annexure-3 and accordingly, the writ application is dismissed. However, for the laches of official, the petitioner should not be allowed to suffer loss. Therefore, it is directed that it should take all necessary steps to recover the amount paid towards interest from the salary of the officer/officers, who is/are responsible for the delay in making deposits.

2019 (I) ILR - CUT- 556

BISWAJIT MOHANTY, J.

W.P.(C) NO. 4095 OF 2016

TANWAR ANWAR …….Petitioner

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Prayer for directing the Registering Authority not to effect change of ownership of the vehicle as the documents have been forcibly obtained by the Recovery Officer of the HDFC Bank along with his musclemen and with the aid of Police – No material substantiating such plea – Further plea of the petitioner that the loan agreement which empowers the bank to go for repossession is one sided and ab initio void – Petitioner has nowhere challenged the same and as such he cannot raise such plea at this belated stage after deriving benefit out of the same – The agreement was signed on 26.11.2011 – For all these years, he never raised a finger against the same – Now in order to attack taking repossession of vehicle, which is permissible under loan agreement, such a desperate plea has been taken, which ought to be ignored.

"Supreme Court decisions make it clear that financier has a right to resume possession in terms of the agreement and such a thing cannot amount to a criminal offence. In the present case it is not disputed that the petitioner defaulted in paying instalments and in such background, repossession of vehicle was taken, which is clearly permissible as per Clause-17 of the loan agreement. Therefore, no illegality has been committed by the opposite party no.4 in taking repossession. Therefore, the prayer for a direction to the Registering Authority not to effect any transfer/change of ownership of vehicle is wholly misconceived." (Para 7)

Case Laws Relied on and Referred to :-

1. (1996) SCC 212 : K. Mathai @ Babu & Anr. .Vs. Kora Bibikutty & Anr.
2. (2001) 7 SCC 417 : Charanjit Singh Chadha & Ors. .Vs. Sudhir Mehera.
3. (2006) 2 SCC 598 : ORIX Auto Finance (India) Ltd. .Vs. Jagmander Singh & Anr.
4. (2013) 1 SCC 400 : Anup Srmah .Vs. Bhola Nath Sharma & Ors.

For Petitioner : M/s. Pradipta K. Bhuyan,
P.K. Samal & C.P. Shahani

For Opp. Parties : Mr. Bigyan K. Sharma, Standing Counsel
Mr. B.P. Tripathy Addl. Govt. Adv.
M/s.Rajeet Roy & S. Singh

JUDGMENT Date of Judgment: 18.02.2019

B. MOHANTY, J.

The present writ application has been filed by the petitioner with a prayer for directing the Registering Authority (Opposite Party No.1) not to effect change of ownership of the vehicle bearing Registration No.OR-04-N-4986 as the documents have been forcibly obtained from the petitioner. He has further prayed for a direction to the appropriate authority to conduct enquiry into the crime as has been committed in collusion with the Barchana Police and further for a direction to charge sheet the Recovery Officer of the HDFC Bank along with his musclemen.

2. The facts of the case according to the petitioner are as follows:

The petitioner took a loan in the year 2008 from opposite party No.4 for purchasing a commercial vehicle. He availed another loan from opposite party No.4 in the year 2011 and again purchased a commercial vehicle. The vehicle was registered before the R.T.O., Chandikhol vide Registration Certificate under Annexure-1. For availing the aforesaid loan, the petitioner signed a composite loan agreement vide Loan Account No.3393644 and as per the conditions of the said agreement, he was to repay an amount of Rs.25,00,000/- in 46 EMIs. The petitioner cleared the EMIs upto the year 2012 and thereafter he could not pay the installments on account of set back

in the business as a result of which the vehicle remained off the road. At this juncture the Bank-Opposite Party No.4 appointed a sole Arbitrator without consent of the petitioner and the Arbitrator passed an award in favour of the Bank on 23.9.2012. The petitioner was warned to pay the awarded amount within seven days. Later, the Bank initiated Execution Case No.17 of 2013 before the learned District Judge, Jajpur in order to realise the awarded amount. With much difficulty by the year 2014, the petitioner had paid a sum of Rs.14,00,000/-. It is in such background, on 8.2.2016 the opposite party No.4-Bank hired musclemen to forcibly dispossess the petitioner and using them took away the vehicle with the help of Police after forcing the petitioner to sign an undertaking on a plain paper. Though the petitioner immediately reported the matter before the Barchana Police Station, however, Barchana Police being hand in gloves did not register his complaint. Thereafter, the petitioner left for his native place in Bihar to attend a family function and on returning to Odisha on 26.2.2016 sent a written complaint to the Superintendent of Police, Jajpur. In such background, the petitioner has pleaded that dispossessing the petitioner of the vehicle despite substantial payment was illegal and arbitrary.

Opposite Party No.3, who happens to be the I.I.C. of Barchana Police Station in his reply has disputed the case of the petitioner with regard to use of force to dispossess him of his vehicle. Further, he has stated that on 8.2.2016 neither the petitioner had gone to Barchana Police Station nor was he forced to sign an undertaking on a plain paper. He has further averred that neither the petitioner nor his family members had reported the Barchana Police Station regarding assault on him and his family members by the hired goondas of HDFC Bank and forcible destruction of his property. According to him, the petitioner failed to pay the EMIs fixed by the Bank and the Bank Authorities decided to repossess the vehicle bearing Registration No.OR-O4-N-4986. Accordingly, on 8.2.2016 they presented pre-repossession intimation at Barchana Police Station and on the same day after taking repossession of the vehicle, they presented post-repossession intimation at Police Station along with a surrender letter duly signed by the petitioner. He has further indicated that during repossession process no police personnel were deputed to assist/support the Bank staff. He has filed pre-repossession intimation, post-repossession intimation and surrender letter signed by the petitioner under Annexure-A/3 Series. Further it is his stand that on verification from the office of the Superintendent of Police, Jajpur, it has been ascertained that no Registered letter has been received on this score by that office. Lastly, he

has stated that the present writ application is misconceived as it involves disputed questions of fact.

The stand of Opposite Party No.4 in his affidavit is that the allegations made by the petitioner as contained in Paragraph-11 of the writ application are frivolous allegations and the same have been made with an intention to deprive the Bank from exercising its right under the loan agreement executed between the petitioner and the Bank. It also disputes and denies the allegations on use of force for taking repossession and forcing petitioner to sign a plain paper document. Its further stand is that the petitioner had availed a loan during the year 2008 with loan Account No.3190056. As against the said loan total loan overdue amount was Rs.12,933/- as on 30.11.2017. With regard to second loan covered by loan Account No.3393644 the outstanding due as on 30.11.2017 was Rs.20,16,843/-. The Bank has further submitted that during pendency of the writ application it has received a letter dated 28.9.2017 vide Annexure-B from the petitioner making a request for settlement of the second loan Account No.3393644 through One Time Settlement. Thereafter, vide legal notice dated 23.10.2017 (Annexure-C) the petitioner demanded issuance of No Objection Certificate under the threat of proposed legal action. Despite this, opposite party no.4 in its reply dated 13.12.2017 vide Annexure-D intimated to the petitioner that the Bank was willing to settle both the loan accounts for an amount of Rs.15,85,347/-, which should be paid by 31.12.2017. However, there has been no response from the side of the petitioner. Lastly, he submitted that no illegality has been committed in taking possession of the vehicle as such action is authorised as per the clauses of the loan agreement. In this context, he relied upon Clause-17 of the loan agreement.

3. Heard Mr. P.K. Bhuyan, learned counsel for the petitioner, Mr. B.K. Sharma, learned Standing Counsel, Transport, Mr. B.P. Tripathy, learned Additional Government Advocate and Mr. R. Roy, learned counsel appearing for Opposite Party No.4.

4. Mr. Bhuyan strenuously argued that opposite party no.4 has committed grave illegality in forcefully taking possession of the vehicle in connivance with the police personnel of Barchana Police Station despite clearance of substantial loan amount. In such background, the vehicle ought to be handed back to the petitioner. Secondly, he contended that the loan agreements are void ab initio being unilateral in character and, therefore,

opposite party no.4 cannot derive any benefit or take any action based on such void and illegal agreement.

Mr. Tripathy, learned Additional Government Advocate submitted that police never helped the Opposite Party No.4 in taking repossession of the vehicle. Police personnel were never deputed to assist the Bank staff during repossession process. Relying on the surrender letter under Annexure-A/3 Series he submitted that the petitioner himself had surrendered the vehicle and the Bank took possession of the same in accordance with the right vested with the Bank as per the composite loan agreement for commercial vehicle. He also reiterated that neither the petitioner ever came to Barchana Police Station on 08.02.2016 nor had given any written report for taking action against the staff of the Bank. He also reiterated the fact that no Registered letter under Annexure-4 has ever been received in the office of the Superintendent of Police, Jajpur. Rather he raised a doubt regarding despatch of the letter under Annexure-4 as no registered letter receipt has been produced by the petitioner in support of such despatch. Further he submitted that though this Court has granted time on 11.01.2019 to the petitioner to file his rejoinder, however, no rejoinder was/has been filed. Lastly, he submitted that the present case involves disputed questions of fact relating to use of force and thus the same ought not to be entertained.

Mr. Roy while disputing the use of force in taking possession submitted that the submission of Mr. Bhuyan on the loan agreement being ab initio void should be ignored as the petitioner has never challenged the same. Further even if the loan agreements are challenged, writ Court has no jurisdiction in such matter and even otherwise such challenge would be highly belated. He also pointed out that the writ application is not maintainable as it involves disputed questions of facts. On the allegations of use of force in taking repossession and forcing the petitioner to sign on a plain paper, he denied such allegations. He further submitted that though by 30.11.2017, the loan outstanding in respect of two agreements was Rs.20,29,776/- and though vide Annexure-D dated 13.12.2017 the Bank has offered to settle both the loan accounts on payment of Rs.15,85,347/- by 31.12.2017 during pendency of the writ application, after giving a substantial waiver, however, the petitioner has maintained a silence on the same. Despite taking time for filing of rejoinder, the petitioner never cared to file the same. Lastly he submitted that as per Clause -17.2(i) of the loan agreement, the Bank can take possession/recover the vehicle in case of default in clearing the loan. Therefore, no illegality has been committed by the Bank in taking

repossession of the vehicle. In this context, he relied on the decisions of the Supreme Court in the cases of **K. Mathai @ Babu and another** v. **Kora Bibikutty and another** reported in **(1996) SCC 212**, **Charanjit Singh Chadha and others** v. **Sudhir Mehera** reported in **(2001) 7 SCC 417**, **ORIX Auto Finance (India) Ltd.** v. **Jagmander Singh and another** reported in **(2006) 2 SCC 598** and **Anup Srmah** v. **Bhola Nath Sharma and others** reported in **(2013) 1 SCC 400**. He put heavy emphasis on Paragraph-9 of the judgment rendered in ORIX Auto Finance (India) Limited (*supra*) wherein it has been made clear that if agreement permits the financier to take possession of the financed vehicles, there is no legal impediment on such possession being taken. Mere fact that possession has been taken cannot be a ground to contend that the hirer is prejudiced. Accordingly, he submitted that the writ application is without any merit and ought to be dismissed.

5. The undisputed facts in the present case are as follows:

The petitioner had taken loan for purchasing a vehicle vide loan Account No.3190056 which was disbursed in the year 2008. As against the said loan, outstanding as on 30.11.2017 was Rs.12,933/-. He had availed another commercial vehicle loan during the year 2011 vide loan Account No.3393644 pursuant to a Composite Loan Agreement. Clause-13 of the loan agreement indicates the "Events of Default" and Clasue-17 indicates Enforcement provisions. This loan agreement has been filed along with an affidavit dated 29.1.2019 by the opposite party no.4.For the sake of convenience, Clauses 13 and 17 of the loan agreement are quoted below:

"xxx xxx xxx

13. EVENTS OF DEFAULT

The Borrower and/or the Guarantors expressly, irrevocably, jointly and severally agree with the Bank in the event of

13.1 the Borrower of the Guarantor(s) or any or more of them (in case of the Guarantor(s) being more than one person) fails to pay any sum due from it or him herein; or,

13.2 the Borrower or any of the Guarantor(s) fail/s duly to perform any obligation or commits any breach of any of the terms, representations, warranties, covenants and conditions herein contained or has made any misrepresentations to the Bank; or

13.3 the Borrower or any of the Guarantor(s) (in case of either of them being a corporation or partnership firm) takes any action or other steps are taken or legal proceedings are started for winding up, dissolution or reorganisation or for the appointment of a receiver, trustee or similar officer on its assets particularly on the Hypothecated Asset; or,

13.4 the Borrower or the Guarantor(s) (in case of either of them being an individual and in case of the Guarantor(s), (if more than one, any of them) dies or takes any steps or any steps are taken with a view to his being made insolvent in any jurisdiction or with a view to the appointment of a receiver, trustee or similar officer or any of his assets; or,

13.5 the Borrower fails to pay any insurance premium for the Hypothecated Asset or cheque bounce charges in terms and conditions hereof; or,

13.6 the Hypothecated Asset is confiscated, attached, taken into custody by any authority or subject to any execution proceeding; or,

13.7 the Hypothecated Asset is distraint, endangered or badly damaged due to accident or any other reason whatever causing the same to be a total loss in the opinion of the Bank or caused bodily injury to any person due to any accident or otherwise; or,

13.8 the Borrower fails to pay any tax imposed, duty or other imposition or comply with any other formalities required for the Hypothecated Asset under law from time to time; or,

13.9 the Hypothecated Asset is stolen or untraceable for a period of 30 days for any reason whatever; or,

13.10 any of the cheques delivered or to be delivered by the Borrower to the Bank in terms and conditions hereof is not encashed for any reasons whatsoever on presentations,

13.11 any instructions given by the Borrower for stop payment of Post-Dated Cheques revoke SI/ECS instruction given as per clause 3, for any reasons whatsoever,

13.12 the Borrower fails to supply a certified true copy of the registration certificate within the time frames specified in clause 5 & clause 8,

13.13 the Hypothecated Asset being destroyed for any reason whatsoever,

13.14 the Borrower fails to file the particulars of the Asset in the prescribed form of the Bank and as provided infrie Schedule to this Agreement; or,

13.15 Any information given by the Borrower and/or the Guarantor(s) in his loan application to the Bank for financial assistance is found to be misleading or incorrect in any material respect or any representation or any warranty referred in Clause 8 is found to be incorrect,

13.16 the Asset has been used or alleged to have been used for any illegal purposes or activity; or

13.17 Any circumstances arises which gives reasonable grounds in the opinion of the Bank that is likely to prejudice or endanger the Hypothecated Vehicle;

Then in any such case at any time thereafter, without prejudice to the rights and remedies of the bank, the Bank may (but shall not be bound to do so), without the

specific intervention of a court or any court order, by written notices to the Borrower and the Guarantor(s) declare the loan to be immediately due and payable, whereupon the same shall become payable together with accrued interest thereon, the charges as set out in the schedule hereunder written and any other sums then owned by the Borrower herein.

On the question whether any of the above events/circumstances has/have occurred/happened, the decision of the Bank shall be final conclusive and binding on the Borrower and/or the Guarantor(s).

xxx xxx xxx

17. ENFORCEMENT

17.1 if the Borrower fails to perform any of the obligations herein and the same (if capable of remedy) is not remedied to the satisfaction of the Bank within the period to be specified by the Bank; or.

17.2 any of the "Event of Default" pursuant to the terms of Clause 13 arise (Whether demand for repayments is actually made or not) then and in such case and at any time thereafter, the Bank through its officers, agents or nominees shall have the right (without prejudice to the rights of Clause 7) to take any one or more than one of the following actions without the specific intervention of a Court or any Court order;

(i) without any notice and assigning any reason and at the risk and expense of the Borrower and if necessary as Attorney for and in the name of the Borrower take charge and/or possession of seize recover, appoint receiver of and remove the Hypothecated Asset. The Bank will be within its rights to use Tow-van to carry away the Asset/and/or,

(ii) enter into or upon any place or premises where the Hypothecated Asset may be kept or stored and inspect, value or insure the same at the costs and expenses of the Borrower, and/or,

(iii) shall by auction or by private contact or tender, dispatch or consign for realisation or otherwise dispose of or deal with the Hypothecated Asset in the manner the Bank may think fit,

17.3 The Borrower hereby agrees and authorises the officers, agents and nominees of the Bank to do and exercise any one or more than one of the acts and powers mentioned in Clause 13 and clause 6,

17.4 Notwithstanding anything to the contrary expressed or implied;

(i) the Bank shall not be bound to exercise any of the powers mentioned in Clause 6 and Clause 13 or any Collateral Documents; or,

(ii) if the Bank exercises any one or more powers mentioned in Clause 6 and clause 13 the same shall be without prejudice to the Bank's rights and remedies of any suit of any legal proceeding either pending or than may be initiated against the Borrower and or the Guarantor(s) in law, or

(iii) the Bank or its officers, agents or nominees shall not be in any way responsible for any loss, damage limitation or depreciation that the Hypothecated Asset may suffer or sustain on any account whatsoever whilst the same is in possession of the Bank, its officers, agents or nominees or because of exercise or non-exercise of the rights, powers, or remedies available to the Bank or its officers, agents or nominees and all such loss, damage or depreciation shall be debited to the account of the Borrower howsoever the same may have been caused; or

(iv) neither the Bank nor its agents, officers or nominees shall be in any way responsible and liable and the Borrower hereby agrees not to make the Bank or its officers, agents of any nominees liable of any loss, damage, limitation or otherwise for any belongings and articles that may be kept or lying in the Hypothecated Asset at the time of taking charge and/or possession, seizure of the Hypothecated Asset pursuant to the terms of Clause13 and Clause 15.

xxx xxx xxx"

A perusal of above quoted clauses would show that as per agreement between the petitioner and opposite party No.4 in case of default in payment, opposite party No.4 has got the right to take over possession of the vehicle. Initially on account of default in making payments, an Arbitration Proceeding vide No.150 of 2012 was initiated which culminated in an award dated 23.9.2012 for an amount of Rs.21,00,833.12 along with 18% interest till realisation. Thereafter, Execution Case No.17 of 2013 was also levied against the petitioner. On 8.2.2016 vide Annexure-A/3 Series attached to the counter affidavit filed by opposite party no.3, the opposite party no.3 gave pre repossession intimation to Barchana Police Station and after getting the vehicle repossessed and getting the surrender letter from the petitioner on the same date, i.e., 8.2.2016 under Annexure-A/3 Series, Opposite Party No.4 submitted post-repossession intimation to Barchana Police Station. In both pre repossession intimation and post repossession intimations under Annexure-A/3 Series, opposite party no.4 has made it clear that they are exercising their rights under the loan agreement/composite loan agreement for taking repossession. During pendency of writ though vide Annexure-B, the petitioner wrote to opposite party No.4 to settle the matter and though the opposite party No.4 made an offer vide Annexure-D giving substantial waiver to the petitioner, however, the petitioner remained unresponsive.

6. Now coming to the contentions of the parties. Though it has been submitted from the side of the petitioner that on 8.2.2016 repossession was taken by the Bank with the support of Barchana Police Station by making use of hired musclemen and by assaulting the petitioner and his family members and though such a matter was reported to Barchana Police Station, Barchana but the Police had remained silent in the matter, however, opposite party

no.3 in his reply has clearly disputed the same and has made it clear that during repossession process no police personnel was deputed to assist the Bank staff. He also pointed out that on 8.2.2016 neither the petitioner visited Barchana Police Station nor gave any report for taking action against repossession staff. The Opposite Party No.4 has also denied use of force in taking possession. Thus, with regard to use of force, while the petitioner says force was used with police support, the opposite party nos.3 & 4 have denied the same. Further despite taking time to file rejoinder, the petitioner never come forward with a rejoinder. Thus, this Court is faced with two opposing versions of the same incident. Therefore, in a true sense this Court is confronted with disputed of questions of fact, which cannot be decided by a writ court. Further there exists no authentic evidence of the petitioner ever approaching the Superintendent of Police, Jajpur in the matter as he has not proved the despatch of the registered letter by producing at least the registered letter receipt. Rather as facts reveal, after the incident, he went back to his native place in Bihar to attend a family function and after returning from the said function, i.e., after a lapse of 18 days on 26.2.2016 vide Annexure-4 he has taken a stand that he complained to the Superintendent of Police, Jajpur. But as indicated earlier there exists no authentic proof of the petitioner despatching Annexure-4 to the Superintendent of Police, Jajpur. Apart from this, it is not known why the petitioner did not approach the appropriate Court by filing complaint petition. All these make version of the petitioner little doubtful.

7. With regard to the second submission that opposite party no.4 could not have acted upon the loan agreement which empowers them to go for repossession as the same is one sided and ab initio void, it may be noted here that the petitioner has nowhere challenged the same. Further he cannot raise such plea at this belated stage after deriving benefit out of the same. The agreement was signed on 26.11.2011. For all these years, he never raised a finger against the same. Now in order to attack taking repossession of vehicle, which is permissible under loan agreement, such a desperate plea has been taken, which ought to be ignored. Secondly, a perusal of the above indicated Supreme Court decisions makes it clear that financier has a right to resume possession in terms of the agreement and such a thing cannot amount to a criminal offence. In the present case it is not disputed that the petitioner defaulted in paying installments and in such background, repossession of vehicle was taken, which is clearly permissible as per Clause-17 of the loan agreement. Therefore, no illegality has been committed by the opposite party no.4 in taking repossession. Therefore**,** the prayer for a direction to the

Registering Authority not to effect any transfer/change of ownership of vehicle is wholly misconceived.

8. For all these reasons, this writ application is without any merit and the same is accordingly dismissed. No costs.

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2019 (I) ILR - CUT- 566

DR. B.R.SARANGI, J.

W.P.(C) NO. 7103 OF 2018

GIRISH CHANDRA TRIPATHY .....Petitioner

.Vs.

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

A) CONSTITUTION OF INDIA, 1950 – Arts. 226 & 227 – Writ petition seeking quashing of the resolution issued by the Government of Odisha in School and Mass Education Department fixing guidelines for State Award to teachers – Petitioner is a teacher working in a Government recognized School established as per the provisions of Orissa Education Act, 1969 – The Department of School & Mass Education issued the resolution for grant of State award restricting its application only to the teachers belonging to the Govt. School & Govt. aided Schools – Petitioner's plea that such a move by the Govt. is discriminatory – Law on the issue discussed and the court held that such resolution passed by the Govt. is self discriminatory and it creates discrimination amongst same class of teachers working under the same working conditions –The resolution which has been passed is also hit by Art. 14 of the Constitution of India, being arbitrary, unreasonable & discriminatory one – The Justification of issuing such resolution suffers from vice of Article 14 of the Constitution of India and, as such, the same is unconstitutional. (Para- 23, 24 & 27)

(B) CONSTITUTION OF INDIA, 1950 – Arts. 226 & 227 – Policy decision of the Government – Interference of the Court – When to be permitted? – Held, policy decision taken by the state or its authorities/instrumentalist is beyond the purview of Judicial review unless the same found to be arbitrary, unreasonable or in contravention of the statuary provisions or violates the right of individual.

