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M/s. Z. Engineers Construction Pvt. Ltd. & Anr. -V-Sri Bipin Bihari Behera & Ors.

2019 (I) ILR-Cut…… 724

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Appellant accepted the tainted G.C. Notes knowing it to be bribe – There is further no evidence to prove whether the complainant was an Office Bearer of "Patita Uddhar Samiti" and he had pending work with the Appellant – The Complainant has turned hostile completely and the accompanying / overhearing witness has supported the defence to the effect that the Complainant put the tainted money in the second drawer of the table of the Appellant – There is also no evidence on record as to whether the file of the Complainant was still pending with the Appellant or the role of the Appellant in withholding the file of the Complainant – Taking into consideration the evidence on record in their totality and the law discussed, I am of the view that the prosecution has failed to prove the charge under Section 7 of the P.C. Act against the Appellant – The Appellant is therefore entitled to be acquitted of the charge –Accordingly, the judgment of conviction and order of sentence are set aside.

Kishore Kumar Mishra -V- State of Orissa,(Vig.)

2019 (I) ILR-Cut…… 710

SIKIMI TENANTS – STATUS & RIGHTS – DETERMINED

The following propositions of law were referred to be decided by the Larger bench as there were conflicting views in earlier decisions.

1. What is the status of a Sikimi tenant?
2. Whether right of the Sikimi tenants in respect of agricultural land vis-à-vis homestead is different and distinct?
3. Whether the Sikimi right in respect of agricultural land is heritable and transferable?
4. Whether the Sikimi right in respect of homestead is heritable and transferable?

With regard to question No.1 – The Full Bench held that**,** in the background of Dalziel Report and definition of Sikmi tenant as given by "Purna Chandra Odia Bhasakosha", a Sikimi tenant can be described both as sub-tenant and under-raiyat – With regard to the second question, the court held that, it would be right of Sikimi tenants in respect of agricultural land and homestead land has become similar after coming into force of Orissa Act 29 of 1976 amending the "OLR Act" – With regard to third question, the answer is Sikimi right in respect of agricultural land is both heritable and transferable as has been correctly laid down in Smt. Sarala Kumari Rath's case – With regard to question No.4, answer would be, Sikimi right in respect of homestead land is heritable and transferable.

Daitary Swain-V- Kartika Swain & Ors.

2019 (I) ILR-Cut…… 659

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2019 (I) ILR - CUT- 641 (S.C.)

UDAY UMESH LALIT, J & INDU MALHOTRA, J.

CIVIL APPEAL NO. 3149 OF 2019

[Arising out of Special Leave Petition (Civil) No. 10663 of 2016]

P. BANDOPADHYA & ORS. ……..Appellants

.Vs.

UNION OF INDIA & ORS. ……..Respondents

(A) SERVICE LAW – Pensionary benefits under the CCS Pension Rules – Entitlement – Pre-condition of qualifying service – Appellants not completing minimum ten years of qualifying service under the Central Govt. – Whether entitled for pension and other benefits? – Held, No. – Reasons discussed.

"The Appellants having voluntarily exercised the option to get absorbed in the regular service of VSNL, were deemed to have retired from the service of the Central Government on the date of their absorption i.e. January 2, 1990 as per Rule 37(1) of the CCS (Pension) Rules, 1972. It is the admitted position that the Appellants had not completed 10 years of service on the date of their absorption into VSNL, i.e. when they were deemed to have retired from the service of the Central Government. To receive pensionary benefits from the Government, a Government servant is required to put in a minimum 'qualifying service' as defined by Rule 3(q) of the CCS (Pension) Rules, 1972. According to Rule 3(q), 'qualifying service' means the service rendered while on duty or otherwise which shall be taken into account for the purpose of Pensions and Gratuities admissible under the CCS (Pension) Rules, 1972." *(Para 8)*

(B) CODE OF CIVIL PROCEDURE, 1908 – Section 11 – Res Judicata – Whether applicable to writ petitions – Held, yes. – The decision rendered in a case by the High court was not challenged before the Supreme Court, and has since attained finality – Therefore, the same relief sought for by the Appellants before the High Court again was barred by the principle of res judicata.

"*It is well established that the principles of res judicata are applicable to writ petitions. The relief prayed for on behalf of the petitioner in the present case is the same as he would have, in the event of his success, obtained in the earlier writ petition before the High Court. The petitioner in reply contended that since the special leave petition before this Court was dismissed in limine without giving any reason, the order cannot be relied upon for a plea of res judicata. The answer is that it is not the order of this Court dismissing the special leave petition which is being relied upon; the plea of res judicata has been pressed on the basis of the High Court's judgment which became final after the dismissal of the special leave petition. In similar situation a Constitution Bench of this Court in Daryao v. State of*

UP3 held that where the High Court dismisses a writ petition under Article 226 of the Constitution after hearing the matter on the merits, a subsequent petition in the Supreme Court under Article 32 on the same facts and for the same reliefs filed by the same parties will be barred by the general principle of res judicata. The binding character of judgments of courts of competent jurisdiction is in essence a part of the rule of law on which the administration of justice, so much emphasised by the Constitution, is founded and a judgment of the High Court under Article 226 passed after a hearing on the merits must bind the parties till set aside in appeal as provided by the Constitution and cannot be permitted to be circumvented by a petition under Article 32…" (Para 8)

Case Laws Relied on and Referred to :-

1. (2007) 6 SCC 16 : AIR 2007 SC 1935 : Union of India & Anr. Vs. Bashirbhai R. Khiliji.
2 (1990) 2 SCC 715 : AIR 1990 SC 1607 : Direct Recruit Class II Engineering Officers' Association Vs. State of Maharashtra & Ors.
3 (1962) 1 SCR 574 : AIR 1961 SC 1457 : Daryao Vs. State of UP

For Petitioners : S.K.Verma [P-1]

For Opp. Party : Parojat Kishore [R-4]
Gurmeet Singh Makker [R-3]

Impleaders Advocate(s) Namita Choudhary[IMPL]

JUDGMENT Date of Judgment : 15.03.2019

INDU MALHOTRA, J.

Leave granted.

1. The present Civil Appeal arises out of S.L.P. (C) No. 4652 of 2018 wherein the impugned Judgment and Order dated January 13, 2016 passed by the Bombay High Court in Writ Petition No. 2704 of 2005 has been challenged.

2. The facts relevant for the present Civil Appeal, are briefly set out below:

2.1. The Appellants were erstwhile employees in the Overseas Communications Service ["**OCS**"], a Department of the Government of India. On April 1, 1986 the OCS was converted into a Government Company known as the Videsh Sanchar Nigam Limited ["**VSNL**"]. Initially, all employees of the erstwhile OCS were transferred

en masse to Respondent No. 4 – VSNL (now known as Tata Communications Limited), where they worked on deputation from April 1, 1986 to January 1, 1990.

2.2. On July 5, 1989 the Department of Pension and Pension Welfare of the Government of India issued Office Memorandum No. 4/18/87P & P.W. (D) ["**Office Memorandum**"] specifying the terms and conditions governing the pensionary benefits of employees who were transferred *en masse* on the conversion of a Government Department into a Central Public Sector Undertaking or Autonomous Body.

The relevant extract of the Office Memorandum is set out here in below for ready reference:

"*…The following terms and conditions will be applicable in the case of en masse transfer of employees:*

(a) The permanent Government servants shall have an option to retain the pensionary benefit available to them under the Government rules or be governed by the rules of the Public Sector Undertaking/Autonomous Body. This option shall also be available to the quasi permanent and temporary employees after they have been confirmed in the Public Sector Undertaking/Autonomous Body.

(b) The Government servants who opt to be governed by the pensionary benefits available under the Government, shall at the time of their retirement, be entitled to pension, etc., in accordance with the Central Government rules in force at that time.

(c) *The permanent Government servants with less than 10 years' service, quasi permanent employees and temporary employees who opt for the rules of the Public Sector Undertaking/Autonomous Body shall be entitled to an amount equal to Provident Fund contribution for the period of their service under the Government up to the date of permanent absorption in the PSU/Autonomous Body with simple interest at 6% per annum as opening balance in their CPF account with the Public Sector Undertaking/Autonomous Body…*" (emphasis supplied)

2.3. In pursuance of the Office Memorandum, Notice dated December 11, 1989 was issued by Respondent No. 4 – VSNL giving the erstwhile employees of OCS the option to either be absorbed in the regular service of VSNL; or, be transferred to the Surplus Staff Cell of the Central Government for employment against possible vacancies available in other Government offices.

The Appellants voluntarily exercised the option to be absorbed into the regular service of VSNL with effect from January 2, 1990.

2.4. Thereafter, a Staff Notice dated February 21, 1990 was issued by Respondent No. 4 – VSNL to its employees, who were earlier working in OCS. The employees were called upon to exercise their option in terms of Clause (a) of the Office Memorandum, *i.e.* either to retain the pensionary benefits available under the Government of India at the time of retirement as per the applicable Central Government rules in force, or opt to be governed by the rules of Respondent No. 4 – VSNL.

The format in which the option was to be indicated was enclosed with the Staff Notice, along with a document titled "*Clarificatory Information to Facilitate Exercise of Option*". As per paragraph I (1) (ii) of the clarificatory document, the eligibility of employees who chose to retain pensionary benefits under the Central Government was conditional on putting in a minimum of ten years of qualifying service. The relevant portion of Paragraph I (1) is reproduced hereinbelow for ready reference:

"*I. Exercise of option in favour of retention of pensionary benefit under Central Government rules.*

(1) This option is open to every employee whose services have been transferred from Overseas Communications Service to Videsh Sanchar Nigam Limited and who has been permanently absorbed in the Videsh Sanchar Nigam Ltd., irrespective of service rendered in the Overseas Communications Service. Your eligibility for benefits under the Pension Rules will however be conditional to :…

(ii) Putting in a minimum of ten years of qualifying service. (9 years 9 months and above will be reckoned as 10 years)…" (emphasis supplied)

2.5. The Appellants opted to retain pensionary benefits under the rules of the Central Government by exercising their option in pursuance of the Staff Notice dated February 21, 2009.

2.6. Respondent No. 4 – VSNL *vide* Letters dated May 22, 2003 and June 29, 2004, sought a clarification from Respondent No. 3 – Ministry of Communications and Information Technology, Department of Telecommunications ["**DOT**"] as to whether the Appellants – P. Bandhopadhya, I.P. Singh and G. Palaniappan could retain the pensionary benefits in spite of having less than 10 years of service as on January 2, 1990.

2.7. In response, the DOT *vide* Letter dated October 13, 2004 requested VSNL to settle the cases of the Appellants in accordance with Clause (b) of the Office Memorandum.

2.8. Accordingly, by Letter dated November 30, 2004, Respondent No. 4 – VSNL informed Respondent No. 2 – Department of Pension and Pension Welfare, Government of India to settle the cases of the Appellants in accordance with Clause (b) of the Office Memorandum.

2.9. In supersession of the Letter dated October 13, 2004, the Department of Pension and Pension Welfare, Government of India, *vide* Letter dated March 24, 2005 informed Respondent No. 4 – VSNL that the payment of Pension to the Appellants would be settled in terms of the Office Memorandum. This was reconfirmed by Respondent No. 3 – DOT *vide* Letter dated May 30, 2005.

2.10. Accordingly, Respondent No. 2 – Department of Pension and Pension Welfare, Government of India informed the Appellants that their pension would be settled in terms of the Office Memorandum.

2.11. On June 27, 2005 the Appellants were informed by Respondent No. 4 – VSNL that they would not be eligible to receive Government Pension. They would, however, be eligible to receive benefits under Clause (c) of the Office Memorandum *i.e.* an amount equal to the Provident Fund contribution for the period of their service under the Government up to the date of permanent absorption in the Public Sector Undertaking/Autonomous Body with 6% Simple Interest as opening balance in their CPF account with the Public Sector Undertaking/Autonomous Body.

2.12. Aggrieved by this decision, the Appellants made a representation before the Respondents seeking for a declaration that their cases be governed by Clause (b), and not Clause (c) of the Office Memorandum.

2.13. The Appellants thereafter filed Writ Petition No. 2704 of 2005 before the Bombay High Court seeking the following prayers:

> setting aside of Communication/Orders passed by the Respondents on March 24, 2005, May 30, 2005 and June 27, 2005;
>
> directions to treat the cases of the Appellants as being governed by Clause (b), and not Clause (c) of the Office Memorandum.

In effect, the Appellants were seeking directions that their cases be considered eligible for grant of pension by the Government of India.

2.14. A Division Bench of the Bombay High Court dismissed Writ Petition No. 2704 of 2005 on April 26, 2006 after holding that the case of the Appellants was covered by an earlier decision of a Division Bench in *S.V. Vasaikar & Ors.* v. *Union of India & Ors.* [2003 (2) Mh.L.J. 691 : 2003 (4) Bom CR 79]. The Judgment dated April 26, 2006 passed by the Division Bench was challenged by the Appellants before this Court by way of S.L.P. (C) No. 15862 of 2006, which was later renumbered as Civil Appeal No. 3059 of 2007. This Court *vide* Order dated July 14, 2011 set aside the Judgment dated April 26, 2006 passed by the Division Bench of the Bombay High Court in view of the submission by the Appellants that the decision in *S.V. Vasaikar & Ors.* v. *Union of India & Ors.* [2003 (2) Mh.L.J. 691 : 2003 (4) Bom CR 79] was not applicable to the facts of their case. The matter was remanded to the High Court for fresh consideration on merits.

2.15. After remand, the Bombay High Court reheard the matter, and passed a detailed judgment dismissing Writ Petition No. 2704 of 2005, and held that the Appellants were not eligible to avail pensionary benefits under the Government of India, since they had served for less than 10 years on the date of their absorption into VSNL.

The High Court held that on a cumulative reading of Clauses (a), (b), and (c) of the Office Memorandum makes it clear that only permanent Government servants who have served for more than 10 years would have the option of getting pensionary benefits after their absorption in Public Sector Undertakings.

The case of the Appellants would be governed by Clause (c) of the Office Memorandum which clearly carved out the category of employees who had not completed 10 years of service. It was held that a new category which is either contrary to Clause (c), or renders the import of Clauses (a) and (b) nugatory, cannot be created by way of judicial interpretation.

The High Court held that the matter was squarely covered by the earlier decision of a Division Bench of the Bombay High Court in *S.V. Vasaikar & Ors.* v. *Union of India & Ors.* [2003 (2) Mh. L.J. 691 : 2003 (4) Bom CR 79].

3. Aggrieved by the Judgment and Order dated January 13, 2016 passed by the Division Bench, the Appellants filed the present Special Leave Petition. Applications for Impleadment have been filed by 48 persons who claim to be similarly situated as the Appellants.

4. Mr. Sanjay Kumar Mishra, Advocate appeared on behalf of the Appellants, and sought the setting aside of the impugned Judgment and Order dated January 13, 2016 passed by the Division Bench.

Mr. Vikramjit Banerjee, learned Additional Solicitor General, appeared on behalf of Respondent Nos. 1 – 3, and Mr. Maninder Singh, learned Senior Advocate, appeared on behalf of Respondent No. 4 – VSNL.

5. We have perused the record with the able assistance of the counsel for the parties. The issue which arises for our consideration in the present Civil Appeal is whether the Bombay High Court was justified in holding that the case of the Appellants was covered by the earlier decision in *S.V. Vasaikar & Ors.* v. *Union of India & Ors.* [2003 (2) Mh. L.J. 691 : 2003 (4) Bom CR 79], and whether they are entitled to receive pensionary benefits under the Central Government.

6. **SUBMISSIONS OF PETITIONERS**

6.1. Mr. Sanjay Kumar Mishra, Advocate, submitted that the Division Bench of the Bombay High Court had committed an error by denying pensionary benefits to the Appellants.

6.2. It was submitted that Clause (b) of the Office Memorandum would govern the case of the Appellants, since they had opted to avail the pensionary benefits available under the Central Government at the time of their retirement under Clause (a) of the Office Memorandum.

6.3. It was further submitted that the Office Memorandum should be interpreted in isolation on the basis of its plain text, and the Form attached with the Staff Notice dated February 21, 1990 should not condition the said interpretation.

6.4. The Division Bench had erroneously interpreted the Office Memorandum, since Clause (a) is the controlling provision, and Clause (c) in no way dilutes what is provided by Clause (a).

The Appellants challenged the interpretation of the Office Memorandum given by a coordinate bench in *S.V. Vasaikar & Ors.* v. *Union of India & Ors.* [2003 (2) Mh. L.J. 691 : 2003 (4) Bom CR 79].

According to Mr. Mishra, Clauses (c) and (d) of the Office Memorandum provides only the mode of payment of retiral benefits with respect to two different categories of employees – *viz.* employees with less than 10 years of qualifying service, and employees with more than 10 years of qualifying service.

7. **SUBMISSIONS OF RESPONDENTS**

7.1. The counsel for the Respondents *inter alia* submitted that the issue in the present case was squarely covered by the earlier judgment of the Bombay High Court in *S.V. Vasaikar & Ors.* v. *Union of India & Ors.* [2003 (2) Mh. L.J. 691 : 2003 (4) Bom CR 79]. The Appellants through their Federation had appeared in this case, and had not challenged this judgment before this Court. As a consequence, this judgment attained finality. It was therefore not open to the Appellants to relitigate the same issue in the present Writ Petition. The Division Bench rightly followed the said decision while dismissing Writ Petition No. 2704 of 2005 by way of the impugned Judgment and Order dated January 13, 2016.

7.2. It was submitted on behalf of VSNL that the Office Memorandum categorises employees into two classes – *first*, those who have completed 10 years of qualifying service; and *second*, those who do not have 10 years of qualifying service. Under the Office Memorandum, while the first class of employees is entitled to pension under the Government of India, the second class is entitled to a certain sum of Provident Fund contribution.

7.3. The Appellants admittedly had less than 10 years of qualifying service. They had voluntarily exercised their option of getting absorbed in the regular service of VSNL. As a consequence, this resulted in the severance of their previous service with the Central Government, and they were deemed to have retired from Government service on January 2, 1990 *i.e.* the date of their absorption with VSNL in accordance with Rule 37(1) of the Central Civil Services (Pension) Rules, 1972 ["**CCS (Pension) Rules, 1972**].

The Appellants having taken a conscious decision to opt for absorption in VSNL, knowing fully well that they had not completed 10 years of qualifying service with the Central Government, were not

entitled to receive pensionary benefits as per Rule 49 of the CCS (Pension) Rules, 1972.

7.4. It was submitted that the Office Memorandum was virtually in conformity with Rule 49 r.w. Rule 37 of the CCS (Pension) Rules, 1972. In any case, the Office Memorandum cannot be interpreted in isolation, and has to be construed in consonance with the CCS (Pension) Rules, 1972.

The requirement of having completed a minimum qualifying service of 10 years for entitlement to pensionary benefits under Rule 49 of the CCS (Service) Rules, 1972 would apply to Clause (a) of the Office Memorandum.

The Appellants had admittedly less than the minimum qualifying service of 10 years, and were deemed to have retired from Government service, and were not entitled to pensionary benefits under the Central Government. On absorption with VSNL, they would not be entitled to pension.

8. DISCUSSION AND ANALYSIS

8.1. Rule 37 of the CCS (Pension) Rules, 1972 provides that a Government servant who is absorbed in a Corporation or Government Company is deemed to have retired from government service on the date of his/her absorption.

The relevant extract of Rule 37 of the CCS (Pension) Rules, 1972 is reproduced hereinbelow:

"***37. Pension on absorption in or under a corporation, company or body***

(1) A Government servant who has been permitted to be absorbed in a service or post in or under a Corporation or Company wholly or substantially owned or controlled by the Central Government or a State Government or in or under a Body controlled or financed by the Central Government or a State Government, shall be deemed to have retired from service from the date of such absorption and subject to subrule (3) he shall be eligible to receive retirement benefits if any, from such date as may be determined, in accordance with the orders of the Central Government applicable to him.

(2) …

(3) Where there is pension scheme in a body controlled or financed by the Central Government in which a Government servant is absorbed, he shall be entitled to exercise option either to count the service rendered under the Central Government in that body for pension or to receive pro rata retirement benefits for the service rendered under the Central Government in accordance with the orders issued by the Central Government.

EXPLANATION.– Body means Autonomous Body or Statutory Body."
(emphasis supplied)

The Appellants having voluntarily exercised the option to get absorbed in the regular service of VSNL, were deemed to have retired from the service of the Central Government on the date of their absorption *i.e.* January 2, 1990 as per Rule 37(1) of the CCS (Pension) Rules, 1972.

8.2. It is the admitted position that the Appellants had not completed 10 years of service on the date of their absorption into VSNL, *i.e.* when they were deemed to have retired from the service of the Central Government.

To receive pensionary benefits from the Government, a Government servant is required to put in a minimum 'qualifying service' as defined by Rule 3(q) of the CCS (Pension) Rules, 1972. According to Rule 3(q), 'qualifying service' means the service rendered while on duty or otherwise which shall be taken into account for the purpose of Pensions and Gratuities admissible under the CCS (Pension) Rules, 1972.

8.3. Rule 49(2) of the CCS (Pension) Rules, 1972 provides that a overnment servant is entitled to receive pension on retirement only after the completion of the qualifying service of 10 years.[1] On the other hand, a Government servant who retires before completing the qualifying service of 10 years is entitled to service gratuity under Rule 49(1) of the CCS (Pension) Rules, 1972.

The relevant extract of Rule 49 of the CCS (Pension) Rules, 1972 is reproduced hereunder for ready reference:

[1] *Union of India & Anr.* v. *Bashirbhai R. Khiliji*, (2007) 6 SCC 16 : AIR 2007 SC 1935.

"***49. Amount of Pension***

(1) In the case of a Government servant retiring in accordance with the provisions of these rules before completing qualifying service of ten years, the amount of service gratuity shall be calculated at the rate of half month's emoluments for every completed six monthly period of qualifying service.

(2) (a) In the case of a Government servant retiring in accordance with the provisions of these rules after completing qualifying service of not less than thirtythree years, the amount of pension shall be calculated at fifty per cent of average emoluments, subject to a maximum of four thousand and five hundred rupees per mensem.;

(b) In the case of a Government servant retiring in accordance with the provisions of these rules before completing qualifying service of thirtythree years, but after completing qualifying service of ten years, the amount of pension admissible under Clause (a) and in no case the amount of pension shall be less than Rupees three hundred and seventyfive per mensem;…" (emphasis supplied)

A conjoint reading of the statutory rules, *i.e.* Rule 37 with Rule 49 of the CCS (Pension) Rules, 1972, would make it abundantly clear that the Appellants were not entitled to pensionary benefits since admittedly they did not have the minimum qualifying service of 10 years, to make their service pensionable with the Central Government. On absorption in VSNL on January 2, 1990 there was a severance of their service with the Central Government. The Appellants would be entitled to the retiral benefits under VSNL.

After exercising the option to be absorbed in VSNL, the Appellants are now estopped from seeking pensionary benefits from the Central Government.

8.4. The Office Memorandum dated July 5, 1989 was issued by the Department of Pension and Pension Welfare, Government of India to settle the pensionary terms and conditions applicable in cases of *en masse* transfer of employees on the conversion of a Government Department into a Central Public Sector Undertaking/Autonomous Body.

(A) Clause (a) of the Office Memorandum provided an option to Government servants (permanent, quasipermanent and temporary) to either retain the pensionary benefits available to them under the Government rules or be governed by the rules of the Public Sector Undertaking/Autonomous Body. Under Clause (b), Government servants who opt to retain pensionary benefits were entitled to receive

pension at the time of their retirement "*in accordance with Central Government rules in force at that time*".

(B) A conjoint reading of Clauses (a) and (b) would indicate that the option of retaining pensionary benefits was available only to those Government servants who were, in the first place, entitled to receive pension at the time of their retirement. This is evident from Clause (a) which provides the option to "*retain*" pensionary benefits available under the relevant Government rules. Clauses (a) and (b) presuppose that the Government servants who opt to retain pensionary benefits, should be entitled to receive pensionary benefits under the Central Government rules, in the first place.

(C) Rule 37 read with Rule 49 of the CCS (Pension) Rules, 1972 indicates that the Appellants were not entitled to receive Pension under the CCS (Pension) Rules, 1972, since they had not completed 10 years of qualifying service. There was, therefore, no question of the Appellants availing of the option of 'retaining' the benefits under Clause (a).

(D) The Division Bench has rightly held that Clause (b) of the Office Memorandum cannot be read in isolation, and is required to be read in conjunction with Clause (a). The entitlement to Pension under Clause (b) is qualified by the phrase "*in accordance with the Central Government rules in force at that time*".

(E) Further, Paragraph I (1) (ii) of the document titled "*Clarificatory Information to Facilitate Exercise of Option*" clearly stated that the eligibility to retain pensionary benefits under the Central Government was subject to the condition of putting in a minimum of 10 years as qualifying service. The Appellants were specifically informed of this clarification at the time of exercising their option that their eligibility for pensionary benefits under the CCS (Pension) Rules, 1972 was dependant on their fulfilling the minimum eligibility requirement of 10 years qualifying service on the day their retirement.

8.5. We find great force in the submissions made by Mr. Maninder Singh, Senior Advocate appearing for VSNL, and the learned Additional Solicitor General, that the case is squarely covered by the earlier decision of a Division Bench of the Bombay High Court in *S.V. Vasaikar & Ors.* v. *Union of India & Ors.* [2003 (2) Mh. L.J. 691 : 2003 (4) Bom CR 79].

8.6. It has been rightly contended that the earlier Writ Petition No. 5374 of 2002 was filed in a representative capacity. Petitioner No. 3 in the said Writ Petition was the Federation of the VSNL Employees Union, a collective body of VSNL employees. The Federation was espousing the collective interest of the Appellants, and other similarly situated persons before the Division Bench. The prayers in Writ Petition No. 5374 of 2002, was recorded by the High Court in the following words:

> "*3. In the second petition, i.e., Writ Petition No. 5374 of 2002, a prayer is made for declaring that the action of the respondents in not giving the petitioners and similarly situated employees, who had not completed ten years of service with the Government of India, the right to exercise option for retaining Government pensionary benefits on their absorption with VSNL is arbitrary, discriminatory and violative of Articles 14 and 16 of the Constitution. It was, therefore, prayed that appropriate direction be issued to the Government of India that the Petitioners and similarly situated employees, who had not completed ten years of service on their date of absorption in VSNL, are entitled to exercise option for retaining Government pensionary benefits by counting their service in Government of India along with their service with VSNL for such benefits.*"
>
> (emphasis supplied)

The Division Bench dismissed the Writ Petitions, and held as follows:

> "*26. Regarding the contention that employees, who had not completed ten years, were not allowed to exercise the option with regard to pensionary benefits, it may be stated that even when they were in the Government service, when VSNL was a Government Company, they were not entitled to such benefits. Reading the memorandum also, it becomes abundantly clear that the persons, who had not completed ten years of service with the Government, were not entitled to pensionary benefits. The option, which was allowed by the Government, and to be exercised by the employees, was in respect of those employees who had completed ten years or more of service and quasi-permanent employees and temporary employees, who would be entitled to such benefits after they would be confirmed in the Public Sector or Autonomous Bodies. Since the petitioners and similarly situated persons, who had not completed ten years of service, were not entitled to such benefits even under the Government, they cannot make grievance for pensionary benefits.*"
>
> (emphasis supplied)

The aforesaid findings of the Division Bench squarely cover the present case of the Appellants.

8.7. The decision in *S.V. Vasaikar & Ors.* v. *Union of India & Ors.* [2003 (2) Mh. L.J. 691 : 2003 (4) Bom CR 79] was not challenged before the Supreme Court, and has since attained finality. Therefore, the

relief sought by the Appellants before the High Court was barred by the principle of *res judicata*.

Reference can be made to the decision of the Constitution Bench in *Direct Recruit Class II Engineering Officers' Association* v. *State of Maharashtra & Ors.*[2] wherein Sharma, J., on behalf of the fivejudge bench, held:

"*35…It is well established that the principles of res judicata are applicable to writ petitions. The relief prayed for on behalf of the petitioner in the present case is the same as he would have, in the event of his success, obtained in the earlier writ petition before the High Court. The petitioner in reply contended that since the special leave petition before this Court was dismissed in limine without giving any reason, the order cannot be relied upon for a plea of res judicata. The answer is that it is not the order of this Court dismissing the special leave petition which is being relied upon; the plea of res judicata has been pressed on the basis of the High Court's judgment which became final after the dismissal of the special leave petition. In similar situation a Constitution Bench of this Court in Daryao v. State of UP*[3] *held that where the High Court dismisses a writ petition under Article 226 of the Constitution after hearing the matter on the merits, a subsequent petition in the Supreme Court under Article 32 on the same facts and for the same reliefs filed by the same parties will be barred by the general principle of res judicata. The binding character of judgments of courts of competent jurisdiction is in essence a part of the rule of law on which the administration of justice, so much emphasised by the Constitution, is founded and a judgment of the High Court under Article 226 passed after a hearing on the merits must bind the parties till set aside in appeal as provided by the Constitution and cannot be permitted to be circumvented by a petition under Article 32…*" (emphasis supplied)

Albeit the decision of the Constitution Bench was in the context of a Writ Petition filed under Article 32, it would apply with greater force to bar a Writ Petition filed under Article 226, like the one filed by the present Appellants, by the operation of the principle of *res judicata*.

8.8. The Appellants were not entitled to receive pensionary benefits either under the CCS (Pension) Rules, 1972 or under Clauses (a) and (b) of the Office Memorandum.

The case of the Appellants being Government servants prior to their absorption in VSNL, with less than 10 years of qualifying service, would be squarely covered by Clause (c) of the Office Memorandum. Under Clause (c), they would be entitled to receive an amount equal

[2] (1990) 2 SCC 715 : AIR 1990 SC 1607
[3] (1962) 1 SCR 574 : AIR 1961 SC 1457

to the Provident Fund contribution for the period of their service under the Government, upto the date of their permanent absorption along with Simple Interest at 6% *per annum* as the opening balance in their CPF account with the Public Sector Undertaking/Autonomous Body.

9. In view of the aforesaid findings, the present Civil Appeal is dismissed. The impugned Judgment and Order dated January 13, 2016 passed by the Bombay High Court in Writ Petition No. 2704 of 2005 is affirmed.

10. The Applications for Impleadment filed in the Appeal are disposed of in terms of the present judgment. Any other pending I.A.s are disposed of.

Ordered accordingly.

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2019 (I) ILR - CUT- 655 (S.C.)

DR. DHANANJAYA Y. CHANDRACHUD, J & HEMANT GUPTA, J.

CRIMINAL APPEAL NO. 483 OF 2019
(ARISING OUT OF SLP(CRL.) NO. 4608 OF 2016)
&
CRIMINAL APPEAL NO. 484 OF 2019
(ARISING OUT OF SLP(CRL.) NO. 4610 OF 2016)

RIPUDAMAN SINGH .....Petitioner(s)

.Vs.

BALKRISHNA .....Respondent(s)

NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 – Agreement for sale – Cheques issued by the purchaser pursuant to the agreement for sale was not honoured due to insufficient fund – Complaint filed for dishonour of cheques – Accused moved High Court under section 482 of Cr.P.C – Proceeding quashed by High Court holding that the cheques have not been issued for creating any liability or debt but for the payment of balance consideration – The question arose as to whether High Court was correct in quashing the proceeding – Held, No.

"We find ourselves unable to accept the finding of the learned Single Judge of the High Court that the cheques were not issued for creating any liability or debt, but 'only' for the payment of balance consideration and that in consequence, there was no legally enforceable debt or other liability. Admittedly, the cheques were

issued under and in pursuance of the agreement to sell. Though it is well settled that an agreement to sell does not create any interest in immoveable property, it nonetheless constitutes a legally encforceable contract between the parties to it. A payment which is made in pursuance of such an agreement is hence a payment made in pursuance of a duly enforceable debt or liablity for the purposes of Section 138."

For Petitioner (s) : Mr. Shyam Divan, Sr. Adv.
Mr. Santosh Kumar, Mr. Visushant Gupta.
Mr. Mushtaq Ahmad, AOR

For Respondent(s) : Mr. Akshat Shrivastava, AOR
Ms. Pooja Shrivastava.

JUDGMENT Date of Judgment : 13. 03 2019

DR. DHANANJAYA Y. CHANDRACHUD, J.

Leave granted.

These appeals arise from a judgment of a learned Single Judge of the High Court of Madhya Pradesh at its Bench at Indore dated 31 March 2016. The learned Single Judge has allowed a petition under Section 482 of the Code of Criminal Procedure, 1973[1] and quashed the complaints instituted by the appellants under Section 138 of the Negotiable Instruments Act, 1881.

The appellants are spouses. Claiming to be owners of certain agricultural land they entered into an agreement to sell dated 28 May 2013 with the respondent. The sale consideration was Rs.1.75 crores. The agreement records that an amount of Rs. 1.25 crores was paid in cash and as for the balance, two post dated cheques were issued, each in the amount of Rs 25 lakhs.

The cheques were issued by the respondent in favour of the two appellants in the present appeals. The details of the cheques are as follows:

(i) Cheque No. 297251 dated 03.06.2013 drawn on Indusind Bank, Indore for an amount of Rs. 25,00,000/- (Rupees twenty-five lacs only) favouring Ripudaman Singh;

(ii) Cheque No. 297252 dated 02.07.2013 drawn on Indusind Bank, Indore for an amount of Rs. 25,00,000/- (Rupees twenty-five lacs only) favouring Smt. Usha.

Together with the agreement, the appellants executed a General Power of Attorney in favour of the respondent. The first of the two cheques was deposited for payment. On 18 June 2013 it was returned unpaid with the remarks "Insufficient funds". The second cheque dated 2 July 2013 was returned with the same remark by the banker, upon deposit.

After issuing legal notices dated 21 June 2013 and 13 August 2013, the appellants instituted complaints under Section 138 of the Negotiable Instruments Act, 1881. Process was issued by the Judicial Magistrate, First Class.

The respondent filed two separate applications seeking discharge in the respective complaint cases. Those applications were dismissed by the Judicial Magistrate, First Class, Indore on 3 September 2014. On 8 October 2014, charges were framed under Section 138.

The respondent then filed a petition under Section 482 CrPC before the High Court in which the impugned order has been passed. While allowing the complaint, the High Court has adverted to Clause 4 of the agreement between the parties which is in the following terms:

> "That on the above property of the seller there is no family dispute of any type nor is any case pending in the court. If due to any reason any dispute arises then all its responsibility would remain of the selling party and the payment of cheques would be after the resolution of the said disputes."

The High Court held that a suit in respect of the land, Civil Suit No. 4-A of 2012 is pending before the XIVth Additional Sessions Judge, Indore since 2 September 2011 in which the complainants are arraigned as parties.

On this basis, the High Court held that under the terms of clause 4 of the agreement, the cheques could not have been presented for payment. The cheques, according to the High Court, have not been issued for creating any liablity or debt but for the payment of balance consideration. Holding that the respondent did not owe any money to the complainants, the complaint under Section 138 have been quashed.

Assailing the judgment of the High Court, Mr. Shyam Divan, learned senior counsel submits that as a matter of fact, acting on the strength of the General Power of Attorney which was issued by the appellants in both the cases, the respondent entered into a sale transaction in respect of the same property on 3 August 2013 for a total consideration of Rs. 3.79 crores. Hence, it has been submitted that the order passed by the High Court is manifestly misconceived.

On the other hand, learned counsel appearing on behalf of the respondent submitted that clause 4 of the agreement to sell postulated that there was no dispute in respect of the land which was the subject of the agreement to sell nor was there any case pending before the Court. Moreover,

it was stated that if a dispute was to arise, it was the duty of the vendor to get it resolved and the payment of cheques would be after the resolution of the dispute.