"The contentions raised that the State Government has taken policy decision consciously to promote teachers from government and government aided schools and consequentially guidelines dated 14.03.2018 have been issued, that itself amounts to discrimination amongst the teachers of recognized/private institutions vis-à-vis the government and government aided schools. The State being a welfare State cannot have any justification to make such discrimination amongst same class of teachers working under the same working conditions imparting education to the students and achieve the objects of constitutional mandate. Thereby, such resolution which has been passed on 14.03.2018 is hit by Article 14 of the Constitution of India, being arbitrary, unreasonable and discriminatory one. The justification of issuing such resolution suffers from wrath of Article 14 of the constitution of India. As such, the procedure which has been evolved is absolutely unfair one. Therefore, considering the proceeding as a whole, this Court is of the considered view that the issuance of such resolution being unfair one, this Court has jurisdiction to interfere with the same. No doubt, it is not for the Courts to determine whether a particular policy or particular decision taken in fulfillment of that policy is fair. They are concerned only with the manner in which those decisions have been taken." *(Para 23 & 24)*

Case Laws Relied on and Referred to :-

1. AIR 1996 SC 1 -I) OLR 135 : State of Maharastra .Vs. Manubhai Pragaji Vashi.
2. AIR 1999 SC 2894 : Preeti Srivastava (Dr) .Vs. State of M.P.
3. (1976) 1 SCC 254 : Sole Trustee, Lok Shikshana Trust .Vs. CIT.
4. (2011) 8 SCC 737 : State of T.N. .Vs. K. Shyam Sunder.
5. (2011) 3 SCC 436 : State of Orissa .Vs. Mamata Mohanty.
6. (2002) 6 SCC 562 : AIR 2002 SC 2877 : Kailash Chand Sharma .Vs. State of Rajasthan.
7. (2001) 3 SCC 635 : Ugar Sugar Works Ltd. .Vs. Delhi Administration.
8. (1984) 3 All ER 935 : C.C.S.U. .Vs. Min.
9. (1990) Supp. SCC 440 : AIR 1989 SC 2138 : Narendra .Vs. Union of India.

For Petitioner : M/s. Sanjeeev Udgata, S. Udgata and A. Mishra,
For Opp.Parties : Mr. S. Parida, Sr. Standing Counsel (S&ME)

JUDGMENT Date of Hearing: 18.01.2019 Date of Judgment : 29 .01.2019

DR. B.R. SARANGI, J.

The petitioner, who is at present working as an Assistant Teacher in B.R. High School, Belpahar, has filed this application to quash the resolution dated 14.03.2018 in Annexure-3 issued by the Government of Odisha in School and Mass Education Department fixing guidelines for State Award to teachers, and further seeks to quash the advertisement published in Odia daily "Dharitri" by the Director, Secondary Education, Odisha in Annexure-4, pursuant to resolution dated 14.03.2018, inviting applications for State Award 2017 only from the teachers working in an institution, which is either government or government aided, thereby depriving the teachers working in a recognized institution.

2. The factual matrix of the case, in hand, is that the petitioner, having acquired trained graduate qualification in Physics, Chemistry and Mathematics, was appointed as a teacher in 1998. Since then, he has been rendering service in different schools within the State of Odisha. At present, he is working as an Assistant Teacher in B.R. High School, Belpahar, a recognized institution, situated in a remote area of the State. The petitioner has been imparting teaching in the said institution since 2014, as a result of which its students have been performing well in the school examinations and different science quiz competitions and are recipients of Pathani Samanta Ganita Scholarship, NRTS and other scholarships consistently every year. The petitioner himself is also a recipient of State Award for his excellent work in environmental protection and teaching. The Government of India in the Ministry of Human Resource Development Department of School Education and Literacy, as well as the Government of Odisha in School and Mass Education Department by different orders issued from time to time allowed the teachers of recognized primary, upper primary and secondary educational institutions to be eligible for State Award on the basis of their contribution, sacrifice and hard work. The selection of a teacher for State Award is made on the basis of principles and guidelines and assessment of marks on his/her performance.

2.1 As the matter stood thus, opposite party no.1 issued resolution no.5313/SME dated 14.03.2018 by revising the earlier scheme for State Award restricting it only to a teacher working in an institution, which is either government or government aided, thereby depriving the teachers working in a recognized institution like that of the petitioner from applying for State Award, in spite of the fact that they are otherwise eligible as per the terms and conditions of the resolution. Pursuant to such resolution dated 14.03.2018, opposite party no.2 issued advertisement, which was published in Odia daily "Dharitri", inviting applications from intending teachers for State Award. As the petitioner is rendering service in a recognized institution, he has been deprived of making application for State Award, pursuant to the advertisement issued in Odia newspaper "Dharitri", in view of resolution dated 14.03.2018, as it is only confined to a teacher working in an institution, which is either government or government aided. Hence, this application.

3. Mr. Sanjeev Udgata, learned counsel for the petitioner emphatically submitted that the resolution dated 14.03.2018 issued by opposite party no.1 depriving the school teachers working in the institutions other than the

government from applying for the State Award is illegal, arbitrary, discriminatory, unreasonable and violative of Article 14 of the Constitution of India. It is contended that the resolution dated 14.03.2018 restricting the State Award, which is a mark of recognition contribution, sacrifice and hard work of a teacher, only to a teacher working in an institution, which is either government or government aided, is not founded on an intelligible differentia having rational nexus to the object sought to be achieved. Thereby, the classification made in the resolution itself is hit by the equality clause under Article 14 of the Constitution of India. Therefore, he seeks for interference of this Court.

To substantiate his contention, he has relied upon the judgments of the apex Court in ***State of Maharastra v. Manubhai Pragaji Vashi***, AIR 1996 SC 1 and of this Court rendered in ***Sasmita Mohanty v. Orissa University of Agriculture and Technology***, 2010 (Supp.-I) OLR 135.

4. Mr. S. Parida, learned Sr. Standing Counsel appearing for the School and Mass Education Department contended that as a matter of policy decision, Government has decided to grant State Award to a teacher working in an institution, which is either government managed (any department of Government of Odisha) or government aided on the date of application and, as such, the State Government has taken this policy decision consciously to promote the teachers of government and government aided schools, and consequently the guidelines have been issued in the shape of resolution dated 14.03.2018. Thereby, no illegality or irregularity has been committed if it is confined to a class of people to apply for State Award for their devotion to the teaching profession. It is further contended that the teachers of government and government aided schools are under continuous direct or indirect observation of district level inspecting officers or education officers of the department at field level. As a result, the performance of such teachers is assessed by the district level officers. Besides teaching work, the teachers of government and government aided schools are entrusted with different responsibilities in district level functions and activities relating to games and sports, junior red-cross, scout, science exhibition and science seminar and similar activities. Therefore, this provides a scope to the district education officer or block education officer to observe and evaluate different facets of the personality of a teacher and, as such, this is not the case with a teacher of unaided recognized private school where the evaluation of overall personality of a teacher is not possible on the part of inspecting officers. Therefore, the resolution has been passed to give such State Award to the teachers of

government and government aided institutions, excluding the teachers of recognized institutions. Thereby, the authority has not committed any illegality or irregularity by excluding such type of teachers of recognized institutions from consideration of granting State Award. Consequentially, he contended that the policy decision of the government, challenging which the writ petition has been filed, may not be interfered with and the writ petition may be dismissed.

5. This Court heard Mr. Sanjeev Udgata, learned counsel for the petitioner and Mr. S. Parida, learned Sr. Standing Counsel for School and Mass Education Department. Pleadings having been exchanged, since the matter is urgent, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. Admittedly, the scheme of State Award to teachers was started since long with the object of magnifying the dignity of teachers and giving public recognition to the meritorious and outstanding teachers working in primary, middle and high schools. Initially, this award was known as Governor's Award, and subsequently it has been changed to State Award. The scheme further extended the benefit that teachers getting National or State Award in Primary and Upper Primary Schools would be allowed reemployment of two years after their retirement. On re-examination, the reemployment scheme was revisited and the Government enhanced the award amount from Rs.2000/- to Rs.10,000/-, pursuant to resolution no.43805 dated 04.10.1990 issued by the erstwhile Education Department. Subsequently, the amount of award was enhanced from Rs.10,000/- to Rs.25,000/- vide resolution no.18742 dated 18.07.2012. With the passage of time and due to transfer of subject of Junior Colleges from the Higher Education Department to School and Mass Education Department, w.e.f. 01.07.2016, it was required to revisit the State Award to Teachers and also the Lecturers of Junior Colleges. Therefore, a meeting was held on 24.01.2018 under the Chairmanship of Principal Secretary of School and Mass Education Department and it was decided that from then every year on 5th of September or any other day the State Award would be given to the teachers. Besides, the number of award was enhanced, i.e., 30 for elementary teachers, 30 for secondary teachers, one each for Sanskrit Tol, Madrasa, OAVs, Arts stream of +2 colleges/Arts, Science, Commerce/Vocational Scheme. It was further decided that to be eligible for State Award, a teacher must have worked in an institution which is either government managed (any department of government of Odisha) or government aided on the date of application and the same was done to

consider only the government funded schools for the State Award. Accordingly, guidelines for State Award to teachers were issued vide resolution no.5313 dated 14.03. 2018 in Annexure-3.

7. The policy decision has been taken to confine the teachers of government and government aided schools who cater to the educational need of children from different strata of the society, including the most weak, poor and downtrodden sections. The students of these schools belong to socio-economic backward section. Therefore, the teachers of government or government aided schools performed the most difficult task of educating and shaping the future of most of the children of the State in general and almost all children from vulnerable section in particular. As a consequence thereof, there is need to recognize and incentivize the performance of such teachers. Further, the teachers of government and government aided private schools are under continuous direct or indirect observation of district level inspecting officers or education officers of the department at field level. As a result, the performance of such teachers is assessed by the district level officers. Besides teaching work, the teachers of government and government aided schools are entrusted with different responsibilities in district level functions and activities relating to games and sports, junior red-cross, scout, science exhibition and science seminar and similar activities. This provides a scope to the district education officer or block education officer to observe and evaluate different facets of the personality of a teacher and keeping this in view, the teachers of government and government aided schools have been given the privilege of award from time to time and the policy of the State teachers Award. But, this is not the case with a teacher of an unaided private school where the evaluation of overall personality of a teacher is not possible on the part of inspecting officers. The above reasons have been shown in the counter affidavit filed by the opposite parties justifying the resolution dated 14.03.2018 issued by the Government confining the State Award to the teachers of government or government aided schools and, as such, pursuant to such resolution, an advertisement was issued inviting applications for selection of teachers for granting State Award. As a matter of course, the district level selection committee recommended the names of suitable teachers and State level selection committee finalized the list of teachers to be awarded as per the guidelines issued by the Government. Admittedly, the petitioner is discharging his duty as an Assistant Teacher in B.R. High School, Belpahar, a recognized institution, situated in a remote area of the State.

8. A 'recognized institution' has been defined under Education Code, which reads as follows:

> *"'A recognized institution' means a college or school in which the course of study followed is that which is prescribed or recognized by the Department of Public Instruction or by the University or by the Board of Basic Education or by the Board of Secondary Education and which satisfies one or more of these authorities, as the case may be, that it attains to a reasonable standard of efficiency. It is open to inspection and its pupils are ordinarily eligible for admission to public examinations and tests held by the Department of the University or one of the above Boards."*

Educational activities in the State were being regulated through the 'Education Code' which is a collection of executive instructions issued by Government from time to time. But action taken under the Education Code has been declared as illegal as the Code does not have any statutory support. As a result, it is becoming increasingly difficult for Government to fulfill their responsibility for management of Educational Institutions, conduct of educational programmes and directions of educational activities. It is not possible to take adequate and timely measures to prevent mismanagement of non-Government institutions. Therefore, it is considered essential to enact what may be called an 'Education Act', in which the Government will assume the authority for taking suitable steps to prevent the affairs and management of the non-Government institutions deteriorating. Government will take the authority and responsibility of directing management, administration and maintenance of teaching standards in educational institutions in this State and determining the service conditions, etc. of staff employed in educational institutions. The Act also proposes to give authority to Government to prevent the management of an institution from abusing or misusing the properties that might have been donated by the people for the purpose of the educational institutions concerned. Above all, this Act will help future development of education. Therefore, an Act to provide for the better organization and development of educational institutions in the State, the Legislature of Orissa have enacted a law called the "Orissa Education Act 1969" (Orissa Act 15 of 1969).

9. Section 3(f) defines "Educational Institution" which reads as follows:-

> *"**Educational Institution** means any College or a junior College or a Higher Secondary School or any other School defined in this Act or any institution imparting technical and professional education, special education and includes all movable and immovable properties of such School or College, as the case may be;"*

Section 3(p) defines "Recognized Educational Institution" which reads as follows:

> *"Recognized Educational institution means any private educational institution which is or has been, recognized[under this Act];"*

10. Chapter-II of the Orissa Education Act 1969 deals with establishment, management and control of educational institutions. Section-4 deals with establishment and recognition of educational institutions, Section-5 deals with permission for establishment of educational institution, Section-6 deals with recognition of educational institution, Section-6-A, which has been inserted by way of amendment Act No.13 of 1994, deals with condition for recognition and Section 6-B deals with withdrawal of recognition.

11. As per Sub-Section (3) of Section-4, the State Government, after taking steps for establishment, shall maintain educational institution. Clause (b) of Sub-Section-(3) of Section-4 states as follows:-

> *"(b) Permit any person or body of persons, to establish and maintain educational institutions and recognize such institutions when so established in accordance with the provisions of this Act."*

Similarly, Sub-Section (4) of Section-4 states as follows:

> *"(4) The Prescribed Authority shall communicate the orders granting permission and recognition to the concerned person or body of persons."*

Section-5 deals with permission for establishment of educational institution wherein it has been stated that no private educational institution which require recognition shall be established except in accordance with the provisions of this Act or the rules made thereunder. Section-6 envisages that an application for recognition of a private educational institution shall be made to the Prescribed Authority on or before the 30th November of the academic year in which the institution starts functioning.

12. On a conjoint reading, Sections-4, 5 and 6 of the Orissa Education Act 1969 clearly provide that to establish a private educational institution and to get recognition, the State Government has a pivotal role to play. As such, power has been vested with the State authorities to grant permission and recognition to such private educational institutions by the 'prescribed authority'. More so, the 'prescribed authority' has also been defined under Sub-Section-(3)(m-1), which has been inserted by way of amendment, Orissa Education (Amendment) Act, 1991 (Act 16 of 1991). If the recognized institutions are being established by the Code with due permission and

recognition of the State Government, it cannot be construed that it itself is a separate class of institution and it requires a different treatment than that of the institution or institutions established by the Government or institutions receiving aid from the Government.

13. The States to make laws under Article 246 is regulated by the VIIth Schedule to the Constitution. In the VIIth Schedule, as was originally in force, Entry 11 of List II gave to the States an exclusive power to legislate on-

> *"education including universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I and Entry 25 of List III".*

Entry 11 of List II was deleted and Entry 25 of List III was amended with effect from 3.1.1976, as a result of the Constitution 42nd Amendment Act of 1976. The present Entry 25 in the Concurrent List is as follows:

> *"25. Education, including technical education, medical education and universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I; vocational and technical training of labour."*

14. In ***Preeti Srivastava (Dr) v. State of M.P***., AIR 1999 SC 2894, the apex Court held that in view of Entries made in the Constitution, both the Parliament as well as State Legislature have power to register and enact the law for imparting education.

15. Now, coming to the meaning of "Education", in common parlance-

> "Education" according to **Chambers Dictionary** is "bringing up or training;... strengthening of the powers of body or mind; culture".

In **Advanced Law Lexicon** (P. Ramanatha Aiyar, 3rd Edn., 2005, Vol.2) "education" is defined in very wide terms which reads as follows:

> *"Education is the bringing up; the process of developing and training the powers and capabilities of human beings. In its broadest sense the word comprehends not merely the instruction received at school, or college but the whole course of training moral, intellectual and physical; is not limited to the ordinary instruction of the child in the pursuits of literature. It also comprehends a proper attention to the moral and religious sentiments of the child. And it is sometimes used as synonymous with 'learning'."*

16. In ***Sole Trustee, Lok Shikshana Trust v. CIT***, (1976) 1 SCC 254 the term "education" was held to mean as follows:-

> *"the systematic instruction, schooling or training given to the young in preparation for the work of life. It also connotes the whole course of scholastic instruction which a person has received. …What education connotes …is the process of training and developing the knowledge, skill, mind and character of students by formal schooling."*

17. In ***State of T.N. v. K. Shyam Sunder***, (2011) 8 SCC 737, the apex Court held as follows:

> *"The right to education is a fundamental right under Article 21-A inserted by the 86th Amendment of the Constitution. Even before the said amendment, the Supreme Court treated the right to education as a fundamental right".*

18. In ***State of Orissa v. Mamata Mohanty***, (2011) 3 SCC 436, the apex Court, while considering Article 21-A, which has been added to the Constitution, held as follows:

> *"Article 21-A has been added in the Constitution with a view to facilitate the children to get proper and good quality education. However, the quality of education would depend on various factors but the most relevant of them is excellence of teaching staff. In view thereof, quality of teaching staff cannot be compromised. The selection of the most suitable persons is essential in order to maintain excellence and the standard of teaching in the institution. It is not permissible for the State that while controlling the education it may impinge the standard of education. It is, in fact, for this reason that norms of admission in institutions have to be adhered to strictly. Admissions in mid-academic sessions are not permitted to maintain the excellence of education".*

19. To achieve the objectives of education, as discussed above, it is the responsibilities of the teachers, parents and above all the State authorities so as to give the systematic instruction, schooling or training given to the young in preparation for the work of life. Therefore, a teacher may be a private, aided or Government has got equal responsibility to discharge his/her duty to achieve the objective of imparting education in the State. There cannot be any classification among the teachers of private, unaided, aided and Government teachers who are discharging their duty to achieve the sole objective of imparting education to the students. More so, it cannot create a separate class among the similarly situated persons. Class within the class cannot have any justification which amounts to discrimination. The present resolution dated 14.03.2018 issued by the Government in School and Mass Education Department, excluding the teachers of recognized, private and unaided institutions from the zone of consideration for grant of State Award amounts to discrimination and it has no rational nexus to the object sought to

be achieved. Thereby, such resolution dated 14.03.2018 is illegal, arbitrary, unreasonable and violative of Article 14 of the Constitution of India.

20. The argument advanced by learned Sr. Standing Counsel for School and Mass Education Department is that the resolution issued on 14.03.2018 is in the shape of policy decision, which cannot be interfered with by this Court. Such an argument cannot sustain in view of law laid down by the apex Court in ***Kailash Chand Sharma v. State of Rajasthan***, (2002) 6 SCC 562 : AIR 2002 SC 2877 wherein the apex Court held that the policy decision, which is subversive of the doctrine of equality, cannot sustain. It should be free from the vice of arbitrariness and conform to the well-settled norms, both positive and negative, underlying Articles 14 and 16 which together with Article 15 form part of the constitutional code of equality.

21. No doubt, right of the State to change its policy from time to time under the changing circumstances cannot be questioned, though the changed policy deviated from the judicial pronouncements of the Supreme Court. Further, the Government policy is not subject to judicial review unless it is demonstrably arbitrary, capricious, irrational, discriminatory or violative of constitutional or statutory provisions. But, at the same time, it cannot be lost sight of the fact of law laid down by the apex Court in ***Ugar Sugar Works Ltd. V. Delhi Administration***, (2001) 3 SCC 635 wherein the apex Court held that unless the policy can be faulted on the grounds of mala fide, unreasonableness, arbitrariness or unfairness etc, the same should not be interfered with by the Court. Therefore, this Court has to examine the resolution dated 14.03.2018 within the parameters of the law laid down by the apex Court, as discussed above.

22. Admittedly, prior to the resolution dated 14.03.2018, under various executive instructions, opportunities were given to all category of teachers, including the teachers from the recognized institutions, to make the application for consideration of the Governor's Award, subsequently renamed as State Award. But, for the first time, in the present resolution dated 14.03.2018 it has been confined only to the teachers working under the government and government aided schools, by which the teachers rendering service in recognized institutions have been deprived of filing application for consideration for State Award. Needless to say, such institutions are being established with prior permission and recognition by the competent authority, namely, the State authority and with the same object to impart education to the students. More particularly, the students those who have been prosecuting

studies in such type of institutions have shown their excellence in comparison to government or government aided institutions and proved their merit at par with their counterparts of such institutions.

23. The contentions raised that the State Government has taken policy decision consciously to promote teachers from government and government aided schools and consequentially guidelines dated 14.03.2018 have been issued, that itself amounts to discrimination amongst the teachers of recognized/private institutions vis-à-vis the government and government aided schools. The State being a welfare State cannot have any justification to make such discrimination amongst same class of teachers working under the same working conditions imparting education to the students and achieve the objects of constitutional mandate. Thereby, such resolution which has been passed on 14.03.2018 is hit by Article 14 of the Constitution of India, being arbitrary, unreasonable and discriminatory one. The justification of issuing such resolution suffers from wrath of Article 14 of the constitution of India. As such, the procedure which has been evolved is absolutely unfair one. Therefore, considering the proceeding as a whole, this Court is of the considered view that the issuance of such resolution being unfair one, this Court has jurisdiction to interfere with the same.

24. No doubt, it is not for the Courts to determine whether a particular policy or particular decision taken in fulfillment of that policy is fair. They are concerned only with the manner in which those decisions have been taken.

In ***C.C.S.U. v. Min***., (1984) 3 All ER 935, LORD DIPLOCK held that if the manner is unfair, the decision will be tainted with 'procedural impropriety'.

In ***Narendra v. Union of India***, (1990) Supp. SCC 440 : AIR 1989 SC 2138, the apex Court held that non-statutory guidelines or administrative instructions are generally not enforceable in a court of law. This means that it is open to the competent authority to depart from such guidelines or policy statements in cases where the proper exercise of his discretion so requires.

25. The reliance was placed by learned counsel for the petitioner on ***Manubhai Pragaji Vashi*** (supra), paragraphs-10 and 12 of which read as under:-

> *"10. On hearing counsel, we are of the view that no dispute seems to have been raised in the High Court regarding the grant-in-aid made available to recognised*

private professional colleges other than law. Nor was any material placed before the court on this score. The conclusion of the High Court to the effect that not extending the grant-in-aid to non-Government law colleges and at the same time extending such benefit to non-Government colleges with faculties viz., Arts, Science, Commerce, Engineering and Medicine (other professional non-Government colleges) is patently discriminatory, and based on material and sustainable. The State has not discharged the burden of proof cast on it to sustain the differential treatment meted out to one of the Government recognisd professional colleges, (private law colleges). It is patent that likes have been treated unlike; without proper justification or reason and the private law colleges have been singled out for hostile discriminatory treatment. The disparity in the service conditions in not affording the benefit of pension- cum-gratuity scheme to the non-teaching staff in non- Government law colleges and at the same time affording the same benefit to non-teaching staff of colleges with faculties in Arts, Science, Commerce, Engineering and Medicine with effect from 1.10.1982 is discriminatory as correctly opined by the High Court and requires to be set right.

12. The facts stated above amply bring out the fact that recognised private law colleges alone were singled out for hostile discriminatory treatment. The recommendations of the committee (pages 198-208) to apply the new formula for the grant to private law colleges and the resolution adopted by the Government to extend the UGC scales to teachers of law colleges (pages 86-87) remained only in `paper' and no concrete steps were taken to implement them. It is not explained as to why recognised private law colleges alone are disentitled to receive grant-in-aid from the Government. The burden of proof cast on the State, that discrimination against recognised private law colleges is based on a reasonable classification having nexus to the object sought to be achieved, has not been discharged. The High Court has held so, placing reliance on the decisions of this Court reported in Budhan Choudhary and others v. State of Bihar (AIR 1955 SC 191), Express Newspaper Ltd. v. Union of India(AIR 1958 SC 578), Mehant Moti Das v. S.P.Sah (AIR 1959 SC 942) Babulal Amthalal Mehta V. Collector of Customs (AIR 1957 SC 877) and D.S.Nakara v.Union of India (AIR 1983 SC 130). We hold that the aforesaid reasoning and conclusion of the High Court is fully justified and no exception can be taken to the decision so arrived at by the High Court. The High Court has further referred to the plea of paucity of funds pleaded by the State and has held that paucity of funds can be no reason for discrimination, placing reliance on the decision of this Court in Municipal Council, Ratlam v.Vardhichand (AIR 1980 SC 1622). This reasoning of the High Court is also fully justified and no exception can be taken to the said proposition as well. We hold so."

26. The reliance was also placed by learned counsel for the petitioner on ***Sasmita Mohanty*** (supra), in paragraphs-12, 13 and 14 of which this Court held as follows:-

"12. With regard to the scope of judicial review of the above decision taken by the University, it would be seen that it is a settled legal proposition that a policy

decision taken by the State or its authorities/instrumentalities is beyond the purview of judicial review unless the same is found to be arbitrary, unreasonable or in contravention of the statutory provisions or violates the rights of the individual guaranteed under the Statute.

In the case of **R.K. Garg v. Union of India and others**, *AIR 1981 SC 2138, the Supreme Court while examining the authority of the provisions of the Special Bearer Bonds (Immunities and Exemptions) Ordinance, 1981 and Special Bearer Bonds (Immunities and Exemptions) Act, 1981 held as follows:-*

"It is clear that Article 14 does not forbid reasonable classification of persons, objects and transactions by the legislature for the purpose of attaining specific ends. What is necessary in order to pass the test of permissible classification under Article 14 is that the classification must not be "arbitrary, artificial or evasive" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature.....Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved..... The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry" that exact wisdom and nice adoption of remedy are not always possible and that "judgment is largely a prophecy based on meager and uninterrupted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore, it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid.....There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation , because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses.Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities

inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues. (emphasis supplied)."

In the case of **State of Himachal Pradesh and another v. Padam Dev and others**, *(2002) 4 SCC 510, the Supreme Court held that unless a policy decision is demonstrably capricious or arbitrary and not informed by any reason or discriminatory or infringing any statute or the constitution, such decision cannot be a subject of a judicial interference under the provisions of Articles 32, 226 and 136 of the Constitution. Similar view has been reiterated in State of Rajasthan and others v. Lata Arun, (2002) 6 SCC 252.*

In exercise of power of judicial review, the Courts do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on the ground of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed arbitrariness, irrationality, perversity and mala fide, render the policy unconstitutional. Unless a policy decision is demonstrably capricious or arbitrary and not informed by any reason or discriminatory or infringing any Statute or the Constitution, it cannot be a subject of judicial interference. However, if the policy cannot be touched on any of these grounds, the mere fact that it may affect business interests of a party does not justify invalidating the policy.

In the case **Union of India and another v. International Trading Company and another**, *(2003) 5 SCC 437, the Supreme Court pointed out that the policy of the Government , even in contractual matters, must satisfy the test of reasonableness and every State action must be informed by reason. Article 14 of the Constitution applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional.*

In the case of **Union of India and another** *(supra), the Supreme Court observed that there is no necessity to multiply decision in this regard as it is now well settled that if the Court finds that a decision of the policy maker is capricious or arbitrary or discriminatory, it will not hesitate to strike down such policy.*

13. In the facts of the present case, an upper age limit has been fixed after which the VAWs/LVAWs cannot be recommended to take admission as in-service candidates to B.Sc.(Ag.) Course. The object to be achieved by sending in-service candidates for undertaking such course is to give opportunity to such candidates to be promoted to the post of JAOs. The minimum percentage of marks fixed to have been obtained in +2 Science examination in the instant case has no nexus with the object to be achieved in respect of the in-service candidates. Further, it transpires that by fixing such cut-off percentage, equals have been treated to be un-equals and seniority has been given a go-by. The said action ipso facto is capricious and applying the ratio of the decision in the case of Union of India and another (supra), it would be clear that the change in such policy has not been made fairly and gives an impression that it was done arbitrarily. Further, as has been held in the said decision, this action of fixing a cut-off mark to have been obtained in +2 Science

examination in case of in- service candidates by creating an artificial classification between the equals comes within the wide sweep of Article 14 of the Constitution as the basic requirement of Article 14 is fairness in action by the State and non-arbitrariness, in essence and substance, which is a heart bit of fair-play.

Further, the fixing of the cut-off mark as discussed above amounts to a restriction. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved, the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time enter into the judicial verdict, the reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country. (See Parbhani Transport Coop. Society Ltd. v. RTA (AIR 1960 SC 801: (1960) 3 SCR 177), Shree Meenakshi Mills Ltd. v. Union of India (1974) 1 SCC 468: AIR1974 SC 366), Hari Chand Sarda v. Mizo Distt. Council (AIR 1967 SC 829: (1967) 1 SCR 1012), Krishnan Kakkanth v. Govt. of Kerala (1997) 9 SCC 495: AIR 1997 SC 128) and Union of India v. International Trading Co. (2003) 5 SCC 437.

14. The above conclusion is supported by the fact that such minimum percentage of marks was not fixed by the Government at the entry point of joining the post of VAWs/LVAWs and fixing such minimum percentage of marks for taking admission to B.Sc. (Ag.) Course as in-service candidates at such belated stage deprives the petitioners from getting an opportunity to prosecute the said course for being considered for promotion to the post of J.A.Os."

27. Considering the law laid down by the apex Court and also this Court, as discussed above, this Court unhesitatingly held that the impugned resolution dated 14.03.2018 issued by the Government in School and Mass Education Department fixing the guidelines for State Award to the teachers, excluding the teachers of the recognized institutions, suffers from vice of Article 14 of the Constitution of India and, as such, the same is unconstitutional. Accordingly, the resolution dated 14.03.2018 is hereby quashed. Consequentially, the follow up actions taken pursuant to such resolution, including the advertisement in Annexure-4, cannot also sustain in the eye of law and the same are hereby quashed. Further, the State authorities may frame guidelines forthwith for the State Award to teachers of all the educational institutions, including government, non-government and recognized, by affording equal opportunity to all category of teachers imparting education to the students, in accordance with law.

28 The writ petition is thus allowed. However, there shall be no order as to costs.

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DR. B.R. SARANGI, J.

W.P.(C) NO. 1018 OF 2014,
W.P.(C) NO. 8554 OF 2014
AND
W.P.(C) NO. 18578 OF 2015,

W.P.(C) NO. 1018 OF 2014
RABINARAYAN DAS & ORS. ……..Petitioners

.Vs.

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

For Petitioners : Mr. Budhadev Routray, Sr. Advocate,
M/s. D.Routray, P.K. Sahoo, R.P.Dalai, S.Jena,
S.K.Samal, S.C.Das, S.D. Routray.

For Opp. Parties : Mr. S.Mishra, Addl. Govt. Adv.
M/s. P.R.Dash, S.Mohapatra & K.Raj.

W.P.(C) NO. 8554 OF 2014
ODISHA MINING WORKERS' FEDERATION ……Petitioner

.Vs.

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

For Petitioners : Mr. R.K. Rath and Mr. S.S. Das, Sr. Adv.
M/s U.C. Patnaik B.Mohanty.
For Opp. Partie : Mr. S.Mishra, Addl. Gov. Adv.
M/s. P.R.Dash, S.Mohapatra & K.Raj.

W.P.(C) NO. 18578 OF 2015
DURGA CHARAN DAS & ORS. ……Petitioners

.Vs.

STATE OF ODISHA & ORS. ……Opp. Parties

For Petitioners : M/s N.C. Das, S.N.Rath, S.Swain
G.G. Pradhan.
For Opp. Parties : Mr. S.Mishra, Addl. Govt. Adv.
M/s. P.R.Dash, S.Mohapatra & K.Raj.

CONSTITUTION OF INDIA, 1950 – Art. 14 – Right to equality – Petitioners who are employees of the Orissa Mining Corporation have filed the writ petition claiming the pensionary benefit at par with the employee of similarly situated public sector undertakings – The Board of Director of the OMC has approved the extension of the pension benefits to its employee which has also been approved and concurred by the Finance Department – But the Govt. refused to grant such benefits – Action of the authority challenged – Held, the action is contrary to law.

"In view of the law laid down by the apex Court and applying to the present context, since the similarly situated PSUs, such as, OPGC and OHPC, having come within the Gold category, have extended pensionary benefit to their employees, non-extension of such benefit to the similarly situated PSU like OMC Ltd., even though as a matter of principle the State Government has approved the same which has received the concurrence of the Finance Department, amounts to violation of Article 14 of the Constitution of India. As the equality is the basic feature of the Constitution and the concept of Article 14 was interpreted by the Supreme Court as a concept of equality confined to the aspects of discrimination and classification, this Court is of the considered view that in the order impugned dated 28.04.2014, which has been passed while complying with the order dated 08.10.2012 passed in W.P.(C) No. 19405 of 2009, this basic principles have been lost sight of. Therefore, the order impugned dated 28.04.2014 in Annexure-9 cannot sustain in the eye of law and accordingly the same is liable to be quashed and is hereby quashed."

(Para 26)

Case Laws Relied on and Referred to :-

1. 1993 Supp (3) SCC 181 : Prafulla Kumar Swain .Vs. Prakash Chandra Misra.
2. AIR 1974 SC 2192 : Samsher Singh .Vs. State of Punjab.
3. (200) 8 SCC 633 : AIR 2001 SC 152 : Praveen Singh .Vs. State of Punjab.
4. (2001) 2 SCC 386 : AIR 2000 SC 3689 : Om Kumar .Vs. Union of India.
5. (2001) 8 SCC 491 : AIR 2001 SC 3887 : Union of India .Vs. Dinesh Engineering Corporation.

7. (2006) 8 SCC 212: AIR 2007 SC 71 : M.Nagaraj .Vs. Union of India.
8. (2002) 4 SCC 34 : AIR 2002 SC 1533 : Ashutosh Gupta .Vs. State of Rajasthan.
9. (1992) Supp.3 SCC 217 : AIR 1993 SC 477 : Indra Sawhney .Vs. Union of India.

JUDGMENT Date of Hearing: 18.01.2019 : Date of Judgment: 29.01.2019

DR. B.R. SARANGI, J.

In all the above mentioned three writ petitions, the petitioners, who are the employees of Orissa Mining Corporation Limited, have claimed to extend the pension scheme at par with the employees of similarly situated Public Sector Undertakings. Therefore, these writ petitions have been heard analogously and are disposed of by this common judgment. For just and proper adjudication of the matter, the facts of W.P.(C) No.1018 of 2014 have been taken into consideration.

2. The Orissa Mining Corporation Limited (for short "OMC Ltd") is a Public Sector Undertaking (PSU) being controlled, managed and financed by the State Government. The petitioners, who were appointed to different posts of the OMC Ltd, have retired from services, after rendering continuous and uninterrupted services, on attaining the age of superannuation. While they were in service, the Board of Directors of OMC Ltd in its 268th meeting dated

25.03.1989 decided in principle on the proposal for introduction of pension scheme for the employees of the Corporation at par with the benefit extended to the State Government employees with effect from 01.04.1989. A committee was accordingly constituted comprising of Chairman, Managing Director; Joint Secretary, Finance, Govt. of Orissa; and Secretary & Financial Advisor, OMC Ltd to examine and submit a report in the matter of introduction of pension scheme for the employees of the OMC Ltd so as to take a decision by the OMC Ltd. A report was accordingly prepared and placed before the Board of Directors in its 282nd meeting dated 25.06.1991, who, on consideration of the same, unanimously resolved to approve the introduction of pension scheme for the employees of the OMC Ltd. Consequentially, a memorandum was prepared to obtain approval of the State Government and the Central Provident Fund Commissioner before implementation of such scheme. The said decision of the Board of Directors, on being forwarded, was approved by the State Government, after due consideration. Accordingly, on 05.10.1991, Under Secretary to the Government in the Department of Steel and Mines addressed a letter to the Chairman-cum-Managing Director, OMC Ltd indicating therein that the proposal for introduction of pension scheme for the employees of the OMC Ltd was approved by the Government with due concurrence of the Finance Department, w.e.f. 01.04.1989 subject to modification to the effect that the age of superannuation of the employees of the Corporation shall be 58 years except in case of Class-IV employees where it is 60 years.

2.1 So far as grant of exemption of Section 17 (1)(a) of Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for short "EPF & MP Act, 1952") is concerned, the Regional Provident Fund Commissioner communicated a letter to the State Government indicating that the State Government is the appropriate authority to grant exemption and to issue necessary notification in exercise of power conferred on it by Clause-(a) of Sub-Section (1) of Section 17 of the Act. Consequentially, the State Government in Labour and Employment Department granted exemption in exercise of power conferred on it. All the conditions enumerated by the State Government, while granting exemption in the notification dated 01.06.1985, were complied with by the OMC Ltd.

2.2 Despite approval of the State Government with due concurrence of the Finance Department, the decision taken by the Board of Directors for introduction of pension scheme for the employees of OMC Ltd, was not implemented from 1991 to 2000. When several demands were raised by the

employees of the Corporation, the Board of Directors, on 30.03.2000, again issued a memorandum for introduction of pension scheme for the employees of the OMC Ltd wherein it was stated that it would be given effect to after receiving approval from the competent authority, which was not necessary at the relevant point of time, as the same was duly approved and concurred by the competent authority.

2.3 In the categorization of State Public Sector Enterprises, the OMC Ltd has been placed under 'Gold Category', as per the decision taken by the Government of Orissa in Public Enterprises Department in Annexure-6 dated 20.12.2011, along with other Public Sector Undertakings, i.e., Orissa Power Generation Corporation (OPGC), Orissa Hydro Power Corporation (OHPC) and Industrial Development Corporation Limited (IDCO). In case of OHPC Ltd, which is also coming under the 'Gold Category', the pensionary benefit was extended to its employees, way back on 11.07.2012. But for some plea or other the said benefit has not been extended to the employees of the OMC Ltd. Therefore, some of the ex-employees of the OMC Ltd, namely, Durga Charan Das and others filed W.P.(C) No.19405 of 2009 seeking direction to the State Government and OMC Ltd to implement the pension scheme for the employees of OMC Ltd at par with the provision of pension followed by the State Government for their employees. This Court, vide order dated 08.10.2012, directed to the State Government to take a decision on the matter within a period of four months. Consequentially, the OMC Ltd, on 09.04.2013, submitted a proposal on the basis of resolution passed by the Board of Directors seeking direction of the Government. But the Government, vide order dated 28.04.2014 in Annexure-9, refused the proposal of the OMC Ltd submitted on 09.04.2013, meaning thereby denied the pensionary benefit to its employees, hence this application.

3. Mr. B. Routray, learned Senior Counsel appearing along with Mr. S.K. Samal, learned counsel for the petitioners in W.P.(C) No.1018 of 2014 contended that denial of pension to the employees of the OMC Ltd, vide order dated 28.04.2014 in Annexure-9, which was passed in response to letter dated 09.04.2013 issued by the Chief Managing Director, OMC Ltd, is not only arbitrary, unreasonable and contrary to the provisions of law, but also discriminatory, and such order has been issued by opposite party no.2 without modifying, revoking or superseding the Government approval accorded vide letter No.12610 dated 05.10.1991, as well as the Public Enterprises Department, Government of Orissa Resolution no. 3169 dated 16.08.1995 notified in the official gazette. Thereby, the order impugned cannot sustain in

the eye of law and is liable to be quashed and the petitioners are entitled to pensionary benefit as was approved by the Government with due concurrence of the Finance Department.

4. Mr. R.K. Rath, learned Senior Counsel appearing along with Mr. B. Mohanty, learned counsel for the petitioner in W.P.(C) No.8554 of 2014 contended that Steel and Mines Department is the administrative department of the OMC Ltd., as per Government of Orissa Rules of Business made under Article 166 of the Constitution of India. Chapter XII of the Rules of Business deals with Steel and Mines Department. Under the heading "State subjects" name of the OMC Ltd has been indicated in Clause-6. Therefore, under the Rules of Business if the Steel and Mines Department is the competent department, which had taken a decision to extend the pensionary benefit to the employees of the OMC Ltd, unless the same is modified or clarified or nullified, the denial of pensionary benefits under Annexure-9 dated 28.04.2014, on consideration of the grievance made by the employees, cannot sustain in the eye of law. It is further contended that the OMC Ltd has been categorized as "Gold", as per notification of the Public Enterprise Department dated 20.12.2011, relying upon the profit statement of the PSUs. The employees of similarly situated PSUs, namely, OPGC and OHPC, having been extended the pensionary benefit, their counter parts in the OMC Ltd have been denied such benefit, which amounts to discrimination and violates Article 14 of the Constitution of India. It is further contended that echoing the voice of Public Enterprises Department, the Steel and Mines Department passed the impugned order dated 28.04.2014 in Annexure-9, as under the Rules of Business the Steel and Mines Department is competent to take such a decision. Therefore, denial of pensionary benefit to the employees of OMC Ltd., pursuant to order dated 28.04.2014, cannot sustain in the eye of law and the same is liable to be quashed. To substantiate his contention, he has relied upon the judgments of the apex Court rendered in ***Prafulla Kumar Swain v. Prakash Chandra Misra***, 1993 Supp (3) SCC 181; and ***Samsher Singh v. State of Punjab***, AIR 1974 SC 2192.

5. Mr. S.S. Das, learned Senior Counsel appearing along with Mr. B. Mohanty, learned counsel for the petitioners in W.P.(C) No.8554 of 2014 and Mr. N.C. Das, learned counsel for the petitioners in W.P.(C) No. 18578 of 2015 supported the arguments advanced by Mr. B. Routray, and Mr. R.K. Rath, learned Senior Counsels appearing for the petitioners in the two writ petitions mentioned above.

6. Mr. S. Mishra, learned Additional Government Advocate also admitted that the State Government in its Steel and Mines Department had approved the recommendation made by the OMC Ltd for introduction of pension scheme with effect from 01.04.1989 subject to modification of item No.6 of the draft rules, i.e., the age of superannuation of the employees of the OMC Ltd. would be 58 years except in case of Class-IV where it was 60 years. He also contended that the same had got concurrence of the Finance Department, vide G.O.R. No.392/CS.III dated 09.08.1991. It is further contended that the Public Enterprises Department notified on 16.08.1995, by way of resolution, in relation to rationalized scale of pay and allowances structure of the employees in the management cadres in the State Public Sector Enterprises where under the heading "retirement benefit" it has been provided that the management of enterprises may formulate suitable pension schemes applicable to the new recruits and the existing employees may be asked to exercise their option either for continuance under the existing CPF scheme or come over to the pension scheme to be devised by the management. But before issuance of this resolution, the OMC Ltd had already taken a decision and approved in principle for introduction of pension scheme for its employees, which had also got approval of the State Government and concurrence of the Finance Department. But at the same time the OMC Ltd in its 355th meeting held on 23.03.2006 introduced a new scheme "OMC Retiring Employees Benefit Scheme" which was duly approved by the Board of Directors to be implemented prospectively after approval of the Government. Though it was moved, vide communication dated 03.04.2006, to accord approval for implementation of the scheme and concurrence was sought for from the Finance Department, in reply thereto certain observations were made by the Addl. Secretary to the Govt. in the Department of Steel and Mines vide letter dated 30.10.2006. Therefore, grant of pensionary benefit to the employees of OMC Ltd does not arise. Thereby, the authorities are justified in rejecting the claim of the petitioners in extending such benefit of pension scheme to the employees of the OMC Ltd.

7. Mr. P.R. Dash, learned counsel appearing for the OMC Ltd unequivocally contended that the Board of Directors of the OMC Ltd had approved the extension of pensionary benefit to its employees, which was duly recommended by it to the State Government, and the State Government in its turn approved the same and the Finance Department also granted concurrence, but for the reasons best known to the authorities such benefit has not been extended to the employees of the OMC Ltd, though similarly situated PSUs, such as OHPC and OPGC have granted such benefit to their

employees. It is further contended that the decision taken by the Administrative Department, with regard to extension of retirement benefit, which was duly approved, has neither been modified nor nullified and the same still holds good and governing the field. Consequentially, the impugned order refusing to grant pensionary benefit to the employees of OMC Ltd, having been passed without application of mind, cannot sustain in the eye of law and is liable to be quashed.

8. This Court heard Mr. B. Routray, learned Senior Counsel appearing along with Mr. S.K. Samal, learned counsel for the petitioners in W.P.(C) No.1018 of 2014; Mr. R.K. Rath and Mr. S.S. Das, learned Senior Counsels appearing along with Mr. B. Mohanty, learned counsel for the petitioner in W.P.(C) No.8554 of 2014; and Mr. N.C. Das, learned counsel for the petitioners in W.P.(C) No.18578 of 2015; Mr. S. Mishra, learned Additional Government Advocate appearing for the State opposite parties; and Mr. P.R. Dash, learned counsel appearing for the Orissa Mining Corporation Ltd. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties, all the three writ petitions are being disposed of finally at the stage of admission.