We find ourselves unable to accept the finding of the learned Single Judge of the High Court that the cheques were not issued for creating any liability or debt, but 'only' for the payment of balance consideration and that in consequence, there was no legally enforceable debt or other liability. Admittedly, the cheques were issued under and in pursuance of the agreement to sell. Though it is well settled that an agreement to sell does not create any interest in immoveable property, it nonetheless constitutes a legally encforceable contract between the parties to it. A payment which is made in pursuance of such an agreement is hence a payment made in pursuance of a duly enforceable debt or liablity for the purposes of Section 138.

Moreover, acting on the General Power of Attorney, the respondent entered into a subsequent transaction on 3 August 2013. Evidently that transaction was after the legal notice dated 21 June 2013 and hence could not have been adverted to in the legal notice. Recourse to the jurisdiction of the High Court under Section 482 was a clear abuse of process.

The question as to whether there was a dispute as contemplated in clause 4 of the Agreement to Sell which obviated the obligation of the purchaser to honor the cheque which was furnished in pursuance of the agreement to sell to the vendor, cannot be the subject matter of a proceeding under Section 482 and is a matter to be determined on the basis of the evidence which may be adduced at the trial.

For these reasons, we are of the view that the order passed by the High Court in the petition under Section 482 CrPC was unsustainable. We allow the appeals and set aside the impugned judgment and order of the High Court.

However, we clarify that we have not expressed any opinion on the merits of the issues which may arise during the course of the trial. The appeals are, accordingly, disposed of. Pending application(s), if any, shall stand disposed of.

2019 (I) ILR - CUT- 659

FULL BENCH

K.S. JHAVERI, C.J, B. MOHANTY, J & DR. B.R. SARANGI, J.

O.J.C. NO. 13720 OF 1997

DAITARY SWAIN ……..Petitioner

.Vs.

KARTIKA SWAIN & ORS. ……..Opp. Parties

SIKIMI TENANTS – STATUS & RIGHTS – DETERMINED

The following propositions of law were referred to be decided by the larger bench as there were conflicting views in earlier decisions.

1. **What is the status of a Sikimi tenant?**
2. **Whether right of the Sikimi tenants in respect of agricultural land vis-à-vis homestead is different and distinct?**
3. **Whether the Sikimi right in respect of agricultural land is heritable and transferable?**
4. **Whether the Sikimi right in respect of homestead is heritable and transferable?**

With regard to question No.1 – The Full Bench held that, in the background of Dalziel Report and definition of Sikmi tenant as given by "Purna Chandra Odia Bhasakosha", a Sikimi tenant can be described both as sub-tenant and under-raiyat – With regard to the second question, the court held that, it would be right of Sikimi tenants in respect of agricultural land and homestead land has become similar after coming into force of Orissa Act 29 of 1976 amending the "OLR Act" – With regard to third question, the answer is Sikimi right in respect of agricultural land is both heritable and transferable as has been correctly laid down in Smt. Sarala Kumari Rath's case – With regard to question No.4, answer would be, Sikimi right in respect of homestead land is heritable and transferable. (Para 10.1)

Case Laws Relied on and Referred to :-

1. 2000 (II) O.L.R. 363 : Smt. Sarala Kumari Rath Vs. Khati Rout & Ors.
2. O.J.C. No.4349 of 1994 : Natabara Pandey Vs. Sri Sri Tareswar Dev and Sri Sri Tarini Thakurani & Ors.
3. Vol-95 (2003) CLT 438 : Subal Baliarsingh & Anr. Vs. Chanchala Bewa & Anr.
4. 1974 (1) CWR 387 : Hari Jena & Others Vrs. Somanath Harichandan
5. 49 (1980) CLT (Note 16) 9 : Shridhar Chandra Kar Vs. Upendranath Gochhayat & Ors.

For Petitioners : M/s. B.H. Mohanty, R.K. Nayak, S.C. Mohanty, B. Das, J.K. Basita & D.P. Mohanty.

For Opp. Party : M/s. N.C. Pati, A.K. Das, S. Misra,
A.K. Mohapatra & S. C. Mohanty
Mr. B.P. Pradhan, Addl. Govt. Adv.

JUDGMENT Date of Hearing:15.03.2019 : Date of Judgment: 27.03.2019

B.MOHANTY, J.

The following propositions of law have been referred for our decision.

1. What is the status of a Sikimi tenant?
2. Whether right of the Sikimi tenants in respect of agricultural land vis-à-vis homestead is different and distinct?
3. Whether the Sikimi right in respect of agricultural land is heritable and transferable?
4. Whether the Sikimi right in respect of homestead is heritable and transferable?

2. The aforesaid reference has been made in the following circumstances.

While this Court in a judgment dated 18.11.1998 rendered by a Division Bench in the case of **Smt. Sarala Kumari Rath Vs. Khati Rout and others,** reported in 2000 (II) O.L.R. 363 came to hold that Sikimi right in respect of both the agricultural land and homestead land is heritable and transferable, however, another Division bench of this Court in an unreported decision i.e. in the case of **Natabara Pandey Vs. Sri Sri Tareswar Dev and Sri Sri Tarini Thakurani and others** pertaining to O.J.C. No.4349 of 1994 decided on 30th October, 2002 has held that a Sikimi tenant is an "under-raiyat" and such tenancy is neither heritable nor alienable. This later view has been reiterated by a learned Single Bench of this Court on 24.01.2004 in the case of **Subal Baliarsingh and another Vs. Chanchala Bewa and another,** reported in Vol-95 (2003) CLT 438 by relying on **Natabara Pandey** case (Supra). In view of such cleavage of opinion, with the above noted questionnaire, the matter has been referred before this Bench.

3. Mr. Mohanty, learned counsel for the petitioner submitted that the later Division Bench while pronouncing its judgment in **Natabara Pandey** case (Supra) has not referred to the judgment pronounced by a Division Bench of this Court earlier in the case of **Smt. Sarala Kumari Rath** (Supra). Similarly, the Single Bench of this Court in **Subal Baliarsingh** case (Supra)

has also not referred to the Division Bench decision as rendered in **Smt. Sarala Kumari Rath** case (Supra). In such background, he submitted that the later two judgments namely the judgments rendered in the case of **Natabara Pandey** and **Subal Baliarsingh** (Supra) have been pronounced per curiam and, therefore, should be over ruled so far as their observations relating to the rights of Sikimi tenant are concerned.

3.1 Secondly, he argued that after amendment of Clause (i) of Sub-Section (1) of Section-4 of the Orissa Land Reforms Act, 1960 for short "OLR Act", by Orissa Act No.29 of 1976, the Sikimi tenants being under-raiyats, the agricultural lands held by them have become heritable and transferable. This amended provision has not been taken note of in **Natabara pandey** case (Supra) and **Subal Baliarsingh** case (Supra). With regard to Sikimi tenancy vis-à-vis homestead lands, he submitted that there exits no dispute that such tenancy has been recognized long back to be heritable and transferable. Thus Sikimi tenancy is clearly heritable and transferable. Thus he strongly supported the view of the Division Bench of this Court as rendered in **Smt. Sarala Kumari Rath** case (Supra) and submitted that on this point, the judgment of the Division Bench as rendered in the case of **Natabara Pandey** and the judgment of Single Bench as rendered in the case of **Subal Baliarsingh** (Supra) needs to be overruled.

4. Learned counsel appearing for the private opposite party Nos.1 & 2 agreed with the submissions made by learned counsel for the petitioner and submitted that the view as rendered by a Division Bench of this Court in the case of **Smt. Sarala Kumari Rath** lays down correct propositions of law.

5. Mr. B.P. Pradhan, learned Additional Government Advocate referring to the Dalziel Report prepared during 1922-1932, submitted that as per the said report Sikimi tenants are under-raiyats. He also submitted that while it is settled that Sikimi tenancy in respect of homestead land is clearly transferable and heritable as per Section 236 of the Orissa Tenancy Act, 1936 r/w Section 9 of the "OLR Act" however, with regard to agricultural land, he submitted that Sikimi tenancy has been made heritable and transferable only after declaration of the raiyati status of such tenant under the provisions of Section-4 of the "OLR Act".

5.1 In this context, he further submitted that for this purpose, a declaration is required to be made under Sub-Sections (5) to (8) of Section-4 of the "OLR Act" and only after such declaration; Sikimi tenancy in respect of agricultural land becomes heritable and transferable. In this context, Mr.

Pradhan relied upon a decision of this Court rendered by a learned Single Judge in the case of **Hari Jena & Others Vrs. Somanath Harichandan,** reported in 1974 (1) CWR 387.

5.2 So from the submissions of the parties, one thing is clear that both the parties have not disputed the fact that so far as the homestead land is concerned, Sikimi tenancy in respect of such land has been recognized to be heritable and transferable since long. A slight dispute remains with regard to Sikimi tenancy in respect of agricultural land. Though both sides agree that such land has become transferable and heritable after coming into force of Orissa Act 29 of 1976, however, Mr. Pradhan learned Additional Government Advocate submitted that for the said purpose declaration of raiyati status of a Sikimi tenant a must.

6. Before discussing the rival submissions in details, we may profitably refer to the Dalziel Report as indicated above. A perusal of the same clearly shows that Shikmi tenants are under-raiyats. There is no dispute at the Bar that there is no difference between the Shikmi tenants, Sikmi tenants and Sikimi tenants and that these are one and the same. A reference to "Purna Chandra Ordia Bhasakosha" which happens to be a lexicon of oriya language published during 1940 recognizes Sikimi tenant as a sub-tenant or a under-tenant. Section-4 (1) (i) of the "OLR Act" clearly deals with the status of sub-tenants and under-raiyats vis-à-vis their lands in personal cultivation or their agricultural lands.

6.1 Since Sikimi tenants have been recognized as under-raiyats/sub-tenants, the above noted provision clearly deals with status of Sikimi tenants. As to how such tenants can become raiyats have been dealt with in Sub-sections (5) to (8) of Section-4 of the "OLR Act". But here we are mainly concerned with the status of a Sikimi tenant vis-à-vis homestead land and agricultural land and not with the issue as to how a Sikimi tenant acquires the status of raiyat and rights of such raiyat.

7. Keeping this in mind, let us refer to the provision of Clause (i) of Sub-Section (1) of Section-4 of the "OLR Act" as it originally stood and its later amended versions.

> "(i) Persons who are immediately before the commencement of this Act in personal cultivation of any land and recorded as sub-tenants or under-raiyats in respect of such land in the record-of-rights under any law in force in any part of the state." **(as originally stood)**

"(i) Subject to the provisions of sub-sections (5) to (8) persons who are immediately before the commencement of this Act in personal cultivation of any land and recorded as sub-tenants or under-raiyats in respect of such land in the record-of-rights under any law in force in any part of the State." **(as stood after amendment by Orissa Act 13 of 1965)**

"(i) Subject to the provisions of Sub-sections (5) to (8) persons who are in personal cultivation of any land and recorded as sub-tenants or under-raiyats in respect of such land in the record-of-rights under any law in force in any part of the State and their successions-in-interest. **(emphasis supplied)**

Provided that nothing in this clause shall apply to persons who are recorded as sub-tenants or under-raiyats after the 30th day of September, 1965 or to their successor-in-interest if the land in respect of which they have been so recorded belongs to a person under disability or to a privileged raiyat." **(as stood after amendment by Orissa Act 29 of 1976)**

7.1 In order to understand the matter better, let us also refer to relevant provisions of Orissa Act 29 of 1976, which amended Section-4 (1)(i) of the "OLR Act". The same reads as follows:

"3. In Section 4 of the principal Act,-
(a) in sub-section (1),-
(i) X X X
(ii) in clause (i) –

(1) the words "immediately before the commencement of this Act" shall be and shall be deemed always to have been deleted;

(2) the words "and their successors-in-interest" shall be and shall be deemed always to have been added at the end;"

7.2 A perusal of all these would make it clear that only after the "OLR Act" stood amended by Orissa Act 29 of 1976 and with introduction of the phrase "and their successors-in-interest"; the sub-tenants and under-raiyats and their successors interest have all been covered under Clause (i) of Sub-section (1) of Section-4 of the "OLR Act". Since the successors-in-interest would cover both inheritors and transferees, it clearly means that the tenancies covered under the above mentioned clause have been recognized as heritable and transferable. Accordingly, Sikimi tenancy in respect of agricultural land has clearly become heritable and transferable.

8. Now coming to the decision rendered in the case of **Smt. Sarala Kumari Rath** (Supra), it has been observed there that since a Sikimi tenant in possession of homestead land acquires occupancy status, therefore his right thereto is both heritable and transferable. With regard to agricultural land it

observed that with amendment of the "OLR Act" by Orissa Act-29 of 1976, the words "and their successors-in-interest" were introduced and this Court while interpreting the words "successor-in-interest" has ruled in the case of **Shridhar Chandra Kar Vs. Upendranath Gochhayat and others;** 49 (1980) CLT (Note 16) 9 that the successors-in-interest also includes a transferee and accordingly, therefore, the right of sub-tenant or under raiyat in respect of cultivable land in his possession has become heritable and transferable. As indicated earlier since Sikimi tenant has been treated both as sub-tenant and under-raiyat, then the cultivable lands held by him have also become heritable and transferable.

8.1 The Division Bench in **Smt. Sarala Kumari Rath** (Supra) further held that even if the sub-tenant/under-raiyat has not filed an application as envisaged under Section-4 of "OLR Act" for declaration of his status as raiyat, yet the right of under-raiyat/sub-tenant in respect of the disputed land will not get extinguished. However, their rights would be enlarged when they would become raiyats by moving the Revenue Officer within the prescribed time as envisaged under Sub-Sections (5) to 8 of Section-4 of the "OLR Act". Thus this decision makes it clear that even without being declared as raiyats, the right of a sub-tenant/under-raiyat is heritable and transferable vis-à-vis cultivable lands in possession of a Sikimi tenant after "OLR Act" got amended by Orissa Act 29 of 1976. In such background Sikimi tenancy in respect of agricultural land has clearly become inheritable and transferable.

8.2 With regard to judgment of this Court rendered in the case of **Hari Jena & Others** (Supra) let it be pointed out that the issue there was how and under what process a Sikimi tenant can become a raiyat and it was made clear therein that until the proceeding as envisaged under Sub-Sections (5) to (8) of Section-4 are concluded by the Revenue Officer by passing an order declaring an under-raiyat to be raiyat, a Sikimi tenant cannot be deemed to be a raiyat and without such declaration, a successor cannot get any benefit. Here, we are not concerned with the said issue. Our only concern here is with the status of Sikimi tenant vis-à-vis homestead land and agricultural land held by him. Secondly, it is most important to note here that the said judgment was pronounced by this Court on 18.02.1974 and by that date the Orissa Act 29 of 1976 was yet to see the light of the day.

8.3 As indicated earlier with the amendment introduced by the Orissa Act 29 of 1976, the status of Sikimi tenant in respect of land under personal cultivation of such tenant has undergone sea change. Therefore, in our

opinion the correct position with regard to right of Sikimi tenant so far as agricultural land is concerned is that after amendment of the Clause (i) of Sub-Section (1) of Section-4 of the "OLR Act", such Sikimi tenancy has become both heritable and transferable.

8.4 No doubt without complying the provisions of Sub-Sections (5) to (8) a Sikimi tenant cannot become a raiyat but that does not in any way affect his rights as a Sikimi tenant to transfer the agricultural land and the right of his legal heirs to inherit the same. The Clause (i) of Sub-Section (1) of Section 4 of the "OLR Act" cannot be read to mean that only after being declared as a raiyat, the Sikimi tenancy of a Sikimi tenant can become heritable and transferable.

8.5 In other words, even without being declared as a raiyat by virtue of the amendment of Clause (i) of Sub-Section (1) of Section-4 of the "OLR Act" as per Act-29 of 1976, a Sikimi tenant can transfer his cultivable/agricultural land and his legal heirs can inherit the same. Therefore, the attempt made by Mr. Pradhan, learned Additional Government Advocate to show that a Sikimi tenancy cannot be transferred and inherited unless a declaration under Sub-Section (5) of Section-4 of the "OLR Act" cannot be accepted as the same runs contrary to the intention of amended Clause (i) of Sub-section (1) of Section-4 of the "OLR Act".

8.6 The case of **Hari Jena** (Supra) mainly deals with the process as per which a Sikimi tenant can become a raiyat and rights of Sikimi tenant as it stood then. Since at that point of time the Sikimi tenancy in respect of agricultural land was neither heritable nor transferable, therefore, at that point of time there was no question of anybody making substitution after such a tenant dies in course of a proceeding. But after amendment introduced by Act-29 of 1976 and with insertion of the words "and their successor-in-interest", it has become clear that Sikimi tenancy in respect of agricultural land has become heritable and transferable and for this; acquisition of raiyat status by a Sikimi tenant is not required. Thus in our view law laid down by this Court in the case of **Smt. Sarala Kumari Rath** (Supra) is correct and cannot be faulted.

9. With regard to **Natabara Pandey** case (Supra) where judgment was pronounced on 30.10.2002, the issue there related to legality or otherwise of the demand of the Landlord from the Sikimi tenant to get rent in a proceeding under Section 15 of the "OLR Act". The present issue was directly not the

issue there. Division Bench of this Court however in the said case held that a Sikimi tenant has no abiding interest in the land and has only a right of cultivation which protects him from paying higher rent or from eviction except as stipulated under the "OLR Act". He is liable to pay rent as per the contract and perform other obligations. Division Bench further opined that Sikimi tenant being under-raiyat, such tenancy is neither heritable nor alienable. There the attention of this Court was neither drawn to **Smt. Sarala Kumari Rath** case (Supra) nor to the amended Clause (i) of Sub-Section (1) of Section-4 of the "OLR Act".

9.1 In such background, for reasons indicated earlier, we have no hesitation in coming to a conclusion that so far as the issue of status of Sikimi tenancy is concerned, the conclusion of the Division Bench of this Court is wholly erroneous. Accordingly, we overrule the observation made in that decision with regard to the present issue wherein it has observed that Sikimi tenancy is neither heritable nor transferable. **Subal Baliarsingh** case (Supra) involved a suit relating to eviction where judgment was pronounced on 24.01.2004. There the plaintiffs claimed that their predecessor Gangadhar was a Sikimi tenant. In the said eviction suit the defendants took a plea that since the Sikimi right is not heritable; the plaintiffs could have no title to that portion of the disputed land i.e. Plot No.400. Relying on **Natabar Pandey** case, the Single Bench therein came to a conclusion that since such tenancy is neither heritable nor transferable, the plaintiffs cannot claim title over the same and bring any suit for eviction vis-à-vis Plot No.400. However, in that judgment also there is neither any reference to the amended provisions of Section 4(1)(i) of the "OLR Act" nor to **Smt. Sarala Kumari Rath's** case (Supra) which makes it clear that Sikimi tenancy both with regard to homestead land and agricultural land is transferable and heritable. In such background, we have no hesitation in coming to a conclusion that declaration of law made by the learned Single Judge in **Subal Baliarsingh** (Supra) case with regard to status of Sikimi tenant is incorrect and accordingly, we over rule the same to that extent.

10. Thus in the end, our answers to the questions containing the propositions of law as referred to this larger Bench are as follows:

10.1 With regard to question No.1, we are clearly of the opinion that in the background of Dalziel Report and definition of Sikmi tenant as given by "Purna Chandra Ordia Bhasakosha", a Sikimi tenant can be described both as sub-tenant and under-raiyat. With regard to the second question, our answer

would be right of Sikimi tenants in respect of agricultural land and homestead land has become similar after coming into force of Orissa Act 29 of 1976 amending the "OLR Act". With regard to third question, our answer is Sikimi right in respect of agricultural land is both heritable and transferable as has been correctly laid down in **Smt. Sarala Kumari Rath's** case (Supra). With regard to question No.4, our answer would be, Sikimi right in respect of homestead land is clearly heritable and transferable.

11. Accordingly, the reference is answered.

Place this matter before appropriate Bench for disposing of O.J.C. No.13720 of 1997 in accordance with law.

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2019 (I) ILR - CUT- 667

K.S. JHAVERI, C.J & DR.A.K.RATH, J.

WP(C) NO.1813 OF 2004

TRINATH BASANT RAY & ANR. .....Petitioners

.Vs.

Sk. MOHAMOOD & ANR. .....Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order 23 Rule 1 – Withdrawal of suit or abandonment of part of claim – Cleavage of decisions between the two coordinate Benches on the interpretation of sub-rule (3) of Rule 1 of Order 23 CPC in the case of Babrak Khan v. A. Shakoor Muhammad, reported in (1954) 20 CLT 642 and Atul Krushna Roy v. Raukishore Mohanty and others, reported in AIR 1956 Orissa 77 – The question of law came up for decision as to "Whether the expression "sufficient grounds" occurring in clause (b) of sub-rule (3) of Rule 1 of Order 23 CPC should be construed "ejusdem generis" with the words "formal defect" mentioned in clause (a) of the said sub-rule and withdrawal of suit can be permitted only if the defect is analogous to a formal defect?" – Held, the expression "formal defect" has not been defined in CPC –The subject of enumeration belongs to a broad based genus as well as narrow based genus – Thus the question of application of principle of "ejusdem generis" does not apply – Clause (b) cannot be constricted by clause (a), when two alternatives are provided – The expression "other sufficient grounds" occurring in

clause (b) of sub-rule (3) of Rule 1 Order 23 CPC cannot be restricted to defects of a formal character – The words are wide enough to take within its sweep other defects as well – Thus the view taken in Atul Krushna Roy is correct enunciation of law and the contrary view taken in Babrak Khan is not correct enunciation of law, which is accordingly overruled. (Para 14)

Case Laws Relied on and Referred to :-

1. AIR 1956 Orissa 77 : Atul Krushna Roy .Vs. Raukishore Mohanty & Ors.
2. AIR 1922 P.C 112 : Chhaju .Vs. Neki
3. (2000) 5 SCC 458 : K.S. Bhoopathy & Ors .Vs. Kokila & Ors.
4. AIR 1979 SC 65 : Uttar Pradesh S.E. Board .Vs. Harishankar.

For Petitioners : Mr.Prafulla Ku. Rath.
For Opp. Parties : Mr.Soumya Mishra.

JUDGMENT Date of Hearing: 01.03.2019 : Date of Judgment: 08.03.2019

DR. A.K.RATH, J.

Cleavage of decisions between the two coordinate Benches on the interpretation of sub-rule (3) of Rule 1 Order 23 CPC in the case of Babrak Khan v. A. Shakoor Muhammad, (1954) 20 CLT 642 and Atul Krushna Roy v. Raukishore Mohanty and others, AIR 1956 Orissa 77, necessitated one of us (Dr. A.K. Rath, J) to refer the matter to the larger Bench.

2. The following question of law has been referred for our decision:

> "Whether the expression "sufficient grounds" occurring in clause (b) of sub-rule (3) of Rule 1 of Order 23 CPC should be construed ejusdem generis with the words "formal defect" mentioned in clause (a) of the said sub-rule and withdrawal of suit can be permitted only if the defect is analogous to a formal defect ?"

3. Sub-rule (3) of Rule 1 Order 23 CPC, which is hub of the issue, is quoted hereunder;

> "**1. Withdrawal of suit or abandonment of part of claim**.- (1) & (2) xxx xxx xxx
>
> (3) Where the Court is satisfied,-
>
> (a) that a suit must fail by reason of some formal defect, or
>
> (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject- matter of a suit or part of a claim,
>
> it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim."

4. The word 'or' appearing in after clause (a) and before clause (b) clinches the issue.

5. In Babrak Khan, learned Single Judge, relying on the decision of the Privy Council in the case of Chhaju v. Neki AIR 1922 P.C 112, held that "sufficient grounds" occurring in clause (b) of sub-rule (2) of Rule 1 of Order 23 should be construed ejusdem generis with the words "formal defect" mentioned in clause (a) of the said sub-rule and withdrawal could be permitted only if the defect was analogous to a "formal defect".

6. An identical question came up for consideration in Atul Krushna Roy. The learned Chief Justice held that the expression "other sufficient grounds" need not be restricted to only formal defects or those analogous thereto. The words are wide enough to embrace other defects as well. It was held that the provisions of Order 23 Rule 1 CPC have been specifically enacted in order to remove any possible doubt as to the meaning of words "formal defect". The Legislature, in putting the two expressions separately in the two sub-rules, intended that the "other sufficient grounds" occurring in clause (b) need not be of a formal character. Though the decision in the case of Babrak Khan was drawn to the attention of the Bench, the learned Chief Justice came to hold that there is no justification for restricting the meaning of the expression "other sufficient grounds" only to formal defects or those analogous thereto. It was further held that the doctrine of ejusdem generis has been pushed too far in some cases. The expression "other sufficient grounds" need not necessarily be restricted to defects of a formal character and that the words are wide enough to embrace other defects as well.

7. The Reference Bench came to hold that the ratio in Atul Krushna Roy runs contrary to Babrak Khan, whereafter the Hon'ble Chief Justice has placed the matter before this Bench.

8. We have heard Mr. Prafulla Kumar Rath, learned counsel for the petitioners and Mr. Soumya Mishra, learned counsel for the opposite parties.

9. In K.S. Bhoopathy and others v. Kokila and others, (2000) 5 SCC 458, the Apex Court held that grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the Court, but such discretion is to be exercised by the Court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided; first where the Court is satisfied that a suit must fail by reason of some formal defect, and the other where the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim. Clause (b) of sub-rule (3) contains the mandate to the Court that it must be satisfied about

the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action.

(emphasis laid)

9.1 The Court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action.

10. In no uncertain terms the Apex Court in K.S. Bhoopathy held that two alternatives are provided under sub-rule (3) of Rule 1 Order 23 CPC.

11. The Apex Court had an occasion to interpret the scope and ambit of sub-rule (3) of Rule 1 Order 23 CPC in V. Rajendran and another v. Annasamy Pandian (dead) through legal representatives Karthyayani Natchiar, (2017) 5 SCC 63. Taking a cue from K.S. Bhoopathy, the Apex Court held in terms of Order 23 Rule 1(3)(b) where the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit, the Court may permit the plaintiff to withdraw the suit.

11.1 In interpreting the words "sufficient grounds", there are two views: One view is that these grounds in clause (b) must be "ejusdem generis" with those in clause (a), that is, it must be of the same nature as the ground in clause (a), that is, formal defect or at least analogous to them; and the other view was that the words "other sufficient grounds" in clause (b) should be read independent of the words a “formal defect” and clause (a). Court has been given a wider discretion to allow withdrawal from suit in the interest of justice in cases where such a prayer is not covered by clause (a).

(emphasis laid)

12. Justice G.P. Singh in his “Principles of Statutory Interpretation”, 14th Edition, succinctly stated the principle of ejusdem generis. The learned author held that when particular words pertaining to a class, category or genus are followed by general words, the general words are construed as limited to things of the same kind as those specified. The rule is known as the rule of ejusdem generis. It reflects an attempt “to reconcile incompatibility between the specific and general words in view of the other rules of interpretation that all words in a statute are given effect if possible, that a statue is to be construed as a whole and that no words in a statute are presumed to be superfluous”.

13. Justice Krishna Iyer in his inimitable style in the case of Uttar Pradesh S.E. Board v. Harishankar, AIR 1979 SC 65, held that the true scope of the rule of "ejusdem generis" is that words of a general nature following specific and particular words should be construed as limited to things which are of the same nature as those specified. But the rule is one which has to be "applied with caution and not pushed too far". It is a rule which must be confined to narrow bounds so as not to unduly or unnecessarily limit general and comprehensive words. If a broad-based genus could consistently be discovered, there is no warrant to cut down general words to dwarf size. If giant it cannot be, dwarf it need not be.

14. The expression "formal defect" has not been defined in CPC. The subject of enumeration belongs to a broad based genus as well as narrow based genus. Thus the question of application of principle of "ejusdem generis" does not apply. Clause (b) cannot be constricted by clause (a), when two alternatives are provided. The expression "other sufficient grounds" occurring in clause (b) of sub-rule (3) of Rule 1 Order 23 CPC cannot be restricted to defects of a formal character. The words are wide enough to take within its sweep other defects as well.

15. True it is, grant of leave envisaged in sub-rule (3) of Rule 1 Order 23 CPC is the discretion of the Court. But then, the discretion need not be fanciful. Benjamin N. Cardozo, whose "The Nature of the Judicial Process" will surpass all ages made a pregnant remark :

> "The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remains".

16. In view of the foregoing discussions, we hold that the view taken in Atul Krushna Roy is correct enunciation of law and the contrary view taken in Babrak Khan is not correct enunciation of law, which is accordingly overruled.

17. The reference is answered accordingly. The Registry is directed to place the matter before the assigned Bench.

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2019 (I) ILR - CUT- 672

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

O.J.C. NO. 1212 OF 1995

SHAW WALLACE & CO. LTD. .....Petitioner

.Vs.

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

BOARDS OF EXCISE RULES, 1965 – Rule 39 A-(7) (b) read with Sections 38, 39 and 90 of Bihar and Orissa Excise Act, 1915 – Writ petition challenging imposition of five times penalty owing to long storage of beer or any stock of I.M.F.L. which has become unfit for human consumption – Plea that neither in the Act nor in the Rule any provision is available for imposition of such penalty – Action of the authority challenged – Held, when section 90 of the Act, which confers power on Board to make Rules, does not empower to make rules for imposition of penalty and as such the Clause (b) under Rule 39-A (7) of Boards of Excise Rules, 1965 which provides for imposition of penalty is without jurisdiction and is required to be struck down – The same is hereby struck down. (Para 6)

For Petitioner : Mr. Arun Ku. Patra
For Opp. Parties : Mr. R.K. Mohapatra, Govt. Adv.

JUDGMENT Heard & Decided on 12.03.2019

K.S. JHAVERI, C.J.

Heard Mr. A.K. Patra, learned counsel for the petitioner and Mr. R.K. Mohapatra, learned Government Advocate for the State-opposite parties.

2. By way of this writ petition, petitioner has challenged the action of the opposite parties in imposing the penalty under Rule 39-A (7)(b) of Boards of Excise Rules, 1965.

3. Before going to the facts of the case, the new Rule 39-A (7)(b) of Boards of Excise Rules, 1965, on the basis of which penalty has been imposed is required to be gone through and the same reads as under:

> "39-A(7)(b) : If any stock of I.M.F.L./ Beer stored under Rule 33 (c) becomes unfit for human consumption owing to long storage or for other factors the licensee shall be squarely responsible and shall be liable to pay fine equal to five times the duty payable to the Government on the stock so spoiled."

4. Learned counsel for the petitioner contended that the cause of action for filing the present writ application arose on 16.01.1995 when the opposite party No.4 made a demand under Annexure-1 directing the petitioner to pay

fine equivalent to five times the excise duty payable on liquor/beer which has been rendered unfit for human consumption. Petitioner was a license holder for operating a "bonded ware house" as well as "trade off ware house". The notification under Annexure-8 came to be issued by the opposite parties-authorities on 12.11.1991 pursuant to which a new rule i.e. Rule 39-A(7)(b) was introduced and on the basis of the said notification, the impugned order under Annexure-1 was passed, whereby he was directed to pay Rs. 6,24,438/- under the Board's Excise Rules 1965.

4.1 Learned counsel for the petitioner refers to relevant provisions of Sections 38, 39 and 90 of the Bihar and Orissa Excise Act, 1915, which reads as under:

> "38. ***Fees for, terms, conditions and form of, and duration of, licences, permits and passes***. –
>
> (1) Every licence, permit or pass granted under this Act-
>
> (a) shall be granted
>
> (i) on payment of such fees (if any), and
>
> (ii) subject to such restrictions and on such conditions, and
>
> (b) shall be in such form and contain such particulars, as the Board may [direct].
>
> (2) Every licence, permit or pass under this Act shall be granted for such period (if any) as may be prescribed by Rule made by the [State Government] under Section 89, Clause (e).
>
> 39. ***Power of Board to reduce fees***. - The Board may, if it thinks fit, at any time during the period for which any licence has been granted, order a reduction of the amount of fees payable in respect thereof during the unexpired portion of the grant."
>
> xxx xxx xxx
>
> 90. ***Power of Board to make rules. - The Board may make [rules];***
>
> (1) for regulating the manufacture, supply, or storage of any [intoxicant], and in particular, and with prejudice to the generality of this provision may make rules for regulating –
>
> (a) the establishment, inspection, supervision, management and control of any place for the manufacture, supply or storage of any [intoxicant], and the provision maintenance of fittings, implements and apparatus therein;
>
> (b) the bottling of liquor for purposes of sale;
>
> (c) the cultivation of the hemp plant;
>
> (d) the collection of portions of the hemp plant from which intoxicating drugs can be manufactured or produced, and the manufacture or production of intoxicating drugs therefrom;

(e) the tapping of tari-producing trees and the drawing of tari from trees;

(f) the making of tari-producing trees in areas notified under Section 14, Sub-section (1), and the maintenance of such marks;

(2) for fixing the strength, price of quantity in excess of or below which any [intoxicant] shall not be supplied or sold, and the quantity in excess of which denatured spirit shall not be possessed, and for prescribing a standard of quality for any [intoxicant];

(3) for declaring how spirit manufactured in [India] shall be denatured;

(4) for causing spirit manufactured to be denatured through the agency or under the supervision of [Government Officers];

(5) for ascertaining whether any spirit so manufactured has been denatured;

(6) for regulating the deposit of any [intoxicant] in a warehouse established, authorised or continued under this Act, and the removal of any [intoxicant] from any such warehouse or from any distillery or brewery;

(7) for prescribing the scale of fees or the manner of fixing the fees payable in respect of [* * *] any licence, permit or pass granted under this Act, or in respect of the storing of any [intoxicant];

(8) for regulating the time, place and manner of payment of such fees;

(9) for prescribing the restrictions under which or the conditions on which any licence, permit or pass may be granted, and in particular, and without prejudice to the generality of this provision, may make rules for –

(i) prohibiting the admixture with any [intoxicant] of any article deemed to be noxious or objectionable;

(ii) regulating or prohibiting the reduction of liquor by a licensed manufacturer or licensed vendor from a higher to a lower strength; .

(iii) prescribing the nature and regulating the arrangement of the premises in which any [intoxicant] may be sold, and prescribing the notices to be exposed at such premises;

(iv) prohibiting or regulating the employment by the licensee or any person or class of persons to assist him in his business;

(v) prohibiting the sale of any [intoxicant] except for cash;

(vi) prescribing the days and hours during which any licensed premises mayor may not be kept open, and providing for closing of such premises on special occasions;

(vii) prescribing the accounts to be maintained and the returns to be submitted by licensees; and

(viii) regulating the transfer of licences;

(10) for prescribing the particulars to be contained in licences, permits or passes granted under this Act;

(11) for the payment of compensation to licensees whose premises are closed under Section 26 or under any rule made under Sub-clause (vi) of Clause (9) of this Section;

(12) for prescribing the time, place .and manner of levying duty on [intoxicant];

(13) for providing for the destruction or other disposal of any [intoxicant] deemed to be unfit for use; and

(14) for regulating the disposal of things confiscated under this Act.

Explanation - Fees may be prescribed under Clause (7) of this Section at different rates for different classes of [* * *] licences, permits passes or storage, and for different areas.

[Validation of certain actions - Notwithstanding any judgement, decree, or order of any Court –

(a) all grants made by way of licences for manufacture and retail sale of country liquor and for retail sale or intoxicating drug in respect of any place on or after the 7th day of August, 1965 shall be deemed to be licences granted to the persons concerned conferring an exclusive privilege under Section 22 of the Principal Act, for manufacture and retail sale of country liquor and, as the case may be, for retail sale of intoxicating drug at such place; and

(b) all amounts paid or payable in respect of such grants shall be deemed to be sums paid or payable under Section 29 of that Act in consideration of the grant of exclusive privilege.]"

4.2 Learned counsel for the petitioner referring to the above provisions, submits that the new Rule 39-A(7)(b) was introduced in exercise of power under Section 90 of the Bihar & Orissa Excise Act, 1915, but nowhere in the Act neither the word 'penalty' is there nor it has been prescribed to impose penalty by framing rules, therefore, the Rule making authority has travelled beyond its scope and has imposed such conditions, which is ultra vires to the Act.

5. We have called upon the learned Government Advocate for the opposite parties to show any power of the State for imposition of such penalty, but the learned Government Advocate was not in a position to answer to the query.

5.1 Though this matter was filed in the year 1995, on 18.12.2018 the matter was admitted and order was passed for fixing the matter to 22.01.2019 for final hearing. However, no further reply has been filed by the opposite parties. A counter affidavit was filed on behalf of the opposite parties in the year 1995, wherein an endeavour has been made to show that the authority has rightly imposed penalty. It is stated that the said rule has been introduced to prevent storage and supply of unhealthy liquor which is unfit for human consumption and therefore in the said rule it is stipulated that if any stock of I.M.F.L./ Beer stored under Rule 33 (c) becomes unfit for human consumption owing to long storage or for other factors the licensee shall be

squarely responsible and shall be liable to pay penalty. Therefore, it is submitted that the same cannot be said to be unreasonable and illegal.

6. Be that as it may, after going through the said counter, we are not in a position to find that the opposite parties have sufficient reason and power to impose such penalty, more particularly when Section 90 of the Act, which confers powers on Board to make Rules, does not empower to make rules for imposition of penalty, clause (b) under Rule 39-A (7) of Boards of Excise Rules, 1965 for imposition of penalty is without jurisdiction and is required to be struck down. The same is hereby struck down.

7. Consequentially, the demand made vide impugned order under Annexure-1 is quashed. It is directed that if the said amount has already been recovered from the petitioner, the same shall be refunded to the petitioner within a period of six weeks from the date of receipt of a copy of this order. If the refund is not made within the stipulated period, the petitioner will be entitled to interest @8% per annum on the refund amount from the date of deposit till the payment is made and, in such event, the said interest amount will be recovered from the salary of the Officer responsible for making delay and not from the exchequer of the State.

7.1 The writ petition is allowed to the extent indicated above.

7.2 All the Misc. Cases connected to the writ petition are also disposed of accordingly.

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2019 (I) ILR - CUT- 676

I. MAHANTY, J. & BISWANATH RATH, J.

W.P. (C) NO. 8591 OF 2014

D.G. & I.G. OF POLICE, FIRE SERVICES, ODISHA & ANR. .....Petitioners

.Vs.

JYOTISH CHANDRA MUDULI .....Opp. Party

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition by State – Challenge is made to the orders passed by the State Administrative Tribunal after implementing the same – Whether

permissible? – Held, no, a party has no right to challenge an order merely because giving effect to it has yielded a result against it which is established from the narrations – We deprecate such behavior from a party like State Government, who should behave like a model employer. (Para 7)

For Petitioners : Addl. Govt. Adv.
For Opp. Party :

JUDGMENT Date of Hearing :07.07.2014 : Date of Judgment: 17.07.2014

BISWANATH RATH, J.

The petitioners by filing the writ petition have called for the legality, propriety and correctness of the judgment/order dated 05.11.2013 and 25.02.2014 passed by State Administrative Tribunal, Bhubaneswar in Original Application No.3037 of 2013 and R.P. No.48 of 2014 arising therefrom.

2. The facts involved in the case is that the opposite party as applicant filed the Original Application 3037 of 2013 inter alia claiming therein that he was an applicant for the post of 'Fireman' under the administrative control of the Chief Fire Officer, Odisha, Buxi Bazar, Cuttack (respondent no.2 /petitioner no.2) following an advertisement vide Annexure-1 in the Original Application. The applicant claimed that as per the conditions in the Odisha Fire Services (Method of Recruitment for Fireman) Order, 2006, the candidates belonging to SEBC category coming within the height of 175 cm to 179 cm will be awarded with 16 marks whereas candidates belonging to SEBC category coming within the height of 179 cm to 184 cm will be awarded 18 marks. It is alleged by the applicant before the Tribunal that during the Test Measurement of height of the candidates, he was found to be having height of 178.5 cm and consequently he was awarded with 16 marks. It is further submitted that in the Recruitment Board there are five members under the Chairmanship of I.G. of Police, Fire Services, Odisha and C.D.M.O. of the concerned district as one of the members in the recruitment board. Since he was an applicant for Bhubaneswar Range, the applicant claimed that the C.D.M.O., Khurda is one of the members of the Selection Board. The applicant further alleged before the Tribunal that in the physical measurement test though he was found to be 179.5 cm but, his height was wrongly recorded in the admit card as 178.5 cm. Though the applicant immediately objected and requested to correct the height measurement and claimed for being awarded the wrong marks, his request was not cared for

and thus he was constrained to file a representation before the petitioner no.1 D.G. & I.G. of Police, Fire Services, Odisha, Cuttack for necessary corrections. His request remained unheeded.

In the pleadings before the Tribunal, he has further claimed that the Odisha Fire Services (Method of Recruitment of Fireman) Order, 2006, which governs the recruitment of fireman, prescribes at Clause-11.2.1., the marks for height for respective categories of candidates. It prescribes height above 179 cm - 184 cm is entitled to 18 marks. It is on the basis of this provision the applicant claimed that since his height was 179.5 cm, he is entitled to 18 marks but by recording his height to be 178.5 cm he has been awarded less marks. The applicant, i.e., the present opposite party further claimed that had his height been taken to be 179.5 cm, he would have got total marks of 53 as against 51, awarded to him. With the aforesaid pleading, by filing the Original Application referred to above the applicant in the Tribunal claimed the following reliefs before the learned Tribunal.

> "**7. RELIEF SOUGHT FOR:**
>
> In view of the facts stated above in Para-6, the applicant prays for following relief(s):
>
> i. To direct the respondents to remeasure the height of applicant.
>
> ii. To direct the respondents to award 18 marks for the height of the applicant by correcting the tabulation sheet his height as 179.5 cm instead of 178.5.
>
> iii. To direct the respondents to appoint the applicant as Fireman if he comes within the zone of selection after adding two marks for his height.
>
> iv. And pass such other order/orders as may be deemed fit and proper for the interest of justice."

3. During course of hearing, modifying his prayer made in the Original Application the petitioner / applicant submitted to the Tribunal for a direction to the Chief District Medical Officer, Khurda to measure the height of the applicant in presence of the Fire Officer, Odisha, Buxi Bazar, Cuttack or if this Tribunal so decides a direction be given to Chief District Medical Officer, Cuttack to measure the height of the applicant in presence of Respondent no.2 therein and if it would be found that the applicant's height is 179.5 cm., a direction be issued to respondent authority to correct the height measurement of the applicant reflecting 179.5 cm. and accordingly after awarding 18 marks, final result of the petitioner be published and on the basis of final result if the applicant will come within the zone of

consideration for appointment in the post of Fireman, necessary appointment order be issued.

The respondents-present petitioners on their appearance, through their counsel orally submitted that they have no serious objection if the Original Application is disposed of on the basis of submissions made by learned counsel for the applicant without observing anything or merits of the case.

4. Considering the submissions made by both the parties, the Tribunal disposed of the Original Application by order dated 05.11.2013 as appearing at Annexure-1 with a direction that the applicant is to appear before the respondent no.2 / Fire Officer, Odisha**,** Buxi Bazar, Cuttack for re-measurement of his height. After the appearance of the applicant before the Fire Officer, he shall do the needful for measurement of the applicant by the C.D.M.O., Cuttack in his presence and if the report of the C.D.M.O., Cuttack will come to the effect that the applicant having height of 179.5 cm then to award appropriate marks in favour of the applicant and after such addition, if the applicant comes within the zone of consideration to issue appointment order in favour of the applicant. The Tribunal further directed the respondents to complete the exercise within a period of three weeks and till such exercise is over, the Tribunal also directed the State respondent to keep one post of 'Fireman' vacant to accommodate the petitioner in the event of his success.

5. It is apt to mention here that the final order in Original Application No.3037 of 2013 was passed on 05.11.2013 that too on the basis of no serious objection by the State-respondent to the asking of the applicant / opposite party. This order was not challenged by any party in the higher forum, rather the direction in the said order was worked out in the meanwhile by issuing letter dated 10.12.2013 vide Annexure-6 to the present writ petition directing therein the Chief Medical Officer-opposite party no.2 asking him to direct the appellant / opposite party to appear before the A.D.M.O., Cuttack at City Hospital Campus, Cuttack on 13.12.2013 at 11.00 A.M. for measurement of his height following the direction of the Orissa Administrative Tribunal, Bhubaneswar. A copy of the said order was also forwarded to the applicant for his information and necessary action at his end. Following the above direction, a fresh measurement of the height of the applicant was also undertaken in the office of A.D.M.O., City Hospital, Cuttack on 13.12.2013 as appearing at Annexure-7 to the writ petition, where the height of the applicant was found to be 178.5 cm. A copy of the proceeding of the

Recruitment Board held in the office of the A.D.M.O., City Hospital, Cuttack on 13.12.2013 is available at Annexure-7 of the writ petition. In another move for reasons indicated therein the Chief District Medical Officer, Cuttack, in a further development of the matter, issued a letter on 23.12.2013 while expressing his helplessness to give an opinion as single individual, the C.D.M.O., Cuttack by this letter, asked the Chief Fire Officer to make necessary arrangement for appearance of the applicant before the District Medical Board at 01.01.2014 in his Chamber at 11.00 A.M. for re-measurement of his height.

Following the above direction the height of the applicant was once again measured and the Board constituted for the purpose, found the height of the applicant as 182 cm, as clearly appearing from the proceeding dated 01.01.2014 appearing at Annexure-9 of the writ petition. After the completion of the re-measurement of the height of the applicant, following the direction of the Tribunal, the applicant, who was directed to proceed for necessary correction in the marks of the applicant in the event of his height, is found to be more than 179 cm. instead of issuing necessary appointment orders in favour of the applicant- respondent in the Tribunal, at this stage, preferred to file a Review petition before the Tribunal on 10.02.2013 registered as R.P. 48 of 2014 seeking the following relief (s):-

> "In the circumstances stated above, it is humbly prayed that this Hon'ble Tribunal be pleased to allow this application and further be pleased to recall the order dated 05.11.2013 and pass necessary direction to accept the decision of the Board taken in regard to measurement to height.
>
> And for the said act of kindness the petitioners/Respondents as in duty bound shall ever pray."

6. It is surprised to note here that even though there was no serious objection by the State-respondent to the asking of the present opposite party / applicant before the Administrative Tribunal and the order of the Tribunal dated 05.11.2013 has been worked out to a great extent and after such following action established that the height of the applicant is 182 cm as found by the Medical Board constituted at the instance of the C.D.M.O., this development has been deliberately suppressed by the applicant in the Review petition (R.P. No.48 of 2014).

On hearing the review petition registered as R.P. No.48 of 2014, the Tribunal by order dated 25.02.2014 was pleased to reject the review petition on two counts, firstly, since the direction of the Tribunal dated 05.11.2013

relating to the re-measurement of the height of the applicant by the C.D.M.O., Cuttack in presence of the Chief Fire Officer, Odisha, Cuttack has already been complied and in the result of such compliance, a further report on the re-measurement of the height of the applicant has already come into existence establishing the height of the applicant to be 182 cm. Secondly, since the review petition was grossly barred by time, as it was filed on 13.02.2014, i.e., three months and eight days after the order sought to be reviewed, 05.11.2013 was passed in absence of the condonation of delay application.

7. Being aggrieved by the order passed in the review petition, the respondents before the Tribunal, have approached this Hon'ble Court by filing the present writ petition praying for quashing of the judgment / orders dated 05.11.2013 and 25.02.2014 as passed in Original Application No.3037(c) of 2013 and R.P. No.48 of 2014 (Arising out of O.A. No.3037 (c) of 2013) under Annexure-1 series.

On a bare perusal of the aforesaid facts narrated above, it appears that the petitioners had not raised any objection to the asking of the opposite party / applicant in the Tribunal, they have even rightly not challenged the judgment / order of the Tribunal dated 05.11.2013 at appropriate level as they were legally estoped. On the other hand, they proceeded for implementation of the direction of the Tribunal dated 05.11.2013. In the process of such implementation, the main direction contained in the Tribunal's order has been worked out yielding a report by the competent authority finding that the height of the applicant as 182 cm as clearly appearing from Annexure-9 goes in favour of the opposite party. The re-measurement having been done by a competent authority, we do not find any flaw in the same. We further observe that a party has no right to challenge an order merely because giving effect to it has yielded a result against it which is established from the narrations made hereinabove. We deprecate such behavior from a party like State Government, who should behave like a model employer. It is needless to mention here that the rest direction of the Tribunal is all consequential, depending on the fresh measurement report. Result of re-measurement having gone in favour of the opposite party / applicant, gives no right in favour of the petitioner to challenge the same, there is no scope for interfering in the matter at this stage. Further since the review petition was filed in clear suppression of the developments taken place in between 05.11.2013 up to 13.02.2014, the petitioners did not move the review petition with clean hand. And further, since the direction of the Tribunal in the Original Application is

already worked out, the attempt of State for review was to render no useful purpose and under the circumstances, there is no scope for this Court for finding any fault either in the order passed in the Original Application or in the Review Petition No.48 of 2014.

8. While affirming the orders vide Annexure-1 series, we do not find any merit in the writ petition which is accordingly dismissed. Consequently, the Misc. Case is also dismissed. However, there shall be no order as to costs.

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2019 (I) ILR - CUT- 682

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

W.P.(C) NO. 24376 OF 2013

SUPRIYO BOSE & ORS. .....Petitioners

Vs.

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

LEASE PRINCIPLES – Lease period expired in 2006 – No application filed for renewal of lease, instead an application was filed to mutate their names and accept the rent – Collector approved the settlement in favour of the lessees subject to payment of salami and rent as assessed by the Tahasildar – Whether such an order can be passed under the Mutation Manual when the lease has not been renewed? – Held, no, the authorities have no jurisdiction under the mutation manual to adjudicate who are the legal heirs of the original lessee, the contentions raised by the learned counsel for the petitioners to carry out the opposite party No.4's direction to reflect the names of some persons as recorded tenants, is not sustainable – Similarly the order directing payment of salami and rent and to settle the land in favour of the lessees without any application for renewal of lease is also not sustainable.

For Petitioners : M/s. Asim Amitav Dah, P.K. Mahali, S.A. Pattnaik, A. Dey, & B.K.Panda.

For Opp. Parties: Mr. Kishore Kumar Mishra, Addl. Govt. Adv. M/s. S.K. Dali, P.N.Swain S.B. Mohapatra & J.Biswal.

ORDER Date of Order : 03.01.2019

S. PANDA, J.

Heard Mr. Asim Amitav Das, learned counsel for the petitioners and Mr. Kishore Kumar Mishra, learned Addl. Government Advocate for the opposite parties.

The petitioners in this writ petition have challenged the order dated 02.03.2013 passed by the opposite party No.2-Revenue Divisional Commissioner, Central Division, Odisha, Cuttack in OGLS Appeal No.03 of 2012 under Annexure-19 in setting aside the order dated 03.08.2011 of the Collector, Puri passed in Balukhand Permanent Lease (BLP) Case No.47 of 1997, inter alia, with other reliefs.

It is the case of the petitioners that Late Janaki Nath Bose, the predecessor-in-interest of the petitioners had acquired a leasehold khasmahal land situated at Gopal Ballav Road, Puri in the year 1916 and subsequently built a two storied house thereon for the purpose of holiday-cum-pilgrimage resort. The original lease holder died in the year 1934. The lease was for a period of thirty years. However, a renewal was made on 16.10.1951 executed by the Collector, Puri on behalf of the Governor of Odisha as a lessor of the one part and the then successors-in-interest of the original lessee as the other part. A copy of such lease deed has been annexed as Annexure-1 to the Writ Petition. The renewal was also made for a period of thirty years commencing from 9th day of May 1946 subject to terms and conditions fixing the rent. Clauses 14 and 15 of the lease deed which are relevant are extracted below:-

> "14. That the lessees shall not use or let any main or residential building or out house within their holding or portion thereof as hotel, lodging, or boarding house or for purposes of trade without the previous written consent of the Collector: provided that nothing in this clause shall be held to prohibit the bonafide entertainment of friends, or relatives without consideration.
>
> 15. That on breach or non-observance of any of the aforesaid terms or conditions, the Collector may declare that the lease has determined and become void, that an order of the Collector declaring that there has been such breach or non-observance shall be final and conclusive proof of such breach or non-observance as between the parties hereto and that on the expiry of one month from the date of such order the Collector or any officer or person appointed in that behalf by the Collector shall be entitled to take possession of the land leased and the buildings erected thereon.
>
> Provided that the Collector shall at the time of such declaration, either offer to pay reasonable compensation for the structures and other improvements made with the

> consent of the Collector or direct the lessees to remove the structures or other improvement within a specified time and if the lessees fail to remove them accordingly, the Collector shall cause such removal to be effected and recover the cost from the lessees. Where compensation is offered, the amount of such compensation shall be fixed by the Collector whose decision shall be final, conclusive and binding on the lessees, subject to revision by the Revenue Commissioner."

A further condition was stipulated in the lease deed that the lease can be renewed for a further period of thirty years subject to such modification of terms and conditions by the Collector and in case the lessees decline to accept such renewal, the Collector shall either offer to pay reasonable compensation for the structures and other improvements made with the consent of the Collector or direct the lessees to remove the same within a specified time and if the lessee fails to remove the same, the Collector shall cause such removal to be effected and recover the cost from the lessee. Where compensation is offered, the amount of such compensation shall be fixed by the Collector whose decision shall be final, conclusive and binding on the lessee, subject to revision by the Revenue Commissioner.

On such expiry of the lease period, another renewal was made in the year 1982 between the same parties, which commenced from 9th day of May, 1976 for a further period of thirty years fixing the rent with terms and conditions of the lease.

In view of such renewal, which was made in the year 1982 and the terms of the lease being thirty years commencing from 9th day of May, 1976, an application was filed by the petitioners to mutate their names and accept the rent before the opposite party No.4, Tahasildar, Puri which was registered as BPL Case No.47 of 1997. On such application, the Collector-opposite party No.3 has passed an order dated 03.08.2011 to the following effect:-

> *"Perused the orders and recommendations of Tahasildar, Puri and Sub-Collector, Puri. This is regarding approval of Khasmahal lease hold land for settlement in favour of the lessees i.e. Suresh Chandra Bose and Others (as per hal settlement R.O.R of 1987) on Raiyati basis on payment of salami and rent as assessed by the Tahasildar, Puri as per Sub-Rule 5(c) of Rule 5-B of Schedule-V of O.G.L.S (Amendment) Rules 2010".*

Accordingly, the Collector approved the settlement in favour of the lessees subject to payment of salami and rent as assessed by the Tahasildar, Puri.

However, the opposite party no.4, Tahasildar, Puri instead of carrying out the said order of the Collector, Puri, vide its order dated 12.08.2011 directed the Revenue Inspector, Balukhand to record the land in the names of Suresh Chandra Bose, Sailesh Chandra Bose, Subash Chandra Bose, Lalita Bose, Manjula Nag, Dwijendranath Bose, Ashok Nath Bose etc. and also fixed the rent upto 2012 and salami.

Mr. Das, learned counsel for the petitioners contended that the persons, who have not filed applications for mutation, their names have been reflected by the opposite party No.4 in its order dated 12.08.2011 directing the Revenue Inspector to reflect those names and in the said order, it was indicated that as per the orders of the Collector, Puri, the names are to be reflected as recorded tenants. The petitioners challenged the order dated 03.08.2011 passed by the Collector, Puri, opposite party No.3 before the Revenue Divisional Commissioner, Central Range, Cuttack, opposite party No.2 in OGLS Appeal No.03 of 2012.It is further contended that the opposite party No.2 passed the impugned order as if he has to decide who are the legal heirs of the original lessee though he no jurisdiction to adjudicate the said dispute and therefore, the orders passed by the opposite parties Nos.2 and 3 need be quashed.

Mr. Mishra, learned Addl. Government Advocate however submitted that after the impugned order was passed by opposite party No.2, the building was handed over to the Culture Department through the District Culture Officer and the renovation was made for conservation, reservation and preservation of the building to open a museum in the name of "Netaji Museum" in the memory of Netaji Subash Chandra Bose.

While the matter stood thus, an order of status quo was passed by this Court on 24.06.2014.

We have gone through the lease deeds, copies of which have been annexed to the writ petition and carefully considered the submission made by the respective parties. It is not in dispute that the terms and conditions incorporated in the lease deed govern the lease. Admittedly, the last renewal of lease was made in the year 1982 commencing from 9th day of May, 1976 for a period of thirty years. In the meantime thirty years have already elapsed since 2006 and no application for renewal of such lease has been filed before the competent authority. However, in an application filed for mutation of the recorded tenants, orders were passed by the opposite parties Nos. 2 and 3 on

an erroneous impression as if an application for lease/renewal of lease was filed under the OGLS Act and Rules.

In view of the above facts and circumstances of the case, since the authorities have no jurisdiction under the mutation manual to adjudicate who are the legal heirs of the original lessee, the contentions raised by the learned counsel for the petitioners to carry out the opposite party No.4's direction to reflect the names of some persons as recorded tenants, is not sustainable. Similarly the order passed by the opposite party no.3 directing payment of salami and rent and to settle the land in favour of the lessees without any application for renewal of lease is also not sustainable. The opposite party no.2 also seems to have gone beyond the scope of the appeal filed by the appellants while passing the impugned order. Law is well settled that the records of rights neither create nor extinguish any right, title or interest of the parties whose names are recorded therein. We are of the view that the order dated 03.08.2011 passed by the opposite party No.3-Collector, Puri in BPL Case No.47 of 1997 and the order dated 02.03.2013 passed by opposite party No.2-Revenue Divisional Commissioner, Central Division, Odisha, Cuttack in OGLS Appeal Case No.03 of 2012 are not sustainable in the eye of law and accordingly, such orders are hereby set aside.

It is open to the parties to take recourse to law to establish, if they have any right exists in accordance with the statutory provisions. The interim order of status quo dated 24.06.2014 stands vacated. The Writ Petition is disposed of accordingly.

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2019 (I) ILR - CUT- 686

S. PANDA, J & P. PATNAIK, J.

W.P.(C) NO. 1320 OF 2019

MANORANJAN SA & ORS. .....Petitioners

.Vs.

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

INDIAN TELEGRAPH ACT, 1885 – Section 16 read with Section 164 of the Electricity Act, 2003 – Provisions there under – Laying of underground pipeline and overhead electricity line over private land by

NTPC – Writ petition challenging the action of the Authority – Scope of interference by High court – Discussed.

"The State Government having jurisdiction under the Electricity Act, 2003 by order in writing for placing the electric line or electrical plant for the purpose of transmission of electricity, which are necessary for the proper coordination of the work conferred upon any other person engaged in the said work for supplying electricity as stipulated under Section 164 of the 2003 Act, authorized the concerned Collector to issue appropriate orders under Section 16(1) of the Indian Telegraph Act, 1885 read with Section 164 of the Electricity Act, 2003 for acquisition of right of user in respect of the private property with proper compensation and subject to certain conditions. Thus, the same is in accordance with the statutory provisions. Power under Section 10 of the Indian Telegraph Act, 1885 is absolute. In case where there is resistance or obstruction in the exercise of that power, the occasion to approach the District Magistrate arises as provided under Section 16(1) of the Act for compensation. While enacting the Electricity Act, 2003, the legislature has also taken the object behind the Indian Telegraph Act and incorporated such mandate under Section 164 of the Electricity Act, 2003." *(Para 10 & 11)*

Case Laws Relied on and Referred to :-

1. (2009) 16 SCC 743 : M.D.,M/s.Ramkrishna Poultry P. Ltd., Vs. R.Chellappan & Ors.
2. AIR 2007 Gujarat 32 : Jayantkumar Bhagubhai Patel & Anr. Vs. State of Gujrat & Anr.
3. 2001 (I) OLR 663 : Soma Oram Vs. Chairman Steel Authority of India Ltd, New Delhi,

For Petitioners : M/s. Gouri Mohan Rath, S.S. Padhy, A.P. Rath, S. Jena, Md. Kharib Ansari

For Opp. Parties : Mr. Kishore Kumar Mishra, Addl. Govt. Adv.
Mr. Jayant Das, Sr. Adv.
M/s. A.N. Das, N. Sarkar, E.A. Das and M. Muduli.

JUDGMENT Date of Judgment: 08.03.2019

S. PANDA, J.

The petitioners, who are the villagers of Sarandamal and Junadihi, in the district of Jharsuguda pray for quashing the order dated 06.04.2016 passed by the Government of Odisha in Revenue & Disaster Management Department under Annexure-4 as well as the order dated 08.04.2016 passed by the Collector & District Magistrate, Jharsuguda under Annexure-5 to the writ petition, wherein M/s National Thermal Power Corporation Limited ('NTPC' in short), Darlipali, S.T.P.P. was permitted to exercise the powers for right of way/right of use of private property as per the land schedule submitted by the GGM, M/s NTPC, Darlipali for laying overhead electric lines and underground water pipelines in the lands of the petitioners.

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

The petitioners claiming to be the marginal farmers are residing in the village Sarandmal and Junadihi under Lakhanpur Tahasil in the district of Jharsuguda. The lands are recorded in the name of the predecessors of the petitioners and the same are the only resource of their livelihood. They are engaged in cultivation. The Land Acquisition Officer-opposite party no.4 issued a general notice in the year 2016 informing the villagers to attend a meeting in the office of the Collector to discuss about the proposed laying of pipeline and electric line by NTPC. Thereafter no notice was issued to the petitioners. However, in the month of December, 2018 the authorities of District Administration as well as the officials of NTPC along with others made a site visit and the petitioners came to know that NTPC is going to lay underground water pipeline as well as 132 Kv overhead electric transmission lines in the lands of the petitioners. On enquiry the petitioners could come to know that NTPC for its commercial requirement is setting up a 1600 MW Thermal power plant at Darlipali village of Lephripara Tahasil in the district of Sundergarh and for such project it intends to draw water from Hirakud Reservoir through underground pipeline. NTPC further intends to construct two numbers of 132 Kv transmission lines along with the said water pipeline corridor.

3. According to learned counsel for the petitioners, the Principal Secretary to Government of Odisha in Revenue and Disaster Management Department vide its letter dated 06.04.2016 has authorized the Collector to issue appropriate orders under section 16 (1) of the Indian Telegraph Act, 1885 read with section 164 of The Electricity Act, 2003 for acquisition of right of user in respect of the private property with proper compensation and subject to certain conditions. Thereafter the Collector, without any notice to the petitioners/ land losers or without any payment of compensation vide letter dated 08.04.2016 allowed NTPC to undertake the project implementation over the land belonging to the petitioners. According to them, the Collector in the said order conferred the authority of NTPC to exercise all power that of Telegraph Authority by purported exercise of the power under section 164 of the Electricity Act, 2003.

4. The main grounds of challenge of the petitioners is as follows:-

(a) Though the Government and the Collector have issued directions for payment of compensation before commencement of work, the same has not been complied

with. The provisions of Right to Fair Compensation & Transparency in Land Acquisition Act, 2013 ought to have been followed including the social impact assessment and rehabilitation and resettlement, before their lands are taken for the said purposes.

(b) The NTPC being neither a distribution licensee nor a transmission licensee under section 14 of the Electricity Act, 2003 do not possess any authority and jurisdiction under Section 67 of the Act to lay overhead electric lines over the private lands without their consent.

(c) There being no notification as provided under section 164 of the Electricity Act, 2003 issued by the appropriate Government conferring power of Telegraph Authority on NTPC, so as to lay electric lines over the lands of the petitioner, the NTPC has no authority to lay such electric lines over the lands of the petitioners. According to him, for the Central Government owned generating companies like NTPC, the Central Government is the Appropriate Government and in this case, the Central Government has not issued any notification conferring the powers of Telegraph Authority on NTCP. Therefore, the State Government has no authority to declare and confer the power of "Telegraph Authority" on NTPC under section 164 of the Electricity Act.

(d) Therefore, according to him, once the State Government has delegated the power to the Collector as the "Telegraph Authority", the NTPC has no authority to exercise the power under the Act to draw lines over and under the private lands of the petitioners.

According to him, such action of the opposite parties are illegal, arbitrary and without jurisdiction and power, for which, the same needs the interference of this Court.

5. A counter affidavit has been filed on behalf of the opposite parties 2 and 3- the State authorities, indicting therein that in exercise of power conferred under Section 164 of the Electricity Act, 2003, the State Government conferred upon NTPC, the supplier of electricity, to exercise all powers vested in the Telegraph Authority under Part-III of the Indian Telegraph Act, 1885 in respect of the electric lines and electrical plants established or maintained or to be established or maintained for the purpose of Telephonic and Telegraphic Communication necessary for proper coordination of the aforementioned work subject to the following conditions stipulated in the order.

It has also been indicated that the NTPC has deposited the compensation amount measuring an area of Ac.198.718 acres for disbursement to the land owners by the LAO, Jharsuguda, out of which measuring an area of Ac.123 has already been disbursed.

The Collector, Jharsuguda in its order dated 08.04.2016 has clarified that for the right of use permission on private land, there is no change in right, title and interest of the petitioners over the said lands. The corporation and its agency have only temporary right to use the land. After laying of the underground pipeline, the land shall be leveled and restored as good as before by the Corporation and possession of land shall be handed over to the owner or occupier of the land by the competent authority. The owner or occupier, after restoration of possession, shall be entitled to use the land for the purpose for which such land was put to use.

It has also been indicated that the Principal Secretary to Government has authorized the Collector, Jarsuguda to issue appropriate order under section 16 (1) of The Indian Telegraph Act, 1885 read with Section 164 of the Electricity Act, 2003. NTPC, Darlipali is Nation Building Project to cater power requirement of eastern part of India, therefore, permission was extended to NTPC to execute the work of pipeline and transmission line.

The villagers had represented the Collector, Jharsuguda demanding 100% land value of the tower base area and accordingly the Collector vide order dated 27.05.2017 has directed that the villagers are to receive 100% compensation for Tower base area.

Hence, according to the state-opposite parties, the impugned orders is for the benefit of the persons whose land is going to be utilized for the aforesaid purpose and they will get the compensation. Thus, the same need not be interfered with.

6. The stand of the NTPC is identical to that of the state-opposite parties. According to them, the NTPC is a Government Company dealing with generation of electricity and allied activities. It was entrusted to set up a 2x800 MW Super Thermal Power Project at village Darlipalli in the district of Sundergarh for the public purpose and especially beneficial to the State of Odisha (50% power is allocated for Orissa) to meet the electricity requirement of Eastern Region of India, including states like Odisha, West Bengal, Jharkhand. Apart from Coal, water is the major critical requirement for setting up the Thermal Power Plant and for generation of electricity. The Company is in possession of all requisite approvals, permissions, NOCs sanctioned by various authorities. The project is being set up as per the joint decision arrived at between Government of India and Government of Odisha. The total area of 2005 acres allotted to the company includes 1441 acres of

private land and 570 acres of government land. Almost 95% of the project construction work has already been completed. The laying of water pipe line is being done at one and a half meter depth of the ground surface and the surface land would be available for utilization of the respective land owners. The State Government has authorized the Collector, Jharsuguda to issue appropriate order under Section 16 (1) of the Indian Telegraph Act, 1885, read with Section 164 of the Electricity Act, 2003 for acquisition of right of user in respect of private property with proper compensation and subject to certain conditions. So far as payment of compensation is concerned, their stand was that entire compensation amount for 198 acres of private land has already been deposited with the authority.

7. After going through the contentions raised by various parties, it is pertinent to quote Section 164 of the Electricity Act, 2003 and Sections, 10 & 16 (1) of the Indian Telegraph Act, 1885.

Section 164 of the Electricity Act, 2003:-

164. ***Exercise of powers of Telegraph Authority in certain cases***:-

The Appropriate Government may, by order in writing, for the placing of electric lines or electrical plant for the transmission of electricity or for the purpose of telephonic or telegraphic communications necessary for the proper coordination of works, confer upon any public officer, licensee or any other person engaged in the business of supplying electricity under this Act, subject to such conditions and restriction, if any, as the Appropriate Government may think fit to impose and to the provisions of the Indian Telegraph Act, 1885 (13 of 1885) any of the powers which the telegraph authority possesses under that Act with respect to the placing of telegraph lines and posts for the purposes of a telegraph established or maintained, by the Government or to be so established or maintained.

This clause provides for the placing of electric lines or electrical plant for the transmission of electricity or for the purpose of telephone or telegraphic communications and confer upon any public officer, licensee or any other person engaged in the business of supplying of electricity under the proposed legislation, any of the powers of the Telegraph Authority (Notes on Clauses)

Relevant provisions of Section-10 and 16 (1) of the Indian Telegraph Act, 1885:-

10. ***Power for telegraph authority to place and maintain telegraph lines and posts***:- *The telegraph authority may, from time to time, place and maintain a telegraph line under, over, along or across, and posts in or upon, any immovable property:*

Provided that-

xxx xxx xxx

16. ***Exercise of powers conferred by Section 10, and disputes as to compensation, in case of property other than that of a local authority****-*

(1) If the exercise of the powers mentioned in section 10 in respect of property referred to in clause (d) of that section is resisted or obstructed, the District Magistrate may, in his discretion, order that the telegraph authority shall be permitted to exercise them.

8. The Electricity Act, 2003 came subsequent to the Indian Telegraph Act, 1885. While the Electricity Act was enacted, they have referred to the Indian Telegraph Act, 1885 in Section 164 of the Electricity Act, 2003, wherein it was specifically stipulated that the Indian Telegraph Act, 1885 will be made applicable for the purpose of implementing the Government orders for placing electrical lines or electrical plants for transmission of the electricity for public interest. A reading of the said provision, it is crystal clear that in respect of a scheme, the mode of implementation is by following the mandates of Section 164 of the Electricity Act, 2003 read with Sections-10 & 16 of the Indian Telegraph Act, 1885. Section 16 of the Indian Telegraph Act, 1885 provides the mechanism of compensation and the petitioners can have no grievance on that.

9. Section 10 of the Indian Telegraph Act clearly stipulates that the Telegraph authority may, from time to time, place and maintain a telegraph line under, over, along, or across, and posts in or upon any immovable property. Section 10 of the Indian Telegraph Act, 1885 gives power to enter upon and there is no restrain except complying Section 16 of the said Act. Such power under Section 10 is exercised in public interest. The intention of the legislature is very clear and there is no ambiguity in it. Such provision still holds the field since 1885 i.e. nearly 135 years and exercise of such power under this Act would not amount to an acquisition, even if that is the intention of the legislature. However Section 16 of the Indian Telegraph Act, 1885 provides the mechanism of compensation. As submitted by the learned counsel for the State, the State Government has already decided to give adequate compensation as required under the law.

10. The State Government having jurisdiction under the Electricity Act, 2003 by order in writing for placing the electric line or electrical plant for the purpose of transmission of electricity, which are necessary for the proper coordination of the work conferred upon any other person engaged in the said

work for supplying electricity as stipulated under Section 164 of the 2003 Act, authorized the concerned Collector to issue appropriate orders under Section 16(1) of the Indian Telegraph Act, 1885 read with Section 164 of the Electricity Act, 2003 for acquisition of right of user in respect of the private property with proper compensation and subject to certain conditions. Thus, the same is in accordance with the statutory provisions.