9. Admittedly, the petitioners are employees of the OMC Ltd, a PSU of the Government of Orissa. Its Board of Directors in its 268th meeting held on 25.03.1989 proposed in principle to introduce a pension scheme for the employees of the OMC Ltd. Needless to mention, the OMC Ltd, which is an oldest State Government undertaking in the public sector for exploration and exploitation of mineral resources of the State, has already completed 32 years of its existence. Initially, its office and field establishments were organized with a small number of officers and staff. With the passage of time and increase in activities in all areas, the number of employees has increased substantially. Of-late, the employees have started retiring after rendering continuous service over a long period of time. As provided under the Rules of the OMC Ltd, the employees, at the time of retirement would receive benefit of gratuity and also employer's contribution to provident fund provided under the statute. These benefits are very meager to take care of the liabilities of an employee after retirement. Hence, the employees face acute financial difficulties. Such situation becomes more acute when the employees die prematurely during service. Keeping the above in view, some of the reputed organizations, as a matter of policy, diverted from their earnings/profits a certain percentage to extend superannuation benefits to the retired employees to enable them to lead a peaceful life after retirement. Provision for such

benefit is considered progressive and attracts better talent and motivates them to retain their services with the organization, which improves profitability and customer satisfaction. Therefore, the Central Public Sector Undertakings, Statutory Corporations and other Boards have introduced pension scheme in one form or other.

10. The OMC Ltd is a stable PSU in the State and has been making profits continuously since 1976 after wiping out all its past accumulated losses. Therefore, the Board of Directors in its 268th meeting held on 25.03.1989 proposed to introduce a pension scheme for the employees of the OMC Ltd. Taking into consideration such proposal, for introduction of pension scheme for the employees of OMC Ltd at par with the State Government employees, w.e.f. 01.04.1989, the Board of Directors, pursuant to 282nd meeting held on 25.06.1991, took into consideration the recommendation made by a committee consisting of Chairman, Managing Director; Joint Secretary, Finance, Government of Orissa; and Secretary and FA, OMC Ltd and resolved as follows:-

> "*Item No. 20(d) : Introduction of the Pension Scheme for the employees of Orissa Mining Corporation Ltd.*
>
> *The Board of Directors approved the proposal contained in the Memorandum and desired that the approval of State Government and the Central Provident Fund Commissioner be obtained before implementation of the same."*

11. The Government of Orissa in the Department of Steel and Mines, while considering the draft proposal for introduction of pension scheme for the employees of the OMC Ltd, granted approval with due concurrence of the Finance Department, vide communication dated 05.10.1991, which reads as under:-

> *"Government of Orissa*
> *Department of Steel and Mines*
> *...*
> *No. 12610 /SM. Bhubaneswar, the DMC.62/91*
>
> *From*
> *Sri G.P. Satpathy, O.A.S.(I)*
> *Under Secretary to Government*
>
> *To*
> *The Chairman-cum-Managing Director,*
> *O.M.C. Ltd., Orissa, Bhubaneswar*
>
> *Sub. : Introduction of pension scheme for the employees of O.M.C.Ltd.*

Sir,

In inviting a reference to your D.O. letter No. 17777/OMC/91, dated 25.07.1991 on the subject mentioned above, I am directed to inform you that your draft proposal for introduction of pension scheme for the employees of O.M.C. Ltd. With effect from 1.4.89 have been approved by the Government subject to modification of Item-6 of the draft rule as follows :

"The age of superannuation of the employees of the Corporation shall be 58 years except in case of Class-IV where it is 60 years."

This has been concurred in by the Finance Department vide their OOR. No. 392/CS. III, dated 9.8.91.

Yours faithfully,
Under Secretary to Government"

In spite of approval granted by the State Government and the concurrence given by the Finance Department for introduction of pension scheme for the employees of the OMC Ltd, vide communication dated 05.10.1991, for the reason best known to the authorities, the same has not been implemented. But subsequently, after revision of the scale of pay of the State Government employees in 1989, a resolution was passed by Public Enterprises Department on 16.08.1995, with regard to rationalization of the scale of pay and allowances structure of the employees in the management cadres of the State Public Sector Enterprises, wherein under the heading "retirement benefit" it has been stated thus:-

"*Retirement benefit :*

Management of the Enterprises may formulate suitable pension schemes to be applicable to new recruits and the existing employees may be asked to exercise their option either for continuance under the existing CPF scheme or come over to the pension scheme to be devised by the management."

Even though the recommendation made by the Board of Directors was duly approved for introduction of pension scheme for the employees of the OMC Ltd. and concurrence was also granted on 05.10.1991, the same has not been implemented for the reasons best known to the authorities and on the contrary a resolution was passed on 16.08.1995 for consideration of retirement benefit asking for option from the person concerned.

12. It is worthwhile to mention, under Article 166 of the Constitution of India, the conduct of business of the Government on State subjects has been prescribed. As per Rule-4, the business of the Government shall be transacted in the departments specified in the First Schedule and shall be classified and

distributed between those departments and their branches as laid down therein. Chapter XII, which was substituted by notification no.15116-Gen. dated 28.05.1990, deals with Steel and Mines Department. Clause-6 of the State subjects indicates Orissa Mining Corporation Limited. Therefore, the administrative department of OMC Ltd is Steel and Mines Department. The letter dated 05.10.1991, reference to which has been made above, was issued by the Department of Steel and Mines, which is the administrative department of OMC Ltd. As such, as a matter of principle the State Government had already approved the draft proposal for introduction of pension scheme for the employees of OMC Ltd w.e.f. 01.04.1989 subject to modification of item No.6 of the draft rules to the extent that "the age of superannuation of the employees of the Corporation shall be 58 years except in case of Class-IV where it is 60 years", which got concurrence of the Finance Department vide G.O.R. No.392/C.S.III dated 09.08.1991. Therefore, if the Government of Orissa in the Department of Steel and Mines has approved the benefit of pension scheme for the employees of the OMC Ltd, which has also got concurrence of the Finance Department, unless the same is annulled, or modified, or clarified, or withdrawn, the same has to remain in force. Merely because a resolution was passed by the Public Enterprises Department seeking exercise of option either for continuance under the existing CPF scheme or coming over to the pension scheme, which is of general nature and not a specific one, that will not have any effect on the letter dated 05.10.1991 in Annexure-4 issued by the Department of Steel and Mines.

13. In ***Prafulla Kumar Swain*** (supra), the apex Court has taken into consideration what constitute a Government order. It has been categorically mentioned that proceedings of a departmental promotion committee will not constitute the Government order. All Government orders must be issued under the signature of the Minister according to the Rules of Business.

14. In ***Samsher Singh*** (supra), the apex Court has taken into consideration the effect of the Rules of Business where it is held as follows:-

> "***35***. *The Scheme was upheld for these reasons. The Governor makes rules under Article 166 (3) for the more convenient transaction of business of the Government of the State. The Governor can not only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any particular function. But that could be done on the advice of the Council of Ministers. The essence of Cabinet System of Government responsible to the Legislature is that an individual Minister is responsible for every action taken or*

omitted to be taken in his Ministry. In every administration decisions are taken by the civil servants. The Minister lays down the policies. The Council of Ministers settle the major policies. When a Civil Servant takes a decision, he does not do it as a delegate of his Minister. He does it on behalf of the Government. The offices are the limbs of the Government and not its delegates. Where functions are entrusted to a Minister and these are performed by an official employed in the Ministry's department, there is in law no delegation because constitutionally the act or decision of the official is that of the Minister."

15. Applying the above principle to the present context, since the order dated 05.10.1991 in Annexure-4 has been issued in adherence to the Rules of Business, the same should have been given effect to in letter and spirit and subsequent resolution issued by the Public Enterprises Department calling for option for retirement benefit have no consequence, when the administrative department of OMC Ltd in Annexure-4 dated 05.10.1991 has already approved for introduction of pension scheme for the employees of OMC Ltd. and the Finance Department has concurred with the same.

16. The Public Enterprises Department, vide letter dated 20.12.2011, communicated categorization of Public Sector Enterprises, wherein the name of OMC Ltd finds place under 'Gold' category, along with OPGC, OHPC and IDCO. If the PSUs like OPGC and OHPC, which make profit and for that matter have been categorized as 'Gold', have introduced pension scheme for their employees and the same has been duly approved by the State Government and concurred by the Finance Department and ultimately implemented, such scheme should not have been denied to the employees of OMC Ltd, which amounts to discriminatory treatment by the authorities concerned.

17. When the matter stood thus, on 01.08.2012, the Chairman-cum-Managing Director wrote a letter to the Principal Secretary to the Government, Steel and Mines Department requesting for extension of pensionary benefit to the employees of OMC Ltd. The relevant part of letter dated 01.08.2012 is extracted hereunder:-

"The Govt. in PE Department has categorized the State Public Sector Undertakings/Enterprises, vide Lr. No. Cor-x(D)-07/2011/4733/PE, Bhubaneswar, dated 20.12.2011 (Copy enclosed). OMC has been placed in Gold Category along with OIPGC, OHPC and IDCO. The PE Department is also contemplating for implementation of a Uniform Pension Scheme for the employees of the above PSUs. M/s. Deloitte, Bhubaneswar has also been entrusted with the task of conducting a study of the existing Pension Scheme for them, develop a uniform Pension Scheme and submit the same to the department with 30 days i.e. from 25.05.2012. As the time is already over, M/s. Deloitte might have submitted its report to the Govt.

> *However, now, the Govt. has extended the pensionary benefit to the employees of OHPC, one of the Gold Category PSUs from the date of incorporation of OHPC i.e. 01.04.1996, vide Lr. No. 5449/En., Bhubaneswar dated 11.07.2012. As OMC has also been categorized as Gold Category PSU, fulfilling the prescribed criteria/norms, implementation of similar pensionary benefit/scheme for the employees of OMC may be considered in accordance with the rules and procedures of the OCS (Pension) Rules. It may be noted here that Govt. of Odisha had earlier approved implementation of Pension Scheme equivalent to Govt. Scheme which could not be implemented."*

Once the proposal for implementation of pensionary scheme has been duly approved and concurrence has been granted, as indicated in letter dated 05.10.1991, there was no need for further reconsideration of the matter by the State and as such, such request could not have been made by the Chairman-cum-Managing Director of OMC Ltd. for reconsideration. Nothing has been placed on record by any of the parties to indicate that letter dated 05.10.1991 issued by the Department of Steel and Mines for introduction of pension scheme for the employees of OMC Ltd. has either been annulled, or clarified, or withdrawn at any point of time in between. But in the name of a decision taken in its 355th meeting held on 23.03.2006 for introduction of new pension scheme, namely, "Orissa Mining corporation Retiring Benefits" the board approved the said scheme to be implemented prospectively after approval of the Government and accordingly the Government of Odisha in Steel and Mines Department was moved, vide letter dated 03.04.2006, to accord approval to the said scheme and concurrence of the Finance Department was also sought. In reply thereto, Addl. Secretary to the Government in the Department of Steel and Mines wrote letter dated 30.10.2006 to the Managing Director, OMC Ltd to furnish a clear proposal after taking into account the observations made therein. But that itself is a separate consideration all together and that has got no nexus with the decision taken earlier on 05.10.1991.

18. In view of Section 17 of the EPF and MP Act, 1952, the State Government has exempted OMC Ltd. and the impugned order dated 28.04.2014 in Annexure-9 refusing to extend the pensionary benefits to the employees of OMC Ltd. is arbitrary and without any authority of law. Needless to say that in similar circumstances the Orissa State Electricity Board, as it was then, was exempted from the ambit of EPF and MP Act, 1952, which was subject matter of consideration in a batch of cases in SLP (Civil) No. 1983 of 1994, and SLP (Civil) Nos. 3078, 3080, 3084, 3025 and 3086 of 1995 and the apex Court held that the EPF and MP Act, 1952 on

introduction of pension scheme in April, 1965 is a matter which has to be determined and the same can be implemented by the State under Section 17. Therefore, if the State has already exercised its power under Section 17 of the EPF and MP Act, 1952 granting exemption, in that case subsequent non-extension of pensionary benefit to the employees of the OMC Ltd. amounts to arbitrary and unreasonable exercise of powers by the authorities concerned.

19. In ***Praveen Singh v. State of Punjab***, (200) 8 SCC 633: AIR 2001 SC 152, the apex Court held the arbitrariness, being opposed to reasonableness, is an antithesis to law. There cannot, however, be any exact definition of arbitrariness neither can there be any strait-jacket formula evolved therefor, since the same is dependent on the varying facts and circumstances of each case.

20. In ***Om Kumar v. Union of India***, (2001) 2 SCC 386 : AIR 2000 SC 3689 the apex Court held that arbitrary action is described as one that is irrational and not based on sound reason or as one that is unreasonable.

21. In ***Union of India v. Dinesh Engineering Corporation***, (2001) 8 SCC 491 : AIR 2001 SC 3887 the apex Court held that any decision, be it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision and violative of the mandate of Article 14 of the Constitution.

22. In the case of ***Praveen Singh*** (supra), the apex Court further held as follows:-

> "*The administrative or quasi-judicial authority clothed with the power of selection and appointment ought to be left unfettered in adaptation of procedural aspect but that does not however mean and imply that the same would be made available to an employer at the cost of fair play, good conscience and equity.*"

23. In ***M.Nagaraj v. Union of India***, (2006) 8 SCC 212 : AIR 2007 SC 71, the apex Court held that the constitutional principle of equality is inherent in the rule of law. The rule of law is satisfied when laws are applied or enforced equally, that is, even-handedly, free of bias and without irrational distinction. The concept of equality allows differential treatment but it prevents distinctions that are not properly justified.

24. In ***Ashutosh Gupta v. State of Rajasthan***, (2002) 4 SCC 34 : AIR 2002 SC 1533 the apex Court held that the doctrine of equality before law is a necessary corollary to the concept of the rule of law of the constitution.

25. In ***Indra Sawhney v. Union of India***, (1992) Supp.3 SCC 217 : AIR 1993 SC 477 the apex Court held that the doctrine of equality is a dynamic and evolving concept. The concept of equality before law means that among equals the law should be equal and should be equally administered and the likes should be treated alike. All that Article 14 guarantees is a similarity of treatment and not identical treatment.

26. In view of the law laid down by the apex Court and applying to the present context, since the similarly situated PSUs, such as, OPGC and OHPC, having come within the Gold category, have extended pensionary benefit to their employees, non-extension of such benefit to the similarly situated PSU like OMC Ltd., even though as a matter of principle the State Government has approved the same which has received the concurrence of the Finance Department, amounts to violation of Article 14 of the Constitution of India. As the equality is the basic feature of the Constitution and the concept of Article 14 was interpreted by the Supreme Court as a concept of equality confined to the aspects of discrimination and classification, this Court is of the considered view that in the order impugned dated 28.04.2014, which has been passed while complying with the order dated 08.10.2012 passed in W.P.(C) No. 19405 of 2009, this basic principles have been lost sight of. Therefore, the order impugned dated 28.04.2014 in Annexure-9 cannot sustain in the eye of law and accordingly the same is liable to be quashed and is hereby quashed. This Court directs the opposite parties to reconsider the extension of pensionary benefit, as per the pension scheme approved by the State Government and concurred by the Finance Department in letter dated 05.10.1991 in Annexure-4, as expeditiously as possible, preferably within a period of four months from the date of communication of the judgment.

27. The writ petitions are thus allowed. However, there shall be no order as to costs.

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2019 (I) ILR - CUT- 595

D. DASH, J.

CRA NO. 218 OF 1992

SURENDRANATH BISOI ……..Appellant.

.Vs.

HAREKRUSHNA SAHU & ANR. ……...Respondents.

CODE OF CRIMINAL PROCEDURE, 1973 – Section 374 – Appeal against acquittal by the complainant – Scope and ambit of interference

by the High court – Held, It is the settled position of law that in the absence of any manifest illegality, perversity or miscarriage of justice, the order of acquittal passed by the trial court may not be interfered with by the High Court in exercise of appellate jurisdiction – It has been recently held in case of Madathil Narayanan vs. State of Kerala; (2018) 14 SCC 513 that if the trial court takes the view that the accused deserves to be acquitted on the basis of evidence on record, the same cannot be reversed unless and until it is found that the same is vitiated on account of gross perversity and erroneous appreciation of evidence on record.

For Appellant : Mr.S.K. Patnaik.

For Respondents : M/s. D. Nayak, S. Swain, P.K. Misra, R.C. Swain, S.K. Nayak-3, K. Bisoi, D.P.Dhal, A. Ahad & A.K. Acharay.

JUDGMENT Date of Hearing & Judgment: 19.02.2019

D. DASH, J.

Being aggrieved by the order dated 18.02.1992 passed by the learned Sub-Divisional Judicial Magistrate, Khurda in 1.C.C. Case No. 21 of 1989 (T.R. No. 412 of 1989) acquitting the respondent (accused persons) of the offence under sections 448/325/427/34 IPC, the complainant as the appellant has filed the appeal.

2. The case of the complainant (appellant) is that on 3.2.89 around 1 P.M., the respondent (accused persons) went to his house. It is stated that accused Harekrushna, then serving as the ASI attached to Nirakarpur Police Out-Post under Jankia Police Station asked Muli Bisoi (P.W.3) who happens to be the father of the complainant (P.W.1) as regards the whereabouts of his son namely, Upendra Bisoi, the brother of complainant. It is further stated that said Upendra was wanted in connection with a case which was pending investigation. It is alleged that when P.W. 3 denied to have any knowledge about the whereabouts of Upendra, said accused Harekrushna assaulted him by giving fist blows, slaps and kicks and then he being apprehensive of being further assaulted, entered inside the room. It is next alleged that said Harekrushna forced his entry thereto by breaking open the door with the help of the other accused Bhaskar and after severely assaulting P.W. 3 left the spot.

The complainant P.W. 1 then took P.W. 3 to the hospital and informed the OIC of Jankia Police Station about the incident. It is stated that as no action was taken at that end, the complaint was filed in court.

3. The accused persons have taken the plea of denial and false implication.

4. The complainant has examined in total seven witnesses including the doctor P.W. 6 and has proved the documents which include the medical examination reports.

5. The trial court having formulated the points for determination has gone for analysis of evidence let in by the complainant and upon their evaluation has held the complainant to have failed to prove his case for commission of offence under sections 448/325/427/34 against the accused persons.

6. None appears on behalf of the appellant.

Learned counsel for the respondents has been heard. The judgment passed by the court below as also the depositions of the complainant's witnesses and the documents admitted in evidence from the side of the complainant have been carefully perused.

7. It is the settled position of law that in the absence of any manifest illegality, perversity or miscarriage of justice, the order of acquittal passed by the trial court may not be interfered with by the High Court in exercise of appellate jurisdiction (Ref:-Bindheswari Pr. Singh vs. State of Bihar; (2002) 6 SCC 650; Rathinam vs. State of Tamil Nadu; (2011) 11 SCC 140 and Sunil Kumar Sambhudayal & Gupta vs. State of Maharashtra; (2010) 13 SCC 657. It has been recently held in case of Madathil Narayanan vs. State of Kerala; (2018) 14 SCC 513 that if the trial court takes the view that the accused deserves to be acquitted on the basis of evidence on record, the same cannot be reversed unless and until it is found that the same is vitiated on account of gross perversity and erroneous appreciation of evidence on record.

8. The court below has taken note of the fact that in the complaint as also the initial statement, P.W.1 (complainant) has narrated all the details of the incident as if he was present at the scene at the time of the occurrence. During evidence that has fallen flat on the ground when he has stated that when he had been to take bath, the incident actually took place in his house and its only on his return, he came to learn about it when his father was found to be lying unconscious. He has admitted that he, his father P.W.3 and his brother Upendra are accused in G.R. Case No. 258 of 1988 and the accused of the present case i.e. Harekrushna Sahu was conducting the investigation of the case. He has further admitted that one U.D. case having

been registered for the unnatural death of the wife of his brother, Upendra, it was also being enquired into by said accused Harekrushna. This witness has also stated that his brother Upendra's father-in-law has filed a case against him, his brother Upendra and their father alleging to have been assaulted by them when he had demanded his daughter's ornaments. Although P.W. 1 has denied the fact that on the allegation of commission of rape upon the daughter of accused Bhaskar his brother, Upendra is facing G.R. Case No. 67 of 1989, the relevant record having been proved, it has been established that actually a case under section 376/511 IPC has been registered against the brother of the complainant. With the above relationship between the complainant and his family members on one hand and the accused persons on the other, the trial court as it appears has rightly gone to analyze the evidence on record in a stricter manner with utmost care and caution. The court below has taken into account the fact that the version of P.Ws. 2 and 3 as regards the incident right from the beginning till end substantially differ in material particulars. The evidence of P.W.2, the wife of P.W. 1 when gone through, not only it is seen that she has failed to say the names of the accused persons but also that she has not identified any accused and has further gone to express her inability to recall even the year of the incident. The documents proved from the side of the complainant relating to the so-called medical examination of P.W. 3 having been taken note of, upon examination of evidence of the persons attached to the hospital including the doctors, the court below has raised suspicion to hold that those relate to P.W.3. The trial court has also noted the exaggeration in the evidence of the witnesses examined from the side of the complainant. In view of all the above, the trial court has held the case of the prosecution as to have not been established so as to fasten guilt upon the accused persons.

9. In view of the discussion of evidence as made above, I do not find that the ultimate finding arrived at by the trial court is vitiated on account of perversity and erroneous appreciation of evidence on record warranting interference within the scope and ambit of this appeal.

10. In the result, the appeal stands dismissed.

2019 (I) ILR - CUT- 599

S. PUJAHARI, J.

CRLA NO. 345 OF 2017

ROHIT SARAF ……..Appellant.

.Vs.

STATE OF ORISSA ……...Respondents.

ODISHA PROTECTION OF INTEREST OF DEPOSITORS (IN FINANCIAL ESTABLISHMENTS) ACT, 2011 – Section 13 – Appeal under – Prayer for quashing the order taking cognizance of offences under Sections 465, 467, 468, 471, 420, 406 and 120-B of the Indian Penal Code and Section 6 of the OPID Act, so also the entire criminal prosecution against the appellant – Scope of interfering with such order – Indicated – No material substantiating the allegation – Order of cognizance quashed.

"Before addressing the contention of the parties, it would be apposite to mention here that though this is a criminal appeal, in view of the statutory mandate of Section 13 of the OPID Act that all the orders of the Presiding Officer of the Designated Court (OPID Act) are appealable, but basically the order of cognizance being challenged in this criminal appeal, the limitation of the Court to interfere at the stage of cognizance in exercise of the power under Section 482 of Cr.P.C. would apply to this case. Hence, being alive to the limitation of the Court to interfere at the stage of cognizance in exercise of power under Section 482 of Cr.P.C., this Court has to examine the sustainability of the order of cognizance and the prosecution initiated against the appellant." *(Para 9)*

Case Laws Relied on and Referred to :-

1. 1960 AIR 862 : R.P. Kapur Vs. The State of Punjab.
2. 1992 AIR 604 : State of Haryana & Ors. Vs. Ch. Bhajan Lal & Ors.
3. (1996) 8 SCC 164 : State of Bihar Vs. Rajendra Agrawalla.
4. (2000) 3 SCC 269 : Medchl Chemicals & Pharma (P) Ltd. Vs. Biological E. Ltd.

For Appellant : Mr. Ashok Mohanty, Sr. Adv.
M/s. Sarada Pr. Singh, S. Mohanty,
P.K. Dash & T.K.Pattnaik.

For Respondents : Bibekananda Bhuyan.

ORDER Date of Order : 21.12.2018

S. PUJAHARI, J.

This Criminal Appeal is listed today for orders on the aforesaid I.A. No.1926 of 2018, but the same having been not pressed and the aforesaid Interim Application for intervention filed in Court having been allowed, on the consent of the parties, this Appeal is taken up for final disposal.

2. The appellant in this Criminal Appeal filed under Section 13 of the Odisha Protection of Interest of Depositors (In Financial Establishments) Act, 2011 (for short "OPID Act") has prayed for quashing of the order of cognizance dated 25.01.2017 passed by the learned Presiding Officer, Designated Court (OPID Court), Cuttack in Criminal Trial No.15 of 2016 taking cognizance of the offences under Sections 465, 467, 468, 471, 420, 406 and 120-B of the Indian Penal Code and Section 6 of the OPID Act, so also the entire criminal prosecution against the appellant.

3. Heard Shri Ashok Mohanty, learned senior counsel appearing for the appellant, Shri Bibekananda Bhuyan, learned counsel appearing for the Respondent -State, so also Shri P.K. Pattanaik learned counsel appearing for the Interveners-Victims.

4. The prosecution case, as revealed from the materials available on record, is that one M/s. Seven Hills Estates Pvt. Ltd., who is one of the co-accused in this case, deals with a Real Estate business. Said M/s. Seven Hills Estates Pvt. Ltd. is stated to be the registered owner of a parcel of land in Mouza- Matiapada-2. Out of the said land, M/s. Seven Hills Estates Pvt. Ltd. sold Ac.1.091 decimals in different patches to the complainant – Subhransu Sekhar Senapati and others by registered deeds of sale executed by N. Kishore Reddy and K.C. Panda as the power of attorney holders of said M/s. Seven Hills Estates Pvt. Ltd. and also delivered possession thereof. However, the said land could not be mutated in their names for the reasons that the same was agricultural land coming under the consolidation area and the sales were in violation of the Odisha Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (for short "OCH & PFL Act"), and the transfers were also made without the permission of the Authority concerned. After 6 to 7 years, again the same patches of land, which were earlier sold to the Complainant and others, were again sold to Lingaraj Infrastructure Pvt. Ltd. by M/s. Seven Hills Estates Pvt. Ltd. through another Power of Attorney holder, namely, Anam Sahoo. The present appellant is one of the Directors of said Lingaraj Infrastructure Pvt. Ltd. and he had also signed in the sale deed on behalf of the vendee-company. After sale of the aforesaid land, a report was lodged by the former purchasers of the land in the name of M/s. Seven Hills Estates Pvt. Ltd. and the Firm of the present appellant alleging them to have committed fraud and forgery and cheated them inasmuch as without any transferable title they executed the sale deeds, and in connivance with the present appellant they subsequently sold the same to Lingaraj Infrastructure Pvt. Ltd. Basing on their such report, investigation was carried on and

ultimately charge-sheet has been filed against M/s. Seven Hills Estates Pvt. Ltd. for the aforesaid offences along with the present appellant showing him as a conspirator.

5. Challenging the impugned order of cognizance and also the prosecution launched against the appellant, Mr. Ashok Mohanty, learned senior counsel appearing for the appellant submits that the prosecution against the appellant in the aforesaid case is totally misconceived inasmuch as it is never the allegation of the prosecution that the appellant was a party to the sales earlier made in violation of the OCH & PFL Act by M/s. Seven Hills Estates Pvt. Ltd. It is not in dispute that M/s. Seven Hills Estates Pvt. Ltd. without having transferable title had sold the disputed land to them with delivery of possession. However, the R.O.R. in respect of the said land having continued to remain in the name of M/s. Seven Hills Estates Pvt. Ltd., the company of the appellant without knowing the fact of the earlier sales, purchased the entire tract of land and got the same mutated in its favour. The learned senior counsel submits that the appellant, who had purchased the litigated property on behalf of the company, could not have been booked for the aforesaid offences and proceeded against, especially when neither the company of the appellant is financial establishment nor it had any link with the financial establishment when the alleged moneys were accepted for transferring the disputed land to the complainant and others. In such premises, it is submitted that the prosecution against the appellant in aid of Section 120-B of IPC, is totally misconceived and the prima-facie allegation being not capable of making out any case against the appellant, the impugned order of cognizance against the appellant is liable to be quashed. Furthermore, it is submitted that the same is more so when the sales made in favour of the earlier purchasers have already been found to be void.

6. On the other hand, Shri Bibekananda Bhuyan, learned counsel appearing for the State submits that since in this case the materials on record would go to show that the appellant is stated to have purchased an encumbranced property from M/s. Seven Hills Estates Pvt. Ltd. knowing well that the same was in possession of others, and thereby put the ownership of the earlier purchasers over the property at a stake in connivance with the original owner. Shri Bhuyan, learned counsel for the State further submits that the Court at the stage of taking cognizance being required only to look into the prima-facie case without resorting to any detail documentation and appreciation of the materials on record, the present appeal is devoid of merit. At the same time, Shri Bhuyan, learned counsel for the State fairly submits

that the indictment of the appellant in this case is confined to one under Section 120-B of IPC alone and no offence under the OPID Act is made out against him inasmuch as he is not a financial establishment and he was not in picture when the transaction had taken place between the Complainant and others and M/s. Seven Hills Estates Pvt. Ltd. in respect of the disputed land.

7. Shri P.K. Pattanaik, learned counsel appearing for the Interveners-victims would submit that since the Interveners-victims have been cheated in this case and the appellant though had promised for refund of their money, and the same having not been refunded whereas money has been refunded to some of the persons in similar footing, this Court should not quash the impugned order of cognizance or the prosecution launched against the appellant.

8. In rejoinder, Shri Ashok Mohanty, learned senior counsel appearing for the appellant submits that the aforesaid contention is fallacious inasmuch as even if the appellant had paid back some money out of sympathy to earlier purchasers on behalf of the company, that does not mean that he was a party to any conspiracy for commission of the aforesaid offences. Therefore, it is submitted that the impugned order of cognizance against the appellant is totally misconceived and the same is liable to be quashed, so also the prosecution against the appellant.

9. Before addressing the contention of the parties, it would be apposite to mention here that though this is a criminal appeal, in view of the statutory mandate of Section 13 of the OPID Act that all the orders of the Presiding Officer of the Designated Court (OPID Act) are appealable, but basically the order of cognizance being challenged in this criminal appeal, the limitation of the Court to interfere at the stage of cognizance in exercise of the power under Section 482 of Cr.P.C. would apply to this case. Hence, being alive to the limitation of the Court to interfere at the stage of cognizance in exercise of power under Section 482 of Cr.P.C., this Court has to examine the sustainability of the order of cognizance and the prosecution initiated against the appellant. For quashment of the order of cognizance, the Apex Court in the case of ***R.P. Kapur vrs. The State of Punjab,*** reported in 1960 AIR 862, have held as follows :-

> "17. xxxxx xxxxxx xxxxx
>
> It is well settled that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings

instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under s. 561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained."

Further, the Apex Court the case of ***State of Haryana and others vrs. Ch. Bhajan Lal and others,*** reported in 1992 AIR 604, have held that unless the case is covered by any of the contingencies mentioned therein, the Court should not interfere with the order of cognizance and issuance of process against the person. One of those contingencies is, where the allegations made in the F.I.R. or complaint and the materials, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.

So also, the Apex Court in the case of ***State of Bihar vrs. Rajendra Agrawalla,*** reported in (1996) 8 SCC 164, have held that "the inherent power of the court under Section 482 of the Code of Criminal Procedure should be very sparingly and cau7tiously used only when the court comes to the conclusion that there would be manifest injustice or there would be abuse of the process of the court, if such power is not exercised. So far as the order of cognizance by a Magistrate is concerned, the inherent power can be exercised when the allegations in the first information report or the complaint together with the other materials collected during investigation taken at their face value,do not constitute the offence alleged. At that stage it is not open for the court either to sift the evidence or appreciate the evidence and come to the conclusion that no prima facie case is made out".

Further, the Apex Court in the case of ***Medchl Chemicals & Pharma (P) Ltd. vrs. Biological E. Ltd.,*** reported in (2000) 3 SCC 269, have held that "exercise of jurisdiction under the inherent power as envisaged in Section 482 of the Code to have the complaint or the charge-sheet quashed is an exception rather than a rule and the case for quashing at the initial stage must have to be treated as rarest of rare so as not to scuttle the prosecution. With the lodgement of first information report the ball is set to roll and thenceforth the law takes its own course and the investigation ensues in accordance with the provisions of law. The jurisdiction as such is rather limited and restricted and its undue expansion is neither practicable nor warranted. In the event, however, the court on a perusal of the complaint comes to a conclusion that the allegations leveled in the complaint or charge-sheet on the face of it do not constitute or disclose any offence as alleged, there ought not to be any hesitation to rise up to the expectation of the people and deal with the situation as is required under the law. To exercise powers under Section 482 of the Code, the complaint in its entirety will have to be examined on the basis of the allegation made in the complaint and the High Court at that stage has no authority or jurisdiction to go into the matter or examine its correctness. Whatever appears on the face of the complaint shall be taken into consideration without any critical examination of the same. But the offence ought to appear ex-facie on the complaint. The truth or falsity of the allegations would not be gone into by the Court at this earliest stage. Whether or not the allegations in the complaint were true is to be decided on the basis of the evidence led at the trial. So the question is: Can it be said that the allegations in the complaint do not make out any case against the accused nor do they disclose the ingredients of an offence alleged against the accused or

the allegations are patently absurd and inherently improbable so that no prudent person can ever reach to such a conclusion that there is sufficient ground for proceeding against the accused ?"

10. Keeping in mind the aforesaid, the contention advanced in this case is to be addressed.

11. Admittedly, M/s. Seven Hills Estates Pvt. Ltd., who is the owner of the land, had sold the said land to the complainant and others in patches in violation of the OCH & PFL Act on receipt of consideration. The possession of the property is stated to have been delivered, but the same could not be mutated in revenue record inasmuch as the fragmented piece of land was shown to have been sold without the permission of the appropriate authority under the OCH & PFL Act. When the persons paid the money for the said lands prima-facie and got the same registered in their names, it is an admitted fact that the subsequent purchaser, i.e., M/s. Lingaraj Infrastructure Pvt. Ltd. was nowhere in picture. Nowhere, it is alleged that M/s. Lingaraj Infrastructure Pvt. Ltd. was a party to such sale or had given any promise for delivery of the salable title to them in the property. The only allegation is that M/s. Seven Hills Estates Pvt. Ltd. sold the disputed land to complainant and many others, but title in the same could not be delivered, and many years thereafter the same owner sold the land to the company of the present appellant. Even if it is accepted that the appellant knowing well the said land to have been earlier sold to the complainant and others, got the land transferred in favour of his company, it can very well be said that the appellant purchased a litigated property which was purchased by some other persons anterior in time. It is also an admitted fact that in the meanwhile the title of those earlier sale deeds has been declared null and void. The indictment of the appellant is one under Section 120-B of IPC which speaks of criminal conspiracy which always precedes the commission of an offence. A conspiracy cannot be subsequent to the commission of offence. Admittedly, it is the allegation of the complainant and others that they could not have purchased the disputed land had they known beforehand that M/s. Seven Hills Estates Pvt. Ltd. was not in a position to transfer any salable title of the land to them and, therefore, M/s. Seven Hills Estates Pvt. Ltd. is alleged to have cheated them by committing fraud and forgery by taking money from them without having any saleable title, and again they sold the same to the company of the present appellant. If at all the appellant had committed any wrong, it is only that he knowing well that the lands were earlier sold, again purchased the same. Therefore, prima-facie no offence under Section 120-B of IPC is made out against the appellant in the aforesaid case for

commission of the offences, inasmuch as there exists no material indicating him to have conspired with M/s. Seven Hills Estates Pvt. Ltd. to deceive the earlier purchasers or commit any fraud and forgery. This Court, ultimately, is of the view that the appellant, who prima-facie appears to be a victim of circumstances, could not have been prosecuted criminally. Liability, if any, of the appellant on account of the purchase of the property by the complainant and others, is purely civil in nature, for which the appellant could not have been prosecuted criminally. In absence of any criminal element to be attributed to the appellant, the prosecution launched against him appears to be misconceived.

12. Accordingly, this Criminal Appeal is allowed and the proceeding against the present appellant for alleged commission of the offences stands quashed. The trial court shall do well to comply with this order on production of the certified copy of this order.

2019 (I) ILR - CUT- 606

S. PUJAHARI, J.

CRLMC 3362 OF 2018

TARACHAND AGARWAL .....Petitioners

.Vs.

STATE OF ORISSA .....Opp. Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Section 311 – Criminal Trial – Recall of witness for re-examination – Principles – Indicated.

"The power under Section 311 of Cr.P.C. which is vested with the Court of wide amplitude and aim at doing justice to a party. The Court, therefore, at any stage of the enquiry of a criminal trial and in any other proceeding can recall a witness who has already been examined, cross-examined and discharged either for cross-examination or re-examine, but the criteria for the same is that the evidence of such witness, for which he/she is going to be recalled, is essential for just decision of the case. The object of the aforesaid provision is to unveil the truth or arrive at the truth through the evidence and decide the case justly. The entire object of the case is to do justice not only from the point view of the accused, but also for the prosecution and for an orderly society, the power, therefore, is required to be exercised only for strong and valid reasons with caution and circumspection and cannot be allowed as a matter of course." *(Para 4)*

For Petitioner : M/s. Samvit Mohanty.
For Opp. Party : Mr. Niranjan Moharana (ASC. VIG.)

ORDER Date of Order : 07.02.2019

S. PUJAHARI, J.

Heard Shri Mohanty, the learned counsel for the petitioner and Shri Niranjan Moharana, learned Addl. Standing counsel appearing for the Vigilance Department.

2. This application under Section 482 of Cr.P.C. has been filed by the petitioner, who is an accused in G.R. Case No.13 of 2008, challenging the order dated 02.08.2018 passed by the learned Special Judge, (Vigilance), Bhawanipatna in G.R. Case No.13 of 2008 rejecting the prayer made by the petitioner to recall the P.W.2 who has examined, cross-examined and discharged on 04.07.2014.

3. It appears that the petitioner wants to ask certain questions to P.W.2 as to whether freezers which stated to have been supplied, belong to one Company or different Companies and the serial number appearing in Ext.38 relates to a single freezer or three different freezers. Since the aforesaid P.W.2 had not stated that his company has supplied the aforesaid freezers to the Accused-petitioner and P.W.2 was examined by the prosecution as the Investigating Agency taken assistance of the said P.W.2 to ascertain the capacity of the freezers held, the cross-examination of the said witness on recall to clarify the aforesaid is not to serve any purpose. It appears that the trial Court had also taken note of the fact that in view of the categorical answer of the P.W.2 about the storage and cooling capacity of the Air Conditioners of Sriram Air Conditioning Private Limited and also Usha International Limited and Sriram Air Conditioning Private Limited and Usha International Limited are separate Companies as has been brought out by the defence through evidence of P.W.2, the question desired to be asked is an afterthought and aimed at protracting the trial, holding the same the trial Court rejected the prayer made.

4. The power under Section 311 of Cr.P.C. which is vested with the Court of wide amplitude and aim at doing justice to a party. The Court, therefore, at any stage of the enquiry of a criminal trial and in any other proceeding can recall a witness who has already been examined, cross-examined and discharged either for cross-examination or re-examine, but the criteria for the same is that the evidence of such witness, for which he/she is going to be recalled, is essential for just decision of the case. The object of the aforesaid provision is to unveil the truth or arrive at the truth through the evidence and decide the case justly. The entire object of the case is to do justice not only from the point view of the accused, but also for the prosecution and for an orderly society, the power, therefore, is required to be

exercised only for strong and valid reasons with caution and circumspection and cannot be allowed as a matter of course.

5. Keeping in mind the aforesaid, when the case in hand is addressed, it appears to this Court that the trial Court making a detailed discussion held the recall of the said witness, i.e., P.W.2, is not essential for the just decision of the case but aimed to protract the trial.

6. On consideration of the aforesaid facts and submissions made and also the reasons given by the trial Court to reject the prayer made, this Court, therefore, finds no infirmity in the said order of refusal to recall of P.W.2. Accordingly, this CRLMC stands dismissed.

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2019 (I) ILR - CUT- 608

BISWANATH RATH, J.

MACA NO.1017 OF 2012

THE B.M., N.I. CO. LTD. …….Appellant.

.Vs.

PABITRA MAJHI & ANR. ……...Respondents.

MOTOR ACCIDENT CLAIM – Appeal by Insurance Company challenging the award passed making it liable for payment – Material suggests that the offending vehicle was not insured with the Company on the date of accident – Whether the Insurance Company can be made liable? – Held, no, award to be made good by the owner of the offending vehicle – Appeal allowed.

"Considering the rival contentions of the parties and on perusal of the Issue No.I coupled with the discussions in paragraph-8 as well as in paragraph-11 and the disclosures from the award regarding filing of the registered postal receipt and receipt of Flying Courier vide Exts.H and J by the Insurance Company, particularly to establish that the vehicle involved was not insured on the date of accident, thereby taking away the liability of the Insurance Company, this Court finds, it is a case of non-consideration of the materials available on record. For the perversity in the finding and further being contrary to the admitted materials available on record, this Court finds, the impugned awards so far it relates to saddling the liability on the Insurance Company is not sustainable. In the process, interfering in the impugned award to the extent fixing the liability on the Insurance Company in both the matters, this Court declares fixation of liability on the Insurance Company as bad. This Court finds, there is no appeal by the owner involving the said awards, in the circumstance, this Court while modifying the awards to the extent indicated above, further directs the owner-respondent no.2 in both the appeals to make the compensation granted by the District Judge-cum-M.A.C.T.(I), Balangir involving the impugned award."

For Appellant : M/s.V. Narasing , S,K,Senapati & Das
For Respondents : M/s. S.K. Joshi, A.K.Joshi & Somonath Dash

ORDER Date of Order : 19. 11. 20.18

B. RATH, J.

Both the Appeals being involved common fact as well as issues, on the consent of the parties, both the Appeals are taken up together for hearing and are disposed of by this common order.

2. Heard Shri Narasingh, learned counsel appearing for the appellant and Shri Joshi, learned counsel appearing for the respondent no.1. None appears for the respondent no.2 at the time of hearing.

3. Both the appeals involve a challenge to the common impugned judgment and award dated 14.08.2012 passed in M.A.C. No.87 of 2007 by the learned District Judge-cum-M.A.C.T.(I), Balangir.

4. Short background involving the M.A.C. Case is that the Claimant-Respondents filed applications vide M.A.C. No.86 of 2007 and M.A.C. No.87 of 2007 respectively with the facts that on 06.06.2006 at about 4 p.m. while the injured – Pabitra Majhi along with his wife, namely, Tila @ Dibya Majhi and their small child were going towards their native village- Malpara from Patnagarh after attending medical work by riding with his Hero Honda motorcycle at Mundodarah chowk, the offending vehicle came with rash and negligent speed and dashed against them, for which the appellants sustained grievous injury on their persons making them lying on the road. It is also alleged that the offending vehicle dashed and dragged them near about ten feets. It is in the premises of rash and negligent driving by the offending vehicle, the Claimants-respondents have claimed financial compensation involving the Insurance Company and bringing a case involving an insured vehicle.

On its appearance, the Insurance Company in filing the written statement had a clear denial about the existence of the Insurance policy and, as such, denied the liability of the Insurance Company involved herein. Thus, the Appeal by Insurance Company appears to be against liability.

Considering the pleadings of the parties as well as the evidence oral and documentary being produced by both the sides, the learned District Judge-cum-M.A.C.T.(I), Balangir passed an Award in favour of the Claimant-respondents directing the Insurance Company to pay a sum of Rs.2 lacs to the Claimant-husband with interest @7% per annum from the date of filing of the claim petition till its realization within one month. The Insurance Company is also

directed to pay Rs.18,700/- to the Claimant-wife with interest @7% per annum from the date of filing of the claim till its realization within one month.

Assailing the impugned orders, the appellant-Insurance Company in filing both the separate Appeals challenged the liability saddled by the Court below on the Insurance Company.

5. Shri Narasingh, learned counsel appearing for the appellant-Insurance Company taking this Court to the grounds taken in the memorandum of appeal, the discussions made in the impugned award, more particularly in paragraph-11 as well as the discussions on the marking of documents by the respective parties, contended that the ultimate finding of the District Judge-cum-M.A.C.T.(I), Balangir remains contrary to the discussions on the claim of the Insurance Company as well as the materials, more particularly Exts.H and J admitted in the lower Court proceeding. It is in the above premises and on the ground of perversity and the reason in contrary to the materials available on record, learned counsel appearing for the Insurance Company submitted that saddling of liability on the Insurance Company by the lower Court in both the Awards is improper and ought to be interfered and set-aside.

6. Shri Joshi, learned counsel appearing for the Claimant-respondents on the other hand taking this Court to the findings arrived at by the lower Court, contended that for the discussions in the finding portion, there is no illegality and further for the observations of the Court below that there is no material either oral or documentary to establish non-insurability of the vehicle, there is no scope of interfering in such impugned awards by this Court.

7. Considering the rival contentions of the parties and on perusal of the Issue No.I coupled with the discussions in paragraph-8 as well as in paragraph-11 and the disclosures from the award regarding filing of the registered postal receipt and receipt of Flying Courier vide Exts.H and J by the Insurance Company, particularly to establish that the vehicle involved was not insured on the date of accident, thereby taking away the liability of the Insurance Company, this Court finds, it is a case of non-consideration of the materials available on record. For the perversity in the finding and further being contrary to the admitted materials available on record, this Court finds, the impugned awards so far it relates to saddling the liability on the Insurance Company is not sustainable. In the process, interfering in the impugned award to the extent fixing the liability on the Insurance Company in both the matters, this Court declares fixation of liability on the Insurance Company as bad. This Court finds, there is no appeal by the owner involving the said awards, in the circumstance, this Court while modifying the awards to the extent indicated above, further directs

the owner-respondent no.2 in both the appeals to make the compensation granted by the District Judge-cum-M.A.C.T.(I), Balangir involving the impugned award.