11. Power under Section 10 of the Indian Telegraph Act, 1885 is absolute. In case where there is resistance or obstruction in the exercise of that power, the occasion to approach the District Magistrate arises as provided under Section 16(1) of the Act for compensation. While enacting the Electricity Act, 2003, the legislature has also taken the object behind the Indian Telegraph Act and incorporated such mandate under Section 164 of the Electricity Act, 2003.

> *Sub-Section-5 of Section-2 of the Electricity Act, 2003 provides "Appropriate Government", which means*
>
> *(a) The Central Government,-*
>
> *xxx xxx xxx*
>
> *(b) In any other case, the State Government having jurisdiction under this Act.*

Thus, the State Governing being the appropriate government has taken step and conferred permission to the company to carry out the work for the public interest.

12. The Apex Court in the case of ***M.D.,M/s.Ramkrishna Poultry P. Ltd., vs. R.Chellappan & Ors***, reported in ***(2009) 16 SCC 743*** observed that the provisions of Section 164 of the Electricity Act, 2003 empowers the appropriate Government to confer on any authority or person engaged in the business of supplying electricity under the Act, any of the powers which the Telegraph Authority possesses under the Telegraph Act with respect to the placing of telephonic lines or posts.

13. In view of such power conferred under Section 10 of the Indian Telegraph Act, the authority while putting on the electric line or water line, can carryout such action as stipulated under Section 10 of the Indian Telegraph Act. The persons if aggrieved for such action may take recourses to Section 16 of the Indian Telegraph Act for higher compensation. On perusal of the impugned order dated 06.04.2016, it is revealed that the State Government authorized the concerned Collectors to issue appropriate orders under Section 16 (1) of the Indian Telegraph Act, 1885 read with Section 164

of the Electricity Act, 2003. Since the power was vested to the Collector under Section 16 (1) of the Indian Telegraph Act, read with Section 164 of the Electricity Act, 2003, it has permitted NTPC the power of right of way/right of use of private property, the same cannot be treated as re-delegation of power of "Telegraph Authority" on NTPC. Similarly as it reveals from the counter that out of Ac.198.718, compensation has already been disbursed for an area of Ac.123.00.

14. With regard to consent of the land owners before laying any overhead electric lines or underground water pipelines, it has been settled in the case of ***Jayantkumar Bhagubhai Patel and another v. State of Gujrat and another, AIR 2007 Gujarat 32*** that such consent is not necessary since no damage of permanent nature would be caused and the land could be used for the agricultural purpose.

In case of ***Soma Oram v. Chairman Steel Authority of India Ltd, New Delhi, 2001 (I) OLR 663*** this Court has held that the land owner is entitled to get compensation in accordance with the provisions contained in the Indian Telegraph Act and if the quantum of compensation fixed by the Collector is not satisfactory, it is open to the parties to approach the appropriate forum.

15. In view of the discussions made hereinabove paragraphs and the law settled in different judicial pronouncements as indicated above, the questions raised by the petitioners are answered. Accordingly, this Court is not inclined to interfere with the impugned orders dated 06.04.2016 as well as 08.04.2016 in exercise of the jurisdiction conferred under Articles 226 and 227 of the Constitution of India. The Writ Petition is accordingly dismissed.

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2019 (I) ILR - CUT- 694

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

CRLMP NO.1391 OF 2018

ARATI SAHOO @ BEHERA ……..Petitioner

.Vs.

STATE OF ORISSA (VIG.) ……..Opp. Party

CONSTITUTION OF INDIA, 1950 – Articles 226 & 227 – Writ petition challenging the order passed by the learned Special Judge, Special

Court rejecting an application to drop the proceeding initiated against her for the charge under Sections 13 (1)(e) read with 13 (2) of the Prevention of Corruption Act, 1988 and under Section 109 of the Indian Penal Code, 1860 – Case initiated against the petitioner and her deceased husband as the main accused – Husband died during pendency of the case – Petitioner's plea that since her husband is dead the case cannot continue against her – Whether such a plea can be accepted – Held, No.

"Having given our anxious thought in the matter, we are of the opinion that no doubt the main accused has died and the case is abated against him. But there is no provision under the Code of Criminal Procedure, 1973 that on such occasion, the criminal proceeding against the abettor shall come to an end. Of course, this Court in exercise of jurisdiction under Section 482 of the Cr.P.C. can pass any order in the interest of justice or to prevent the abuse of process of law. But, in our considered opinion, whether the offence under Section 13(1)(e) read with 13(2) of the P.C. Act has been proved or whether the public servant cannot satisfactorily account for or the property disproportionate to his known sources of income has to be determined at the end of the trial not at the midst of the trial."

SIDDARTH VERMA -Vrs.- C.B.I.: 2010 (4) CCR 214 followed."The learned Special Judge rightly dismissed the application of the petitioner for discharge. Charges were framed against two accused persons, against one for substantive offence and against other for abetment. If the main accused has died, that does not mean that substantive offence stands wiped out. The offence committed by the deceased, accused of amassing wealth through corrupt means, does not stand wiped out and the wealth still stands there in the hands of LR of the deceased/accused and the role of the petitioner of acting as a conduit for amassing wealth for his father can be proved by CBI during trial." (Para 6 to 8)

Case Laws Relied on and Referred to :-

1. (1991) 3 SCC 655 : K. Veeraswami .Vs. Union Of Ndia & Ors.
2. 2001 SCC Crl. 1499 : Wakil Yadav and Another Vs. State of Bihar.
3. 2010 (4) CCR 214 : Siddarth Verma .Vs. C.B.I.

For Petitioner : M/s. Hemanta Ku. Mund, A.R. Mohanty, A.D. Dei & S.K. Panda
For Opp. Party : Mr. Srimanta Das,(Sr. Standing Counsel (Vigilance) Mr. Niranjan Maharana,(Addl. Standing Counsel (Vigilance)

JUDGMENT Date of Hearing & Judgment: 25.02.2019

S.K. MISHRA, J.

In this CRLMP, the petitioner has assailed the order dated 09.08.2018 passed by the learned Special Judge, Special Court, Cuttack in T.R. Case No.15 of 2008, rejecting her application to drop the proceeding initiated

against her of the charge under Sections 13 (1)(e) read with 13 (2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "the P.C. Act") and Section 109 of the Indian Penal Code, 1860 (hereinafter referred to "as the I.P.C.").

The facts of the case are not in dispute.

02. Brief facts of the case is that a criminal case under Sections 13(1)(e) read with 13(2) of the P.C. Act and Section 109 of the I.P.C. was initiated bearing T.R. No.15 of 2008 in the court of the learned Special Judge, Special Court, Cuttack against the petitioner and her late husband. Obviously, the allegation was that the husband of the petitioner, who was a public servant, was in possession of disproportionate assets and hence, charge-sheet filed against him under Section 13(1)(e) read with 13 (2) of the P.C. Act. Whereas most of the properties stands in the name of the petitioner, who is not a public servant and admittedly, she is not an income tax assessee, the charge under Section 13(1)(e) read with 13(2) of the P.C. Act and Section 109 of the I.P.C. has been framed against her. Fifty-seven witnesses have been examined. The accused-public servant, who happens to be the husband of the petitioner died and the case abated against him. Thereafter, the present petitioner filed an application before the learned Special Judge, Special Court, Cuttack that the criminal case cannot be continue against her, in view of the death of her husband, the main accused. That application was heard and disposed of by the learned Special Judge, Special Court, Cuttack on 09.08.2018. While dealing with the same, the learned Special Judge, Special Court, Cuttack said that even in case of death of the main offender, the case shall stand against the abettor.

03. In assailing the findings of the learned Special Judge, Special Court, Cuttack, learned counsel for the petitioner relies upon the exact words used in Section 13 of the P.C. Act wherein the criminal misconduct by a public servant has been defined. Relevant portions of Section 13 of the P.C. Act are quoted as follows:

> "**Criminal misconduct by a public servant**.- (1) A public servant is said to commit the offence of criminal misconduct,-
>
> x xx xx xx xx xx xx xx xx xx xx xx xx xx xx
>
> (e) if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, or pecuniary resources or property disproportionate to his known sources of income.

Xx xx xx xx xx xx xx xx xx xx xx xx xx xx"

04. Giving more emphasis on the expression "*for which the public servant cannot satisfactory account*", learned counsel for the petitioner submits that the surviving accused should be discharged from the criminal proceeding, as she was not in possession and has no means to explain the disproportionate property held by her husband is disproportionate to his known sources of income. In course of hearing, learned counsel for the petitioner relies upon the up-reported case i.e. in the case of **K. VEERASWAMI –Vrs.- UNION OF NDIA AND OTHERS**: (1991) 3 SCC 655. We feel it appropriate to take note of the paragraph 75 of the said judgment which reads as follows:

> "In the view that we have taken as to the nature of the offence created under clause (e), it may not be necessary to examine the contention relating to ingredient of the of- fence. But since the legality of the charge sheet has been impeached, we will deal with that contention also. Counsel laid great emphasis on the expression "for which he account satisfactorily account" used in clause (e) of Section 5(1) of the Act. He argued that that term means that the public servant is entitled to an opportunity before the Investigating Officer to explain the alleged disproportionality between assets and the known sources of income. The Investigating Officer is required to consider his explanation and the charge sheet filed by him must contain such averment. The failure to mention that requirement would vitiate the charge sheet and renders it invalid. This sub- mission, if we may say so, completely overlooks the powers of the Investigating Officer. The Investigating Officer is only required to collect material to find out whether the offence alleged appears to have been committed. In the course of the investigation, he may examine the accused. He may seek his clarification and if necessary he may cross check with him about his known sources of income and assets possessed by him. Indeed, fair investigation requires as rightly stated by Mr. A.D. Giri, learned Solicitor General, that the accused should not be kept in darkness. He should be taken into confidence if he is willing to cooperate. But to state that after collection of all material the investigating Officer must give an opportunity to the accused and call upon him to account for the excess of the assets over the known sources of income and then decide whether the accounting is satisfactory or not, would be elevating the Investigating Officer to the position of an enquiry officer or a judge. The investigating officer is not holding an enquiry against the conduct of the public servant or determining the disputed issues regarding the disproportionality between the assets and the income of the accused. He just collects material from all sides and prepares a report which he files in the Court as charge sheet."

05. It is apparent from the aforesaid judgment that the Hon'ble Supreme Court have considered whether there is failure on the part of the Investigating Officer to give adequate chance to the public servant to explain the alleged dis-propertionality between assets and the known sources of income. While

examining such point, the Hon'ble Supreme Court held that it is the duty of the Investigating Officer only to collect material from all sides and prepares a report which he files in the court as charge-sheet. The disproportionality between the assets and the income of the accused is to be determined by the court and not by any other agency.

06. Having given our anxious thought in the matter, we are of the opinion that no doubt the main accused has died and the case is abated against him. But there is no provision under the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Cr.P.C." for brevity) that on such occasion, the criminal proceeding against the abettor shall come to an end. Of course, this Court in exercise of jurisdiction under Section 482 of the Cr.P.C. can pass any order in the interest of justice or to prevent the abuse of process of law. But, in our considered opinion, whether the offence under Section 13(1)(e) read with 13(2) of the P.C. Act has been proved or whether the public servant cannot satisfactorily account for or the property disproportionate to his known sources of income has to be determined at the end of the trial not at the midst of the trial.

07. Moreover, in the case **Wakil Yadav and Another –Vrs.- State of Bihar : 2001 SCC Crl. 1499**, the Hon'ble Supreme Court held that abetment to an offence of corruption was itself a distinct offence for which a charge could be framed. Now, in this case, even if the charge under Section 13(1)(e) read with 13(2) of the P.C. Act could not be proved, Section 13(1)(e) read with 13(2) of the P.C. Act and Section 109 of the I.P.C. being separate and distinct charge, the trial is to be continued.

08. Similarly, Mr. Srimanta Das, learned Senior Standing Counsel for the Department of Vigilance Department brings to the notice of this Court on a reported judgment rendered by Hon'ble Justice Shiv Narayan Dhingra of High Court of Delhi in the case of **SIDDARTH VERMA –Vrs.- C.B.I**.: 2010 (4) CCR 214, wherein it has been held:

> "I consider that learned Special Judge rightly dismissed the application of the petitioner for discharge. Charges were framed against two accused persons, against one for substantive offence and against other for abetment. If the main accused has died, that does not mean that substantive offence stands wiped out. The offence committed by the deceased, accused of amassing wealth through corrupt means, does not stand wiped out and the wealth still stands there in the hands of LR of the deceased/ accused and the role of the petitioner of acting as a conduit for amassing wealth for his father can be proved by CBI during trial. I, therefore, find no force in this petition, The petition is hereby dismissed."

09. In view of such verdicts/pronouncements and our discussions made above, we are of the opinion that we cannot pass any order to quash the aforesaid proceeding pending against the petitioner under the Special Courts Act, 1979.

10. Hence, this CRLMP filed under Articles 226 and 227 of the Constitution of India challenging the impugned order dated 09.08.2018 passed by the learned Special Judge, Special Court, Cuttack in T.R. Case No.15 of 2008 is dismissed being devoid of any merit.There shall be no order as to costs.

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2019 (I) ILR - CUT- 699

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

W.P.(CRL.) NO. 75 OF 2018

LALLU @ DILLIP SAHOO .....Petitioner

.*Vs.*

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

NATIONAL SECURITY ACT, 1980 – Section 3 read with Article 22 of the Constitution of India – Detention – Petitioner while in judicial custody in relation to some other case, he was served with detention order on 20.03.2018 along with the grounds of detention – Representation was made on 09.04.2018 addressed to the Hon'ble Chairman and Companion Members of the N.S.A. Advisory Board, Orissa, Cuttack through the Superintendent of Sub-Jail enclosing requisite number of copies of the representations for sending to the Government of India and to the Government of Odisha – Representation to the State Govt. was sent after seven months by the Jail Superintendent – Effect of – Held, in view of the position of law and on the undisputed facts that the representation submitted by the petitioner on 09.04.2018 was forwarded to the State Government by the Jail Authority on 18.11.2018, it is apparent that the detaining authority has failed in complying the constitutional mandate while performing their duties and hence, the detention of the petitioner is definitely unsustainable – It is also not disputed that the reports submitted by the Superintendent of Police, Jharsuguda was relied upon by the concerned District Magistrate in assessing the criminal activities of the petitioner but the copy of the said order was not served on the petitioner – Order of detention quashed. (Para 5)

Case Laws Relied on and Referred to :-

1. AIR 1991 SC 1090 (Smt. Gracy Vs. State of Kerala & Anr.)
2. (2004) 29 OCR 686 (Babu @ Gobardhan Rath Vs. State of Odisha & Ors.).
3. (2007) 36 OCR 833 (Sailendra Kumar Jora Vs. District Magistrate & Two Ors.).
4. AIR, 1980 SC 1983 (Smt. Icchu Devi Choraria Vs. Union of India & Ors.)

For Petitioner : M/s. B.K.Ragada, L.N.Patel, N.K. Das, U.C.Dora & H.K.Muduli

For Opp. Party : J.Katkia (Addl. Govt. Adv.) M/s Anup Ku.Bose (ASG) U.R.Jena (C.G.C.)

JUDGMENT Date of Hearing: 11.01.2019 : Date of Judgment: 01.03.2019

J.P. DAS, J.

The petitioner in this writ application challenges the legality of the order dated 20.03.2018 passed by the District Magistrate and Collector, Jharsuguda vide Annexure-I directing the detention of the petitioner in custody in exercise of power under Sub-section(2) of Section-3 of the National Security Act, 1980 (hereinafter referred to as 'the Act').

2. The sequence of undisputed fact is that while the petitioner was in judicial custody in relation to some other case, he was served with detention order vide Annexure-1 on 20.03.2018 along with the grounds of detention. The detention was informed to the Government, Home Department by the concerned Collector and it was approved by the State Government on 28.03.2018. The approved order was served on the petitioner on 05.04.2018. On 09.04.2018 the petitioner made a representation challenging his detention addressed to the Hon'ble Chairman and Companion Members of the N.S.A. Advisory Board, Orissa, Cuttack through the Superintendent of Sub-Jail, Jharsuguda vide Annexure-4. He had also enclosed free copies of the representations with his said letter for sending to the Government of India and to the Government of Odisha and any other appropriate authority. On 10.04.2018 the Superintendent of Sub-Jail, Jharsuguda forwarded the copy of the said representation to the Hon'ble Chairman and Companion Members of the N.S.A Advisory Board, Odisha for favour of perusal. Thereafter on 17.04.2018 the District Maistrate, Jharsuguda served a letter on the petitioner informing about his right to represent to the Central Government. On 20.04.2018 the petitioner was personally heard by the N.S.A, Advisory Board and his detention was approved by the order of the Board dated 26.04.2018. On 08.05.2018, the detention of the petitioner was also approved by the Central Government. On 18.11.2018 i.e. almost more than six months

thereafter the Superintendent of Sub-Jail, Jharsuguda forwarded a copy of the representation dated 09.04.2018 given by the petitioner to the State Government.

3. In the present application the petitioner assails his detention submitting that it was not only illegal but the actions of the detaining authority were also not according to the prescribed procedure thereby making his detention unlawful. The learned counsel for the petitioner mainly contended that the detaining authority failed to carry out their responsibility that arises under Article 22(5) of the Constitution of India by failing to forward the representation of the petitioner to the State Government as well as to the Central Government, thereby violating a statutory right available to the petitioner. It was submitted that Article 22(5) casts an important duty on the detaining authority to communicate the grounds of the detention to the detenue at the earliest to afford him an opportunity of making a representation against the detention order. It was submitted that although the petitioner submitted his representations on 09.04.2018 still those were forwarded to the concerned authorities only on 18.11.2018 and one month thereafter the State Government as well as the Central Government rejected his representation. It was further submitted on behalf of the petitioner that the grounds of detention as served on the petitioner mentioned that assessing the activities of the petitioner as reported by the Superintendent of Police, Jharsuguda and its further repercussion on the normal public life, the District Magistrate, Jharsuguda had reasons to believe that the detention of the petitioner under the provisions of the Act was essential for maintenance of public order and for prevention of disturbance of normal tempo of life in Jharsuguda town and its vicinity. It was submitted that although the observations of the District Magistrate relied upon the report submitted by the Superintendent of Police, Jharsuguda, still a copy of the said report was not supplied to the petitioner thereby violating his valuable right as per the settled principle of law.

4. Per contra, it was submitted on behalf of the State as well as the Union of India that there has been no violation of the principles of natural justice nor was there any deviation in carrying out the obligations on the part of the detaining authority so as to make the detention of the petitioner illegal or unlawful. It was submitted that the specific grounds of detention mentioning the criminal activities of the petitioner disturbing the normal public life along with the list of twenty two criminal cases involving different serious offences were also intimated to the petitioner and he was also

informed that he had liberty to represent his case to the State Government/Advisory Board under Section 9 of the Act. It was further submitted that as claimed by the petitioner on 09.04.2018, the petitioner submitted a representation addressed only to the Hon'ble Chairman and Companion Members of the N.S.A. Advisory Board and it was duly forwarded to the addressed authority by the concerned Superintendent of Sub-Jail Jharsuguda on the very next day. It was submitted by the learned counsel for the State that since the letter was addressed to the Advisory Board, it was sent to the said authority and there being no other representation of the petitioner addressed either to the State Government or to the Central Government, no latches could be attributed to the actions of the detaining authority in not forwarding the same to the State or Central Government. As regards the report of the Superintendent of Police, it was submitted that the details of the criminal activities as well as pending criminal cases were informed to the petitioner in the grounds of detention served on him on the very day of detention i.e. 20.03.2018 and hence, non-supply of the copy of the report of the Superintendent of Police to the petitioner in no way affected his information.

5. It is borne out from the record that the petitioner made a representation on 09.04.2018 addressed to the Hon'ble Chairman and Companion Members of the N.S.A. Advisory Board, Odisha, Cuttack wherein his signature was duly attested by the Superintendent of Sub-Jail, Jharsuguda and it is specifically seen therein (Annexure-4) that the petitioner had enclosed three copies of his such representation for sending to Home Affairs, Government of India, New Delhi and Secretary, Home Department (Special Section) Government of Odisha, Bhubaneswar/appropriate authority. Thus, the submission made on behalf of the State that the petitioner had not made any other representation falls to the ground. That is, more so, for the admitted position that there being no further representation made by the petitioner, the Superintendent, Sub-Jail, Jharsuguda forwarded the copy of the said representation to the Secretary of the Government, Home Department, Bhubaneswar on 18.11.2018 i.e. more than seven months after the representation was made by the petitioner. In this regard, the learned counsel for the petitioner relied upon the decision of the Hon'ble Apex Court reported in ***AIR 1991 SC 1090 (Smt. Gracy v. State of Kerala and another***) which was also relied upon by this Court in a decision reported in ***(2004) 29 OCR 686 (Babu @ Gobardhan Rath Vrs State of Odisha and others***). It was observed by the Hon'ble Apex Court that:-

"It is undisputed that if there be only one representation by the detenu addressed to the detaining authority, the obligation arises under Art.22(5) of its consideration by the detaining authority independent of the opinion of the Advisory Board in addition to its consideration by the Advisory Board while giving its opinion. In other words, on representation of the detenue addressed only to the Central Government and not also the Advisory Board does not dispense with the requirement of its consideration also by the Advisory Board. The question, therefore, is: Whether one of the requirement of consideration by Government is dispensed with when the detenu's representation instead of being addressed to the Government or also to the Central Government is addressed only to the Advisory Board and submitted to the Advisory Board instead of the Government ? On principle, we find it difficult to uphold the learned Solicitor General's contention, which would reduce the duty of the detaining authority from one of substance to mere form. The nature of duty imposed on the detaining authority under Art. 22(5) in the context of the extraordinary power of preventive detention is sufficient to indicate that strict compliance is necessary to justify interference with personal liberty. It is more so since the liberty involved is of a person in detention and not of a free agent. Art. 22(5) casts an important duty on the detaining authority to communicate the grounds of detention to the detenu at the earliest to afford him the earliest opportunity of making a representation against the detention order which implied the duty to consider and decide the representation when made, as soon as possible. Art.22(5) speaks of the detenu's representation against the order, and imposes the obligation on the detaining authority. Thus, any representation of the detenue against the order of his detention has to be considered and decided by the detaining authority, the requirement of its separate consideration by the Advisory Board being an additional requirement implied by reading together Cls. (4) and (5) of Art. 22, even though express mention in Art. 22(5) is only of the detaining authority. Moreover, the order of detention is by the detaining authority and so also the order of its revocation if the representation is accepted, the Advisory Board's role being merely advisory in nature without the power to make any order itself. It is not as if there are two separate and distinct provisions of representation to two different authority viz. the detaining authority and the Advisory Board, both having independent power to act on its own.

It being settled that the aforesaid dual obligation of consideration of the detenu's representation by the Advisory Board and independently by the detaining authority flows from art.22(5) when only one representation is made addressed to the detaining authority, there is no reason to hold that the detaining authority is relieved of his obligation merely because the representation is addressed to the Advisory Board instead of the detaining authority and submitted to the Advisory Board during pendency of the reference before it. It is difficult to spell out such an inference from the contents of Art. 22(5) in support of the contention of the learned Solicitor General. The content of Art.22(5) as well as the nature of duty imposed thereby on the detaining authority support the view that so long as there is a representation made by the detenu against the order of detention, the aforesaid dual obligation under Art.22(5) arises irrespective of the fact whether the representation is addressed to the detaining authority or to the Advisory Board or

> *to both. The mode of address is only a matter of form, which cannot whittle down the requirement of the constitutional mandate in Art. 22(5) enacted as one of the safeguard provided to the detenu in case of preventive detention."*

In view of the aforesaid position of law and on the undisputed facts that the representation submitted by the petitioner on 09.04.2018 was forwarded to the State Government by the Jail Authority on 18.11.2018, it is apparent that the detaining authority has failed in complying the constitutional mandate while performing their duties and hence, the detention of the petitioner is definitely unsustainable. It is also not disputed that the reports submitted by the Superintendent of Police, Jharsuguda was relied upon by the concerned District Magistrate in assessing the criminal activities of the petitioner but the copy of the said order was not served on the petitioner. In this respect, the learned counsel for the petitioner relied on the decision of this Court reported in (***2007) 36 OCR 833 (Sailendra Kumar Jora v. District Magistrate and Two Ors).*** It was observed therein that whatever materials have been considered by the detaining authority in passing the order of the detention should be made available to the petitioner to enable him to make a proper representation against the grounds of detention. It was further observed that even then the grounds of detention virtually contains all the materials which were there in the report of the Superintendent of Police, even though the fact remains that the report of the Superintendent of Police has not been supplied to the detenue. Relying upon a decision of the Hon'ble Apex Court reported in ***AIR, 1980 SC 1983 (Smt. Icchu Devi Choraria V. Union of India and Ors***). It was observed that:

> *"This is an area where the Court has been most strict and scrupulous in ensuring observance with the requirements of the law, and even where a requirement of the law is breached in the slightest measure, the Court has not hesitated to strike down the order of detention."*

6. In view of the aforesaid facts and the position of law, we are of the considered view that there were fatal lapses on the part of the detaining authority, and consequentially therefore, the order of detention is liable to be quashed.

7. Accordingly, we allow the petition quashing the order dated 20.03.2018 passed by the District Magistrate and Collector, Jharsuguda vide Annexure–1 and direct that the petitioner be released forthwith if his detention in custody, is not required in connection with any other case.

2019 (I) ILR - CUT- 705

C.R. DASH, J.

CRIMINAL APPEAL NO. 2 OF 2006

KUMARI BEHERA & ORS. ……..Appellants

.Vs.

STATE OF ORISSA ……...Respondent

PREVENTION OF CORRUPTION ACT, 1988 – Section 13(2) read with Section 13(I)(d) & Section 7 – Offence under – Conviction – Allegation of demand of bribe by the appellant for processing the application for recommending his name for grant of loan – Trial court has relied on each and every prosecution witness to return the finding of the conviction without appreciating their evidence in proper perspective – Effect of – Held, if all the aforesaid evidence in their totality are taken into consideration, the prosecution case becomes doubtful and I am constrained to hold that, the prosecution has failed to prove the factum of demand and acceptance of alleged bribe money by the appellant – Only on the basis of recovery of tainted money from the possession of the appellant and detection of Phenolphthalein in the hand wash and pocket wash of the appellant, the appellant cannot be incriminated U/s. 7 of the P.C. Act especially in view of the nature of shaky evidence as discussed and the defence plea, which is in the nature of competing probability to the extent that, when the complainant/ P.W.5 put some G.C. notes forcibly into the pocket of the appellant while he was busy in marketing, he immediately threw it away – Conviction set aside. (Para -11)

For Appellants : Mr. Mukesh Panda & Mr. V. Jena.
M/s. S. Nanda, A.K. Dash, S. Mohanty,
S.S. Satapathy, S.K. Samantaray
For Respondent : Asst. Standing Counsel (Vigilance)

JUDGMENT Date of Judgment :19.03.2019

C.R. DASH, J.

The appeal is directed against the Judgment of conviction and order of sentence dated 24.12.2005 passed by the learned Special Judge, Vigilance, Berhampur, Ganjam in convicting the appellant for the offences punishable U/Ss. 13(2) r/w Section 13(I)(d) & Section 7 of the Prevention of Corruption Act, 1988 (for short "The P.C. Act") and sentencing him to R.I. for one year for the offence punishable U/S. 13(2) r/w Section 13(I)(d) of the P.C. Act and further sentencing him to suffer R.I. for six months for the offence U/S. 7 of the P.C. Act directing the sentences to run concurrently.

2. At the relevant time, the appellant was working as Progress Assistant in Baliguda Block. The complainant was a beneficiary under the IRDP Scheme of Baliguda Block and his name was sponsored to the State Bank of India, Baliguda for sanction of loan of Rs.19, 000/- for starting a cloth store. It is alleged in the written complaint dated 04.03.1998 presented to the D.S.P., Vigilance, Berhampur by the complainant that, while recommending the name of the complainant to avail the aforesaid loan benefit, the present appellant demanded bribe of Rs.1,000/- for processing the application for recommending his name. However, the name of the complainant was recommended for availing the loan admittedly by the Block Development Officer and on 13.02.1998, he got the first installment of the loan. It is further alleged that on 13.02.1998 itself, the appellant reiterated his demand of Rs.1,000/- towards bribe, but the complainant expressed his inability to pay such a huge amount. On 26.02.1998, the complainant received the second installment of loan of Rs.5,000/-. After the complainant got the second installment of the loan amount, the appellant went to the house of the complainant and told his wife to inform the complainant to give him the demanded bribe. The complainant, however, did not fulfill the demand of the appellant. On 04.03.1998, the appellant again went to the house of the complainant and searched for him, but he was absent. The appellant told his wife in absence of the complainant that, she should inform the complainant to come to the Block Office on 05.03.1998 with the amount of Rs.500/-, which the complainant had to give to him. It is further alleged that, the appellant told the wife of the complainant that, if the bribe amount is not paid within the aforesaid period, his further installments will be blocked. The complainant, instead of paying the bribe, lodged a written report with the D.S.P., Vigilance, Berhampur vide Ext.9. The D.S.P., Vigilance, after receipt of the written report, made preparation and laid the trap. Investigation was taken up into the matter after the trap and after completion of the investigation, Charge Sheet was submitted against the appellant.

3. The defence plea is one of complete denial. The appellant, in his statement recorded U/S. 313 Cr. P.C., has specifically stated that, while he was busy in purchasing goods in the market, suddenly the complainant came and forcibly put some money into his pocket, which he immediately threw.

4. The prosecution has examined eight witnesses to bring the charges to home. P.W.5 is the complainant/Decoy, P.W.1 is the accompanying witness, who was arranged to overhear the talk between the appellant and the complainant and to signal the raiding party, when the bribe is accepted. P.Ws.

2 and 7 are the official witnesses, who had witnessed the preparation and seizure etc. P.W.3 is the Head Clerk of the Block Office, Baliguda, P.W. 6 is the sanctioning authority, P.W.4 is the D.S.P., Vigilance, with whom, the written complaint vide Ext.9 was lodged by P.W.5, P.W.7 is an Official witness to the trap and P.W.8 is the Investigating Officer.

5. There is no dispute by the defence that the appellant is a public servant and, at the relevant time, he was working as Progress Assistant in Baliguda Block. The defence plea being to the effect that, the complainant forcibly put some currency notes into the shirt pocket of the appellant, while he was busy in marketing, detection of Phenolphthalein from his pocket wash, is quite natural. The further defence plea being to the effect that, the appellant threw the money bringing it out from his pocket, Phenolphthalein from his hand wash was detected naturally. But this Court has to see how far such circumstances are incriminatory in nature on the face of the evidence adduced.

6. Learned counsel for the appellant impugns the findings of the learned Special Judge, Vigilance on the following grounds :-

> (i) The complainant- P.W.5 having ipse dixit stated in the cross-examination that, after some days of the trap, he received the final installment of loan and there being further evidence to the effect that, after sanction of the first & second installment, the Bank authorities had visited his proposed shop to see the progress of work, it is to be held that, no work was pending with the appellant so far as the loan application of the complainant (P.W.5) is concerned on the date, the trap was laid and, therefore, there was no occasion for the appellant to demand any bribe from the complainant for doing such work.
>
> (ii) There is no evidence to show that, there was any prior demand or demand at the time of acceptance of bribe and the most important witness on this aspect, i.e., the wife of the complainant has not been examined.
>
> (iii) No independent witness has been examined by the prosecution to prove the demand of bribe, as alleged.
>
> (iv) The evidence of the complainant has not been corroborated by any other witness and even by the accompanying witness- P.W.1.

7. Learned counsel for the Vigilance Department *per contra* submits that, in a trap case, except the Decoy and the accompanying witness, there cannot be any other independent witness to be examined on behalf of the prosecution and in the present case, though the accompanying witness- P.W.1 has turned hostile, he has corroborated the complainant- P.W.5 in material particular. There is no ground therefore to disbelieve the prosecution case. It

is further contended by the Department that, there is evidence to show that, the demand was made by the appellant prior to the forwarding of letter for availing the loan, but the bribe money must have been paid afterwards. It is further submitted that, Phenolphthalein having been found from the hand wash and pocket wash of the appellant, it is to be held that, the appellant had accepted the bribe and legal or compulsory presumption is available to be drawn against the appellant to incriminate him U/S. 7 of the P.C. Act.

8. Rival contention of the parties can be resolved by proper appreciation of evidence adduced on record. It is found from the impugned Judgment that, learned Special Judge, Vigilance has relied on each and every prosecution witness to return the finding of the conviction without appreciating their evidence in proper perspective.

9. From the evidence of P.W.5 and other evidence, let me first fix the place of detection or the spot, where the alleged demand and acceptance of bribe had happened in between the appellant and the complainant. The complainant-P.W.5 in para- 5 of his examination-in-chief has testified that, *at about 11 a.m., he along with the accompanying witness- P.W.1 first proceeded to the Office of the appellant ; as the appellant was absent in his Office, he came to his residence & found that the appellant was also not present in his residence ; while returning from the residence of the appellant on the way near Lamp, the appellant called him, when he went to the appellant, he was talking with another person ; the appellant did not take the tainted G.C. notes from him at that place ; then he took him towards the Tahasil Office; as many employees were present near the Tahasil Office, the appellant did not also accept the tainted G.C. notes from him there; then he took him towards the back side of Saloon of Prafulla Dakua and accepted the tainted G.C. notes from him. After accepting the tainted G.C. notes, the appellant kept the amount in his chest shirt pocket.*

9.1. P.W.1- accompanying witness in para- 3 of his examination-in-chief has testified that, *he along with the complainant went to the Block Office, where the appellant was found absent in his Office, so they returned back and while proceeding towards the market, on the way, found the appellant and at the sight of the complainant, the appellant talked with him and thereafter both of them went towards a lane in front of the Tahasil Office……*

P.W.2, who was a member of the raiding party, has not stated about the spot of detection.

P.W.4- D.S.P., Vigilance, who is the head of the raiding party, in para- 4 of his examination-in-chief has testified that, *the place of detection is near the betel shop close to the Block Office* and in his cross-examination, he has testified that, *the place of detection is a market place*. He thereafter in his cross- examination has testified that, due to the pocket wash, there was no stain in the pocket of the appellant.

P.W.7, who is also a member of the raiding party, has testified that *the complainant- P.W.5 & the accompanying witness- P.W.1 went to the Office of the appellant, but as they did not find him there, they went in search of him and ultimately found him in a bank of Baliguda. The appellant-P.W.5 & P.W.1, while returning from the said bank, on the way near Jolly Club, P.W.5 handed over the tainted G.C. notes to the appellant.*

10. From the evidence of all the witnesses, it is manifestly clear that, each is pointing to a different spot so far as detection is concerned. All the members of the raiding party, who have been examined as witnesses as discussed (supra) have testified that, getting the signal from the accompanying witness-P.W.1, they had rushed to the spot. But the accompanying witness, who has turned hostile, has not whispered a single word regarding giving of signal.

10.1. The complainant-P.W.5 himself in para- 6 of his cross-examination has testified that, *his loan application was forwarded by the B.D.O. to the State Bank of India, Baliguda Branch, where the bank authorities paid the amount to him after scrutinizing the loan application and he received the last installment of Rs.10,000/- after the trap*. Such evidence of P.W.5 coupled with the evidence to the extent that, before hand, he had already received two installments and the bank officials had visited his proposed cloth shop to see progress of work there, it cannot be held that, any work of the complainant-P.W.5 was pending with the appellant by the time the trap was laid. It is clear from the evidence of the witnesses that, B.D.O. is the authority, who is to forward the application form of the beneficiaries to the bank and the bank is the authority to release the loan installment-wise after verifying the progress of work in the proposed place of business of the beneficiary. When the complainant-P.W.5 had therefore received the first & second installments before the trap and he received the last installment after the trap, it cannot be held that, the appellant had not processed the application of the complainant-P.W.5 for getting any illegal gratification. Had the appellant not processed the application in time, the complainant P.W.5 would not have received the

loan amount as stated by him. Further, the appellant or the authorities of the Block had no role to play so far as release of successive installments of loan by the bank is concerned. It was complete jurisdiction of the bank only. There is also no evidence regarding the earlier demand, the wife of the complainant-P.W.5, before whom the demand is stated to have been made being an important witness, has been withheld by the prosecution and the evidence of P.W.5 regarding prior demand is also shaky. From the evidence of P.W.5 and other witnesses, it cannot be held that, there was also immediate demand by the appellant before acceptance of the alleged bribe money.

11. If all the aforesaid evidence in their totality are taken into consideration, the prosecution case becomes doubtful and I am constrained to hold that, the prosecution has failed to prove the factum of demand and acceptance of alleged bribe money by the appellant. Only on the basis of recovery of tainted money from the possession of the appellant and detection of Phenolphthalein in the hand wash and pocket wash of the appellant, the appellant cannot be incriminated U/S. 7 of the P.C. Act especially in view of the nature of shaky evidence as discussed (supra) and the defence plea, which is in the nature of competing probability to the extent that, when the complainant/ P.W.5 put some G.C. notes forcibly into the pocket of the appellant while he was busy in marketing, he immediately threw it away.

12. In view of the discussions (supra), I am constrained to hold that, the prosecution has failed to prove the charge. Accordingly, the Judgment of conviction and order of sentence passed by the learned court below are set-aside and the appeal is allowed.

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2019 (I) ILR - CUT- 710

C.R. DASH, J.

CRIMINAL APPEAL NO. 219 OF 2009

KISHORE KUMAR MISHRA ……...Appellant

.Vs.

STATE OF ORISSA,(VIGI.) ……Respondent

PREVENTION OF CORRUPTION ACT, 1988 – Section 13(2) read with Section 13 (1)(d) and Section 7 – Offence under – Junior clerk demanding illegal gratification – Acquitted for the charges under

Section 13(2) read with Section 13 (1)(d) but convicted for the offence under section 7 – Appreciation of evidence – Held, it might have been proved that tainted money was recovered from the second drawer of the table of the Appellant, but there is no evidence to prove the demand or payment or the circumstance under which the money was paid – There is also no evidence to prove that the Appellant accepted the tainted G.C. Notes knowing it to be bribe – There is further no evidence to prove whether the complainant was an office bearer of "Patita Uddhar Samiti" and he had pending work with the Appellant – The Complainant has turned hostile completely and the accompanying / overhearing witness has supported the defence to the effect that the Complainant put the tainted money in the second drawer of the table of the Appellant – There is also no evidence on record as to whether the file of the Complainant was still pending with the Appellant or the role of the Appellant in withholding the file of the Complainant – Taking into consideration the evidence on record in their totality and the law discussed, I am of the view that the prosecution has failed to prove the charge under Section 7 of the P.C. Act against the Appellant – The Appellant is therefore entitled to be acquitted of the charge – Accordingly, the judgment of conviction and order of sentence are set aside.

Case Laws Relied on and Referred to :-

1. A.P., 2007 CRL. L. J. 754 : V. Venkata Subbarao .Vs. State represented by Inspector of Police.
2. (2009) 3 SCC 779 : C.M. Girish Babu .Vs. CBI, Kochin, High Court of Kerala.
3. (2014) 58 OCR 566 : Bhagirathi Pera .Vs. State of Orissa.
4. (2014) 58 OCR 703 : Manoranjan Mohanty .Vs. State of Orissa.
5. (1988) 1 OCR 329 : Kailash Ch. Sahoo .Vs. State of Orissa.

For Appellant : Mr. Tusar Kumar Mishra
For Respondent : Mr. Sanjay Kumar Das, Standing Counsel (Vigilance).

JUDGMENT Date of Judgment:19.03.2019

C.R. DASH, J.

Judgment of conviction and sentence dated 14.05.2009 passed by the learned Special Judge (Vigilance), Bhubaneswar in T.R. No.62 of 2000 convicting the Appellant under Section 7 of the Prevention of Corruption Act, 1988 ("P.C. Act" for short) and sentencing him to suffer R.I. for six months and to pay a fine of Rs.1,000/- (one thousand) with default stipulation, has obliged the convict Appellant to file this Appeal.

2. The date of occurrence was 16.09.1998. One Pankaj Kumar Chhualsingh (P.W.7) presented a written complaint before the S.P. (Vigilance), Bhubaneswar alleging demand of illegal gratification of Rs.500/- (five hundred) by the Appellant. The Appellant at that time was working as a Junior Clerk in the Office of the A.D.M., Bhubaneswar and he was dealing with processing of files to be sent to the Inspector General of Registration for registration of different organizations. Pankaj Kumar Chhualsingh (P.W.7) claiming himself as a member of "Patita Uddhar Samiti" – a voluntary organization, had approached the Appellant in his office for processing of the file for registration of the organization. It is alleged that the Appellant had demanded Rs.500/- (rupees five hundred) from said Pankaj Kumar Chhualsingh (P.W.7) to do his work. Going further into the fact it is found that, on 18.05.1998 the B.D.O., Bhubaneswar had submitted a report recommending for registration of the aforesaid Society. The file containing such recommendation of the B.D.O., Bhubaneswar was in the office of the Additional District Magistrate, Khurda at Bhubaneswar and the Appellant was dealing with that file. On the basis of the complaint, a trap was laid on the same day. Tainted G.C. Notes of Rs.500/- (five hundred) was detected from the second drawer of the table of the Appellant in presence of witnesses, Detection Report was prepared and the Appellant was ultimately charge-sheeted.

3. The prosecution has examined nine witnesses to bring the charge to home against the Appellant. P.W.1 is the Collector & District Magistrate, Khurda and he had given the order of sanction. P.W.2 is the Assistant Director of State Forensic Science Laboratory, Bhubaneswar, P.W.3 is the accompanying / overhearing witness – a Junior Clerk in the Office of the Executive Engineer, Prachi Division, Bhubaneswar, P.W.4 is a Trap Witness who is stated to have brought out the tainted G.C. Note from the second drawer of the table of the Appellant and has tallied the numbers with the numbers there in the Preparation Report, P.W.5 is also a Trap Witness, P.W.7 is the Complainant, P.W.6 is a witness to the Seizure, P.W.8 is the Investigating Officer and P.W.9 is the Officer who led the trap party and detected the tainted G.C. Notes in the second drawer of the table of the Appellant and had taken the hand-wash of the Appellant which was collected in a clean bottle and was sent to the S.F.S.L., Bhubaneswar for chemical examination.

Besides oral evidence, a number of documents including the Preparation Report, Detection Report, Chemical Examination Report and Signatures of different witnesses have been proved by the prosecution.

4. The specific defence plea is that, the Complainant is not related to the "Patita Uddhar Samiti". He was frequently offering bribe to the Appellant, but the Appellant did not receive the same. It is the further plea that, when the Appellant was busy in locating some files from his table, two persons came and challenged him and he denied to have received any money, but the Complainant said that the money is in the drawer of the Appellant, and then the Vigilance Officers asked him to bring out the money and he brought out the money. However, no evidence has been tendered by the defence.

5. Learned trial court, on detail discussion of the materials on record, found that the prosecution has failed to establish the factum of demand of bribe by the Appellant and accordingly he acquitted the Appellant from the charge under Section 13(2) read with Section 13 (1)(d) of the P.C. Act.

6. So far as Section 7 of the P.C. Act is concerned, learned Court below had relied on the evidence of P.Ws.3, 4, 7 and 9 in addition to the Chemical Examination Report and the conduct of the accused.

7. Learned counsel for the Appellant submits that, there being no evidence regarding demand and acceptance of bribe, offence under Section 7 of the P.C. Act cannot be made out. Further it is submitted by learned counsel for the Appellant that, mere recovery of tainted G.C. Notes by itself is not enough in absence of any evidence to prove demand of bribe or to show that the accused voluntarily accepted the money, knowing very well it to be bribe. The second contention of learned counsel for the Appellant is that, the burden on the accused to rebut the presumption under Section 20 of the P.C. Act is not the same as the burden placed on the prosecution to prove the case beyond reasonable doubt. The accused, by cross-examining the witnesses and by adducing plausible evidence, may discharge his part of the burden.

8. Learned Standing Counsel for the Vigilance Department on the other hand supports the impugned judgment.

9. Coming to the evidence on record, P.W.7, who is the Complainant, has not supported the prosecution case at all. Learned trial Court on misconception has accepted the facts brought out on record in evidence by cross-examination of the said witness (P.W.7) under Section 154 of the Evidence Act, as to what he had told before the I.O. during investigation.

10. P.W.3, the overhearing / accompanying witness has testified that, when the Complainant entered into the room of the accused, the accused showed a file to him. Thereafter the Complainant tendered the amount to the accused. The Complainant had kept the tainted G.C. Note in the drawer of the accused. On this aspect, this witness has also been cross-examined under Section 154 of the Evidence Act and the learned Court below has taken into consideration what the witnesses have stated before the I.O.

11. P.W.4 is stated to have brought out the tainted G.C. Notes from the second drawer of the table of the Appellant, verified its number and on comparison it was found to be tallied with the numbers there in the Preparation Report.

12. P.W.9, the Detecting Officer has supported the prosecution case and has testified that, on washing of the hand of the Appellant, it turned pink colour and phenolphthalein trace from the hand-wash collected from the Appellant is supported by the Chemical Examination Report.

13. From the evidence on record it is found that, both the decoy and the overhearing / accompanying witness have not supported the prosecution case. The decoy may be a private complainant, but the accompanying / overhearing witness is a government officer. He has specifically stated that the Complainant had kept the money in the drawer of the table of the Appellant.

14. Learned Court below, relying on the evidence of P.W.4 alone, has convicted the Appellant under Section 7 of the P.C. Act.

15. Hon'ble Supreme Court, in the case of **V. Venkata Subbarao *vrs.* State represented by Inspector of Police, A.P.,** 2007 CRL. L. J. 754**,** in paragraph 24, has held thus :-

> "24. Submission of the learned counsel for the State that presumption has rightly been raised against the appellant, cannot be accepted as, *inter alia*, the demand itself had not been proved. In the absence of a proof of demand, the question of raising the presumption would not arise. Section 20 of the Prevention of Corruption Act, 1988 provides for raising of a presumption only if a demand is proved. ……".

In the aforesaid case, Hon'ble the Supreme Court was dealing with a case under Sections 7 and 13 of the P.C. Act. In the aforesaid case it is also held in paragraph – 26 of the judgment that, the onus on the accused is not as heavy as that on the prosecution. It may be compared with a Defendant in a Civil Proceeding.

16. Hon'ble Supreme Court, in the case of **C.M. GIRISH BABU *vrs.* CBI, KOCHIN, HIGH COURT OF KERALA,** (2009) 3 SCC 779**,** were dealing with a question relatable to Section 7 of the P.C. Act, as to whether mere recovery of tainted currency note from the accused when substantive evidence is not reliable, is a ground enough for conviction under Section 7 of the P.C. Act.

In paragraph-18 of the judgment, Hon'ble Supreme Court in the aforesaid case, relying on 1979 (4) SCC 725, has held that, mere recovery of tainted money divorced from the circumstance under which it has been paid, is not sufficient to convict the accused. When the substantive evidence in the case is not reliable, the mere recovery by itself cannot prove the charge of the prosecution against the accused in absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted money knowing it to be bribe.

17. Similarly, regarding the nature of proof the accused is liable to adduce, Hon'ble the Supreme Court has held that the burden of proof placed upon the accused person against whom the presumption is raised under Section 20 of the Act is not akin to that of the burden placed on the prosecution to prove the case beyond reasonable doubt. Such burden can be discharged through cross-examination of the witnesses cited against the accused or by adducing reliable evidence.

18. This Court, in cases relatable to Section 7 of the P.C. Act, in the cases of **Bhagirathi Pera *vrs.* State of Orissa,** (2014) 58 OCR – 566, **Manoranjan Mohanty *vrs.* State of Orissa,** (2014) 58 OCR – 703 **and Kailash Ch. Sahoo *vrs.* State of Orissa,** (1988) 1 OCR – 329, have held that, mere recovery of tainted money divorced from the circumstance under which it was paid, is not sufficient for conviction of the accused, as substantial evidence is not reliable.

19. In the present case, from the evidence of P.W.4, it might have been proved that tainted money was recovered from the second drawer of the table of the Appellant. But there is no evidence to prove the demand or payment or the circumstance under which the money was paid. There is also no evidence to prove that the Appellant accepted the tainted G.C. Notes knowing it to be bribe. There is further no evidence to prove whether the complainant was an Office Bearer of "Patita Uddhar Samiti" and he had pending work with the Appellant. The Complainant has turned hostile completely and the accompanying / overhearing witness has supported the defence to the effect

that the Complainant put the tainted money in the second drawer of the table of the Appellant. There is also no evidence on record as to whether the file of the Complainant was still pending with the Appellant or the role of the Appellant in withholding the file of the Complainant.

20. Taking into consideration the evidence on record in their totality and the law discussed supra, I am of the view that the prosecution has failed to prove the charge under Section 7 of the P.C. Act against the Appellant. The Appellant is therefore entitled to be acquitted of the charge. Accordingly, the judgment of conviction and order of sentence are set aside.

21. The Criminal Appeal is allowed. The Appellant be discharged of the Bail Bond forthwith.

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2019 (I) ILR - CUT- 716

DR. A.K.RATH, J.

MACA NO. 470 OF 2011

STATE MANAGER, ICICI LOMBARD GEN. INSURANCE CO. LTD., BHUBANESWAR .....Appellant

.Vs.

SARITA AGRAWAL & ORS. .....Respondents

MOTOR VEHICLE ACT, 1988 – Section 166 read with Rule 20 of the Orissa Motor Vehicles (Accidents Claims Tribunal) Rules, 1960 – Provisions under – Claim application disposed of ex parte – Application under Order 9 Rule 13 of the Code of Civil Procedure filed for setting aside ex-parte award – Plea that provision of CPC not applicable instead an appeal under section 173 of the M.V Act should have been filed against the ex-parte award – Whether such a plea is correct? – Held, no, on a conspectus of Rule 20 of Rules, it is crystal clear that the provisions of Order 9 Rule 13 CPC will apply to the proceeding under Section 166 of the M.V. Act. (Para -10)

Case Laws Relied on and Referred to :-

1. (2008) 1 SCC 125 : Transcore Vs. Union of India & Anr.

For Appellant : Mr. Jayasankar Mishra.
For Respondent : Mr. S.S. Sahoo.

JUDGMENT Date of Hearing & Judgment : 11.01.2019

DR.A.K. RATH, J.

Aggrieved by and dissatisfied with the award dated 04.11.2010 passed by the learned M.A.C.T.,Kalahandi-Nuapada, Bhawanipatna in M.A.C. No. 01 of 2008, the insurer has filed the present appeal.

02. Claimants-respondent nos.1 to 6 filed an application under Section 166 of the Motor Vehicles Act (in short, 'the M.V. Act') for compensation before the learned Tribunal. The case of the claimants was that the Manohar Lal, husband of claimant no.1, father of claimant nos.2 to 6, was travelling in an indica car bearing registration No.OR-08-C-7923 from Saintala to Sambalpur. On the way, the vehicle met with an accident, as a result of which, he succumbed to the injuries. The deceased was forty one year old at the time of accident. He was a business man and earning more than Rs.3.6 lakhs per annum.

03. Though notice was issued to the owner of the vehicle, opposite party no.1, but he had chosen not to contest the case and as such set ex parte. Opposite party no.2, insurer filed a written statement denying liability. It was stated that the deceased was travelling in a private car. The insurer had violated the terms and conditions of the policy. It is exonerated from liability. Parties led evidence. On an anatomy of pleadings and evidence on record, learned Tribunal awarded the amount of Rs.18,97,000/-. While matter stood thus, the opposite party no.1 filed CMA No. 17 of 2009 under Order 9 Rule 13 CPC to set aside the ex parte award. Learned Tribunal set aside the award on 23.07.2009. Thereafter opposite party no.1 filed a written statement stating therein that the deceased was a hired passenger in his car. The vehicle was validly insured with the insurer opposite party no.2. The insurer has paid damages to him for the damages of the vehicle.

04. Stemming on the pleadings of the parties, learned Tribunal framed three issues. Parties led evidence, oral and documentary. On an assessment of the evidence on record and pleadings, learned Tribunal awarded Rs.19, 85,500/- with interest @ 6% per annum from the date of claim application and directed the insurer to pay the same.

05. Heard Mr. Jayasankar Mishra, learned counsel for the appellant and Mr. Sasanka Sekhar Sahoo, learned counsel for the respondent nos.1, 4, 5 and 6. None appears for respondent no.2 and respondent no.3.

06. Mr. Mishra, learned counsel for the appellant submits that any person, aggrieved by an award of the Claims Tribunal, may file an application under Section 173 of the M.V. Act before the High Court. In the event the appeal is filed before this Court, he has to deposit Rs.25,000/- or fifty percent of the amount so awarded. Learned Tribunal awarded the amount of Rs.18,97,000/- with 6% interest and directed the owner to pay the same. Thereafter, the owner of the vehicle filed an application under Order 9 Rule 13 CPC to set aside the ex parte award. Learned Tribunal set aside the ex parte award and observed that the amount shall be paid by the insurer and the same shall be recovered from the owner of the vehicle. The provisions contained in Order 9 Rule 13 CPC does not apply to a proceeding under Sec.166 of the M.V. Act. Further after the award was set aside, on the self-same evidence, learned Tribunal awarded Rs.19,85,500/-. There is no rhyme or reason to enhance the award amount from Rs. 18,97,000/- to Rs.19,85,500/-.

07. Per contra, Mr. Sahoo, learned counsel for the respondent nos.1, 4, 5 and 6 submits that the deceased was the sole bread earner of the family. The family received a set back after the death. Initially, the award was passed, but the same was set aside at the behest of the owner. The award amount is just and proper.

08. Section 173 of the M.V. Act provides that any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court. It further provides that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court unless he has deposited with it twenty-five thousand rupees or fifty per cent of the amount so awarded, whichever is less, in the manner directed by the High Court.

09. Rule 20 of the Orissa Motor Vehicles (Accidents Claims Tribunal) Rules, 1960 (in short, "the Rules") deals with application of the Code of Civil Procedure in certain cases. The same reads as follows:-

> "20.Code of Civil Procedure to apply in certain cases. - The following provisions of the First Schedule to the Code of Civil Procedure, 1908, shall, so far as may be, apply to proceedings before the Claims Tribunals, namely, Order V, Rules 9 to 13 and 15 to 30; Order IX, Order XIII, Rules 3 to 10; Order XVI, Rules 2 to 21; Order XVIII and Order XXIII Rules 1 to 3."

10. On a conspectus of Rule 20 of Rules, it is crystal clear that the provisions of Order 9 Rule 13 CPC will apply to the proceeding under Section 166 of the M.V. Act.

11. On a harmonious reading of Sec.173 of the M.V. Act and Rule 20 of the Rules, it is evident that any person aggrieved by an exparte award may either file an application under Sec.177 of the M.V. Act before the High Court or may file an application under Order 9 Rule 13 CPC before the learned Tribunal to set aside the same. The provision of the statute is clear and explicit. It is open to the aggrieved party either may file an appeal or file an application under Order 9 Rule 13 CPC.

12. In Transcore v. Union of India and another, (2008) 1 SCC 125, the apex Court in paragraph-64 of the judgment held as follows:

> "64. ..... There are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. According to *American Jurisprudence*, 2d, Vol. 25, p. 652, if in truth there is only one remedy, then the doctrine of election does not apply.....According to Snell's Principles of Equity (31st Edn., p. 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent....."
>
> (emphasis laid)

13. The next question crops up as to whether the learned Tribunal is justified in enhancing the award from Rs. 18,97,000/- to Rs.19,85,500/-. Parties led evidence. On taking a holistic view of the matter, learned Tribunal awarded an amount of Rs. 19, 85,500/- with interest @ 6% per annum from the date of the application and directed the insurer to recover the same from the owner of the vehicle. After the award was set aside, no further evidence was adduced by the parties. Learned Tribunal committed a manifest illegality in enhancing the award from Rs. 18,97,000/- to Rs.19,85,500/- on the self-same evidence. In view of the same, the award amount is reduced to Rs. 18,97,000/- from Rs.19,85,500/-. The rest part of the award shall remain unaltered. The appeal is allowed to the extent indicated above. No costs.

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2019 (I) ILR - CUT- 719

DR. A.K. RATH, J.

MACA NO. 907 OF 2006

DHIREN KUMAR MISHRA & ANR. .....Appellants

.Vs.

KANDE PURTY & ANR. .....Respondents

MOTOR ACCIDENT CLAIMS – Offending vehicle was a mini bus which had no valid permit – The question arose as to whether the owner of the vehicle can be exonerated from its liability, when the offending vehicle did not have a valid permit to ply on the road? – Held, No.

"A person without permit to ply a vehicle cannot be placed on a better pedestal vis-a-vis one who has a permit, but has violated any condition thereof. Plying of a vehicle without a permit is an infraction. Therefore, in terms of Section 149(2) defence is available to the insurer on that aspect. The acceptability of the stand is a matter of adjudication. The question of policy being operative had no relevance for the issue regarding liability of the insurer. It was further held that considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the executing court concerned as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the executing court shall take assistance of the Regional Transport Authority concerned. The executing court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the executing court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle i.e. the insured. National Insurance Co. Ltd. V. Challa Bharathamma and others, (2004) 8 SCC 517 and Amrit Paul Singh and another v. Tata AIG General Insurance Company Limited and others, (2018) 7 SCC 558. followed." *(Para 9 & 10)*

Case Laws Relied on and Referred to :-

1. (2004) 8 SCC 517 : National Insurance Co. Ltd. Vs. Challa Bharathamma & Ors.
2. (2018) 7 SCC 558 : Amrit Paul Singh and another Vs. Tata AIG General Insurance Company Limited & Ors,

For Appellants Mr. S.K. Nayak-2,

For Respondents : None

JUDGMENT Date of Hearing :11.01.2019 : Date of Judgment:21.01.2019

DR. A.K.RATH, J.

Aggrieved by and dissatisfied with the award dated 29.07.2006 passed by the learned 3rd M.A.C.T, Rairangpur in MACT Misc. Case No.5 of 2005, the owners of the vehicle have filed this appeal.

2. Claimant-respondent no.1 filed an application under Sec.166 of the Motor Vehicles Act (in short, "the Act") before the learned 3rd M.A.C.T., Rairangpur for the injuries sustained in a motor vehicle accident. Case of the claimant was that on 23.03.2000, he was travelling as a passenger in the bus bearing registration number OR-II-5002 from Bahalda to Asana. Near Hendadunguri, the driver of the bus lost control, as a result of which, it was upturned. Immediately he was shifted to Jharadihi P.H.C. Thereafter, he was shifted to Cuttack and admitted to Orissa Nursing Home from 24.3.2000 to 14.4.2000. He was treated there till 19.5.2000. His right foot above ankle joint was amputated and the left grt and 2nd toe (two fingers of left foot) were disarticulated. There was also fracture of left femur. He became 75% disabled. He was a mason by profession and earning Rs.125/- per day. With this factual scenario, he filed the application.

3. Opposite parties 1 and 2-owners of the vehicle filed a written statement pleading, inter alia, that the claimant was not a passenger in the mini bus. He was a pedestrian. While crossing the road in a reckless manner, the accident took place. On humanitarian ground, they shifted the injured to Cuttack and admitted in the nursing home. They had borne the entire medical expenses. The driver of the vehicle had a valid driving licence. The bus had a valid permit.

4. Opposite party.3-insurer of the vehicle entered contest and filed a written statement denying the liability. It was stated that neither the driver had a valid driving licence at the time of accident, nor the bus had a route permit. Owner of the vehicle had violated the policy condition and as such, the insurer is exonerated from its liability.

5. Stemming on the pleadings of the parties, learned Tribunal framed five issues. Parties led evidence, oral and documentary. Learned Tribunal came to hold that the claimant was a passenger in the bus bearing registration number OR-II-5002. Due to rash and negligent driving of the driver of the offending bus, the accident took place. The vehicle had no valid permit to ply on the route. Held so, it awarded a sum of Rs.2,20,000/- with interest at the rate of 6% per annum and directed the insurer to pay the same to the claimant and granted liberty to the insurer to recover the amount from the owner of the vehicle.

6. Heard Mr.S.K. Nayak, learned counsel for the appellants. None appeared for the respondents.

7. Mr. Nayak, learned counsel for the appellants submitted that the finding of the learned Tribunal that the vehicle had no valid route permit is perverse. The insurer is not exonerated from its liability to indemnify the owner of a vehicle in respect of injuries to third parties if the vehicle gets involved in the accident after expiry of period of valid permit. Learned Tribunal committed a manifest illegality and directed the owners to furnish security for the awarded amount. The award amount is excessive.

8. The seminal point that hinges for consideration is whether the owner of the vehicle is exonerated from its liability, when the offending vehicle did not have a valid permit to ply on the road?

9. In National Insurance Co. Ltd. V. Challa Bharathamma and others, (2004) 8 SCC 517, the apex Court held that a person without permit to ply a vehicle cannot be placed on a better pedestal vis-a-vis one who has a permit, but has violated any condition thereof. Plying of a vehicle without a permit is an infraction. Therefore, in terms of Section 149(2) defence is available to the insurer on that aspect. The acceptability of the stand is a matter of adjudication. The question of policy being operative had no relevance for the issue regarding liability of the insurer. It was further held that considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the executing court concerned as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the executing court shall take assistance of the Regional Transport Authority concerned. The executing court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the executing court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle i.e. the insured.

10. An identical question came up for consideration before the apex Court in the case of Amrit Paul Singh and another v. Tata AIG General Insurance Company Limited and others, (2018) 7 SCC 558. The apex Court held:

> "In the case at hand, it is clearly demonstrable from the materials brought on record that the vehicle at the time of the accident did not have a permit. The appellants had taken the stand that the vehicle was not involved in the accident. That apart, they had not stated whether the vehicle had temporary permit or any other kind of permit. The exceptions that have been carved out under Section 66 of the Act, needless to emphasise, are to be pleaded and proved. The exceptions cannot be taken aid of in the course of an argument to seek absolution from liability. Use of a vehicle in a public place without a permit is a fundamental statutory infraction. We are disposed to think so in view of the series of exceptions carved out in Section 66. The said situations cannot be equated with absence of licence or a fake licence or a licence for different kind of vehicle, or, for that matter, violation of a condition of carrying more number of passengers. Therefore, the principles laid down in Swaran Singh and Lakhmi Chand in that regard would not be applicable to the case at hand. That apart, the insurer had taken the plea that the vehicle in question had no permit. It does not require the wisdom of the 'Tripitaka', that the existence of a permit of any nature is a matter of documentary evidence. Nothing has been brought on record by the insured to prove that he had a permit of the vehicle. In such a situation, the onus cannot be cast on the insurer. Therefore, the tribunal as well as the High Court had directed the insurer was required to pay the compensation amount to the claimants with interest with the stipulation that the insurer shall be entitled to recover the same from the owner and the driver. The said directions are in consonance with the principles stated in Swaran Singh (supra) and other cases pertaining to pay and recover principle."

11. On an anatomy of pleadings and evidence on record, learned Tribunal came to hold that the vehicle had no valid permit to ply on the road. There is no perversity in the said findings. The ratio in the decisions cited supra applies with full force to the facts of this case.

12. The claimant had sustained injuries. His right foot above ankle joint was amputated and the left grt and 2nd toe (two fingers of left foot) were disarticulated. There was also fracture of left femur and he became 75% disabled. Considering the nature of injuries sustained in the motor vehicle accident and disability of 75%, it cannot be said that the award is exorbitant.

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

2019 (I) ILR - CUT- 724

DR. A.K. RATH, J.

C.M.P. NO. 1534 OF 2018

M/S. Z. ENGINEERS CONSTRUCTION PRIVATE LIMITED & ANR. .....Petitioners

.Vs.

SRI BIPIN BIHARI BEHERA & ORS. .....Opp. Parties

(A) CODE OF CIVIL PROCEDURE, 1908 – Order 13 Rule 8 – Application for impounding of documents i.e 'Power of Attorney' on the plea that those documents are in the nature of conveyance and proper stamp duty has not been paid – Plea considered with reference to the provisions under Sections 2(10), 2(21), 33, 35 and 36 of Indian Stamp Act,1899 and the decision in Suraj Lamp and Industries Private Limited through Director vs. State of Haryana and another reported in (2012) 1 SCC 656 – The court held that the "power of attorney" is a document of convenience, not conveyance – Writ petition dismissed. (Para 9 to 18)

(B) POWER OF ATTORNEY – Ambit and scope – Held, a power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property – The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see section 1A and section 2 of the Powers of Attorney Act, 1882) – It is revocable or terminable at any time unless it is made irrevocable in a manner known to law – Even an irrevocable attorney does not have the effect of transferring title to the grantee – Suraj Lamp and Industries Private Limited through Director vs. State of Haryana and another reported in (2012) 1 SCC 656 followed. (Para 18)

Case Laws Relied on and Referred to :-

1. AIR 1961 SC 1655 : Javer Chand and Ors Vs. Pukhraj Surana.
2. (1978) 3 SCC 236 : Ram Rattan (dead) by L.Rs. Vs. Bajrang Lal & Ors.
3. (2003) 8 SCC 752 : R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple & Anr.
4. (Smt.), (2008) 4 SCC 720 : Government of Andhra Pradesh & Ors. Vs. P. Laxmi Devi
5. (2009) 2 SCC 532 : SMS Avinash Kumar Chauhan Vs. Vijay Krishna Mishra.
6. (2011) 14 SCC 66 : Tea Estates Private Limited Vs. Chandmari Tea Company Private Ltd.

7. AIR 2013 Karnataka 52 : Miss Sandra Lesley Anna Bartels Vs. Miss P. Gunavath.
8. (2012) 1 SCC 656 : Suraj Lamp and Industries Private Limited (2) through Director Vs. State of Haryana & Anr.

For Petitioners : Mr. Banshidhar Baug, Mr. Rati Ranjan Jethi.
For Opp. Parties : Md. Akhtar Alam, Mr. Sidheswar Rath.

JUDGMENT Date of Hearing & Judgment: 24.01.2019

DR. A.K. RATH, J.

This petition under Article 227 of the Constitution of India seeks to laciniate the order dated 14.12.2018 passed by the learned Civil Judge (Sr. Divn.), Bhubaneswar in C.S. No.245 of 2010, whereby and whereunder the learned trial court has rejected the petition of the defendant nos.11 and 12, petitioners herein, under Order 13 Rule 8 C.P.C. to impound the power of attorneys, Exts.4 and 5.

02. Since the dispute lies in a narrow compass, it is not necessary to recount in detail the cases of the parties. Pithily put, Pathani Behera, predecessor-in-interest of the opposite party nos.1 to 5 and opposite party no.6 instituted the suit for partition through their power of attorney holder, Kishore Chandra Behera, impleading opposite party nos.7 to 16 as well as the petitioners as defendants. Defendant nos.11 and 12 filed their written statement denying the assertions made in the plaint. In course of hearing of the suit, Kishore Chandra Behera, power of attorney holder, was examined as P.W.1. During examination of P.W.1, the defendant nos.11 and 12, petitioners herein, filed a petition under Order 13 Rule 8 C.P.C. praying inter alia to impound the power of attorneys, Exts.4 and 5. It was stated that the original plaintiffs, Pathani Behera and Dunguri Behera had executed two registered power of attorneys in favour of Kishore Chandra Behera. In the General Power of Attorney (in short 'GPA') dtd.04.10.2008, Ext.5, they had given power to P.W.1 in respect of an area Ac.0.833 dec. out of a big patch of land to deal with the property. Again they had executed another GPA, Ext.4, in the name of P.W.1 on 21.02.2011 in respect of an area Ac.0.415.6 dec. out of the suit land. In Exts.4 and 5, P.W.1 has got the power to sale, gift, mortgage and lease the property mentioned in the GPA. Possession of the land was delivered to him. P.W.1 stated that he had taken possession of the suit land by virtue of Exts.4 and 5. He further stated that when Exts.4 and 5 were executed in the year 2008 and 2011, the value of the suit property was more than two crores. Thus, as per the Indian Stamp Act, when possession of the land is delivered to the power of attorney holder to sale the property, the

same is to be treated as deed of conveyance. The stamp duty and fee has to be paid as per Indian Stamp Act provided for execution of a deed of conveyance. In the instant case, even though the plaintiffs executed the power of attorneys vide Exts.4 and 5 in favour of P.W.1 to remain in possession of the suit land and to sale the land, but no fee has been paid as per deed of conveyance. Exts.4 & 5 are insufficiently stamped. The documents cannot be marked as exhibits by the court, unless impounded and impounded fees are recovered from the plaintiffs. Exts.4 and 5 are to be impounded. The court shall recover ten times penalty fees thereon from the plaintiffs within a fix period, failing which, Exts.4 and 5 may be unmarked as exhibits for the interest of justice.

03. The plaintiffs filed objection to the petition. It is stated that the petition is not maintainable. The defendants have raised the question of valuation of the suit and its improper adjudication. The petition is hit under Rule 20 of G.R.C.O. (Civil). It is further stated that both the GPAs have been admitted in evidence by the court and marked as Exts.4 and 5. The document once admitted by the court, cannot be questioned. The provision of Indian Stamp Act pertaining to impound of a document is not applicable to this case. Exts.4 and 5 are prepared, executed and registered as per the provisions of Indian Contract Act and Indian Registration Act with all legal impediment. Had it not been properly stamped or under valued, then the registering authority could have referred both Exts.4 and 5 to the Stamp Collector for realization of deficit fees. But both the documents were properly valued and stamped. Defendant nos.11 and 12 are estopped to raise the question of deficit court fee relating to the execution of Exts.4 and 5.

04. Learned trial court came to hold that Exts.4 and 5 have been registered as per provision under Sec.17 of Indian Registration Act. It is not a deed of conveyance in terms of Sec.2(10) of Indian Stamp Act. The documents have been proved in evidence, admitted by the court and marked as exhibits. Sec.36 of the Indian Stamp Act comes into play. Once an instrument is admitted in evidence, the same cannot be questioned at later stage of proceeding. Exts.4 and 5 are no more in status of mere instruments. Held so, it rejected the petition.

05. Heard Mr.Banshidhar Baug along with Mr. Rati Ranjan Jethi, learned Advocates for the petitioners and Md. Akhtar Alam along with Mr. Sidheswar Rath, learned Advocates for the opposite party nos.1 to 6.