8. Both the Appeals stand allowed accordingly, but however with the modification of the impugned awards only in respect of liability which is now shifted to the owner. Since both the appeals are at the instance of the Insurance Company, the statutory deposit may be returned back to the Insurance Company along with accrued interest on proper application.

2019 (I) ILR - CUT- 611

BISWANATH RATH, J.

W.P.(C) NO.9090 OF 2018
&
W.P.(C) NO.26164 OF 2017

In W.P.(C) No.9090 of 2018
NAKULA CHARAN DAS .....Petitioner

.Vs.

KUSHANATH DAS & ORS. .....Opp. Parties

For Petitioner : M/s. S.K.Mishra, J. Pradhan, S. Rout & P.S. Mohanty
For Opp.Party : Mr. A.P. Bose, N. Hota, V.Kar, D.J. Sahoo & S.S. Dash ,Sri S.N.Mishra, Addl. Govt. Adv.

In W.P.(C) No.26164 of 2017
NAKULA CHARAN DAS .....Petitioner

.Vs.

COLLECTOR-CUM-DISTRICT MAGISTRATE, KEONJHAR & ORS. ..... Opp. Parties

For Petitioner : M/s. S.K.Mishra, J. Pradhan, S. Rout & P.S. Mohanty
For Opp.Party : S.N.Mishra, Addl. Govt. Adv.
: Mr. A.P. Bose, N. Hota, V.Kar, D.J.Sahoo & S.S. Dash

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Challenge is made to the order passed by the Election Tribunal and the Appellate forum – Notification for election of Sarpanch reserved for Schedule caste male – Petitioner's caste is Pana but in the ROR it is mentioned as "Pana Baishnaba" – Caste Certificate indicates the caste of the petitioner to be 'Pana' – Petitioner elected as Sarpanch – Election dispute raised challenging the caste – The Election Tribunal declared the candidature of petitioner as void on the ground that the petitioner was not a Schdule caste – Confirmed by the appellate court

– The question arose as to whether the Election Tribunal has jurisdiction to determine the caste of a candidate when there is availability of a valid caste certificate and in absence of challenge to the said caste certificate – Jurisdiction of both courts questioned – Held, both the courts below have exceeded their jurisdiction in entering into the conflict to which they have no jurisdiction and the impugned orders having been passed entering into the question of validity of the caste certificate in an election proceeding, the same cannot be sustained.

Case Laws Relied on and Referred to :-

1. 2018 (II) CLR (SC) 1159 : State of Orissa Vs. Dasarathi Meher.
2. 2018(II) CLR (SC) 404 : Bharati Ready Vs. State of Karnataka & Ors.
3. 2011 (II) CLR (SC) 1036 : Collector, Bilaspur Vs. Ajit P.K.Jogi & Ors.
4. AIR 1986 SC 1534 : Bhagawati Prasad Dixit 'Ghorewala' Vs. Rajeev Gandhi.
5. AIR 1995 SC 94 : Kumari Madhuri Patil & Anr. Vs. Addl. Commissioner, Tribal Development & Ors.
6. 2018 (II) CLR 404 : Bharati Reddy Vs. State of Karnataka & Ors.

JUDGMENT Date of Hearing:19.02.2019 : Date of Judgment : 08.03.2019

B. RATH, J.

W.P.(C) No.9090 of 2018 is filed by the elected candidate challenging the orders involving election dispute under the Orissa Grama Panchayat Act, involving challenge to the order passed in Election Misc. Case No.2 of 2017 vide Annexure-1 and the Appellate Court's order in Election Appeal No.1 of 2018, vide Annexure-2, whereas W.P.(C) No.26164 of 2017 is filed involving the proceeding under Section 26(2) of the Orissa Grama Panchayat Act disposed of as allowed by the Collector & District Magistrate, Keonjhar, vide Annexure-4 therein. It is needless to mention here that both the proceedings under the Grama Panchayat Act involved one election and also involved one elected candidate though involving proceeding under different provisions of law. Result of W.P.(C) No.26164 of 2017 since is dependent on the ultimate outcome involving W.P.(C) No.9090 of 2018, W.P.(C) No.9090 of 2018 is taken up first.

2. The short background involved in the cases is that pursuant to Election Notification No.4534 dated 18.11.2016 issued by the State Election Commissioner, election for the post of Sarpanch of Mareigaon Gram Panchayat under Hatadihi Panchayat Samiti was held on 13.02.2017 and the date of publication of result was 23.02.2017. The post of Sarpanch of Mareigaon Grama Panchayat was reserved for Scheduled Caste male

candidates. Five persons namely Ajay Jena, Debendra Kumar Jena, Bhakta Sekhar Jena as well as the petitioner Nakula Charan Das submitted their nominations. On filing of the nomination, on the premises of doubt in the caste of Nakul Charan Das, petitioner in both the writ petitions, on 11.01.2017, the election petitioner submitted written objection before the Panchayat Level Election Officer-opp. party no.3 involving W.P.(C) No.9090 of 2018 and on 18.01.2017, Kushanath Das prayed for cancellation of the nomination paper of the petitioner involved herein at the time of scrutiny on the premises that the petitioner in W.P.(C) No.9090 of 2018 does not belong to Scheduled Caste. In spite of written objection and oral objection of Kushanath Das as well as his proposer and seconder, opp. party no.3 did not respond and there has been illegal acceptance of nomination paper of the petitioner. It is alleged that opp. party no.3 should have conducted enquiry in terms of Rule 25 of Orissa Gram Panchayat Rules and should have rejected the nomination paper of the petitioner in W.P.(C) No.9090 of 2018. It is further alleged that in spite of the present petitioner not being eligible to contest the election, he was permitted to contest the election and ultimately was also declared as the elected Sarpanch compelling the opposite party no.1 in W.P.(C) No.9090/2018 to file election petition with a prayer to declare acceptance of nomination paper of opp. party no.1 by opp. party no.3 for the post of Sarpanch, Mareigaon Gram Panchayat illegal and thereby also to declare the result of election as void. In the same application, the petitioner therein also sought for a declaration to declare the nearest candidate as the elected Sarpanch of the Mareigaon Gram Panchayat. Petitioner involving both the writ petitions appearing therein filed his show-cause inter alia contending that on the date of scrutiny of nomination paper, he was not aware about the presence of proposer and seconder and his nomination paper was duly accepted for being supported with the caste certificate. On 23.02.2017, the petitioner on declaration of the result of the election was declared elected obtaining highest number of valid votes. It is further contended that the petitioner not only belongs to Schedules Caste but in the Record of Right though mentioned his caste as “Pana Baishnab”, but “Baishnab” is not the cast rather it is a title and designation attached therein. To explain his designation, the petitioner further submitted that during the period of Sri Chaitanya Dev, a devotee of Lord Bishnu, Baishnavism was spread and propagated by him in the State of West Bengal as well as Orissa. During the period, persons belonging to different categories became devotees of Lord Bishnu and his disciples were called as Baishnabs. Thus, the petitioner claimed that Bishnab is only his designation and has nothing to do

with the caste of the petitioner "Pana". It is on the premises that the caste of the petitioner is "Pana" and being an item in the schedule of the presidential notification, the petitioner claimed to be Scheduled Caste and thus claimed that he has been rightly permitted to contest the election for the post of Sarpanch. Petitioner appearing as opposite party in the election petition strongly relied on the Caste Certificate issued by the competent authority.

3. Considering the rival contention of the parties, trial Court involving Election Misc. Case No.2 of 2017 framed the following issues.

(i) Whether the O.P. No.1 belongs to Scheduled Caste?

(ii) Whether the nomination paper of O.P. No.1 has been improperly accepted?

(iii) Whether the acceptance of nomination paper of O.P. No.1 by O.P. No.3 for the post of Sarpanch of Mareigaon Gram Panchayat is illegal, unjust and Invalid ?

(iv) Whether on dtd.23.02.2017 declaring O.P. No.1 as the Sarpach of Mareigaon Gram Panchayat by O.P. No.2 is void?

(v) Whether the petitioner can be declared as Sarpanch being the nearest candidate of Mareigaon Gram Panchayat?

(vi) Whether the petitioner is entitled to any other relief and the O.P. No.1 is liable to pay any cost?

4. To establish their respective case, the election petitioner- the present opp. party no.1 examined P.W.1 to P.W.6 including himself himself as P.W.4. This apart, the opp. party no.1 herein, the election petitioner also exhibited Ext. 1 to Ext.4/27. Similarly, the writ petitioner being opp. party no.1 in the trial Court examined D.W.1 to D.W.9 and marked documents as Exts. A to Exts. W/1.

Considering the materials available on record, both oral and documentary, pleading of the parties and the submissions of the respective parties, the Election Tribunal disposing the Election Misc. Case No.2 of 2017 held as follows :-

> "From the aforesaid discussions with respect to different issues, it is clear that, O.P. No.1 does not belong to scheduled caste and accordingly he is disqualified to be elected under the provision of this Act and his nomination paper was improperly accepted and accordingly declaring him as Sarpanch of Mareigaon Gram Panchayat on dtd.23.02.2017 is void. Hence, ordered."

Thereby declaring the election of the present petitioner as bad in law and that his nomination paper was illegally accepted. On appeal, the Election

Appeal No.1 of 2018 at the instance of the present petitioner, the opp. party no.1 in the original proceeding, the appellate authority dismissed the appeal in confirmation with the findings of the original authority. At the same time, the appellate authority consequent upon election of the opp. party no.1 in the election proceeding-the present petitioner being declared void, further declared that a casual vacancy is created in respect of the post of Sarpanch of the Mareigaon Gram Panchayat under Hatadihi Grama Panchayat Samiti.

5. Challenging the orders passed by both the original authority as well as the appellate authority, Sri Mishra, learned counsel appearing for the elected candidate lost in both the forums, on reiteration of his case in both the forums and taking this Court to the materials on record as well as the evidence available in the original proceeding contended that for the allegation made questioning the election of the return candidate, it was necessary on the part of the opp. party no.1 to establish with conclusive material regarding the disqualification involving the return candidate. Sri Mishra, learned counsel appearing for the petitioner, thus, contented that there is no satisfaction of the provision of Section 101 of the Evidence Act, 1872 by the election petitioner-the opp. party 1 in W.P.(C) No.9090 of 2018 herein. Further, taking this Court to the caste certificate, vide Ext. A and the register of the year, Ext.B regarding issuance of caste certificate in favour of the elected candidate, Sri Mishra, leaned counsel for the petitioner submitted that unless there is challenge to the caste certificate vide Ext. A so also Ext.B , the contents in the Register issuing caste certificate and there is a declaration by competent Court of law declaring both the actions as illegal, there was no occasion for the Courts below to disbelieve the certificate and decide the case against the petitioner, the elected candidate. Sri Mishra, learned counsel for the petitioner further taking this Court to the cross- examination of the Tahasildar, Hatadihi, P.W.7 submitted that for the clear evidence of P.W.7, there was no question of disbelieving the certificate at Ext.A. Further, for the existence of the Caste certificate vide Ext. A, there is also no possibility of a view declaring that Ext.A is a fake certificate, particularly, in absence of any challenge to such certificate in competent court of law. Referring to decisions reported in AIR 1995 S.C. 94, 2011 (II) CLR 1036, and further decision in 2018 (II) CLR (S.C) 404, Sri Mishra, learned counsel for the petitioner submitted that for clear decision of the Hon'ble Apex Court in the above decisions, documents at Ext.A and B involving the caste certificate could not be questioned involving an election dispute and the Caste Scrutiny Committee is the only competent authority to take up such issues. For the demonstration of the case of the petitioner that Baishnaba is only a designation and mere mentioning of Pana

Baishnab in some documents does not reflect Caste of a person. For no support of Amin report, Sri Mishra also submitted that documents at Ext. 5 and Ext.6, further being questioned by the election petitioner, these two documents had no relevance in the determination of the case involving the election petition and thus contended that the documents have been wrongly relied by the trial Court. Sri Mishra, learned counsel for the petitioner on the other hand taking this Court to the document at Ext. K contended that for the information therein that there is no limitation period involving the validity of Caste Certificate and the Ext. A being the true/valid original one, there was no scope for the trial Court or the appellate Court to discard such certificate. Further, taking to the document at Ext. C, Sri Mishra learned counsel for the petitioner submitted that there is further material placed in the trial court to establish that petitioner was getting some benefits by virtue of his belonging to Scheduled Caste. It is also contended by Sri Mishra that for Ext.D establishing the petitioner's availing the post-matric stipend as a student of Baula Junior College in the years, 1986-87 and 1987-88, there is ample material to establish the case of the election petitioner. For non-availability of register of a year, Sri Mishra, learned counsel for the petitioner submitted that this could not have been facilitated drawing the conclusion that no caste certificate was ever issued in that year. Similarly, taking to other documents, vide Exts.A, B, H, J, K, L, R, M, N & P. Sri Mishra, learned counsel for the petitioner submitted that for the number of documents referred to hereinabove establishing the claim of the petitioner belonging to "Pana" as Scheduled Caste, Sri Mishra, learned counsel for the petitioner contended that trial Court failed in appreciating such material evidence. Referring to the Gazette also, Sri Mishra, learned counsel for the petitioner submitted that there has been no proper consideration of the information to the Gazettee by the trial Court. While challenging the order of the trial Court on the same premises, Sri Mishra, learned counsel for the petitioner also attacked the order passed by the appellate Court and ultimately contended that for the appellate Court entering into a different consideration, not being available in the trial Court, the appellate Court's judgment also otherwise remains bad and cannot be construed to be the judgment in concurrence of the Trial Court. In the above circumstances and taking this Court to the decisions reported in AIR 1965 S.C 1269, AIR 1995 SC 94, 2011 (II) CLR (SC) 1036 & 2018 (II) CLR (SC)-404, Sri Mishra, learned counsel appearing for the petitioner prayed this Court for interfering in both the impugned orders and setting aside the same thereby allowing the writ bearing W.P.(C) No.9090 of 2018 and for same reason, this Court should also interfere in the impugned order involving W.P.(C) No.26164 of 2017 and set aside the impugned order at Annexure-4 involving this writ petition.

6. In his opposition, Shri A.P. Bose, learned counsel appearing for the contesting opp. parties in both the writ applications on reiteration of the election petitioner's plea in the trial Court and further in the appeal as the contesting respondent while opposing each of the contentions raised by the learned counsel for the petitioner taking this Court to the documents relied on by the evidence of plaintiff therein, the documents Ext.1 to Ext.4/27 and taking this Court, particularly to the exhibits at his client's instance in the trial Court submitted that for the material available on record, the observation of the trial Court is in proper consideration of the material available on record. Referring to the documents exhibited by the elected candidate in the trial Court, Ext.A and the evidence thrown by the Tahasildar, Hatadihi clearly deposing in his cross-examination that there is no such Register available for issuance of such certificate, Sri Bose, learned counsel for contesting opp. party submitted that there is no existence of any such Caste Certificate. Sri Bose thus contended that there is right appreciation of the issue involved by both the Courts below. Taking this Court to the documents at Ext.B, the letter of the Tahasildar, Hatadihi indicating that there is no availability of Misc. Case Certificate registered for the year 1989 and further the Register of the year 2009 clearly disclosing at serial no.69, the elected candidate belongs to Pana Bishnab Caste and further for non-availability of Caste "Pana Baishnab" in the schedule of the Presidential Notification. Sri Bose, learned counsel appearing for the contesting opp. parties contended that there is also right appreciation of this aspect by both the courts below thereby took the plea that there is no infirmity in the order of the original authority or the appellate authority requiring any interference in both the impugned orders by this Court. Sri Bose, further taking this Court to the findings of both the Courts below submitted that for the detailed discussions and the findings of both the forums having based on reasonable assessment, both the impugned orders cannot be held to be otherwise bad. Sri Bose, learned counsel for the contesting opp. parties lastly submitted that there being a concurrent finding of fact by both the courts below, there is no scope for interfering in either of the impugned orders. Besides taking this Court to the observations of the Collector in the disposal of the 26 (2) of the Grama Panchayat Act, involving W.P.(C) No.26164 of 2017, Sri Bose, learned counsel appearing for the contesting opp. parties in both the writ petitions submitted that there being a common view of both the Courts below and the Collector, it appears there is reasonable consideration by at least three authorities involving the dispute involved herein. In the circumstances, Sri Bose, learned counsel for the contesting opp. parties prayed this Court for dismissing both the writ petitions.

7. Considering the rival contentions of the parties, this Court finds, Kushanath Das, O.P.1 involving W.P.(C) No.9090/2018 filed the election

dispute bearing Civil Miscellaneous Case No.2/2017, inter alia, on the ground that Nakul Charan Das, petitioner involving both the writ petitions the elected candidate involving the post of Sarapanch, Mareigaon Gram Panchyat on the premises of illegal acceptance of his nomination paper by the Election Officer in spite of the fact that the petitioner herein, i.e. the elected Sarapanch belonging to Pana Baisnab Caste, which did not form part of the Gazette Notification involving Scheduled Castes. It is also alleged that in spite of written objection by Kushanath Das, O.P.3 did not consider such aspect of the matter and allowed Nakul Charan Das to contest the election and got elected. The election of Nakul Charan Das was contested on the premises that said Nakul Charan Das has filed his nomination involving a fake caste certificate showing him falsely belonging to Pana Caste. To establish such case, it also appears, Kushanath Das also produced several documents in proof of his claim. In his opposition Nakul Charan Das while contradicting the claim of Kushanath Das apart from relying on certain documents to prove the following specific plea :-

> "a) The O.P.No.1 during his study was availing stipend from the Govt. as a student of S.C. Category of Caste "Pana".
>
> b) Tahasildar, Hatadihi has also issued Caste Certificates in favour of O.P.1 mentioning his caste "Pana" in the year 1989 & 2009.
>
> (c) Various R.S.Ds. were obtained by the O.P.1 and his father Ananda Das from different persons belonging to S.C. Category having their caste "Pana" and no permission U/s 22 of OLR Act were required for the execution of the sale deeds as the O.P.1 and his father belong to S.C.Category.
>
> d) Various mutation R.O.Rs. were also issued by the Tahasildar, Hatadihi basing upon R.S.Ds. obtained by the O.P.1 and his father from persons belonging to S.C. Category.
>
> e) Permission U/s.22 of O.L.R. Act is required for execution of R.S.D. by a person belongs to "Pana Baishnab" (S.C.) in favour of General Caste Person.
>
> f) In the S.E.B.C. list prepared by Govt. of India after proper verification the caste of O.P.1 has been recorded as S.C.
>
> g) The Caste of O.P.1 being "Pana" comes under S.C.Category as basing upon F.I.R. lodged by him against a person of General Category a case under prevention of Atrocity Act was registered against that person coming under general category, in which the General Caste person faced trial to the court of the District & Sessions Judge (Special Judge), Keonjhar.
>
> h) That O.P. No.1 availed compensation from the Govt. as he was defamed in the society."

In the background of evidence and the material produced by both the parties and the documents exhibited by the respective parties, this Court finds,

Kushanath Das has produced six witnesses and filed documents, vide Ext.1 to Ext.4/27. Similarly Nakul Charan Das, the elected candidate contesting, petitioner herein in both the writ petitions produced nine witnesses besides exhibiting, vide Exts.A to W/1. For the controversy involved herein, this Court entering into the evidence of the respective parties finds, P.W.1 in his chief while claiming that Nakul Charan Das filed his nomination paper with fake certificate and for that he was Pana Baisnab, caste certificate involving Nakul Charan Das remained ungenuine, and therefore, there is illegal acceptance of nomination of Nakul Charan Das but did not rely on any document in his evidence. In cross-examination, this witness deposed that at the filing of nomination paper of Nakul Charan Das, he has not verified his documents and he cannot say as to what document he had filed at the time of nomination. But again in paragraph-11, this very witness submitted that Nakul Charan Das had filed caste certificate incurred from the Tahasil. During cross-examination by O.Ps.2 & 3, this witness again said that no caste certificate of Nakul Charan Das was filed at the time of scrutiny. P.W.2 in his chief simply said Nakul Charan Das was not a person belonging to Pana Caste but a man belonging to Pana Baisnab Caste. In cross-examination by O.P.1 this witness has simply said, he has not seen the Caste Certificate of Patta of Nakul Charan Das. P.W.3 in his chief while admitting that he was the seconder in the nomination of Kushanath Das and deposing that Kushanath Das and others submitted objection disputing the nomination of Nakul Charan Das and that there is illegal acceptance of nomination in spite of objection involving Caste of Nakul Charan Das relied on Record of Rights to establish that he belongs to Pana Baisnab. In cross-examination this witness submitted that in the Caste Certificate of Nakul Charan Das was mentioned as Pana Baisnab and of Scheduled Caste category. P.W.4, Kushanath Das himself while deposing that he had made objection to O.P.3 on filing of nomination by Nakul Charan Das attempted to establish his case by showing light from the Record of Rights bearing Nos. 2, 3 & 4 of Chandiabiranchipur. He also filed orders in Mutation Case No.1375/2016 along with Amin's report and notice then copy of another mutation order in Mutation Case No.1364/16 along with Amin's report ad notice. He also took support of a reply of Public Information Officer on his application under the R.T.I. Act and further a copy of the disputed Caste Certificate involving Misc. Case No.486/1989, copy of affidavit of O.P.1, Nakul Charan Das and copy of High School Certification of Nakul Charan Das. This witness also relied on a letter of the P.I.O., Hatadihi Tahasil, which contains an up-to-date list of S.C. & S.T. Caste and attempted to establish that Nakul Charan Das belongs to Pana Baisnab by Caste and thereby does not belong to Scheduled Caste. In cross-examination also this witness deposed on the basis of document appearing at Ext.1 to Ext.13.

P.W.5 while deposing rested on Exts.2, 2/1, 3, 13 & 14. He was appearing as a witness in the capacity of P.I.O.-cum-Additional Tahasildar of Hatadihi Tahasil. O.P.6 appeared as W.E.O.-cum-P.I.O., Hatadihi. Nakul Charan Das to establish his case in his deposition as D.W.1 in chief relying on Record of Rights involving him and his father submitted that their Caste has been mentioned as Pana Baisnab and further deposed that Pana is the Caste whereas Baisnab is a designation. Narrating the visit of Chaitanya Dev to the State of Odisha, this witness attempted to submit that the disciple of Chaitanya Dev is called as "Baisnab" in spite of their Caste, which he claimed to be a designation attached to his Caste. Relying on further document submitted by him, Nakul Charan Das as witness submitted that for his belonging to S.C. category, there has been issuance of Caste Certificate for over years also particularly in 1989 and 2009 showing him to be belonging to Scheduled Caste. This witness also relied on some purchase of land by his father and himself in the capacity of their Caste being Pana and for this reason, there was also no requirement for permission from the competent authority for the execution of sale deeds. This witness also relied on various Mutation Record of Rights issued by the Tahasildar, Hatadihi basing upon R.S.Ds. are obtained by this witness as well as his father from the persons belonging to S.C. category. Relying on S.E.C.C. List prepared by the Government of India, whereas his Caste has been mentioned as Scheduled Caste and also relying on some F.I.Rs. at his instance, there have been some cases involving Section 3(1)(x) of S.C. & S.T. (P & A) Act were registered. Nakul Charan Das also deposed in his evidence that for the pendency of the Mutation Case relied on by Kushanath Das, no inference can be drawn from such document. The other witnesses at the instance of Nakul Charan Das since simply supported the claim of Nakul Charan Das, it is not necessary to take note of their statements to avoid unnecessary repetition except indicating herein that Nakul Charan Das has exhibited through his chief Exts.A to W/1.