06. Mr.Baug, learned Advocate for the petitioners, argues with vehemence that power of attorney is an instrument. Article 1-A/23 of Schedule 1-A of the Stamp Duty on Instruments Odisha Amendments prescribes mode of payment of stamp duty on conveyance. Explanation appended to the Article 1-A/23 states that if in a power of attorney, possession is given or intended to be given to the power of attorney, it will be deemed to be a conveyance and the stamp duty thereon shall be chargeable accordingly. In Exts.4 and 5, as per Clause-22, possession of the land has been delivered to the power of attorney. The power of attorney holder, P.W.1, in his evidence has admitted that under Exts.4 and 5 he has taken delivery of possession of the lands. In Clause-17 of the Exts.4 and 5, the power of attorney holder has been authorized to make construction over the lands. Unless the power of attorney holder is given possession and enters into the land, he cannot make any construction thereon. The Entry No.1-A/23 has been amended by the State of Odisha pursuant to the order of the Revenue and Disaster Management Department No.Stamp-10/06-3327/RDM dated 05.08.2008, wherein the percentage of stamp payable as per the schedule in the Indian Stamp Act has been increased from 5% to 7%. In Clause-5 of both the power of attorneys, i.e., Exts.4 and 5, power of sale has been given to the power of attorney holder. As per Clauses 22 & 5 of the power of attorney, not only possession has been delivered, but also power of sale with consideration has been given to the power of attorney holder. Under Exts.4 and 5, duties and responsibilities have been entrusted to the attorney holder and the said responsibilities/powers are to be considered as consideration. The power of attorneys containing power of sale and power to make construction along with other powers, stamp duties are to be paid as conveyance. Thus as per Clause (f) of Article 1-A/48 of the Stamp Act (Odisha Amendment), Exts.4 and 5 are to be treated as conveyance and stamp duty is payable as per Article 1-A/48 of the Stamp Act (Odisha Amendment). The stamp duty is to be paid @7% on the market value of the property involved in the power of attorney. But in both the Exts.4 and 5, stamp duty worth Rs.150/- on each has been paid. Exts.4 and 5 are insufficiently stamped. He further submits that Exts.4 and 5 have been produced in court. When the power of attorneys vide EXts.4 and 5 are produced before the learned court below and those being insufficiently stamped, the learned trial court ought to have exercised jurisdiction under Sec.33 of the Stamp Act to impound the same. Secs.33 and 35 of the Stamp Act operates in different fields. Sec.33 comes into play the moment an insufficiently stamped instrument is produced before an authority having power to take evidence, whereas Sec.35 shall come into play only

when the insufficient instruments are attempted to be brought in evidence and marked as exhibit. As per Sec.35 unless a required stamp duty and 10 times penalty thereon is paid, the said insufficiently instrument cannot be accepted in evidence. In the instant case, when two power of attorneys are produced, Sec.33 shall come into play. So, in exercise of power under Sec.33 of the Stamp Act, both the power of attorneys being insufficiently stamped, are to be impounded and impounding fees along with 10 times penalty thereon are to be recovered. Ext.4 is marked without objection, whereas Ext.5 is marked with objection. If this Court finds that Sec.33 of the Stamp Act is not applicable to both the power of attorneys, then as per Sec.35 of the Stamp Act, those would have been impounded. Ext.5 has been marked with objection. Hence, the question of admitting Ext.5 into evidence waiving the objection is to be considered keeping in view the fact that it is insufficiently stamped and the same can only be admitted in evidence when impounding fees and 10 times penalty thereon is paid by the plaintiffs. He further submits that under Sec.36 of the Indian Stamp Act, once an instrument has been admitted in evidence, the admission thereof shall not be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped except as provided under Sec.61 of the Stamp Act. Sec.61 of the Stamp Act provides that once an instrument is admitted in evidence as duly stamped or as not requiring a stamp or upon payment of duty and penalty under Sec.35 of the Act, the Court, to which appeals lie from or references are made can re-consider the same. In order to invoke Sec.35 of the Stamp Act, objection has to be raised at the time when the instrument is tendered in evidence. When Ext.4 was tendered in evidence, although objection was raised, but then the trial court has not noted the objection thereto, whereas Ext.5 has been marked with objection. When Ext.5 is marked with objection, the same can not be admitted in evidence. The objection is raised with regard to insufficiency of stamp duty. Hence, Ext.5 can only be admitted in evidence after the adequate stamp duty and 10 times penalty is paid thereon. To buttress the submission, he places reliance to the decisions of the apex Court in the case of *Javer Chand and others vs. Pukhraj Surana,* AIR 1961 SC 1655, *Ram Rattan (dead) by L.Rs. vs. Bajrang Lal and others,* (1978) 3 SCC 236, *R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P. Temple and another,* (2003) 8 SCC 752, *Government of Andhra Pradesh and others vs. P. Laxmi Devi (Smt.),* (2008) 4 SCC 720, *Avinash Kumar Chauhan vs. Vijay Krishna Mishra,* (2009) 2 SCC 532, *SMS Tea Estates Private Limited vs. Chandmari Tea Company Private Limited,* (2011) 14 SCC 66, and the decision of the Karnataka High

Court in the case of *Miss Sandra Lesley Anna Bartels vs. Miss P. Gunavath,* AIR 2013 Karnataka 52.

07. Per contra, Md. Alam, learned Advocate for the opposite party nos.1 to 6, submits that plaintiffs have executed the power of attorney in favour of Kishore Chandra Behera, P.W.1. Stamp duty as per the Stamp Act has been paid. The same is not an instrument. No stamp duty is payable. He further submits that the registering authority could have referred the matter to the Collector. Exts.4 and 5 have been marked as exhibits. With regard to Ext.4, the same has been marked as exhibit without objection. Once documents had been marked as exhibits, the court cannot unmark the said documents. He places reliance to the decision of the apex Court in the case of *Javer Chand and others vs. Pukhraj Surana,* AIR 1961 SC 1655.

08. Before adverting to the contentions raised by the learned counsel for the parties, it will necessary to set out some of the provisions of the Indian Stamp Act, 1899. Secs.2(10), 2(21), 33, 35 and 36 of the Stamp Act are quoted hereunder.

> "**2(10)** *"Conveyance"* – "Conveyance" includes a conveyance on sale and every instrument by which property, whether moveable or immoveable, is transferred *inter vivos* and which is not otherwise specifically provided for by Sch.I;
>
> xxx xxx xxx
>
> **2(21)** *"Power-of-attorney"* – "Power-of-attorney" includes any instrument (not chargeable with a fee under the law relating to Court-fees for the time being in force) empowering a specified person to act for and in the name of the person executing it;
>
> xxx xxx xxx
>
> **33.** Examination and impounding of instruments – (1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same.
>
> (2) For that purpose every such person shall examine every instrument so chargeable and so produced on coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in India when such instrument was executed or first executed:
>
> xxx xxx xxx
>
> **35.** Instruments not duly stamped inadmissible in evidence, etc.—No instrument chargeable with duty shall be admitted in evidence for any purpose by any person

having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duty stamped :

Provided that –

(a) any such instrument [shall] be admitted in evidence on payment of the duty with which the same is chargeable or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion.

(b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such, receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it;

(c) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(d) nothing herein contained shall prevent the admission of any instrument in evidence in any preceding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898);

(e) nothing herein contain shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government) or where it bears the certificate of the Collector as provided by Sec.32 or any other provision of this Act.

36. Admission of instrument, where not to be questioned – Where an instrument has been admitted in evidence, such admission shall, not, except as provided in Sec.61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

09. Schedule-I-A of the Indian Stamp Act, 1899 provides stamp duty on instruments (Orissa Amendments). Articles I-A/23 and I-A/48(f), which are relevant, are quoted hereunder:

Schl/Art.	Description of Instrument	Proper Stamp Duty
I-A/23	**Conveyance**, as defined by Section 2(10) not being a transfer charged or exempted under No.62:	
	(a) in respect of movable property.	Four per centum of the amount or value of the consideration as set forth in the instrument.
	(b) in respect of immovable property.	Eight per centum of the amount or value of the consideration for such conveyance as set forth therein or the market value of the property whichever is higher.
	(c) in respect of a multi-unit house or unit of apartment/feat/portion of a multi-storeyed building or part of such structure to which the provisions of the Orissa Apartment Ownership Act, 1982 apply-	
	(i) where the amount or value of the consideration for such conveyance as set forth therein or market value of the property whichever is higher, does not exceed rupee 5 lakhs.	Three per centum of the amount.
	(ii) where it exceeds rupees 5 lakhs but does not exceed rupees 15 lakhs.	Four per centum of the amount.
	(iii) where it exceeds rupees 15 lakhs.	Seven per centum of the amount.
	Explanation- For the purpose of this article, an agreement to sell any immovable property or a power of attorney shall, in case of transfer of the possession of such property before or at the time of or after the execution of such agreement for power of attorney, be deemed to be a conveyance and the stamp duty thereon shall be chargeable accordingly. Provided that the stamp duty already paid on such agreement or power of attorney shall, at the time of the execution of a conveyance in pursuance of such agreement or power of attorney, be adjusted towards the total amount of duty chargeable on the conveyance. Provided further that Section 47-A shall not apply to such agreement and power of attorney.	
	xxx	xxx
xxx		
I-A/48	**Power-of-attorney**, as defined by section 2(21) not being a proxy –	
	(a) to (e) xxx xxx	xxx
	(f) when given for consideration and authorising the attorney to sell any immovable property;	The same duty as a Conveyance [under Division (A), (B) or (C), as the case may be, of Article 23] for the amount of consideration.
	xxx xxx	xxx

10. Much emphasis has been laid by Mr. Baug, learned Advocate for the petitioners, with regard to Clause (f) of Art.I-A/48 that when power of attorney is given for consideration and authorising the attorney to sell any immovable property, stamp duty is payable under Division (A), (B) or (C) as the case may be of Article 23 for the amount of consideration.

11. The submission though at a first flush appears to be very attractive, but on a deeper scrutiny, it is like a billabong.

12. Instrument as defined in Sec.2(14) of the Indian Stamp Act, 1899 (in short 'Act') is a generic term. It includes every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded. Sec.2(21) of the Act defines power of attorney. It provides that the power of attorney includes any instrument (not chargeable with a fee under the law relating to Court-fees for the time being in force) empowering a specified person to act for and in the name of the person executing it.

13. On a bare reading of Clause (f) of Article I-A/48 (Orissa Amendment), it is evident that when a power of attorney is given for consideration and authorising the attorney to sell any immovable property, the stamp duty is payable as a conveyance under Division (A), (B) or (C), as the case may be, of Article 23 for the amount of consideration.

14. Consideration has been defined under Sec.2(d) of the Indian Contract Act, 1872. It means, when, at the desire of the promisor, the promise or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise. The consideration may be past, present and future.

15. The word "consideration" appearing in Article I-A/48 of the Indian Stamp Act is vital. If the power of attorney is given for consideration and authorising the attorney to sell any immovable property, then the stamp duty is payable as a conveyance [under Division (A), (B) or (C), as the case may be, of Article 23] for the amount of consideration.

16. On a conspectus of Exts.4 and 5, it is evident that the plaintiffs have executed the power of attorney in favour of Kishore Chandra Behera, P.W.1 and appointed him as attorney holder to look after 1/3rd share of schedule property of Late Uchhaba Behera with certain terms and conditions as

enumerated in Clause-1 to 23 thereof. The power of attorney holder is empowered to apply for demarcation and mutation of the said property. He will gift/mortgage/sale/lease the schedule property to anybody and execute necessary documents. He will negotiate to sale the schedule property and receive consideration. He will apply to the concerned authority and also do the necessary requirements for transfer of the schedule property in favour of the intending purchasers. He will construct house on any portion of the schedule property on their behalf. The principals undertook not to sale, lease and mortgage contract for sale or deliver possession or deal with the properties in any manner during subsistence of this power of attorney.

17. There is no clause in the power of attorney that in the event the power of attorney sales the property, he will receive consideration. By no stretch of imagination, it can be said that the power of attorney has been given to Kishore Chandra Behera, P.W.1, for consideration.

18. In *Suraj Lamp and Industries Private Limited (2) through Director vs. State of Haryana and another,* (2012) 1 SCC 656, the apex Court had the occasion to consider the scope of power of attorney. The apex Court held :

> ***"Scope of Power of Attorney***
>
> 20. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see section 1A and section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee.
>
> 21. In *State of Rajasthan vs. Basant Nehata* - 2005 (12) SCC 77, this Court held :
>
> "13. A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favour of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well known, a document of convenience.
>
> 52. Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers-of-Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the donee to act on

> his behalf. Except in cases where power of attorney is coupled with interest, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee."
>
> An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor." (Emphasis laid)

19. The ratio in the case of *Suraj Lamp and Industries Private Limited (2) through Director* proprio vigore apply to the facts of the case.

20. The logical sequitur of the analysis made in the preceding paragraphs is that the power of attorney is a document of convenience, not conveyance.

21. The decisions cited by Mr. Baug, learned Advocate for the petitioners, are distinguishable on facts.

22. In *Javer Chand and others* (supra), the apex Court held that Sec.36 of the Stamp Act is categorical in its terms that when a document has once been admitted in evidence, such admission cannot be called in question at any stage of the suit or the proceeding on the ground that the instrument had not been duly stamped. Sec.36 does not admit of other exceptions. Where a question as to the admissibility of a document is raised on the ground that it has not been stamped, or has not been properly stamped it has to be decided then and there when the document is tendered in evidence. Once the Court rightly or wrongly, decides to admit the document in evidence so far as the parties are concerned the matter is closed. Sec.35 is in the nature of a penal provision and has far-reaching effects. Parties to a litigation, where such a controversy is raised, have to be circumspect and the party challenging the admissibility of the document has to be alert to see that the document is not admitted in evidence by the Court. The Court has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case. Once a document has been admitted in evidence, it is not open either to the trial court itself or to a Court of appeal or revision to go behind that order. Such an order is not one of those judicial orders which are liable to be reviewed or revised by the same Court or a Court of superior jurisdiction. There is no quarrel over the proposition of law. As held above, the power of attorneys, Exts.4 and 5 are documents of convenience, not conveyance.

23. In *Ram Rattan* (supra), the apex Court held that if a person having by law authority to receive evidence and the Civil Court is one such person before whom any instrument chargeable with duty is produced and it is found that such instrument is not duly stamped, the same has to be impounded. The duty and penalty has to be recovered according to law. Section 35, however, prohibits its admission in evidence till such duty and penalty is paid.

24. In *Avinash Kumar Chauhan* (supra), the apex Court held that Section 33 of the Act casts a statutory obligation on all the authorities to impound a document. The court being an authority to receive a document in evidence is bound to give effect thereto.

25. In *P. Laxmi Devi* (supra), the apex Court held that When a document is produced (or comes in the performance of his functions) before a person who is authorised to receive evidence and a person who is in charge of a public office (except a police officer) before whom any instruction chargeable with duty is produced or comes in the performance of his functions, it is the duty of such person before whom the said instruction is produced to impound the document if it is not duly stamped. The use of the word *shall* in Section 33(1) shows that there is no discretion in the authority mentioned in Section 33(1) to impound a document or not to do so. The word *shall* in Section 33(1) does not mean *may* but means *shall.* In other words, it is mandatory to impound a document produced before him or which comes before him in the performance of his functions.

26. In *SMS Tea Estates Pvt. Ltd.* (supra), the apex Court held that if the document is found to be not duly stamped, Section 35 of the Stamp Act bars the said document being acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document under Section 33 of the Stamp Act and follow the procedure under Section 35 and 38 of the Stamp Act.

27. In *R.V.E. Venkatachala Gounder* (supra), the apex Court held that for every document admitted in evidence in the suit being endorsed by or on behalf of the court, which endorsement signed or initialled by the Judge amounts to admission of the document in evidence. An objection to the admissibility of the document should be raised before such endorsement is made and the court is obliged to form its opinion on the question of admissibility and express the same on which opinion would depend the document being endorsed as admitted or not, admitted in evidence. In the

latter case, the document may be returned by the court to the person from whose custody it was produced.

28. *Miss Sandra Lesley Anna Bartels* case is distinguishable to the facts of the present case.

29. In the wake of aforesaid, the petition, sans merit, deserves dismissal. Accordingly, the same is dismissed. No costs.

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2019 (I) ILR - CUT- 736

DR. A.K. RATH, J.

R.S.A. NO. 48 OF 2009

SMT. RAMA DEO ……....Appellant

.Vs.

STATE OF ORISSA & ORS. …….Respondents

CODE OF CIVIL PROCEDURE, 1908 – Section 11 – Res Judicata – Principles – Suit dismissed but counter claim allowed – Against the judgment and decree passed in suit the plaintiff filed appeal but no appeal was filed against the judgment passed in counter claim – The question as to whether the judgment and decree in the counter claim shall operate as res judicata ? – Held, Yes. (Rajni Rani & Another v.Khairati Lal & Others, 2017 AIR SCW 6187 followed.)

Case Laws Relied on and Referred to :-

1. AIR 1966 SC 1332 : Sheodan Singh Vs. Smt. Daryao Kunwar.
2. 2017 AIR SCW 6187 : Rajni Rani & Another Vs. Khairati Lal & Ors.
3. AIR 2017 Patna 187 : Smt. Kishori Devi and others Vs. Rameshwar Prasad.
4. AIR 1981 Orissa 23 : Karunakar Panda Vs. Durgabati Bewa & Ors.

For Appellant : Mr. Samir Kumar Mishra.
For Respondents : A.S.C.

JUDGMENT Date of Hearing and Judgment: 24.01.2019

DR.A.K. RATH, J.

Plaintiff is the appellant against a confirming judgment in the suit for declaration of title, confirmation of possession and in the alternative for recovery of possession and permanent injunction.

02. The case of the plaintiff was that the suit land was recorded in the name of Lord Balunkeswar Mahesh Bije Badasasan, Keonjhar. After abolition of estate, it was wrongly recorded in the name of the Government as Anabadi. The Executive Officer of the deity filed O.E.A. Case No. 40 of 1986 before the O.E.A. Collector, Keonjhar to record the suit land in favour of deity. By order dated 10.07.87, the O.E.A. Collector settled Ac.18.07 dec. in favour of deity on rayati status subject to payment of back rent and salami from 1970-71 to 1986-87. On 17.09.91, the O.E.A. Collector directed the Executive Officer of deity to deposit back rent. The Executive Officer deposited Rs.17,631.70 paisa on 21.04.1994 towards back rent and salami. By order dated 12.04.94, the O.E.A. Collector directed correction of R.O.R. and issuance of patta in favour of deity. The R.O.R. was issued and land was recorded in favour of deity. While matter stood thus, the Executive Officer of deity executed an agreement to sell the suit land in her favour on 02.01.94, since she was in possession and assured her to sale the same after correction of R.O.R. She paid Rs.6,000/- towards advance on 29.01.1994 to Executive Officer vide receipt no. 803. She was in permissive possession of the suit land. Thereafter, the Executive Officer filed O.A. No. 1 of 1994 (II) under Sec.19 of O.H.R.E. Act, 1951 before the Commissioner of Endowments, Orissa, Bhubaneswar to accord permission to sell the suit land and other lands to meet the day to-day expenditure of the deity. On 30.1.95, the Commissioner of Endowments allowed the application to sell the land @ Rs.5,500/- per decimal and keep the money in fixed deposit. The Executive Officer registered two sale deed nos.1380 and 1381 respectively in her favour for a consideration of Rs.38,000/- on 2.6.95. Ac.0.08 dec. of land was purchased from Plot No. 178/2 and 179/1. Under registered sale deed no. 1381, Ac.0.025 was purchased from Plot No. 178/1. Possession of the land was delivered to her. Defendant no. 3, who has no semblance of right, title or possession over the suit land, tried to make boundary wall over the suit land. Her son filed Misc. Case No. 51/95 under Sec.144 Cr.P.C. before the S.D.M., Keonjhar. On 02.07.95, the S.D.M. directed the parties to maintain status quo. With this factual scenario, she instituted the suit seeking the reliefs mentioned supra.

03. The defendant nos.1 and 2 filed a joint written statement pleading, inter alia, that description of suit land described in the plaint does not tally with the sale deeds. It was recorded as Sadaka in sabik 3 khata no.2, sabik plot no. 5 in 1914-15 settlement. In current settlement, it was recorded in the name of State in Khata No. 137. Mutation Case No. 40/86 was initiated for

settlement of land of some properties of deity. On an erroneous report of Amin, rent was assessed in favour of deity. The plots were mutated in deity's favour. But sabik plot no.5 was not settled in favour of deity. Therefore plaintiff had not acquired any title over the suit land. She is not in possession of the suit land. While preparing plot index in settlement, hal plot no.179 had been erroneously referred to sabik plot no.10. Mutation case no. 40/86 had been wrongly referred to as O.E.A. Case. The suit land had never been given to deity for any purpose. State of Orissa is the paramount owner of suit land. Mochibandha High School applied for alienation of suit land alongwith some other land, whereafter Alienation Case No. 17/82 was registered on 20.7.82. The case is subjudice. The school is in possession of suit land. Accordingly certificates have been granted by Tahasildar, Keonjhar by Resolution dated 16.12.94. Government of Orissa took over management of Mochibandha High School. The School and its assets have been taken over by the State. That School now functions under the control and supervision of defendant no.2. Suit land was never the property of the deity. The plaintiff has not acquired any title by virtue of the sale made by the Executive Officer. Plaintiff is not in possession of the suit land as would be revealed from the reports obtained in Crl.Misc. Case No. 51/95 under Sec.144 Cr.P.C. The conduct of Naresh Chandra Soy, the then Executive Officer of deity in obtaining permission under Sec.19 of the O.H.R.E. Act, 1951 in O.A. No. 1/94 and selling the suit land appeared to be mysterious. Soon after this sale and some other sales in the name of members of plaintiff's family, Naresh Chandra Soy was relieved of his charges. No document or reference relating to disputed transfers is now available in the office of Executive Officer of deity.

04. Defendant no.3, Headmaster of Mochibandha High School filed written statement-cum-counter claim praying, inter alia, for declaration that the registered sale deed nos.1380 and 1381 dated 02.06.95 illegal and void, the plaintiffs have no title over the suit land, confirmation of its possession and permanent injunction. The stand of the defendant no.3 is similar to defendant nos.1 & 2.

05. Stemming on the pleadings of the parties, learned trial court struck eight issues. Parties led evidence, oral and documentary. The suit was dismissed. The counter claim of the defendant no. 3 was allowed. Assailing the judgment and decree passed in the suit, plaintiff filed R.F.A. No. 49 of 2007 before the learned District Judge, Keonjhar, which was eventually dismissed.

06. Heard Mr. Samir Kumar Mishra, learned counsel for the appellant.

07. In course of hearing, Mr. Mishra, learned counsel for the appellant raised various contentions with regard to merits of the case. This Court did not delve into the same on the following reasons.

08. Against the judgment and decree passed in T.S. No. 88 of 1995, plaintiff filed R.F.A. No. 49 of 2007 before the learned District Judge, Keonjhar. No appeal was filed against the judgment passed in counter claim.

09. The seminal question that hinges for consideration is whether the judgment and decree of the learned trial court in the counter claim shall operate as res judicata ?

10. In Sheodan Singh vs Smt. Daryao Kunwar, AIR 1966 SC 1332, the apex Court held:-

> "91..... Where the trial court has decided two suits having common issues on the merits and there are two appeals therefrom and one of them is dismissed on some preliminary ground, like limitation or default in printing, with the result that the trial court's decision stands confirmed, the decision of the appeal court will be res judicata and the appeal court must be deemed to have heard and finally decided the matter. In such a case the result of the decision of the appeal court is to confirm the decision of the trial court given on merits, and if that is so, the decision of the appeal court will be resjudicata whatever may be the reason for the dismissal."

11. In Rajni Rani & Another v.Khairati Lal & Others, 2017 AIR SCW 6187, the apex Court held:-

> "15. From the aforesaid enunciation of law, it is manifest that when there is a conclusive determination of rights of parties upon adjudication, the said decision in certain circumstances can have the status of a decree. In the instant case, as has been narrated earlier, the counter-claim has been adjudicated and decided on merits holding that it is barred by principle of Order 2, Rule 2 of C.P.C. The claim of the defendants has been negatived. In Jag Mohan Chawla and Another v. Dera Radha Swami Satsang and Others dealing with the concept of counter-claim, the Court has opined thus:-
>
> "... is treated as a cross-suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection (sic protraction), the legislature intended to try both the suit and the counter-claim in the same suit as suit and cross-suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to 6 him even though it is independent of the cause of action

averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit."

16. Keeping in mind the conceptual meaning given to the counter-claim and the definitive character assigned to it, there can be no shadow of doubt that when the counter-claim filed by the defendants is adjudicated and dismissed, finality is attached to it as far as the controversy in respect of the claim put forth by the defendants is concerned. Nothing in that regard survives as far as the said defendants are concerned. If the definition of a decree is appropriately understood it conveys that there has to be a formal expression of an adjudication as far as that Court is concerned. The determination should conclusively put to rest the rights of the parties in that sphere. .....

17..... there may be situations where an order can get the status of a decree. A Court may draw up a formal decree or may not, but if by virtue of the order of the Court, the rights have finally been adjudicated, irrefutably it would assume the status of a decree....."

12. In Smt. Kishori Devi and others v. Rameshwar Prasad, AIR 2017 Patna 187, the question arose (i) Whether a decree granting relief to the defendants in the counter-claim is separately appealable or a composite appeal is maintainable against the judgment and decree of the trial court by the plaintiff whereby the suit has been dismissed but the counter-claim has been decreed ? and (ii) Whether non-filing of the appeal against the decree passed in the counter-claim in accordance with law and procedure would attract the bar of res judicata in the appeal filed only against the judgment and decree dismissing the suit ? Taking a cue from the decision of the apex Court in the case of Rajni Rani, the Court held:

"15…….. that a counter-claim filed in a suit has to be tried as a cross suit with all legal implications and consequences and the order passed in such a counter-claim has to be appealed separately in accordance with law and procedure. In the said case, no separate appeal was filed by the plaintiff-respondent against the decree of the counter-claim of the defendants which attained finality thereby and the said fact was potent enough to attract the bar of res judicata……"

13. This Court in the case of Karunakar Panda v. Durgabati Bewa and others, AIR 1981 Orissa 23 held that:-

"16..... But where the subject-matter of each of the two suits or appeals is different and the decision in the two proceedings, though stated in one judgment, really amounts to two decisions and not one decision common to both the proceedings, an appeal filed against the decision in one proceeding will be barred by the rule of res judicata if no appeal is filed against the decision in the other proceeding."

14. Mr. Mishra, learned counsel for the appellant submits that since one of the decree was drawn up, only appeal filed. The same was not pointed out by the first appellate court. Hence the matter may be remitted back to the first appellate court so as to enable the appellant to file two appeals. The submission of the learned counsel is difficult to fathom. Order 41 Rule 1 CPC provides that every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the judgement. In view of the fact that the plaintiff has not appealed against the judgment and decree passed by the counterclaim, the said judgment shall operate as res judicata.

15. The logical sequitur of the analysis made in the previous paragraph is that the appeal, sans merit, deserves dismissal. Accordingly, the same is dismissed. There shall be no order as to costs.

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2019 (I) ILR - CUT- 741

DR. A.K. RATH, J.

S.A. NO. 7 OF 1997

STATE OF ORISSA & ANR. .....Appellants

.Vs.

JALADHAR SHA & ORS. .....Respondents

ADVERSE POSSESSION – Suit for declaration of title on the basis of adverse possession of a Govt. Land – Decreed and confirmed in appeal – Second appeal by State – Admittedly the suit land is a Govt. land and recorded as Jalasaya – Plaintiffs paid penalty in encroachment case thus admitting the title of the State – Held, mere possession of the suit land for long time is not suffice to hold that the plaintiffs have perfected title by way of adverse possession, unless the classical requirements of adverse possession nec vi, nec clam, nec precario are pleaded and proved and the possession is not hostile to the real owner. (Para 10 to 12)

Case Laws Relied on and Referred to :-

1. 2017 SCC Online Ori.37 : State of Orissa & Anr. Vs. Abu Bakkar Habib.
2. (2004) 10 SCC 779 : Karnataka Board of Wakf Vs. Govt. of India & Ors.

For Appellants : Mr. S. Mishra, A.S.C.
For Respondents : Mr. D.P. Mohanty, Miss M. Pal.

JUDGMENT Date of Hearing :17.01.2019 : Date of Judgment:25.01.2019

DR. A.K. RATH, J.

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

02. Plaintiffs-respondent nos.1 to 4 instituted T.S. No.13 of 1985 in the court of the learned Subordinate Judge, Anandapur for declaration of title on the basis of adverse possession. The case of the plaintiffs was that the suit land was a piece of Government land. Their grandfather reclaimed the suit land and converted it to a paddy field in the year 1935. He was in possession of the said land. Thereafter, the plaintiffs are in continuous cultivating possession of the suit land to the knowledge of the State. The R.I., being instigated by some persons of the locality, submitted his report to the Tahasildar, Anandapur, defendant no.2, with regard to encroachment of the suit land by the plaintiffs. Thereafter, Encroachment Case No.1/82 was initiated against them. Order of eviction was passed. With this factual scenario, they instituted the suit seeking the reliefs mentioned supra.

03. The defendant nos.1 and 2 filed written statement denying the assertions made in the plaint. The case of the defendant nos.1 and 2 was that the suit land belongs to the State of Orissa. The plaintiffs encroached upon the suit land in the year 1980. The R.I. submitted its report, whereafter the Tahasildar, Anandapur, defendant no.2, initiated Encroachment Case No.1/82. Order of eviction was passed. Penalty was imposed. The plaintiffs paid the penalty. Thereafter, the plaintiffs filed Encroachment Appeal No.9/84, which was dismissed. The suit land was recorded as Jalasaya under the name of Chatara Pokhari in Rakhit khata. Padan Sha, father of the plaintiffs, filed an affidavit before the defendant no.2 on 15.4.83 stating therein that he had been evicted from the suit land.

04. Stemming on the pleadings of the parties, learned trial court struck six issues. Learned trial court decreed the suit holding inter alia that no evidence was adduced from the side of the defendants to prove eviction in encroachment case. There is no document on record to show the plaintiffs were in possession prior to the year 1980. The oral evidence of plaintiffs that they are in possession of the land since 35 years is not rebutted by the State. Source of information of Govt. for initiation of encroachment case has not

proved. The father of the plaintiffs paid penalty, which is evident from Ext.3. The plaintiffs have perfected their title by way of adverse possession. The unsuccessful defendant nos.1 and 2 filed T.A. No.40 of 1988 before the learned District Judge, Keonjhar, which was eventually dismissed. It is apt to state here that during pendency of the second appeal, the respondent nos.3 and 5 died. Their legal heirs have been substituted.

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

> "If the finding of both the courts below about plaintiffs' acquisition of title by adverse possession is legally sustainable ?"

06. Heard Mr. S. Mishra, learned A.S.C. for the appellants and Mr. D.P. Mohanty along with Miss M. Pal, learned Advocates for the respondents.

07. Mr. Mishra, learned A.S.C. for the appellants, submitted that the date of entry into the suit land has not been mentioned in the plaint. Continuous possession howsoever long will not become adverse unless there is hostility against the true owner. The plaintiffs had not pleaded when their possession became adverse to the Government. The plaintiffs paid penalty in the encroachment case as would be evident from rent receipt, Ext.3. The same amounts to admitting the title of the State. To buttress the submission, he placed reliance to the decision of this Court in the case of *State of Orissa and another vs. Abu Bakkar Habib,* 2017 SCC Online Ori.37.

08. Per contra, Mr. Mohanty, learned Advocate for the respondents, submitted that the grandfather of the plaintiffs entered into the suit land in the year 1935. He was in possession of the same. Thereafter the plaintiffs are in possession of the land peacefully, continuously and with the hostile animus to the defendants and as such perfected title by way of adverse possession. Neither the affidavit, nor the orders passed by the encroachment proceeding had been exhibited by the defendants. Both the courts below concurrently held that the plaintiffs have perfected title by way of adverse possession. There is no perversity in the said finding.

09. Admittedly the suit land is a Govt. land. It was recorded as Jalasaya. Mere possession of the suit land for long time is not suffice to hold that the plaintiffs have perfected title by way of adverse possession, unless the classical requirements of adverse possession nec vi, nec clam, nec precario are pleaded and proved.

10. In *Karnataka Board of Wakf vs. Govt. of India and others,* (2004) 10 SCC 779, the apex Court held:

> "In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.
>
> The court further observed that plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."
>
> (emphasis laid)

11. Ext.3, rent receipt, shows that the father of the plaintiffs paid penalty in Encroachment Case No.1/82. This Court in the case of *Abu Bakkar Habib* held that when penalty is paid, the plaintiff admits the title of the State. The possession is not hostile to the real owner and amount to a denial of title to the property claimed.

12. The plaintiffs have failed to prove the date of entry into the suit land. Their father paid the penalty. The element of hostile animus is absent. The findings of the courts below with regard to acquisition of title by the plaintiffs are perverse. The substantial question of law has been answered accordingly.

13. Resultantly, the impugned judgments are set aside. The appeal is allowed. The suit is dismissed. There shall be no order as to costs.

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2019 (I) ILR - CUT- 745

DR. B.R. SARANGI, J.

OJC NO. 6319 OF 1999

JANARDAN MOHANTY .....Petitioner

.Vs.

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

SERVICE LAW – Petitioner while working as A.S.I in CISF faced a preliminary enquiry for certain charges – Subsequently Departmental Proceeding against the petitioner was initiated – Preliminary enquiry report was provided to Petitioner – Petitioner submitted representation raising objection to the preliminary enquiry report – But the Disciplinary Authority neither gave any attention to the objection raised in the representation nor provided any opportunity to cross examine the witnesses examined during preliminary enquiry – Order of removal passed basing upon such preliminary enquiry report – Held, the purpose behind holding a preliminary enquiry is only to take a prima facie view as to whether there can be some substance in the allegations leveled against the employee, which may warrant a regular enquiry – The evidence recorded in preliminary enquiry cannot be used in regular departmental enquiry, as the delinquent is not associated with it and opportunity to cross-examine the persons examined in such enquiry is not given – Therefore, using such evidence in the Departmental enquiry would be violative of principles of natural justice – Order of punishment set aside. (Para 13)

Case Laws Relied on and Referred to :-

1. AIR 1997 SC 2148 : Narayan Dattatraya Ramteerthakhar, Vs. State of Maharashtra.
2. AIR 2013 SC 1513 : Nirmala J. Jhala Vs. State of Gujarat.
3. (1994) 5 SCC 267 : Rash Lal Yadav (Dr) Vs. State of Bihar.
4. (2007) 1 SCC 283 : AIR 2007 SC 192 : Kendriya Vidyalaya Sangathan Vs. Arun kumar Madhavrao Sindhaya.

For Petitioner : M/s D.R. Pattanayak, N.Biswal, L.K.Pattanayak, A.K.Routray, M.K. Khuntia & N.S.Panda.

For Opp. Parties : Ms. B.Tripathy (Central Govt. Counsel)

JUDGMENT Date of Hearing : 11.01.2019 : Date of Judgment :17.01.2019

DR. B.R. SARANGI, J.

The petitioner, who was working as Assistant Sub-Inspector/Clerk under the Central Industrial Security Force (CISF), has filed this application

to quash the order of punishment passed by the Deputy Inspector of General, CISF Unit HEC Ranchi-04 in Annexure-2 dated 29.08.1998 and the order of confirmation made thereof by the appellate authority in Annexure-3 dated 19.04.1999, and further seeks for a direction to grant him all consequential benefits as due and admissible in accordance with law.

2. The factual matrix of the case, in hand, is that the petitioner, who is a resident of Orissa, in the district of Angul, was selected and appointed on 02.04.1989 as a Constable in CISF First Reserve Battalion, Barwaha, Madhya Pradesh. After successful completion of training at R.T.C. Bhilai, he joined on 10.01.1990. While he was so continuing, he was promoted to the rank of A.S.I./Clerk and directed to proceed for training at NISA, Hyderabad, where he reported on 01.04.1995. After completion of his training for A.S.I./Clerk the petitioner joined at CISF Unit HEC Ranchi on 04.07.1995. The petitioner, while working at Ranchi as A.S.I./Clerk, a disciplinary proceeding was started against him on the following charges:-

> ***" Article of Charge-I***
> *"Gross misconduct, misdemeanor and criminal breach of trust on the part of No.894500596 ASI/Clk Janardhan Mohanty in that while he was serving at CISF Ist Res. Battalion, Berwaha at Constable, he was deployed in the accounts section he connived and abetted with other CISF Personnel in preparation of forged/fraudulent TA/DA bills and false acquaintance rolls".*
>
> ***Article of Charge-II***
> *"Gross misconduct, indiscipline and highly irresponsible in that No.894500596 ASI/Clk Janardhan Mohanty was sent on temporary duty to CISF 1st Res. Bn. Barwaha from this Unit wef. 26.12.95 for participation in Police investigation against him in connection with embezzlement of Govt. fund and was arrested by police on 21.03.1996 and released on bail on the same day with direction to remain present at Barwaha till further order. But, he left CISF Ist Res. Bn. Barwaha on 10.04.96 and reported to CISF Unit, HEC Ranchi on 13.04.96 and submitted an application dated 15.04.1996 wherein he misrepresented that inquiry against him has been completed and that he had obtained anticipatory bail in order to protect himself from case and police arrest. Hence the charge"*

2.1 The aforementioned charges were framed in respect of events occurred at CISF Unit, First Reserve Battalion, Barwaha (Madhya Pradesh). On the basis of such charges, inquiry officer was appointed and departmental enquiry was conducted. The inquiry officer, after completion of departmental enquiry, submitted his enquiry report on 17.06.1998. The inquiry officer discharged the petitioner from charge No.(II) but upheld charge No.(I) on the basis of the statement of P.W.-2- Inspector/Ministerial A.K. Mishra and documents exhibited by him during the course of preliminary enquiry. After

enquiry report was submitted, the petitioner was supplied with a copy of the same. Before taking final decision by the disciplinary authority, the petitioner submitted his representation dated 08.07.1998 against the enquiry report before the disciplinary authority. But the disciplinary authority, without considering the contention raised in such representation, passed final order on 29.08.1998 awarding punishment of "removal from service" with immediate effect under Rule 29-A read with Rule-31-B of CISF Rules, 1969. The order of removal from service dated 29.08.1998 was served on the petitioner which was received by him on the very same day. The petitioner, challenging the order of removal from service, preferred appeal on 31.08.1998, but the appellate authority, without considering the contention raised in the appeal memo, confirmed the order of punishment dated 29.08.1998 passed by the disciplinary authority, vide order dated 04.09.1999. Hence this application.

3. Mr. N. Biswal, learned counsel appearing on behalf of Mr. D.R. Pattnaik, learned counsel for the petitioner specifically urged that the departmental authorities could not have utilized against the petitioner the statements recorded in a preliminary enquiry, without affording opportunity of hearing, and imposed the major penalty of removal from service for the trivial charges framed against him. It is further contended that the petitioner was not given any opportunity of cross-examining the witnesses so deposed in the preliminary enquiry and thereby there is gross violation of principles of natural justice. Accordingly, the order of punishment passed by the disciplinary authority and the order confirmation thereof made by the appellate authority cannot sustain in the eye of law and are liable to be quashed. It is further contended that out of two charges framed since charge no.(II) was not proved, imposition of penalty of removal from service only for charge no.(I) is harsh and disproportionate to the charges leveled against him, therefore such punishment cannot sustain in the eye of law. It is also contended that during pendency of the writ application, the criminal case, which was initiated against the petitioner for the self same allegation, was ended in acquittal and, therefore, once the petitioner has been acquitted of the self same charges by the competent criminal Court, imposition of penalty of removal from service and confirmation made thereof, in a disciplinary proceeding cannot sustain.

To substantiate his contention, learned counsel for the petitioner has relied upon the judgments of the apex Court in ***Narayan Dattatraya Ramteerthakhar, v. State of Maharashtra,*** AIR 1997 SC 2148 and ***Nirmala J. Jhala v. State of Gujarat,*** AIR 2013 SC 1513.

4. Ms. B. Tripathy, learned Central Government Counsel appearing for the opposite parties argued justifying the order of punishment passed by the disciplinary authority and conformation made thereof by the appellate authority and contended that since there are concurrent findings of fact by both the forums, the same should not be interfered with in the writ jurisdiction and therefore prays for dismissal of the writ application.

5. This Court heard Mr. N. Biswal, learned counsel appearing on behalf of Mr.D.R.Pattnayak, for the petitioner and Ms. B. Tripathy, learned Central Government Counsel for the opposite parties. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. The facts, which are undisputed, are that on the basis of the allegations made against the petitioner, a preliminary enquiry was conducted from 24.04.1995 to15.05.1995 by the opposite parties. On the basis of preliminary report submitted on 15.09.1995, regular disciplinary proceeding was initiated on 28.04.1996. During the disciplinary proceeding, as would be evident from the impugned order of punishment, three persons were examined, namely, S.I./Min. P.K. Nath, Inspector-Gokul Chand (P.W.1) and Inspector-A.K.Mishra (P.W.2), but S.I./Min. P.K. Nath became hostile. Inspector-A.K.Mishra-P.W.2 produced the statements of S.I./Min. M.K. Bhandari and S.I./Min. P.K. Nath recorded in the preliminary enquiry. Basing on their statements recorded in the preliminary enquiry, the enquiry officer found that charge no.(I) is proved. On 17.06.1998, the enquiry report was submitted holding that the charge no.(I) is proved and charge no.(II) is not proved. To such enquiry report dated 17.06.1998, the petitioner submitted representation on 08.07.1998 specifically mentioning that since S.I./Min. M.P. Bhandari was not examined in the disciplinary proceeding, his statement recorded in the preliminary enquiry cannot be utilized as per the CISF circular no. 1 of 1992. Furthermore, after March, 1993, the petitioner was posted at Non-Government Fund Section, which has no nexus with the Accounts Section, and the alleged incident took place after March, 1993 and, as such, the petitioner is no way connected with the incident took place after he was relieved from the Accounts Section. Even though no evidence was made available against the petitioner, the inquiry officer, basing upon the statements of S.I./Min. M.K. Bhandari and S.I./Min. P.K. Nath recorded in the preliminary enquiry produced by Inspector-A.K.Mishra (P.W.2) found the petitioner guilty so far as charge no.(I) is concerned. Though the

petitioner wanted to examine S.I./Min. M.K. Bhandari, but no opportunity was given to him, and even if S.I./Min. P.K. Nath became hostile, utilizing the statements of S.I./Min. M.K. Bhandari and S.I./Min. P.K. Nath recorded in the preliminary inquiry, the disciplinary authority imposed the punishment of removal from service, which is contrary to the rules and settled position of law.

7. The initiation of disciplinary proceedings may be preceded by preliminary enquiry by the employer to assess as to whether disciplinary proceeding should be initiated or not. Such an enquiry is in the nature of a preliminary enquiry which is undertaken to monitor the conduct and integrity of the employee. Such preliminary or fact-finding enquiries are not formal departmental enquiries and observance of prescribed rules of procedure or principles of natural justice could have the result of vitiating such enquiry since its very nature demands non-transparency.

8. In ***Kendriya Vidyalaya Sangathan v. Arunkumar Madhavrao Sindhaya,*** (2007) 1 SCC 283 : AIR 2007 SC 192, the apex Court held that the fact that by its very nature the employee was allowed to participate in such preliminary enquiry or some queries were put to certain persons would not alter the nature of enquiry. Even though a disciplinary enquiry was recommended on the basis of a preliminary enquiry, but employer instead chose to exercise its right of termination simpliciter under the appointment letter and although the order terminating the services was wholly innocuous, and did not contain any stigma against him and was passed in terms of the appointment letter, the Supreme Court found that it was a termination by way of punishment.

9. In view of such position, the opposite party employer has every right to cause a preliminary enquiry, but the employer, while causing preliminary enquiry and on that basis initiating disciplinary proceeding, cannot and could not have utilized the materials available in the preliminary enquiry against the delinquent in the disciplinary proceeding without affording opportunity of hearing and without complying the principles of natural justice. More particularly, if a delinquent wants to cross-examine the witnesses examined in the preliminary enquiry, opportunity should have been given to him, as has not been done in the present case. In case of imposition of major penalty of removal/dismissal from service, the rules generally provide sufficiently elaborate procedure incorporating various facets of the principle of natural justices to be followed. As far as dismissal and removal are concerned, there

is further Constitutional protection conferred by Article 311(2) of the Constitution in cases where the employee is holding a civil post. The proceedings which are initiated in terms of the service rules are generally referred to as departmental proceedings, the major part of which comprises an inquiry which is commonly referred to as a departmental enquiry, which shall be in adherence to the principles of natural justice where the proposal is to dismiss or remove the delinquent from service.

10. The rules of natural justice supplement the enacted law and do not supplant the law. In ***Rash Lal Yadav (Dr) v. State of Bihar***, (1994) 5 SCC 267 Hon'ble Justice Ahmadi, Chief Justice of India, while delivering judgment expressed as follows:-

> *"The concept of natural justice is not a static one but is an ever expanding concept. In the initial stages it was thought that it had only two elements, namely, (i) no one shall be a judge in his own cause and (ii) no one shall be condemned unheard. With the passage of time a third element was introduced, namely, of procedural reasonableness because the main objective of the requirement of rule of natural justice is to promote justice and prevent its miscarriage. Therefore, when the legislature confers power on the State Government to be exercised in certain circumstances or eventualities, it would be right to presume that the legislature intends that the said powers be exercised in the manner envisaged by the statute. If the statute confers drastic powers it goes without saying that such powers must be exercised in a proper and fair manner. Drastic substantive laws can be suffered only if they are fairly and reasonably applied. In order to ensure fair and reasonable application of such laws courts have, over a period of time, devised rules of fair procedure to avoid arbitrary exercise of such powers. True it is, the rules of natural justice operate as checks on the freedom of administrative action and often prove time consuming but that is the price one has to pay to ensure fairness in administrative action. And this fairness can be ensured by adherence to the expanded notion of rule of natural justice. Therefore, where a statute confers wide powers on an administrative authority coupled with wide discretion, the possibility of its arbitrary use can be controlled or checked by insisting on their being exercised in a manner which can be said to be procedurally fair. Rules of natural justice are, therefore, devised for ensuring fairness and promoting satisfactory decision-making. Where the statute is silent and a contrary intention cannot be implied the requirement of the applicability of the rule of natural justice is read into it to ensure fairness and to protect the action from the charge of arbitrariness. Natural justice has thus secured a foothold to supplement enacted law by operating as an implied mandatory requirement thereby protecting it from the vice of arbitrariness. Courts presume this requirement in all its width as implied unless the enactment supplies indications to the contrary as in the present case. This Court in A.K.Kraipak v. Union of India, after referring to the observations in State of Orissa v. Dr. (Miss) Binapani Dei, observed as under: (SCC page 272, para 20)*

> *"the aim of the rules of natural justices is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it."* *(emphasis supplant)*

In view of such position, when a major penalty of removal from service has been imposed as a measure of punishment against a public servant for some cause, the same can only be done after affording opportunity of hearing to the delinquent in compliance of principles of natural justice.

11. In the case of ***Narayan Dattatraya Ramteerthakhr*** (supra), the apex Court held as follows:-

> *".....The preliminary enquiry has nothing to do with the enquiry conducted after the issue of the charge-sheet. The former action would be to find whether disciplinary enquiry should be initiated against the delinquent. After full-fledged enquiry was held, the preliminary enquiry had lost its importance."*

12. In the case of ***Nirmala J. Jhala***, mentioned supra, in which reference has also been made to the case of ***Narayan Dattatraya Ramteerthakhar*** (supra), in paragraphs 23 and 25 the apex Court held as follows:-

> ***"23.*** *In view of the above, it is evident that the evidence recorded in preliminary inquiry cannot be used in regular inquiry as the delinquent is not associated with it, and opportunity to cross-examine the persons examined in such inquiry is not given. Using such evidence would be violative of the principles of natural justice.*
>
> ***xx*** ***xx*** ***xx***
>
> ***25.*** *The preliminary enquiry may be useful only to take a prima facie view, as to whether there can be some substance in the allegation made against an employee which may warrant a regular enquiry."*

13. Applying the above principles, as laid down by the apex Court, to the present context, the purpose behind holding a preliminary enquiry is only to take a prima facie view as to whether there can be some substance in the allegations levelled against the employee, which may warrant a regular enquiry. The evidence recorded in preliminary enquiry cannot be used in regular departmental enquiry, as the delinquent is not associated with it and opportunity to cross-examine the persons examined in such enquiry is not given. Therefore, using such evidence would be violative of principles of natural justice. Therefore, the statements of S.I./Min. M.K. Bhandari and S.I./Min. P.K. Nath recorded in the preliminary enquiry, which have been utilized against the petitioner, on being produced by Inspector-A.K.Mishra (P.W.2), without affording opportunity of hearing, amounts to non-compliance of principles of natural justice, and relying upon the same major

penalty of removal from service should not have been imposed. It is also admitted by the opposite parties in the counter affidavit that S.I./Min. P.K. Nath had become hostile in the regular disciplinary proceeding and, therefore, imposition of major penalty of removal from service on the basis of his statement as well as the statement of S.I./Min. M.K. Bhandari recorded in preliminary enquiry, which were produced by Inspector-A.K.Mishra (P.W.2), cannot sustain in the eye of law.

14. During pendency of the writ application it has been brought to the notice of this Court that for the selfsame charges a criminal case was registered against the petitioner, vide Criminal Case No. 341 of 1995/T.R. No. 350 of 2008 under Section 409/34, IPC, in which the petitioner has been acquitted and, therefore, major penalty of removal from service, which has been imposed without compliance of principles of natural justice, also otherwise cannot have any justification.

15. In view of the aforesaid facts and circumstances, this Court is of the considered view that the order of major penalty of removal from service passed by the disciplinary authority in Annexure-2 dated 29.08.1998 and the order confirmation made thereof by the appellate authority in Annexure-3 dated 19.04.1999 are liable to be quashed and accordingly the same are hereby quashed. The petitioner shall be reinstated in service with all consequential benefits as due and admissible to him in accordance with law.

16. The writ petition is thus allowed. No order as to cost.

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2019 (I) ILR - CUT- 752

DR. B.R. SARANGI, J.

W.P.(C) NO. 8381 OF 2016

SABYASACHI LENKA & ORS. .....Petitioners

.Vs.

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

(A) ADMINISTRATIVE TRIBUNAL ACT, 1985 – Section 2 – Definition – 'Any other armed forces' – The question arose as to whether writ petition against Odisha Industrial Security Force (OISF) an armed force constituted and maintained by the State Govt. is maintainable? – Held, Yes. – Reasons indicated. (Para 7)

(B) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Appointment – Application for the post of constables under the Odisha Industrial Security Force (OISF) – Petitioners qualified in the written examination and found physically fit by the Medical Board after having undergone the physical test – Merit list was prepared and provisional order of appointment issued and they were asked to join the training – During training their heights re-measured and found less than the requirement and consequently a revised merit list was prepared by eliminating the petitioners from the appointment – Writ petition challenging the legality and propriety of such re-measurement particularly after the completion of selection process – Held, there is no provision for drawing any second revised select list nor making second physical measurement, so far as height is concerned, after the select list was finalized either under the rule or under the advertisement, hence the impugned orders of elimination are quashed.

(Para 14)

Case Laws Relied on and Referred to :-

1. (2010) 2 SCC 637 : AIR 2010 SC 932Rakhi Ray v. High Court of Delhi,
2. (1990) 2 SCC 669 : Andhra Pradesh Public Service Commission, Hyderabad v. B. Sarat Chandra,

For Petitioners : Mr. G.A.R. Dora, Sr. Adv., M/s (Smt.) G.R. Dora, (Dr.) J.K. Lenka & P. Tripathy.

For Opp. Parties : Mr. B. Senapati, Addl. Govt. Adv.

JUDGMENT Date of Hearing: 11.03.2019 & Date of Judgment : 19.03.2019

DR. B.R. SARANGI, J.

The petitioners, who were selected as constables under the Odisha Industrial Security Force (OISF) by the State Selection Board, Odisha Police, Cuttack pursuant to advertisement issued in December, 2015 under Annexure-1, have filed this writ petition to quash orders dated 28.04.2016 in Annexures-5, 6 and 7 respectively, by which their names have been removed from the second revised select list and eliminated from the appointment as constables in OISF on re-measurement of height.

2. The factual matrix of the case, in hand, is that the State Selection Board, Odisha Police, Cuttack issued an advertisement in December, 2015 under Annexure-1 for recruitment of 1370 constables in OISF. Pursuant thereto, the petitioners, along with several others, applied for and participated in process of selection, which consisted of written test, physical measurement test and physical fitness test. The written test carrying 25 marks consisted of multiple choice questions in Odia language, English language, Arithmetic, General Knowledge, Aptitude test and Logical reasoning. The petitioners,

being qualified in the written test, were examined by the medical board and found physically fit. Thereafter, the petitioners attended physical measurement test, which consisted of height, chest and weight measurement; 1.6 km run; high jump; broad jump; rope climbing; swimming; cross country; etc. For General and SEBC candidates, the height requirement was 168 cm and for Scheduled Caste 163 cm. It was provided that if height of a candidate exceeded 178 cm, he would be entitled to get 3 bonus marks. As height of petitioner no.1 was found to be 178 cm, he got 3 marks as bonus, which was duly signed and certified by the Chairman and 7 other members. Similarly, so far as petitioners no.2 and 3 are concerned, their heights were found to be 168 cm and 163 cm respectively, which was the requirement as per the advertisement, duly signed by the Chairman and other seven members of the selection committee. All the three petitioners, having cleared the required three tests, were asked to report before the Principal, Police Training Institute, Bayree, Jajpur by 23.04.2016 positively, as per appointment (provisional) letters issued on 17.04.2016 vide Annexures-2, 3 and 4 respectively. While undergoing training, heights of the petitioners were re-measured and found to be less than the requirement. Consequentially, their names were removed from the select list and eliminated from appointment pursuant to orders dated 28.04.2016 vide Annexures-5, 6 and 7 respectively. Hence this application.

3. Mr. G.A.R. Dora, learned Senior Counsel appearing for the petitioners contended that during recruitment process height of the petitioners no.1, 2 and 3 were measured and found to be 178 cm, 168 cm and 163 cm respectively, which was the requisite height, and all other items under physical test were of requisite standard. The petitioners, having satisfied the physical fitness of requisite standard, qualified in the written test. After recruitment/selection process was over and approval of select list by the Director General of Police, as the petitioners were found fit in all respect, appointment (provisional) letters dated 17.04.2016 were issued to them and they were asked to report for training, which they did on 23.04.2016. As per clause-10 of the advertisement, after appointment only physical fitness of the candidates can be re-examined at any point of time, but not the height. In other words, there is no mention in the advertisement that height can be re-measured during training period. Thus, re-measurement of height is contrary to the advertisement. Therefore, removal of petitioners' names from the select list and elimination from appointment as constable is illegal, arbitrary, unreasonable and contrary to the provisions of law, which violates Articles 14 and 16 of the Constitution of India.

4. Mr. B. Senapati, learned Additional Government Advocate raised preliminary objection with regard to maintainability of the writ petition. He argued with vehemence that as the height of the petitioners was not as per requirement, in course of training when the said measurement was taken it was found that the petitioners did not possess the required height. Therefore, action has been taken, pursuant to orders dated 28.04.2016 in Annexures-5, 6 and 7 respectively, to remove the petitioners' name from the second revised select list and eliminating them from appointment as constables in OISF. He supported the action of the authority concerned and contended that if the action has been taken by the authority in consonance with the advertisement, no illegality or irregularity has been committed so as to warrant interference of this Court at this stage.

5. This Court heard Mr. G.A.R. Dora, learned Senior Counsel appearing for the petitioners and Mr. B. Senapati, learned Additional Government Advocate appearing for the opposite parties. Pleadings having been exchanged, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. In view of the facts pleaded above and rival contentions raised by learned counsel for the parties, the following issues are formulated:-

(i) Is the writ petition maintainable?

(ii) If the writ petition is held to be maintainable, whether re-measurement of height of the petitioners, which was made by the opposite parties, is legally permissible even after recruitment process was over, final select list was published and appointment was made?

(iii) Any other relief the petitioners are entitled to?

7. **Issue No.(i):** Is the writ petition maintainable?

A preliminary objection with regard to maintainability of the writ petition was raised in course of argument on 21.01.2019 and this Court passed the following order:-

> *"Heard Mr. G.A.R. Dora, learned Sr. Counsel for the petitioner and Mr. A.K. Mishra, learned Additional Government Advocate.*
>
> *Mr. A.K. Mishra, learned Additional Government Advocate contended that since the petitioner applied for selection to the post of Orissa Industrial Security Force and seeking recruitment under the State authority, the writ petition is not maintainable.*

Mr. G.A.R. Dora, learned Sr. Counsel for the petitioner seeks time to obtain instruction in the matter.

List after two weeks. Instruction be obtained in the meantime."

Mr. G.A.R. Dora, learned Senior Counsel appearing for the petitioners brought to the notice of this Court the provisions of sub-sections (a), (d) and (i) of Section 2 of the Odisha Industrial Security Force Act, 2012 and contended that the writ application is maintainable before this Court. Sub-sections (a), (d) and (i) of Section 2 of the Odisha Industrial Security Force Act, 2012 read thus:-

"2. In this Act, unless the context otherwise requires,—

(a) "autonomous body" means an institution wholly or partially run on the funds or grants of, or controlled by, the Central Government or the State Government;

xx xx xx

(d) "Force" means the Odisha Industrial Security Force constituted under section 3;

xx xx xx

(i) "member of the Force" means a person appointed to the Force under this Act;"

Section 3 thereof deals with constitution of Force; Section 4 envisages appointments and powers of the supervisory officers; and Section 5 deals with appointment and enrolment of the members of the Force.

On perusal of the aforementioned provisions, it is seen that OISF is an institution wholly or partly run on the funds or grants of, or controlled by the Central Government or the State Government. As such, it is an autonomous body. The State Government by notification constitute and maintain Armed Force of the State called Odisha Industrial Security Force for better protection and security of industrial undertakings owned by the Government, industrial undertaking in public sectors, private industrial undertakings and establishments. Section 2 (a) of the Administrative Tribunal Act, 1985 states that Act not apply to certain persons. Sub-section (a) of Section-2 states that the provisions of this Act means Administrative Tribunal Act shall not apply to any member of the naval, military or air forces or of any other armed forces of the Union. In view of expressed definition contained in Section 2 of Odisha Industrial Security Force Act, 2012 and constitution of force under Section 3 of the said Act, since it comes under Section-2(a) of Administrative Tribunal Act "any other armed forces", which excludes the jurisdiction of the Tribunal, in that case the writ application is thus maintainable and thereby the issue is answered in affirmative.

8. **Issue No.(ii):**

If the writ petition is held to be maintainable, whether re-measurement of height of the petitioners, which was made by the opposite parties, is legally permissible even after recruitment process was over, final select list was published and appointment was made?

Before answering this issue, it is worthwhile to recapitulate that the State Selection Board, Odisha Police, Cuttack issued an advertisement in December, 2015 under Annexure-1 for appointment of 1370 constables in State level under the OISF. As per the advertisement, applications in prescribed form were to reach respective district Superintendent of Police on or before 04.01.2016 and any application received after the date fixed was to be rejected. The category-wise vacancy position was as follows:-

Un-Reserved (50%)		S.E.B.C. (11.25%)		S.C.(16.25%)		S.T. (22.50%)		Total Posts	
685		154		223		308		1370	
Male (85%)	Female (15%)	Male (85%)	Female (15%)	Male (85%)	Female (15%)	Male (85%)	Female (15%)	Male (85%)	Female (15%)
582	103	131	23	189	34	262	46	1164	206

Apart from this, some posts were reserved for the Home Guards, Retired Armed Personnel and Sports Personnel candidates as per the reservation rules and Government circulars. For the purpose of selection, candidates were to undergo physical measurement, physical fitness and written examination. Clause-9(A) of the advertisement, which prescribes requirement of minimum physical measurement of the candidates, reads thus:-

Sl. No.	Category	Height	Weight	Chest		Women	
				Unexpanded	Expanded	Height	Weight
1	UR/SEBC	168cm	55 kg	79 cm	84 cm	158 cm	47.5 cm
2	SC/ST	163 cm	50 kg	76 cm	81 cm	153 cm	45 kg

Clause-10 of the advertisement prescribes the procedure for conducting physical measurement/physical fitness examination. It was specifically mentioned therein that for selection of candidates, physical measurement and

physical fitness examination, along with written test, would be conducted. For physical fitness examination, it may so happen, there would be application of technology. Before or after physical fitness, a test would be conducted by the committee of Unit Selection Board, in order of ascertain physical deficiency of a candidate, whose decision would be final. At any stage of the recruitment process, examination or re-examination of physical deficiency could be conducted. Besides that, physical measurement and physical fitness tests for different categories of candidates could be conducted on different dates. In that regard, the concerned Superintendent of Police would impart necessary information to the candidates. So far as physical measurement is concerned, it was specified that in the event height of a candidate would be 178 cm if the height is more than that, he would get 3 marks as bonus. It was also indicated that for the purpose of physical fitness, the candidates were to undergo different events, such as, running, high jump, long jump, rope climbing, swimming and cross country, etc.

9. With due compliance of the terms and conditions set out in the advertisement under Annexure-1 and after undergoing the rigorous tests prescribed therein, the petitioners got qualified in the physical measurement, physical fitness tests and the written test, and provisionally selected for appointment as constables in OISF on 17.04.2016 vide Annexures-2, 3 and 4. Accordingly, provisional appointment letters were issued to the petitioners subject to medical fitness by the medical officer, as well as verification of documents, character and antecedents, and also grant of performance-cum-identity card. As petitioner no.1 belonged to SEBC category having 178 cm height, he got 3 marks as bonus, as the requirement for unreserved category candidate was fixed to 168 cm. As such, after the physical measurement, signatures of the Chairman and seven other members of the selection committee were obtained and clearance certificate was also given in favour of petitioner no.1. Similarly, petitioner no.2, who belonged to SEBC category and whose height was recorded as 168 cm, was also granted performance-cum-identity card and clearance certificate was also issued in his favour under the signatures of the Chairman and seven other members of the selection committee. So far as petitioner no.3 is concerned, he belonged to SC category and his height being 163 cm, the Chairman and seven other members of the selection board issued performance-cum-identity card along with clearance certificate in his favour. As per clause-10 of the advertisement, there is no provision for physical re-measurement of the candidates after recruitment process is over, save and except examination/re-examination of physical deficiency at any stage of recruitment process.

10. Now, question comes once physical measurement, physical fitness and written test were done and select list was approved and on that basis the petitioners, being found fit in all respect, were asked to report for training which they did on 23.04.2016, whether in the midst of training physical measurement is permissible.

11. As per pleadings available on records, paragraphs-4, 5 and 6 of the writ petition read as follows:

> *"4. That the selection process consisted of written test, physical test and physical fitness. The written test carrying 25 marks consisted of multiple choice question in Odia language, English language, Arithmetic, General reasoning.*
>
> *5. That the petitioners were found eligible and participated in the written test and qualified. They were examined by the Medical Board and were found physical fit.*
>
> *6. That the Physical test consisted of height and chest measurement, weight, 1.6 K.M. run, High Jump, Broad Jump, Rope climbing, swimming, cross country etc. For general and SEBC candidates, the height requirement was 168 C.M. and for Scheduled Caste 163 Cm. if the height is 178 cm, one is entitled to 3 bonus marks."*

These facts are admitted by opposite parties no.3 and 4 in paragraphs-3 of the counter affidavit.

12. In paragraph-11 of the writ petition, the petitioners have pleaded as follows:-

> *"11. That, during the recruitment process the height of all 3 petitioners was measured and it was 178 cm, 168 cm and 163 cm respectively which was the requisite height and all other items under physical test were of requisite standard. Physical fitness was also of requisite standard and they qualified in the tuff written test. Appointment letters were issued after recruitment/selection process was over and approval of select list by D.G. as per provisions as they were found fit in all respects and were asked to report for training which they did by 23.04.2016."*

This fact has also been admitted in paragraph-8 of the counter affidavit which reads as follows:-

> "8. That as regards the averments made in Para-11 of the writ petition, this deponent has no comment to offer."

13. In view of the facts being admitted in the pleadings available on records, it is to be examined the rules governing the field. In exercise of powers conferred by Section 21 of the Odisha Industrial Security Force Act, 2012 (Odisha Act 7 of 2012) and in supersession of the instructions issued in this regard except with respect to things done or omitted to be done before such supersession, the State Government framed rules to regulate the method

of recruitment and conditions of service of the persons appointment to the posts of constables in the State Industrial Security Force called "*Odisha Industrial Security Force (Method of Recruitment and Conditions of Service of Constables) Rules, 2014*". Some of the provisions of the aforesaid Rules, which are relevant for the purpose of this case, are extracted hereunder:

> *"**3. Constitution of the Force** :—The Force shall consist of such number of Constables, as may be determined by the Government, from time to time, for the purpose of these rules.*
>
> *xx xx xx*
>
> ***5. Recruitment** :—The posts of Constables in force shall be filled up by direct recruitment :*
>
> *Provided that the Government may fill up the posts under the provisions of the Odisha Civil Service (Rehabilitation Assistance) Rules, 1990, if the candidate fulfils the eligibility criteria prescribed in these rules subject to relaxation made in the said rules.*
>
> ***6. Selection Board** :—(1) The State Selection Board for the purpose of recruitment to the post of Constables shall be constituted by the Government consisting of the following members, namely :—*
>
> *(a) An Additional Director General of Police or the Inspector General to act as the Chairman;*
>
> *(b) One Officer in the rank of Deputy InspectorGeneral of Police member;*
>
> *(c) Commandant posted at Headquarters-Member Convenor; and*
>
> *(d) One representative from each of the Scheduled Tribes and Scheduled Castes Development and Minorities and Backward Classes Welfare Department to be special invitees.*
>
> *(2) The Chairman of the Board shall constitute Unit Level Selection Board for conducting Physical Efficiency Tests at such place and time to be decided by him, consisting of—*
>
> | | | |
> |---|---|---|
> | *(a)* | *One Commandant or Superintendent of Police* | *. .Chairman* |
> | *(b)* | *One Additional Superintendent of Police or Deputy Commandant* | *. . Member* |
> | *(c)* | *One Deputy Superintendent of Police* | *. . Member-Convenor* |
> | *(d)* | *District Welfare Officer shall act as an invitee of the Board.* | |
>
> ***7. Eligibility** :—(1)A candidate, to be eligible for consideration, must—*

(a) have passed High School Certificate Examination (Matriculation/10th Class pass) conducted by the Board of Secondary Education, Odisha or an equivalent examination conducted by any other recognized Board or Council;

(b) be able to speak, read and write Odia and must have passed Odia as one of the subjects in the High School Certificate Examination or an examination in Odia language equivalent to M.E. standard recognised or conducted by the School & Mass Education Department of Government of Odisha;

(c) have registered his name, in one of the Employment Exchanges of the State, before the earliest date of publication of

(d) advertisement for recruitment and must not have registration in more than one Employment Exchange;

(e) be not less than 18 years of age and not more than 23 (twenty-three) years of age on the 1st day of January of the year in which the advertisement for recruitment is issued :

Provided that the upper age limit in respect of candidates belonging to reserved categories, referred Rule 9 shall be relaxed in accordance with the provisions of the Acts, Rules, Orders or Instructions in force for the respective reserved categories;

(f) not have more than one spouse living;

(g) be of good moral character;and

(h) be of sound health and free from organic defects and physical deformity.

(2) The candidate must have the minimum physical standard of height, weight and chest as follows:-

Category	*Height*	*Weight*	*Chest*	
			Unexpanded	*Expanded*
(1)	*(2)*	*(3)*	*(4)*	*(5)*
Unreserved/SEBC (Men)	*168 Cm*	*55 Kg.*	*79 Cm*	*84Cm*
Unreserved/SEBC (Women)	*158 C.M*	*47.5 Kg.*	-	-
Scheduled Caste/ Scheduled Tribe (Men)	*163 Cm*	*50 kg*	*76 Cm.*	*81 Cm*
Scheduled Caste/ Scheduled Tribe (Women)	*153 Cm.*	*48 Kg*	-	

(3) Persons with disability and deformity are not eligible for consideration

(4) Eligibility of the candidates can be verified at any stage of the recruitment

process with respect to their original certificates, actual measurements of height, weight and chest as mentioned in these rules and physical verification for disability or deformity can also be made at any stage of the recruitment process, as considered appropriate by the Unit Level Selection Board.

8. Recruitment Centres :—*(1) The Recruitment Centres for Constables shall be decided by the Board.*

(2) The Board may requisition the services of Government Officials or private persons or agencies to assist the Board in the recruitment process.

(3) The Board shall notify, control, supervise and direct the method and process of the recruitment.

(4) The Unit Level Selection Board shall conduct the recruitment test under the direction and supervision of the Board.

(5) The Chairman of the Board may decide to cunduct combined recruitment in one centre for more than one Unit Level Selection by the Unit Level Selection Board.

xx xx xx

11. Recruitment Process :—

xx xx xx

(4) (a) The Unit Level Selection Board shall start the Recruitment Process by conducting the Physical Measurement.

(b) Candidates only qualifying in the physicalmeasurement, shall proceed to the next stage.

(c) The Board may decide thereafter the sequence of further tests i.e. Written Test and Physical Efficiency Test.

xx xx xx

12. Physical Measurement for all Categories :— *(1) Height, Weight and Chest shall be measured to determine the eligibility.*

(2) ***3 (three) bonus marks*** *shall be awarded to all candidates (irrespective of categories) whose height is 178 cms orabove.*

(3) Similarly, all female candidates (irrespective of categories) with height of 165cms and above will get 3 (three) bonus marks.

(4) These bonus marks shall be added in total marks while preparing the select list.

(5) Candidate who does not qualify in any of the physical standard i.e. (height or weight or chest), shall not be allowed to appear in further recruitment process.

13. Written Test :— *(1) The candidates shall be required to appear in a written examination which may consist of objective type multiple choice questions only.*

(2) The test shall be preferably in Optical Mark Reader or Optical Code Reader or

any other format decided by the Board.

(3) Till such arrangements are made, alternative format may be used if deemed necessary.

(4) Written test shall be of twenty-five marks and shall consist of multiple choice questions in Odia Language, English Language, Arithmetic, General Knowledge, Aptitude and Logical reasoning, etc.

(5) The standard of the questions may be such that a student who has passed High School Certificate Examination shall be able to answer.

(6) Different sets of question papers may be prepared, each having the same questions which will be differently serial numbered.

(7) The Board may take steps to conduct the Written Test on the same day and at the same time in all the venues as far as practicable.

(8) The Board shall fix the date, time and venues for holding written test.

(9) The Board shall deputed the Superintendent of Police of the concerned district (in which written test is held) and or any other Senior Officer or Officers to act as the observer or observers during the writtentest.

(10) The candidates not appearing for written test shall be disqualified.

(11) The Board shall decide the minimum qualifying marks in the written test.

(12) The whole process of setting of question papers and evaluation of Answer Sheets may be outsourced, if considered necessary, by the Board.

xx xx xx

21. Select List—

xx xx xx

(7) The merit list so prepared by the Board shall be placed before the Director-General and Inspector General of Police for approval and after receiving the approval the merit list shall be called the select list."