8. Now coming to scan the documents filed by the respective parties from Ext.1, this Court finds, this is a document involving the objection of Kushanath Das requesting not to accept the nomination of Nakul Charan Das along with procedure regarding scrutiny of nomination. Ext.2 is the reply to R.T.I. application only indicating that the sub-caste of Pana Baisnab is not included in the list of S.C. Community. This Court observes here, the observation of the P.I.O.-cum-Additional Tahasildar is of no use for the reason that the Caste Certificate produced by Nakul Charan Das has a clear indication of his Caste as Pana and belonging to Scheduled Caste. Similarly, Ext.4 is a list of S.C. & S.T., at serial no.69 of which it is indicated that Pana as Scheduled Caste. Exts.5 & 6 involving Nakul Charan Das as the applicant in a Mutation Case on the basis of which he belongs to Pana Caste and rejecting the Mutation Case on the premises

that Pana Baisnab does not belong to Scheduled Caste category and also there is no permission from the competent authority under the O.L.R. Act though the enquiry report attached therein discloses the applicant's caste as Pana Baisnab. Ext.7 is a Record of Right of one Ananta Prasad Das belonging to Pana Baisnab. Similarly Ext.8 also does not belong to Nakul Charan Das. Ext.9 again a document involving Ananta Prasad Das. Ext.10 is a document indicating that the particular Constituency was reserved for Scheduled Castes. Ext.11 is the Election Notification giving the time schedule therein for the election involved herein. Ext.12 is a guideline regarding scrutiny of nomination paper. Exts.13 & 14 are the replies by the P.I.O. indicating that Nakul Charan Das has not obtained any Caste Certificate from the Tahasildar, Hatadihi since long.

9. Coming to scan the documents produced by Nakul Charan Das in support of his case that he belongs to Scheduled Caste, it appears, vide Ext.A, Nakul Charan Das produced a Caste Certificate issued involving Miscellaneous Certificate Case No.486/1989 showing his Caste to be Pana and further indicating that it is recognized as Scheduled Caste under the Order, 1950 and the Amendment Order, 1978. Ext.B is a letter issued by the P.I.O., Hatadihi Tahasil, who has issued documents at Exts.13 & 14 indicating that basing on the Scheduled Caste Certificate Register 2009, Caste Certificate was issued in favour of Nakul Charan Das even though there is no availability of Miscellaneous Certificate Register for the Year, 1989. This Court referring to twenty-six documents more particularly observes that there is no dispute that a Caste Certificate indicating Nakul Charan Das belonging to Scheduled Caste has been issued by the competent authority. Non-availability of the Miscellaneous Certificate Register for the Year, 1989 cannot take away the acceptance of the Caste Certificate in favour of Nakul Charan Das since 1989 particularly when a Caste Certificate issued by the competent authority very much exhibited and without objection. Again coming to the Caste Certificate at Ext.B bearing Case No.69/CAS/2009, this Court finds, said Nakul Charan Das is again issued with the Caste Certificate showing him to be belonging to Pana Caste with clear indicator that Pana Caste is recognized as Scheduled Caste under the Constitution (Scheduled Castes) Order, 1950. May be this Certificate was granted for the purpose of filing nomination of M.L.A. candidature but the fact that Nakul Charan Das belonging to Pana and further recognized as a Scheduled Caste cannot be lost sight of. Considering Ext.C this Court finds, this is a Certificate issued by the Headmaster of Panchayat High School, Mareigaon with clear disclosure that Nakul Charan Das was a student of Panchayat High School, Mareigaon from Class-VII to Class-X and according to the Admission Register, he belongs to Scheduled Caste. Not only that Nakul Charan Das was also granted pre-Matric stipend by virtue of his belonging to Scheduled Caste.

Coming to Ext.D, this Court finds, it is a document supporting the claim of Nakul Charan Das issued from the Office of Public Information Officer, Baula Junior College, Soso with clear indication that he belongs to Scheduled Caste even though there is no Caste Certificate available in the College. Similarly, coming to Ext.F, this Court again finds, it is a document supporting the claim of Nakul Charan Das. The list of S.E.B.C. at Serial No.1 clearly indicates that Nakul Charan Das belongs to Scheduled Caste. There has been also other document, which comes to show that there have been some orders and promises of the competent authority under the OLR Act involving some other persons indicating their Caste as Pana Baisnab on the premises of they belong to Scheduled Caste. It also appears, there is a criminal case before the Special Judge, Keonjhar involving a complain of the petitioner against the accused persons under Sections 294/341/323/506/427/34, I.P.C. read with Section 3(I)(X)S.C./S.T.(PA) Act. The proceeding was undertaken and concluded on the premises that Nakul Charan Das was a Scheduled Caste. From Ext.J, it appears, there have been some financial benefits to said Nakul Charan Das in his capacity of Scheduled Caste. Nakul Charan Das also produced some sale deeds to establish that he belongs to Scheduled Caste, as clearly borne from the sale deeds. Preparing the documents at the instance of the rival parties getting into the controversy as to whether Nakul Charan Das belongs to Scheduled Caste or not, this Court finds, in one side there is a mere claim that for Nakul Charan Das belonging to the Caste, Pana Baisnab and such a Caste not being found in the list of S.C. & S.T. under the Presidential Notification, Nakul Charan Das cannot be considered as a Scheduled Caste, on the other hand there is a clear claim by Nakul Charan Das on production of several documents including the Caste Certificate showing Nakul Charan Das is all through treated as a Scheduled Caste. This Court, therefore, observes that for the limited scope of consideration that the authorities dealing with the election proceedings, there is no scope for such authorities to get into the question as to whether the Caste Certificate granted in favour of an elected candidate is false or not ? It is for the competent authority to get into such aspect. It is in the above background, this Court again observed, since the claim of the election petitioner based on elected candidate seeking election on production of false Certificate unless the election petitioner succeeded in a proceeding, declaring such Certificate either un-genuine or forged, the court undertaking the election dispute is bound by such Certificate. In the circumstance, this Court finds, both the courts below have exceeded in their jurisdiction in coming to observe that the petitioner does not belong to Scheduled Caste in spite of clear existence of series of documents establishing that the petitioner involved in both the cases belonging to Scheduled Caste. Further there is also wrong appreciation of material evidence available on

record. Further the appellate authority not concurring findings of the trial court and on the other hand moving on the basis of a non-existent ground, this Court further observes that there is no proper consideration by the appellate court involving the appeal proceeding.

10. Now coming to the other dispute involved herein that Pana and Panabaisnab are not same thereby disqualifying Nakul Charan Das to contest the election, this Court taking into consideration the decision of the Hon'ble apex Court in the case of ***State of Orissa vrs. Dasarathi Meher*** reported in 2018 (II) CLR (SC) 1159 observes that for the decision therein there is no doubt to observe that Pana is the Caste when Panabaisnab is a designation but however since Ext.A clearly indicates that Nakul Charan Das belongs to Pana, this Court finds, the controversy has no relevancy for the time being. Again taking into account the decision of the Hon'ble apex Court involving ***Bharati Ready vrs. State of Karnataka & others*** reported in 2018(II) CLR (SC) 404, this Court observes, the question of validity of Caste Certificate involved herein unless challenged before the competent forum and an order holding the same as invalid is obtained cannot be entertained. The authority deciding the election case is bound by the existence of such Certificate. This Court finds support of the decision in the case of ***Collector, Bilaspur vrs. Ajit P.K.Jogi & others*** reported in 2011 (II) CLR (SC) 1036 to the case of the petitioner. Taking note of another decision of the Hon'ble apex Court in the case of ***Bhagawati Prasad Dixit 'Ghorewala' vrs. Rajeev Gandhi*** reported in AIR 1986 SC 1534 wherein in paragraph-11 the Hon'ble apex Court observed, the question of a candidate, whether is an Indian citizen even after acquiring foreign citizenship held that the High Court is not competent to decide such question in an election petition. Such declaration is only lie with the competent authority and unless such declaration is set aside by the competent authority, the Election Court remains undone. This Court finds, this decision has clear support to the case of the petitioner. Taking into account the decision in the case of ***Kumari Madhuri Patil & another vrs. Addl. Commissioner, Tribal Development & others*** reported in AIR 1995 SC 94, this Court observes, for the clear direction of the Hon'ble Supreme Court, the validity of the Certificate involved herein should be left to the Sub-Committee so constituted. This decision has also been followed in another decision of the Hon'ble apex Court in the case of ***Bharati Reddy vrs. State of Karnataka & others*** reported in 2018 (II) CLR 404. This Court here also observes that the decisions involving democratically elected candidates cannot be interfered with so lightly unless there is strong case dislodging such candidates.

11. In the above background of the matter, this Court finds, both the election court as well as the appellate court have exceeded their jurisdiction in entering into the conflict, to which they have no jurisdiction and the impugned

orders involved herein since have been passed entering into the question of validity of the Caste Certificate in an election proceeding cannot be sustained. Therefore, both the impugned orders, vide Annexures-1 & 2 involving W.P.(C) No.9090 of 2018 must fail. For the decision of the Collector involving the other writ petition bearing W.P.(C) No.26164 of 2017 on the same premises and based on similar conclusions as that of the election court, for the reasons assigned herein above the impugned order involving W.P.(C) No.26164/2017 also to fail. In the process, this Court while allowing both the writ petitions sets aside the orders at Annexures-1 & 2 of W.P.(C) No.9090 of 2018 and Annexure-4 of W.P.(C) No.26164 of 2017. For allowing both the writ petitions, this Court directs that in the event the petitioner has been unseated in the meantime, he may be permitted to assume charge of the post of Sarapanch forthwith.

12. In the result, both the writ petitions succeed. No cost

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2019 (I) ILR - CUT- 624

S. K. SAHOO, J.

CRLMC NO. 2273 OF 2006

SUNIL KUMAR WADHWA & ORS. .....Petitioners

.Vs.

SIBA PRASAD SAHU & ANR. .....Opp. Parties

CODE OF CRIMINAL PROCEDURE,1973 – Section 482 – Inherent power – Prayer for quashing of the order taking cognizance of offences under sections 406, 420 read with section 34 of the Indian Penal Code – Ingredients of the offences not available – Principles of exercising the inherent power – Discussed – Held, where a criminal proceeding is manifestly attended with malafide and maliciously instituted with ulterior motive for wreaking vengeance on the accused, the High Court can exercise its inherent power under section 482 of Cr.P.C. to quash the same in order to prevent abuse of process of the Court or otherwise to secure the ends of justice – State of Haryana -Vrs.- Bhajan Lal reported in A.I.R. 1992 S.C. 604 followed.

Case Laws Relied on and Referred to :-

1. A.I.R. 2000 S.C. 754 : G. Sagar Suri .Vs. State of U.P.
2. (2005) 10 SCC 336 : Uma Shankar Gopalika .Vs. State of Bihar.
3. (2005) 32 OCR (SC) 789 : Hotline Teletubes .Vs. State of Bihar.

4. A.I.R. 2006 S.C. 2780 : M/s. Indian Oil Corporation .Vs. M/s. NEPC India Ltd.
5. A.I.R. 1992 S.C. 604 : State of Haryana .Vs. Bhajan Lal.
6. (2011) 48 OCR (SC) 116 : Iridium India Telecom Ltd. .Vs. Motorola
7. A.I.R. 1976 S.C. 1947 : Smt. Nagawwa .Vs. Veeranna.
8. (2014) 57 OCR (SC) 285 : Fiona Shrikhande -.Vs. State of Maharashtra.
9. A.I.R. 2000 S.C. 754 : G. Sagar Suri -Vrs.- State of U.P.
10. (2005) 10 SCC 336 : Uma Shankar Gopalika .Vs. State of Bihar.
11. (2005) 32 OCR (SC) 789 : Hotline Teletubes .Vs. State of Bihar.
12. A.I.R. 2006 S.C. 2780 : M/s. Indian Oil Corporation .Vs. M/s. NEPC India Ltd.
13. (2011) 48 OCR (SC) 116 : Iridium India Telecom Ltd. .Vs. Motorola
14. A.I.R. 1976 S.C. 1947 : Smt. Nagawwa .Vs. Veeranna.
15. (2014) 57 OCR (SC) 285 : Fiona Shrikhande .Vs. State of Maharashtra
16. A.I.R. 1992 S.C. 604 : State of Haryana .Vs. Bhajan Lal.

For Petitioners : Mr. Umesh Ch. Behura
For Opp. Party : Mr. Bijay Ku. Mohanty

JUDGMENT Date of Hearing: 14.05.2018 : Date of Judgment: 09.07.2018

S. K. SAHOO, J.

The petitioners Sunil Kumar Wadhwa, Sanjeeb Borbora and Manoj Kumar Dash have filed this application under section 482 of the Criminal Procedure Code challenging the impugned order dated 11.09.2006 passed by the learned Sub-divisional Judicial Magistrate, Sadar, Cuttack in I.C.C. No.606 of 2006 in taking cognizance of offences under sections 406, 420 read with section 34 of the Indian Penal Code and issuance of process against them.

2. The complainant-opposite party no.1 Siba Prasad Sahu filed the complaint petition on 14.08.2006 alleging therein that he was the proprietor of M/s. Sahu Electrical Enterprises, Manisahu Chowk, Buxi Bazar, Cuttack and dealing with electrical equipments such as machinery parts, pump sets and he was also the authorized dealer of M/s. Usha International Ltd. (hereafter 'the company') for 'USHA' brand pump sets and electrical appliances. The petitioner no.1 was the Managing Director of the company and petitioners nos.2 and 3 were the Divisional Manager and Sales Manager of the company respectively who are working under Divisional Sales Office at Cuttack. It is the further case of the complainant that he was the authorized dealer of the company for more than ten years and fulfilled all the criteria and eligibility to be an authorized dealer and furnished security deposit before becoming an authorized dealer. The complainant used to receive the products of the petitioners on cash and credit basis after issuing cheques against the invoices. The complainant for his best performance was selling the products

of the petitioners and he had been rewarded several times as a number one dealer in Odisha. During the transactions with the petitioners, the complainant had performed his duty with best of his ability and never been questioned or received any objection from the side of petitioners till end of the year 2005. The complainant verified all his transactions and accounts and found some deficit of amount showing outstanding against the petitioners and as such the complainant wrote several letters and reminders during the year 2005 explaining the details of accounts which was showing as outstanding against the petitioners and requested the company to settle the accounts as early as possible for better relationship. After several correspondences to the petitioners, the complainant wrote a letter dated 08.06.2006 to them to clear up all the outstanding dues failing which the complainant would be forced to bring the matter to proper Court of law for his redressal and also for recovery of all the dues as shown as outstanding against the petitioners. The complainant after verifying the books of accounts and detailed transactions thoroughly from year 2000-2001 to 2005-2006, found Rs.1,35,815/- was showing outstanding against the petitioners. It is the further case of the complainant that after several correspondences of letters and reminders, the petitioners did not come forward to the complainant for settlement of accounts and with an ulterior motive and ill intention and in order to escape from the liability, there was every chance of institution of false and frivolous case against the complainant by utilizing the blank signed cheque which has been issued by the complainant to the petitioners on good faith and for better transactions during the business dealings as wholesaler and dealer at the time of good relationship between the parties. The petitioners nos. 2 and 3 were stated to be intentionally cheating the complainant as they have misappropriated the amount continuously without forwarding the same in their accounts and the petitioner no.1 being the controlling officer of petitioners nos. 2 and 3 has never initiated any action against them although the complainant time and again intimated to settle the accounts. It is the further case of the complainant that the petitioners were jointly and severally liable for the misappropriation of the money of the complainant by manipulating the official documents for cheating with a common intention. Petitioners nos. 2 and 3 were stated to have misappropriated the amount received from Orissa Agro Industries Corporation Ltd. towards the supply of two nos. diesel pump sets of 3-5 HP made by complainant of worth Rs.23,943/-. In that respect, Orissa Agro Industries Corporation Ltd. clarified and confirmed vide his letter no.700 dated 10.05.2006 addressing to the complainant stating that the amount towards the payment of complainant has

been received by the petitioners nos.2 and 3. It is the further case of the complainant that besides the security money, other outstanding dues as per other books of accounts of Rs.1,35,815.00 was payable by the petitioners to the complainant and accordingly he prayed to take cognizance of offences under sections 406, 420, 467, 468 read with section 34 of the Indian Penal Code.

3. After filing of the complaint petition with documents, the case was registered and the initial statement of the complainant was recorded on 28.08.2006 and the case was posted for holding inquiry under section 202 of Cr.P.C. and on 06.09.2006 one witness namely Krushna Chandra Sahoo was examined by the complainant and a memo was filed not to adduce further evidence and on 11.09.2006 the learned Magistrate after perusing the complaint petition, initial statement of the complainant recorded under section 200 of Cr.P.C. and the statement of the witness Krushna Chandra Sahoo recorded during inquiry under section 202 of Cr.P.C., found prima facie case under sections 406, 420 read with section 34 of the Indian Penal Code and passed the impugned order.

4. Mr. Umesh Chandra Behura, learned counsel appearing for the petitioners contended that the petitioners nos.1, 2 and 3 were the Managing Director, Divisional Manager and Sales Manager of the company respectively. The complainant was appointed as dealer of the company on 10.09.1996 and on 07.10.2004 the performance of the complainant was reviewed and it was found that the sale of the company products has come down and numbers of cheques issued by the complainant were dishonoured. The complainant confirmed in writing that the balance amount of Rs.51,887/- in monoblock pump would be paid as soon as possible. The complainant issued cheque no.439195 dated 20.12.2005 of Rs.51,887/- drawn in Bank of Baroda but the said cheque was dishonoured by the Bank on the ground of 'stopped by drawer'. The petitioner no.2 being the Divisional Manager of the company at Cuttack issued notice to the complainant by registered post with A.D. demanding payment of the amount. Since the complainant did not pay the amount despite demand, the petitioner no.2 filed a complaint petition against the complainant for commission of offence under section 138 of Negotiable Instruments Act which was registered as I.C.C. Case No.152 of 2006 in the Court of learned S.D.J.M., Sadar, Cuttack and after cognizance of offence was taken, summons was issued against the complainant and in order to counter such complaint petition, a frivolous complaint vide I.C.C. Case No.606 of 2006 was filed against the petitioners. It is further contended that

the letters issued by the complainant to the petitioners would indicate that basically his grievance is for settlement of the accounts and therefore, the dispute between the parties being civil in nature, the filing of complaint petition was uncalled for and therefore, this Court should exercise its inherent power under section 482 of Cr.P.C. to quash the same in order to prevent abuse of process. It is further contended that the ingredients of offences under which cognizance has been taken are not attracted and the proceeding has been initiated with an ulterior motive. Learned counsel for the petitioners filed a written note of submission and placed relied upon the decisions of the Hon'ble Supreme Court in the cases of **G. Sagar Suri -Vrs.- State of U.P. reported in A.I.R. 2000 S.C. 754**, **Uma Shankar Gopalika -Vrs.- State of Bihar reported in (2005) 10 Supreme Court Cases 336**, **Hotline Teletubes -Vrs.- State of Bihar reported in (2005) 32 Orissa Criminal Reports (SC) 789**, **M/s. Indian Oil Corporation -Vrs.- M/s. NEPC India Ltd. reported in A.I.R. 2006 S.C. 2780 and State of Haryana -Vrs.- Bhajan Lal reported in A.I.R. 1992 S.C. 604** on points canvassed.

Mr. Bijay Kumar Mohanty, learned counsel appearing for the complainant-opposite party no.1 supported the impugned order and submitted a memo of citations in which he has relied upon the decisions of the Hon'ble Supreme Court in the cases of **Iridium India Telecom Ltd. -Vrs.- Motorola reported in (2011) 48 Orissa Criminal Reports (SC) 116**, **Smt. Nagawwa -Vrs.- Veeranna reported in A.I.R. 1976 S.C. 1947** and **Fiona Shrikhande -Vrs.- State of Maharashtra reported in (2014) 57 Orissa Criminal Reports (SC) 285**.

5. Adverting to the contentions raised by the learned counsels for the respective parties, it appears that whereas it is the case of the complainant that his books of accounts and detailed transaction during the period 2000-2001 to 2005-2006 indicate that Rs.1,35,815/- was outstanding against the petitioners and in spite of receipt of cost of the diesel pump sets from Orissa Agro Industries Corporation Ltd., the petitioners nos.2 and 3 misappropriated the amount and petitioner no.1 being the controlling officer of the petitioners nos. 2 and 3 did not take any action against them, it is the case of the petitioners that due to filing of a complaint petition by the petitioner no.2 against the complainant under section 138 of the N.I. Act for dishonour of the cheque issued by him, a false case has been foisted with an ulterior motive.

In case of **G. Sagar Suri -Vrs.- State of U.P. reported in A.I.R. 2000 S.C. 754**, it is held that jurisdiction under section 482 of Cr.P.C. has to

be exercised by the High Court with a great care and not superficially. It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process, a Criminal Court has to exercise a great deal of caution. For the accused, it is a serious matter.

In case of **Uma Shankar Gopalika -Vrs.- State of Bihar reported in (2005) 10 Supreme Court Cases 336**, it is held that every breach contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating.

In case of **Hotline Teletubes -Vrs.- State of Bihar reported in (2005) 32 Orissa Criminal Reports (SC) 789**, the Hon'ble Supreme Court after going through the complaint petition held that there is no whisper in the complaint that at the very inception of the contract between the parties, there was any intention to cheat and it is a case of purely civil liability and allowing the prosecution to continue would amount to an abuse of process of Court and to prevent the same, it would be just and expedient to quash the same.

In case of **M/s. Indian Oil Corporation -Vrs.- M/s. NEPC India Ltd. reported in A.I.R. 2006 S.C. 2780**, it is held that a growing tendency in business circles to convert purely civil dispute into criminal cases is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil dispute and claims, by applying pressure through criminal prosecution should be deprecated and discouraged.

In the case of **Iridium India Telecom Ltd. -Vrs.- Motorola reported in (2011) 48 Orissa Criminal Reports (SC) 116**, it is held that power to quash proceedings at the initial stage have to be exercised sparingly with circumspection and in the rarest of the rare cases. The power is to be exercised ex debito justitiae. Such power can be exercised where a criminal proceeding is manifestly attended with malafide and have been instituted maliciously with ulterior motive. This inherent power ought not to be exercised to stifle a legitimate prosecution.

In the case of **Smt. Nagawwa -Vrs.- Veeranna reported in A.I.R. 1976 S.C. 1947**, it is held as follows:-

> "Thus it may be safely held that in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside:
>
> (1) Where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;
>
> (2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;
>
> (3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and
>
> (4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.
>
> The cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings."

In the case of **Fiona Shrikhande -Vrs.- State of Maharashtra reported in (2014) 57 Orissa Criminal Reports (SC) 285**, it is held that the law as regards issuance of process in criminal cases is well settled. At the complaint stage, the Magistrate is merely concerned with the allegations made out in the complaint and has only to prima facie satisfy whether there are sufficient grounds to proceed against the accused and it is not the province of the Magistrate to enquire into a detailed discussion on the merits or demerits of the case. The scope of enquiry under section 202 is extremely limited in the sense that the Magistrate, at this stage, is expected to examine prima facie the truth or falsehood of the allegations made in the complaint. Magistrate is not expected to embark upon a detailed discussion of the merits or demerits of the case, but only consider the inherent probabilities apparent on the statement made in the complaint.

6. On careful analysis of the averments made in the complaint petition with the initial statement of the complainant and the witness examined on behalf of the complainant during inquiry under section 202 of Cr.P.C., it appears that one of the allegations made by the complainant is that his books of accounts and detailed transaction during the period 2000-2001 to 2005-2006 indicate that Rs.1,35,815/- was outstanding against the petitioners and in spite of several correspondence and reminders by the complainant, the

petitioners did not come forward for settlement of accounts. Such allegations, in my humble view, are essentially of civil nature. The complainant has to adduce documentary evidence in that respect before the Civil Court and after giving due opportunity to the petitioners, the Court has to give a finding as to whether any such outstanding amount is there against the petitioners or not and if so, what relief can be granted in favour of the complainant. On the face of it, such allegations do not make out any criminal offence.

The other accusation made by the complainant against the petitioners is that in spite of receipt of cost of the diesel pump sets from Orissa Agro Industries Corporation Ltd., the petitioners nos.2 and 3 misappropriated the amount and cheated the complainant and petitioner no.1 being the controlling officer of the petitioners nos. 2 and 3 did not take any action against them. It is pertinent to note that in the complaint petition, a categorical assertion has been made that Orissa Agro Industries Corporation clarified and confirmed vide letter no.700 dated 10.05.2006 addressing to the complainant stating that the amount towards payment of the complainant has been received by the petitioners nos. 2 and 3. Since that letter was the basis of accusation of misappropriation against the petitioners nos.2 and 3, the learned counsel for the complainant-opposite party no.1 was asked to produce the copy of such letter. The learned counsel produced the letter dated 10.05.2006 which indicates that it was addressed to M/s. Sahu Electrical Enterprises, Buxi Bazar, Cuttack relating to payment of bill no. SEE/137/2000-01 by Deputy General Manager (E) of the Orissa Agro Industries Corporation Ltd. and it is indicated therein that payment of the bill has been released to the Principal M/s. Usha International during the period from May 2001 to January 2002 in various cheques. The specific dates of release, cheque nos., amount involved in the cheques etc. have not been mentioned in the letter. Though the complainant cited the Deputy General Manager as a witness in the complaint petition but he has not been examined during inquiry under section 202 Cr.P.C. Therefore, there is nothing in the letter dated 10.05.2006 that any payment towards the cost of diesel pump sets was made by Orissa Agro Industries Corporation to the petitioners nos.2 and 3 rather it is stated to have been made in favour of the company by way of cheques. Therefore, the allegations against the petitioners nos.2 and 3 appear to be baseless. Once there is no clear proof of payment to the company particularly to the petitioners nos.2 and 3 by Orissa Agro Industries Corporation Ltd. towards the cost of diesel pump sets received from the complainant as alleged by the complainant, the ingredients of the offences under sections 406 and 420 of

the Indian Penal Code are not attracted against the petitioners. It seems that after filing of the complaint petition against the complainant by the petitioner no.2 in I.C.C. Case No.152 of 2006 and taking of cognizance of offence under section 138 of the N.I. Act and issuance of process against him and after receipt of the summons on 24.06.2006, the present complaint petition has been filed on 14.08.2006 with an ulterior motive.

In case of **State of Haryana -Vrs.- Bhajan Lal reported in A.I.R. 1992 S.C. 604**, it is held, inter alia, that where a criminal proceeding is manifestly attended with malafide and maliciously instituted with ulterior motive for wreaking vengeance on the accused, the High Court can exercise its inherent power under section 482 of Cr.P.C. to quash the same in order to prevent abuse of process of the Court or otherwise to secure the ends of justice.

Since one part of the allegations made by the complainant is a case of purely civil liability and for the other part there are no prima facie materials to attract the ingredients of the offences, I am of the humble view that allowing the prosecution to continue would amount to an abuse of process of Court and to prevent the same, the proceedings in the Court below should be quashed.

7. In view of the foregoing discussions, the impugned order dated 11.09.2006 passed by the learned Sub-divisional Judicial Magistrate, Sadar, Cuttack in I.C.C. No.606 of 2006 in taking cognizance of offences under sections 406, 420 read with section 34 of the Indian Penal Code and issuance of process against the petitioners stands quashed. Accordingly, the CRLMC application is allowed.

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2019 (I) ILR - CUT- 632

DR. A. K. MISHRA, J.

CRLMC NO. 2205 OF 2017

GANESWAR BEHERA .....Petitioner

.Vs.

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 482 & 299 – Inherent power of the court – Quashing of the trial against the

absconded accused persons – Case was split up & evidence recorded u/s 299 Cr. P.C. – Acquittal order passed in favour of other accused persons – Parity of such order in favour of the absconded accused persons – When to be permitted? – Held, the requirement of section 299 Cr.P.C. for use of evidence in subsequent trial can't be over looked – At the same breath, it can be said that if the judgment recording acquittal of accused persons, has disproved the substratum of the prosecution case & the co-accused who had not faced trial is found to have acted bona fide to honour of the judicial process, the said factum can be considered as one of the aspects to quash the criminal proceeding because in that event the continuance of criminal proceeding may amount to an abuse of the process of law and there is bleak chance of conviction. (Para 8)

Case Laws Relied on and Referred to :-

1. 2005 (II) OLR 386 : Kanhu Behera Vs. State of Orissa.
2. 2006 (II) OLR 308 : Santosh Kumar Maity Vs. State of Orissa.
3. (2007) 37 OCR 159: Ramananda @ Ram Mandal @ Rupsingh Naik Vs. State of Orissa.
4. AIR 2000 SC 1416 : Nirmal Singh Vs. State of Haryana
5. 1997 (II) OLR 426 : Smt. Urmila Sahu Vs. State of Orissa

For Petitioner : M/s. Satya Ranjan Mulia, R. C. Moharana, M. Mulia, R. R. Nayak and H. K. Singh.

For Opp. Party : Mr. S. Dash, Addl. Standing Counsel.

JUDGMENT Date of Hearing : 14.02.2019 :Date of Judgment : 26.02.2019

DR. A. K. MISHRA, J.

In this Lis U/s.482 Cr.P.C. prayer has been made to quash the order dtd.01.06.2015 of learned J.M.F.C., Betnoti in G.R. Case No.588 of 2014 in taking cognizance of offences U/ss.394, 397 of the Indian Penal Code (in short the 'I.P.C.') and U/s.9(B)(i)(b) of The Explosives Act, 1884 and the criminal proceeding culminated thereof.

2. The case of the petitioner, simply said, is that informant Gurupada Pal was the owner of a Jewellery shop situated at Betnoti Bus Stand. On 21.12.2014 at about 10 P.M. he closed his shop and returned with bag containing silver ornaments weighing 2.5 kilograms, gold ornaments weighing 170 grams and cash of Rs.1,27,000/- by his scooter. While he reached near his house, three unknown culprits threw chili powder and captured him. They snatched away the bag containing cash and ornaments. In

course of scuffle, one of them dealt a blow to his back by means of a sharp cutting weapon and all the culprits exploded bomb to take escape route.

The informant was immediately shifted to hospital. On lodging of F.I.R. on the next day morning at about 8.30 A.M. vide annexure-1, Betnoti P.S. Case No.225 dtd.22.12.2014 was registered. Investigation was ensued. Two accused persons were arrested and test identification parade was conducted. Recovered articles were left in zima of informant. Charge-sheet was submitted, basing upon which impugned order was passed on 01.06.2015 taking cognizance U/ss.394, 397 of I.P.C. and U/s.9(B)(i)(b) of Explosives Act, 1884. Sufficient ground U/s.204 Cr.P.C. was found to proceed against four accused persons. Two accused persons, namely, Bapun @ Gopinath Moharana and Abhi @ Abhiram Dalei were in jail custody by then. Other two accused persons, namely Deba @ Debendra jena and Banguru @ Ganeswar Behera (present petitioner) were found absconding, hence NBW was issued against them.

As two absconders were not apprehended, the case against them was split up and for rest two UTPs commitment was made to the Court of Sessions. Trial was taken up. Twenty witnesses were examined. Learned 2nd Additional Sessions Judge, Baripada vide his judgment dtd.22.02.2017 under Annexure-4 in S.T. Case No.223 of 2015, acquitted both the accused persons extending the benefit of doubt and did not pass any order regarding disposal of seized properties as the case was pending against the absconding accused persons including present petitioner.

3. Heard learned counsel for the parties and diligently perused the evidence and the judgment annexure-4 in respect of two co-accused persons who faced trial.

4. Amongst several grounds taken by the petitioner in assailing the cognizance order, one of the grounds does not depict any relevancy to the facts of this case and for that the same is extracted below:-

> "E) For that it appears from the Annexure-4 that the P.W.6 and 7 are the mother and father of the deceased, categorically stated that due to the accidental fire, her daughter died and she was living happily in her matrimonial house and there was no demand of dowry from the side of the petitioners' family. So in view of such matter, the interference of this Hon'ble Court is highly required to quash the criminal proceeding against the petitioners."

On this score, suffice to note that, for the paradox in the petition, the petitioner should not be deprived of justice if he is otherwise entitled to.

5. Learned counsel for the petitioner Mr. Satya Ranjan Mulia submitted that as the evidence recorded in course of trial in S.T. Case No.223 of 2015 has not implicated the present petitioner and two accused persons who faced trial were already acquitted of the charges by the learned 2nd Additional Sessions Judge, Baripada, continuance of the split up proceeding against the present petitioner will be an abuse of process of law, as such the same should be quashed. In support of his contention, learned counsel for the petitioner relied upon the following decisions:-

i) **Kanhu Behera Vrs. State of Orissa** reported in **2005 (II) OLR 386;**

ii) **Santosh Kumar Maity Vrs. State of Orissa** reported in **2006 (II) OLR 308**; and

iii) **Ramananda @ Ram Mandal @ Rupsingh Naik Vrs. State of Orissa** reported in **(2007) 37 OCR 159.**

5-A. *Per contra*, learned Additional Standing Counsel Mr. S. Dash submitted that the trial court has acquitted the two accused persons giving benefit of doubt and thereby the incident has not been disbelieved. Further one of the absconding accused, namely Deba @ Debendra Jena is yet to be apprehended and the present petitioner who has not yet appeared in the court should not be allowed to reap dividend out of his own fault.

6. In the **Ramananda** case (supra), relied upon by learned counsel for the petitioner, both the decisions of **Kanhu Behera** (supra) and **Santosh Kumar Maity** (supra) have been referred to. In that case though 1000 unnamed persons were implicated in the F.I.R., neither any specific overt act was attributed nor was any nexus of the petitioners found for which the Court found no prima facie case and accordingly held that continuance of criminal proceeding would amount an abuse of the process of the Court.

In the **Kanhu Behera** case, no prima facie case was found against the petitioner for which the proceeding was quashed. Similarly, in **Santosh Kumar Maity** case, the Court found that from the materials of U.D. case and other materials, no specific allegation against the petitioners was revealed.

6-A. In the above three cited decisions, no ratio devidendi has been laid down to the effect that basing upon the acquittal of accused in a trial, the split up proceeding in respect of co-accused who has not faced trial, can be quashed. it is only the principle laid down in the judgment that is binding Law under Article 141 of the Constitution. The cited decisions are of no help to the petitioner.

7. On the other hand, in the decision reported in **AIR 2000 SC 1416, Nirmal Singh Vrs. State of Haryana** their Lordships of Hon'ble Apex Court have held as follows:-

"xxxxxxxxx

Section 299 of the Code of Criminal Procedure consists of two parts. The first part speaks of the circumstances under which witnesses produced by the prosecution could be examined in the absence of the accused and the second part speaks of the circumstances, when such deposition can be given in evidence against the accused in any inquiry or trial for the offence with which he is charged. This procedure contemplated under Section 299 of the Code of Criminal Procedure is thus an exception to the principle embodied in Section 33 of the Evidence Act inasmuch as under Section 33, the evidence of a witness, which a party has no right or opportunity to cross-examine is not legally admissible. Being an exception, it is necessary, therefore, that all the conditions prescribed, must be strictly complied with. In other words, before recording the statement of the witnesses, produced by the prosecution, the Court must be satisfied that the accused has absconded or that there is no immediate prospect of arresting him, as provided under first part of Section 299(1) of the Code of Criminal Procedure. In the case in hand, there is no grievance about non-compliance of any of the requirements of the first part of sub-section (1)of Section 299 Cr.P.C. When the accused is arrested and put up for trial, if any, such deposition of any witness is intended to be used as an evidence against the accused in any trial, then the Court must be satisfied that either the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience, which would be unreasonable. xxxxxx"

7-A. Apropos the facts at hand, it is profitable to refer a decision of the Court reported in **1997 (II) OLR 426, Smt. Urmila Sahu Vrs. State of Orissa**, wherein it is held authoritatively that:-

"6. Section 299, Cr.P.C. (Section 512 of the Old Code) has a limited application inasmuch as if it is proved that an accused person has absconded and there is no immediate prospect of arresting him or that it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown and there is no immediate prospect of arrest of such offenders, the Court competent to try or commit for trial may examine the witnesses produced on behalf of the prosecution and record their depositions. After apprehension of the accused or when the accused is available to the Court for trial at that stage if any of such witnesses examined under Section 299, Cr.P.C. is not available being dead or incapable of giving evidence or cannot be found or if his presence cannot be procured without an amount of delay, expense or inconvenience, then circumstances should be taken into consideration and the evidence recorded under Section 299, Cr.P.C. may be accepted in evidence to be used against such accused persons. In that sense, Section 299, Cr.P.C. is an exception to the general rules and criminal jurisprudence regarding recording of evidence in presence of the accused. It thus, follows that even if evidence is recorded under Section 299, Cr.P.C., but if after the

apprehension of the accused if such witnesses are available and are capable of giving evidence, then the evidence recorded under Section 299, Cr.P.C. cannot be utilised as substantive evidence. The aforesaid legal proposition is apparent on a bare reading of Section 299, Cr.P.C. (i.e. Section 512 of the Old Code). In the case of State of Hyderabad v. Bhimaraya (AIR 1953 Hyderabad 63) a Munsif-Magistrate, recording statement of witnesses under Section 512 of the Old Code with respect to certain absconding accused, passed order to delete the name of such absconding accused persons on the ground that no sufficient proof of their participation was available. On the reference being made by the Sessions Judge, Gulbarga, a Division Bench of the Hyderabad High Court had examined the legality of the aforesaid order of the Munsif. Magistrate and have held that Section 512of the Code does not authorise the Magistrate to delete the name of an absconding accused on the basis of evidence so recorded. This Court respectfully agree with the above view and for that reason the prayer to quash or drop the proceeding is accordingly rejected."

8. From the Law authoritatively enunciated in the above two decisions, the requirement of Section 299 Cr.P.C. for use of evidence in subsequent trial cannot be over-looked. At the same breath, it can be said that if the judgment recording acquittal of accused persons, has disproved the substratum of the prosecution case and the co-accused who had not faced trial is found to have acted bona fide to honour the judicial process, the said factum can be considered as one of the aspects to quash the criminal proceeding because in that event the continuance of criminal proceeding may amount to an abuse of the process of Law and there is bleak chance of conviction.

9. Tested in the touchstone of above principle, in the case at hand the acquittal of two accused persons in the trial has not disproved the alleged incident at all. The requirements to use the evidence recorded in that trial U/s.299 Cr.P.C. and Section 33 of The Indian Evidence Act are wanting. The acquittal of co-accused cannot be a fact finding point for cognizance order igniting the process of the Court qua accused.

10. The materials available on record, reveals prima facie case against the petitioner. The acquittal of co-accused persons in separate trial has not disproved the substratum of the prosecution case. Ergo the petitioner cannot derive any benefit of that acquittal judgment to quash this proceeding. Further the petitioner was found to have absconded and thereby allowed the judicial proceeding delayed. For these reasons, this court is not inclined to invoke the inherent jurisdiction U/s.482 Cr.P.C. to quash the proceeding in question. Accordingly the CRLMC stands dismissed.

2019 (I) ILR - CUT- 638

DR. A. K. MISHRA, J.

CRLMC NO. 1989 OF 2018

ARUN KUMAR BHANJ & ORS. ……..Petitioner

.Vs.

STATE OF ORISSA & **ANR.** ……Respondent

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Quashing of the F.I.R on the ground of Jurisdiction – Offences U/s 498A, 354-A, 376, 511, 307, 506 , 120- B of IPC read with Section 4 of Dowry Prohibition Act – Alleged offences committed under the jurisdiction of Bonai Police Station i.e where husband house situated – But the F.I.R. lodged at Joda Police Station –Territorial Jurisdiction of Joda Police Station questioned – Held, after investigation is over, if the investigation officer arrives at the conclusion that the cause of action for lodging F.I.R. has not arisen within his territorial jurisdiction then he is required to submit a report accordingly, as the investigation is yet to be completed, quashing of proceeding, as prayed for does not arise.

(Para-6)

Case Laws Relied on and Referred to :-

1. (2008) 40 OCR (SC) 841 : Bhura Ram & Ors. Vs. State of Rajasthan & Anr.
2. (1999) 8 SCC 728 : Satvinder Kaur Vs. State (Government of NCT of Delhi) & Anr.

For Petitioner : M/s. S.K. Zafarulla Jgannath Kamila
Pruthhiwiraj Bhanja & Rama Chandra Bhanja
For Respondent : Nirupama Baghel.

ORDER Date of Order : 28.02.2019

DR. A. K. MISHRA, J.

In this proceeding U/s.482 Cr.P.C. prayer has been made to quash the criminal proceeding in connection with Joda P.S. Case No.140 of 2017, corresponding to G.R. Case No.620 of 2017 pending in the court of learned J.M.F.C., Barbil.

2. Heard learned counsel for the petitioners and learned Addl. Standing Counsel for opposite party – State.

3. Facts necessary for the present purpose are filtered out thus;

The opposite party no.2, as informant, lodged F.I.R. on 21.11.2017 before I.I.C., Joda Police Station which was registered as Joda P.S. Case

No.140 dtd.21.11.2017 for offence U/s.498(A), 354-A, 376, 511, 307, 506, 120-B of the Indian Penal Code and U/s.4 of the Dowry Prohibition Act. Investigation was ensued. It is submitted that investigation is yet to be completed.

Petitioner no.1 is the husband of opposite party no.2 while petitioner no.2 is the brother of petitioner no.1 and petitioner no.3 is his relative.

As per F.I.R. the informant had married Arun Kumar Bhanja (petitioner no.1), resident of village Bonaigarh under Bonai police station on 7.7.2016. While staying at matrimonial house, the informant – opposite party no.2 was tortured and petitioner no.2 attempted to commit rape.

4. Learned counsel for the petitioners vehemently urged that whatever incidents alleged to have been made in the F.I.R. by the informant are stated to have occurred within the jurisdiction of Bonai police station where her husband's house situates and as the registration of F.I.R. at Joda police station was beyond its territorial jurisdiction, the F.I.R. should be quashed.

4-(a). On this score, as to whether on the ground of lack of territorial jurisdiction during continuance of investigation, the F.I.R. is to be quashed, learned counsel for the petitioner relied upon a decision of Hon'ble Apex Court reported in **(2008) 40 OCR (SC) 841**, **Bhura Ram & Ors. Vrs. State of Rajasthan & Anr.**

In that decision, Hon'ble Apex Court, held that the offence U/s.498(A) I.P.C. was a continuing offence and in the facts that charge already framed in the court, stated that the case could not be tried by the Court where no part of offence was committed and accordingly directed to return the complaint for filing in the appropriate Court.

5. In the case at hand, the investigation is under progress and thereby it can be said that the stage of taking cognizance has not yet reached.

6. In the above premises it is profitable to refer a decision of Hon'ble Apex Court in the case of **Satvinder Kaur Vrs. State (Government of NCT of Delhi) and Another, (1999) 8 SCC 728** wherein their Lordships have held as follows:-

> *"8. In our view, the submission made by the learned counsel for the appellant requires to be accepted. The limited question is whether the High Court was justified in quashing the FIR on the ground that Delhi Police*

Station did not have territorial jurisdiction to investigate the offence. From the discussion made by the learned Judge, it appears that learned Judge has considered the provisions applicable for criminal trial. The High court arrived at the conclusion by appreciating the allegations made by the parties that the SHO, Police Station Paschim Vihar, New Delhi was not having territorial jurisdiction to entertain and investigate the FIR lodged by the appellant because the alleged dowry items were entrusted to the respondent at Patiala and that the alleged cause of action for the offence punishable under Section 498-A IPC arose at Patiala. In our view, the findings given by the High Court are, on the face of it, illegal and erroneous because:

(1) The SHO has statutory authority under Section 156 of the Criminal Procedure Code to investigate any cognizable case for which an FIR is lodged.

(2) At the stage of investigation, there is no question of interference under Section 482 of the Criminal Procedure Code on the ground that the investigating officer has no territorial jurisdiction.

(3) After investigation is over, if the investigating officer arrives at the conclusion that the cause of action for lodging the FIR has not arisen within his territorial jurisdiction, then he is required to submit a report accordingly under Section 170 of the Criminal procedure Code and to forward the case to the Magistrate empowered to take cognizance of the offence."

In view of the above ratio laid down by Hon'ble Apex Court, as the investigation is yet to be completed, quashing of proceeding, as prayed, does not arise. As such interference of this court U/s.482 Cr.P.C. is uncalled for. Accordingly the CRLMC stands dismissed.

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