14. In consonance with the rules mentioned above, the State Selection Board, Odisha Police, Cuttack, having determined the number of constables required for the Force, issued advertisement under Annexure-1 to fill up 1370 number of posts of constable by way of direct recruitment by constituting a Selection Board as per Rule-6 taking into eligibility criteria under Rule-7. As per Rule-8, the recruitment centres for constables shall be decided by the Board and the Unit Level Selection Board shall conduct the recruitment test under the direction and supervision of the Board. As per Sub-rule(4) of Rule-11 the Unit Level Selection Board shall start the recruitment process by conducting the physical measurement. Then, the candidates only qualifying

the physical measurement shall proceed to the next stage, i.e. physical fitness test and thereafter the Board may decide to further tests, i.e. written test and physical efficiency test. Rule-12 provides that physical measurement for all categories has to be done and Rule-13 provides written test. As per the decision of the Unit Level Selection Board, in the present case, after physical measurement was done, physical efficiency test, i.e., physical fitness test was conducted as per Rule-15. The petitioners, having been found suitable, were called for written test. After completion of recruitment test, the Board drawn up a composite merit list of the successful candidates of all categories and the said merit list was prepared in descending order on the basis of aggregate marks in accordance with the vacancies. The merit list so prepared by the Board was placed before the Director-General and Inspector General of Police for approval and after receiving approval it was called select list. As the petitioners' name were found place in the select list, they were issued with provisional appointment order and directed to report for training. While undergoing training, the petitioners were again called for physical measurement test, so far height is concerned, which is not permissible either under the advertisement or under the Rules mentioned above. The order impugned indicates that only after conducting physical measurement, so far height is concerned, the petitioners name have been removed from the second revised select list and eliminated from the appointment as constables in OISF. As such, there is no provision for drawing any second revised select list nor making second physical measurement, so far as height is concerned, after the select list was finalized either under the Rules, 2014 or in the advertisement under Annexure-1. Therefore, the entire action taken by the authority under Annexures-5, 6 and 7 dated 28.04.2016 in removing the names of the petitioners from the second revised merit list and eliminating from the appointment as constables in OISF cannot sustain in the eye of law.

15. In ***Rakhi Ray v. High Court of Delhi***, (2010) 2 SCC 637 : AIR 2010 SC 932, it has been held by the apex Court that the process of selection begins with the issuance of advertisement and ends with the filling up of notified vacancies.

16. In ***Andhra Pradesh Public Service Commission, Hyderabad v. B. Sarat Chandra***, (1990) 2 SCC 669 the apex Court held that the process consists of various steps like inviting applications, scrutiny of applications, rejection of defective applications or elimination of ineligible candidates, conducting examinations, calling for interview or viva voce and preparation of list of success candidates for appointment.

17. The statement of the Supreme Court appears to be much wider than the true legal position because the selection process, in its accurate sense, is not initiated by the issuance of advertisement. In its true sense the process begins when the stage of evaluation of the merits of the candidates is reached. Generally, the task of selection is assigned to a selection committee. The function of such a committee is to select those amongst the eligible candidates on the basis of merit adjudged by adopting fairly laid down criteria and finally preparing a panel or select list of the successful or selected candidates.

18. In view of the factual and legal matrix discussed above, this Court comes to an irresistible conclusion that the orders passed on 28.04.2016 in Annexures-5, 6 and 7, so far as removal of the petitioners from the second revised merit list and eliminating them from appointment as constable in OISF cannot sustain in the eye of law.

19. While entertaining the writ application, this Court passed interim order on 18.05.2016 directing that three posts of constable in the office of OISF, Cuttack shall not be filled up without leave of this Court. In view of such position, since the impugned orders in Annexures-5, 6 and 7 dated 28.04.2016 have been held to be unsustainable in the eye of law, so far as the present petitioners are concerned, the same are liable to be quashed and accordingly hereby quashed. The petitioners are entitled to continue in their posts/service, pursuant to letters of appointment issued under Annexures-2, 3 and 4 dated 17.04.2016, which are lying vacant by virtue of the interim order passed by this Court, with all consequential benefits, as due and admissible in accordance with law. The opposite parties shall complete the entire exercise by allowing the petitioners to continue in service and grant all consequential benefits within three months from the date of communication of this judgment.

20. The writ petition is thus allowed. No order to cost.

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2019 (I) ILR - CUT- 766

DR. B.R.SARANGI, J.

W.P.(C) NO. 13036 OF 2018

SATYANARAYAN PALAI …… Petitioner

.Vs.

ODISHA GRAMYA BANK & ANR. ……Opp. Parties

(A) CONSTITUTION OF INDIA, 1950 – Arts. 226 & 227 – Appointment – Petitioner, a physically disabled, applied online and qualified in the written examination for the post of Office Assistant (multipurpose) in the Regional Rural Banks conducted by IBPS – But his candidature was not taken into consideration on the ground of false information with regard to his date of birth in the online application – As per original record his date of birth is 01.06.1988 whereas he mentioned in the on line application as 01.07.1988 – Petitioner's plea that it was neither intentional nor false information rather it was a mistake or a typographical error while filling up of the online application – However authority rejected his candidature – Action of authority challenged on the question as to whether such mentioning of date of birth can be corrected in the online application form or not, if so, then whether the application of the petitioner can be taken into consideration for selection of Office Assistant (Multipurpose) pursuant to the advertisement – Held, yes, the mistake which was unintentional, can't disentitle the petitioner to be considered for selection, particularly when the mistake is bonafide and un-intentional and the same will not materially affect the selection process and does not go into the root of the matter – The authority can permit the petitioner to rectify the same in the interest of justice, equity, and fair play. (Para 13)

(B) WORDS & PHRASES – Mistake – Meaning of – It means to take or understand wrongly or inaccurately, to make error in interpreting it, it is an error, a fault, a misunderstanding, a misconception – It may unilateral or mutual but it is always un intentional – If it is intentional it ceases to be a mistake.

Case Laws Relied on and Referred to :-

1. (2016) 8 SCC 471 : Avtar Singh .Vs. Union of India.
2. (2001) 2 SCC 451 : West Bengal SEB Vs. Patel Engineering Co. Ltd.
3. AIR 2004 SC 3291 : D.D.A. Vs. Joginder S. Monga.
4. (2008) 2 SCC 439 : Dev Metal Powders (P) Ltd.Vs. . Commissioner of Trade Tax, U.P.

For Petitioner : M/s Sujata Jena, G.B. Jena & B. Jena.
For Opp.Parties : M/s H.K. Mishra, S.K. Nanda & A. Nanda,

JUDGMENT Date of Hearing: 19.03.2019 : Date of Judgment : 26.03.2019

DR. B.R. SARANGI, J.

The petitioner, who was an applicant for the post of Office Assistant (Multipurpose), pursuant to online advertisement issued on 22.07.2017 for Common Recruitment Process for Recruitment of Officers (Scale-I, II & III) and Office Assistant (Multipurpose) in Regional Rural Banks (RRBs)-CRP, RRBs-VI, has filed this application challenging rejection of his candidature during verification of original documents on the ground that at the time of uploading the application through online, his date of birth was indicated as "01.07.1988" though his actual date of birth is "01.06.1988."

2. The factual matrix of the case, in hand, is that Institute of Banking Personnel Selection (IBPS) published an advertisement on 22.07.2017 for Common Recruitment Process for Recruitment of Officers (Scale-I, II & III) and Office Assistant (Multipurpose) in Regional Rural Banks (RRBs)-CRP, RRBs-VI, which was to be conducted between September and November, 2017. The eligibility criteria were prescribed, including the age and educational qualifications. In the said advertisement, age was prescribed between 18 years to 28 years, i.e., the candidate should have not been born earlier than 02.07.1989 and later than 01.07.1999 (both dates inclusive). The persons with benchmark disability, as defined under the Rights of Persons with Disabilities Act, 2016, would be given 10 years relaxation. The educational qualification was prescribed that the candidate must be a Bachelor's Degree in any discipline from a recognized University or its equivalent with proficiency in local language as prescribed by the participating RRBs and working knowledge in computer was desirable. The petitioner, being differently disabled person and is suffering from BH-Ateral moderately severe mixed hearing loss of 48% and with his disability he tried to have a decent living and was otherwise found himself eligible for applying the post of Office Assistant (Multipurpose), submitted his application through online within the prescribed time with prescribed manner on payment of requisite fees. On consideration of his qualification, he was called for online preliminary examination with Roll No.2470802787. The date of examination was fixed to 23.09.2017 and reporting time was 2.45 P.M. The venue of the examination was fixed at ION Digital IDZ Golanthara, Roland Institute of Technology, Surya Vihar, Golanthara, Berhampur, Ganjam, Odisha-761008.

2.1 Accordingly, the petitioner appeared in the online preliminary examination (CWE) for recruitment of Office Assistant (Multipurpose) in Regional Rural Banks. The petitioner cleared up the preliminary examination with a score of 53.75% marks and thereafter, he was called for online main examination to be held at the same venue on 12.11.2017 and the reporting was fixed to 8.30 A.M. Consequentially, he appeared in the said test and having qualified in the said examination, he received a call letter on 12.03.2018 from the opposite party-bank for biometric/document verification and assessment of proficiency test in Odia language. He was directed to remain present on 22.03.2018 at 9.30 A.M. at Odisha Gramya Bank Head Office, Gandamunda, PO-Khandagiri, Bhubaneswar along with certificates and documents for verification. In compliance of the same, the petitioner appeared at the head office along with all the certificates and documents on the scheduled date. But, at the time of verification of documents, it was found that in the online application, the petitioner had furnished his date of birth as "01.07.1988", though his actual date of birth is "01.06.1988". Consequentially, opposite party no.1-bank rejected his candidature and his documents were not accepted and assessed for proficiency test in Odia language. Hence this writ application.

3. Ms. Sujata Jena, learned counsel for the petitioner contended that in all the documents filed by the petitioner, his date of birth was mentioned as "01.06.1988", but while submitting the application through online, pursuant to advertisement issued under Annexure-1, inadvertently his date of birth was entered in the application form as "01.07.1988", which was detected when he went for verification of documents. Therefore, the petitioner immediately filed an affidavit to that extent. It is contended that the mistake, which has been committed was bona fide one, which will not materially affect the selection process, so far as age of the petitioner is concerned, and it will never go to the root of the matter to deprive the petitioner from participating in the process of selection. As such, the petitioner had no intention to defraud anybody by furnishing his date of birth as "01.07.1988" in place of "01.06.1988. But his request was not acceded to and direction was given to approach the IBPS for correction of the same and consequentially his application was rejected. It is further contended that the IBPS is only concerned about the advertisement, conduct of the examination process and provisionally allot the candidates so selected by it to the concerned participating banks and, as such, it has no role in the further selection process. Therefore, informing the IBPS about the mistake in the

application form regarding date of birth cannot have any justification and, as such, after the process of selection was over and after provisional allotment of candidates to the concerned participating banks, the IBPS became functus officio. Thereby, the mistake which has been committed can only be rectified by the opposite party-bank, but instead of doing so, the bank has rejected the same. Therefore, the petitioner seeks for interference of this Court.

To substantiate her contention, she has relied upon the judgment of the apex Court rendered in the case of ***Avtar Singh v. Union of India***, (2016) 8 SCC 471.

4. Mr. H.K. Mishra, learned counsel for opposite party-bank contended that the only discrepancy with regard to date of birth though wanted to be rectified by the petitioner by swearing an affidavit before the Notary Public, the bank did not allow the petitioner for proficiency test in Odia language. Rather, he was advised to approach the IBPS for the same and the IBPS is only the deciding agency and concerned about the advertisement, conduct of the examination process and provisionally allot the candidates so selected by it to the concerned participating banks. It is further contended that the IBPS became functus officio after provisionally allotted the candidates to the concerned banks. Therefore, the discrepancy in question about the date of birth was so technical and ought to have been corrected by the bank instead of advising the petitioner to approach the IBPS. It is also further contended that as per the advertisement in Annexure-1, under the heading procedure for applying online, it has been emphasized that candidates are advised to carefully fill the online application themselves as no changes in any of the data filled in the online application will be possible/entertained. It has also been indicated that *"please note that all the particulars mentioned in the online application including name of the candidate, category, date of birth ……. will be considered as final and no change/modifications will be allowed after submission of the online application form"*. Further, the IBPS will not be responsible for any consequences arising out of furnishing of incorrect and incomplete details in the application or omission to provide the required details in the application form. Therefore, if the petitioner has submitted his date of birth by mistake indicating as "01.07.1988" in place of "01.06.1988" and consequentially rejected his application on verification of documents, no illegality or irregularity has been committed by the authority so as to warrant interference by this Court at this stage.

5. This Court heard Ms. Sujata Jena, learned counsel for the petitioner

and Mr. H.K. Mishra, learned counsel for opposite parties no.1 and 2, and perused the record. Though IBPS has been made as proforma opposite party no.3, this Court did not inclined to issue notice to the said opposite party, pursuant to order dated 20.08.2018, as it was an outsourcing agency which conducted the process of selection. Since pleadings having been exchanged, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. On the basis of the pleadings available, Ms. Sujata Jena, learned counsel for the petitioner confined her argument to the extent that the date of birth indicated in the online application form as "01.07.1988" should have been corrected as "01.06.1988" and for this unintentional bona fide mistake, the application of the petitioner could not have been rejected.

Mr. H.K. Mishra, learned counsel for opposite parties no.1 and 2 though raised several questions, as learned counsel for the petitioner confined her argument to the extent mentioned above, he contended that admittedly there was wrong mentioning of date of birth in the application form and the same could not have been rectified as the opposite party no.3 conducted the selection process and as per the terms of the advertisement, the said mistake cannot be rectified. So far as other pleadings are concerned, both the counsels abandoned their argument and confined to the aforesaid effect only stating that whether wrong mentioning of date of birth in online application form can be rectified and opportunity can be given to the petitioner to participate in the process of selection. Since both the counsels have admitted that there was wrong mentioning of date of birth in the online application form indicating "01.07.1988" in place of "01.06.1988", it is to be considered whether such mentioning of date of birth can be corrected in the online application form or not, if so, then whether the application of the petitioner can be taken into consideration for selection of Office Assistant (Multipurpose) pursuant to the advertisement issued in Annexure-1.

7. Before going into the merits of the case, relevant provisions of the advertisement in Annexure-1 are extracted below:-

> ***"B. Eligibility Criteria:-***
>
> *xxx* *xxx* *xxx*
>
> *II. Age (As on 01.07.2017)*
>
> *xxx* *xxx* *xxx*
>
> *For Office Assistant (Multipurpose) – Between 18 years and 28 years i.e. candidates should have not been born earlier than 02.07.1989 and later than 01.07.1999 (both dates inclusive).*

The maximum age limit specified above is applicable to General candidates only. For other categories, the following relaxation would apply"

Sl.No.	*Category*	*Age relaxation*
xxx	*xxx*	*xxx*
xxx	*xxx*	*xxx*
3.	*Persons with Benchmark Disability as defined under "The Rights of Persons With Disabilities Act, 2016"*	*10 years*

Clause-III : <u>Reservation for Persons with Benchmark Disabilities</u>

Under section 34 of "The Rights of Persons with Disabilities Act, 2016" persons with benchmark disabilities are eligible for Reservation.

<u>M. How to apply:</u>

A candidate can apply for the post of Office Assistant (Multipurpose) and can also apply for the post of Officer. However, a candidate can apply for only one post in Officer's cadre i.e. for Officer-Scale-I or Scale-II or Scale-III.

Candidates have to apply separately and pay fees/intimation charges separately for each post.
Candidates can apply online only from 24.07.2017 to 14.08.2017 and no other mode of application will be accepted.

Pre requisites for Applying Online:

Before applying online, candidates should –

(i) scan their photograph and signature ensuring that both the photograph (4cm x 3.5cm) and signature adhere to the required specifications as given in Annexure-III to this Advertisement.

(ii) Signature in CAPITAL LETTERS will NOT be accepted.

*(iii) Keep the necessary details/documents ready to make **Online Payment** of the requisite application fee/intimation charges.*

(iv) have a valid personal ID, which should be kept active till the declaration of results of this round of CRP, IBPS may send call letters for the Examination etc. through the registered e-mail ID. Under no circumstances, a candidate should share with/mention e-mail ID to/of any other person. In case a candidate does not have a valid personal e-mail ID, he/she should create his/her new e-mail ID before applying on-line and must maintain that e-mail account.

Application Fees/Intimation Charges Payable from 24.07.2017 to 14.08.2017 (Online payment) both dates inclusive, shall be as follows:

Officer (Scale I, II & III)

- *Rs.100/- For SC/ST/PWD/EXSM candidates*
- *Rs.600/- for all others*

Office Assistant (Multipurpose)

- *Rs.100/- For SC/ST/PWD/EXSM candidates*
- *Rs.600/- for all others*

***Procedure for applying online**:-*

(1) Candidates are first required to go to the IBPS's authorized website www.ibps.im and click on the home page to open the line "CRP for RRBs" and then click on the appropriate option "CLICK HERE TO APPLY ONLINE FOR CRP-RRBs-OFFICERS (Scale-I, II and III) or "CLICK HERE TO APPLY ONLINE FOR CRP-RRBs-OFFICE ASSISTANT (Multipurpose) to open up the online application form.

(2) Candidates will have to click on "CLICK HERE FOR NEW REGISTRATION" to register their application by entering their basic information in the online application form. After that a provisional registration number and password will be generated by the system and displayed on the screen. Candidate should note down the provisional registration number and password. An Email and SMS indicating the provisional registration number and password will also be sent. They can reopen the saved data using provisional registration number and password and edit the particulars, if needed.

(3) Candidates are required to upload their photograph and signature as per the specifications given in the guidelines for scanning and upload of photograph and signature (Annexure-III).

(4) Candidates are advised to carefully fill in the online application themselves as no change in any of the data filled in the online application will be possible/entertained. Prior to submission of the online application candidates are advised to use the "SAVE AND NEXT" facility to verify the details in the online application form and modify the same if required. No change is permitted after clicking on FINAL SUBMIT Button. Visually impared candidates are responsible for carefully verifying/getting the details filled in in the online application form properly verified and ensuring that the same are correct prior to submission as no change is possible after submission.

(5) For the posts of Office Assistant (Multipurpose) and Officers Scale-I, the candidate should indicate in the online application the state to which he/she opts for provisional allotment on selection. The option once exercised will be irrevocable.

Note :

xxx xxx xxx

Please note that all the particulars mentioned in the online application including name of the candidate, category, date of birth, post applied for, address, mobile number, E-mail ID, centre of examination, local language, preference of RRBs etc. will be considered as final and no change/modifications will be allowed after submission of the online application form". Candidates are hence requested to fill in the online applications form with the utmost care as no correspondence

regarding change of details will be entertained. IBPS will not be responsible for any consequences arising out of furnishing of incorrect and incomplete details in the application or omission to provide the required details in the application form.

N. General Instructions:

xxx *xxx* *xxx*

5) A candidate's admission to the examination/short listing for main examination/short-listing for interview/subsequent process is strictly provisional. The mere fact that the call letter(s)/provisional allotment has been issued to the candidates does not imply that his/her candidature has been finally cleared by IBPS/Regional Rural Banks. IBPS/RRBs would be free to reject any application, at any stage of the process, cancel the candidature of the candidate in case it is defected at any stage that a candidate does not fulfil the eligibility norms and/or that he/she has furnished any incorrect/false information/certificate/documents or has suppressed any material facts. If candidature of any candidate is rejected for any reason according to the terms and conditions of this advertisement, no further representation in this regard will be entertained. If any of these shortcomings is/are detected after appointment in a Regional Rural Banks, his/her services are liable to be summarily terminated.

6) Decision of Nodal RRBs/Regional Rural Banks/IBPS in all matters regarding eligibility of the candidates, the stages at which such scrutiny of eligibility is to be undertaken, qualifications and other eligibility norms, the documents to be produced for the purpose of the conduct of examination, interview, verification etc. and any other matter relating to CRP RRBs-VI will be final and binding on the candidate. No correspondence or personal enquiries shall be entertained by IBPS/Regional Rural Banks in this regard. IBPS/Nodal Bank/RRBs take no responsibility to receive/collect any certificate/remittance/document sent separately."

8. In compliance of the conditions stipulated in the advertisement, the petitioner submitted his online application form, but while submitting online application he had wrongly submitted his date of birth as "01.07.1988" in place of "01.06.1988". Under clause-II of the advertisement, age has been prescribed and for the post of Office Assistant (Multipurpose), it has been prescribed that the candidates must be between 18 years and 28 years, i.e. candidates should have not been born earlier than 02.07.1989 and later than 01.17.1999 (both dates inclusive). As the petitioner is a physically challenged person, he would get relaxation of 10 years as per clause-3 of the advertisement. Therefore, the eligibility of the petitioner will relate back to 02.07.1979, meaning thereby, a candidate having physically disability born in between 02.07.1979 and 01.07.1999, would be eligible to make an application for the post of Office Assistant (Multipurpose). Admittedly, the petitioner's date of birth is "01.06.1988", but wrongly it has been mentioned

in the online application form as "01.07.1988". The eligibility of the petitioner will not materially affect the process of selection and it will not go into the root of the matter, as he comes within the purview of relaxation clause as prescribed in the advertisement itself. But merely because of some typographical mistake committed at the time of filling of online application, i.e, "01.07.1988" in place of "01.06.1988", which being unintentional, the authority should have taken a pragmatic view permitting the petitioner to participate in the process of selection.

9. In ***West Bengal SEB V. Patel Engineering Co. Ltd,*** (2001) 2 SCC 451, the apex Court held that a mistake may be unilateral or mutual but it is always unintentional. If it is intentional it ceases to be a mistake.

10. In ***D.D.A. v. Joginder S. Monga***, AIR 2004 SC 3291, the apex Court held that a mistake is not a fraud. It may be discovered and in a given case it must be pleaded. Such plea must lead to a fundamental error. It can be a subject-matter of acquiescence.

11. In ***Dev Metal Powders (P) Ltd. V. Commissioner of Trade Tax, U.P.,*** (2008) 2 SCC 439, the apex Court held that 'mistake' means to take or understand wrongly or inaccurately; to make an error in interpreting it; it is an error, a fault, a misunderstanding, a misconception.

It is further held that 'mistake' is an ordinary word but in taxation laws, it has a special significance. It is not an arithmetical error which after a judicious probe into the record from which it is supposed to emanate is discerned. The work 'mistake' is inherently indefinite in scope, as to what may be a mistake for one may not be one for another. The 'mistake' to be rectified under Section 22 of the Act must be apparent from the record.

12. In ***Avtar Singh*** mentioned supra, while considering the fact that employees are required to furnish correct information relating to their character and antecedents in the verification form, before or after their induction in the service, the apex Court in paragraphs-29 and 30 held as follows:-

> *"29. The verification of antecedents is necessary to find out fitness of incumbent, in the process if a declarant is found to be of good moral character on due verification of antecedents, merely by suppression of involvement in trivial offence which was not pending on date of filing attestation form, whether he may be deprived of employment? There may be case of involving moral turpitude/serious offence in which employee has been acquitted but due to technical reasons or giving benefit of doubt. There may be situation when person has been convicted of*

an offence before filing verification form or case is pending and information regarding it has been suppressed, whether employer should wait till outcome of pending criminal case to take a decision or in case when action has been initiated there is already conclusion of criminal case resulting in conviction /acquittal as the case may be. The situation may arise for consideration of various aspects in a case where disclosure has been made truthfully of required information, then also authority is required to consider and verify fitness for appointment. Similarly in case of suppression also, if in the process of verification of information, certain information comes to notice then also employer is required to take a decision considering various aspects before holding incumbent as unfit. If on verification of antecedents a person is found fit at the same time authority has to consider effect of suppression of a fact that he was tried for trivial offence which does not render him unfit, what importance to be attached to such non-disclosure. Can there be single yardstick to deal with all kinds of cases?

30. The employer is given "discretion" to terminate or otherwise to condone the omission. Even otherwise, once employer has the power to take a decision when at the time of filing verification form declarant has already been convicted/acquitted, in such a case, it becomes obvious that all the facts and attending circumstances, including impact of suppression of an incumbent for are taken into consideration while adjudging suitability of an incumbent for services in question. In case the employer comes to the conclusion that suppression is immaterial and even if facts would have been disclosed it would not have adversely affected fitness of an incumbent, for reasons to be recorded, it has power to condone the lapse. However, while doing so employer has to act prudently on due consideration of nature of post and duties to be rendered. For higher official/higher posts, standard has to be very high and even slightest false information or suppression may be itself render a person unsuitable for the post. However, same standard cannot be applied to each and every post. In concluded criminal cases, it has to be seen what has been suppressed is material fact and would have rendered an incumbent unfit for appointment. An employer would be justified in not appointing or if appointed, to terminate services of such incumbent on due consideration of various aspects. Even if disclosure has been made truthfully, the employer has the right to consider fitness and while doing so effect of conviction and background facts of case, nature of offence, etc. have to be considered. Even if acquittal has been made, employer may consider nature of offence, whether acquittal is honourable or giving benefit of doubt on technical reasons and decline to appoint a person who is unfit or of doubt of dubious character. In case employer comes to conclusion that conviction or ground of acquittal in criminal case would not affect the fitness for employment, incumbent may be appointed or continued in service."

13. The only question which has been raised by the opposite party-bank with regard to the Note of Clause-(M) and Sub-clause (5) of Clause-(N) of the advertisement that IBPS/RRBs would be free to reject any application, at any stage of the process, cancel the candidature of the candidate in case it is defected at any stage that a candidate does not fulfil the eligibility norms and/or that he/she has furnished any incorrect/ false information/certificate/

documents or has suppressed any material facts. But from the pleadings available on record, it appears that it is not the case of the petitioner that he does not fulfil the eligibility criteria and further it is not a fact that the petitioner has furnished any incorrect/false information/ certificates or documents and has suppressed any material fact. But fact remains, there was a typographical error, while filling up of the date of birth in the online application form, with regard to the date of birth which has been indicated as "01.07.1988" in place of "01.06.1988". Therefore, the mistake which is an unintentional one, cannot disentitle the petitioner to be considered for selection, particularly when the mistake is bona fide and un-intentional and the same will not materially affect the selection process and does not go into the root of the matter disentitling the petitioner to be selected in the post applied for.

14. In view of the law discussed above, if the mistake has been caused unintentionally and it does not affect materially the selection process and does not go into the root of the matter, the authority can permit the petitioner to rectify the same in the interest of justice, equity and fair play, particularly when the petitioner is a physically challenged person and had crossed different stages of selection process and reached the final stage where his proficiency test in Odia language is to be held.

15. This Court while entertaining this application, vide order dated 26.07.2018 passed in Misc. Case No.1130 of 2017 directed as follows:

> "*The interim application is filed in Court today. Office to register the same.*
>
> *The petitioner has prayed for a direction to the opposite party no.2 to allow the petitioner to appear in the test for verification of his original documents and for assessment of his proficiency in odia language for recruitment in the post of Office Assistant (Multipurpose).*
>
> *Mrs. Sujata Jena, learned counsel for the petitioner submits that petitioner has cleared up his written examination. In the event, the opposite party no.2 does not allow the petitioner to verify his original documents, the future of the petitioner will be bleak.*
>
> *Considering the submission made by learned counsel for the petitioner, this Court directs the opposite party no.2 to verify the original documents of the petitioner and allow him to appear in the test for proficiency in odia. The result of the same shall not be published without leave of this Court.*
>
> *I.A. is disposed of."*

16. In view of the aforesaid facts and circumstances and keeping in view the law discussed above, since by virtue of the interim order passed by this Court the petitioner has been allowed to appear in the proficiency test in Odia language, it is directed that the result of the said examination should be published and if the petitioner is otherwise found eligible, the consequential benefit of the advertisement so as to get the benefit of appointment as an Office Assistant (Multipurpose) be given to him in accordance with law. The entire exercise shall be completed within a period of three months from the date of passing of this judgment.

17. The writ petition is accordingly allowed. However, there shall be no order as to costs.

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2019 (I) ILR - CUT- 777

D. DASH, J.

CRA NO. 446 OF 1994

AKSHYA KUMAR LENKA .....Appellant

.Vs.

BHARAT CHARAN LENKA & ORS. ..... Respondents

CODE OF CRIMINAL PROCEDURE, 1973 – Section 378(4) – Provisions under – Appeal against the order of acquittal by the complainant – When can be entertained – Principles – Discussed.

"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." *(Para 6)*

For Appellant : M/s. D. Nayak, S. Swain, D.P. Pradhan, R.K. Pradhan & J. Pal, M/s. D. Mishra, R.N. Naik, B.S. Tripathy, D.K. Sahoo, & P. Panda.

For Respondents : M/s. S.K. Sah00, S.K. Sahoo,
S.K. Nayak & G.C. Swain.

JUDGMENT Date of Hearing & Judgment: 20.02.2019

D. DASH, J.

Being aggrieved by the order dated 01.07.1994 passed by the learned S.D.J.M., Kendrapara acquitting the respondents (accused persons) of the offence under sections 447/379, I.P.C., the complainant as the appellant has filed this appeal.

2. The case as laid in the complaint in brief is that the parties were in litigating terms in Title Suit No.116 of 1988 where in one Misc. Case No.230 of 1988, an interim order had been passed appointing the appellant and his father as receivers for the purpose of harvesting the standing paddy crops in the year 1989 over the disputed property in presence of the accused persons. It is stated that since the complainant and his father had raised paddy crops in that year over the land in question, they had been so appointed by the Civil Court as the receivers to harvest the paddy crops in that relevant year. The allegation stands that on 30.11.1989, the accused persons went over the said disputed land holding deadly weapons and forcibly cut and removed the paddy crops. The complainant when protested, they did not pay any heed to the same and on the contrary accused-Bharat chased the complainant to assault by means of a Tenta and gave serious threat to kill him. It is said that the accused-Bharat then left that place by giving further threat to the complainant to assault in case, he would raise any complaint. It is the case of the complainant that all the accused persons together cut and removed the paddy crops grown by him on the land, under sabak Plot No.156 and 163 corresponding to hal Plot No.58 measuring about Ac.0.12 decimals and caused loss to the complainant to the tune of Rs.1200/-.The defence is of complete denial.

3. The trial court having framed charge for commission of offence under section 447/379/506, I.P.C. proceeded to record the evidence. The complainant having examined four witnesses, the accused persons have examined two. Furthermore the complainant has proved the certified copy of the orders of the Civil Court marked as Exts.1 and 2 and the defence has proved the certified copy of the orders of the appellate court marked as Exts.A and B.

4. The trial court formulated the points for determination as to the happening of the alleged incident and the role of these accused persons said to have been played therein.

It appears that having taken up the exercise of analysis of the evidence in great detail, the trial court has found the complainant to have not been established his case beyond reasonable doubt against the accused persons. Accordingly, they have been acquitted of the charges.

5. None appears on behalf of the appellant.

Mr. S.K. Nayak, learned counsel appearing for the respondents has been heard. I have perused the judgment of the trial court and have gone through the depositions of the witnesses examined by the parties as well as the documents Exts.1, Exts.2 and Exts.A and Exts.B.

6. 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.

7. Admittedly, Title Suit No.116 of 1988 has been filed by the accused-Bharat against the complainant and others and the subject matter of the same is the land over which the incident is said to have taken place. The land, in question, being claimed to be the ancestral property of the parties, accused Bharat claims to be the son of Hrudananda and as such being a member of the joint family has asserted his share over the same in that very suit for partition. The claim of the complainant is that the said accused-Bharat has no share in the property. It is further stated by the complainant that one power of attorney has been obtained from his father, Hrudananda by playing fraud. The complainant, on the other hand, says that accused-Bharat is the son of one Bina Rout. In that view of the matter, without adjudication of the issues, cloud covers on the claim of the complainant that he is the exclusive owner in possession of the land in question as well as the claim of accused Bharat

having a share over that land. By the time of initiation of the criminal case, the competing claims had not been adjudicated by the appropriate forum and, in fact, that was pending adjudication. The complainant when says that he being appointed as a receiver to harvest the paddy crop from the land in question, was not allowed to do that by the accused persons and rather, it is they who forcibly cut and removed the paddy crops from the land, no such document has been proved to show that said incident had been reported to the court which had appointed the receiver for that. The evidence adduced by the complainant by examining the witnesses on being examined do not go to establish the fact beyond reasonable doubt that after the appointment of the complainant and his father as the receivers to harvest the paddy crops from the land in question, these accused persons forcibly entered into the land and removed the standing paddy crops in committing the offence under section 447 and 379, I.P.C.

8. The trial court has gone through the evidence of all the witnesses and it appears that on thread bare discussion of the same, it has found the complainant to have not been successful in proving his case beyond reasonable doubt; that these accused persons being aware of the order that they have no authority to enter into the land and cut and remove the standing paddy crops had done so. Furthermore, since the complainant as per his status as one of the receivers has also not led any evidence to show that such overt-act on the part of these accused persons had been brought to the notice of the concerned court which had appointed the complainant as receiver seeking appropriate action, that goes to raise suspicion as to the happening of the incident as placed. In view of that the very foundation of the case of the complainant gets pushed into the thick clouds blurring the vision of the Court to look at the case of the complainant clearly. Had it been the case, the complainant should have informed the court being certainly answerable for not cutting and removing the paddy crops as had been so directed by the court which being not shown, justifies the drawal of adverse inference.

9. In view of the aforesaid discussion and reasons, this Court finds no such infirmity with the finding of the learned trial court in acquitting the accused persons calling for interference within the scope and ambit of this appeal.

10. In the result, the CRA fails and is hereby dismissed.

2019 (I) ILR - CUT- 781

D. DASH, J.

JCRA NO.41 OF 2002

AUTHESH KUMAR KEUT @ KUNDA ……..Appellant

.Vs.

STATE OF ORISSA ……Respondent

For Appellant : Miss Reena Nayak, advocate
For Respondent : Mr. K.K. Nayak, learned Addl. Standing Counsel.

JCRA NO.42 OF 2002

KANHU MUNDA ……...Appellant

.Vs.

STATE OF ORISSA ……Respondent

For Appellant : M/s. B.P. Satapathy & S.C. Choudhury,
For Respondent : Mr. K.K. Nayak, learned Addl. Standing Counsel.

CRA NO.54 OF 2002

CHUDAMANI BHAINSA ……...Appellant

.Vs.

STATE OF ORISSA …….respondent

For Appellant : M/s.B.K. Pattnaik, A.C. Gatani.
For Respondent : Mr. K.K. Nayak, learned Addl. Standing Counsel.

Case Laws Relied on and Referred to :-

1. AIR 2016 SC 341 : State of Assam Vs. Ramen Dowarah.
2. (1996) 2 SCC 384 : State of Punjab Vs. Gurmit Singh & Ors.

INDIAN PENAL CODE, 1860 – Section 376 – Offence under – Conviction of the appellants under sections 376(g) and 506 IPC – Plea that the trial court ought not to have placed reliance upon the evidence of the victim of the case in the absence of any corroboration on material particulars more particularly from the medical evidence, providing such support to the allegations – Whether the court can rely on the sole testimony of the victim – Held, Yes.

"The position of law is well settled that the evidence of rape victim if found to be reliable and trust worthy, the same can form the foundation of guilt against the persons ravishing her even without corroboration, either from the oral testimony of other witnesses or from the evidence of expert. Where, however in a given case there appears some such future to raise any finger so as to entertain a doubt in the mind on the reliability of the evidence of the victim, the court would look for some corroboration from other sources. It is also the settled position of law that a prosecutrix complaining of having been a victim of the offence of rape is not an

accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration from material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is physical, psychological and emotional. However, if the Court of fact finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would suffix. To put it in the exact words as expressed by Hon'ble Apex Court in case of ***State of Assam vs. Ramen Dowarah****; AIR 2016 SC 341 and* ***State of Punjab vs. Gurmit Singh & others****; (1996) 2 SCC 384:-*

"The Courts must, while evaluating evidence, remain alive to the fact that in case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is invalid in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case of even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook……" *(Para 9)*

JUDGMENT Date of Hearing & Judgment: 01.03.2019

D.DASH, J.

The appellants being aggrieved by the judgment of conviction and order of sentence passed on 22.01.2002 by the Addl. Sessions Judge, Jharsuguda in S.T. Case No. 48/6 of 2001 have filed these appeals (appeals under item nos. I and II have been filed from inside the jail).

2. The appellants as the accused persons faced the trial for commission of offence under sections 376(g) and 506 IPC. In the trial each of them has been convicted for those offences and have been sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.2,500/- in default to undergo rigorous imprisonment for three months for the offence under section 376(g) IPC. They have been further sentenced to undergo rigorous imprisonment for a period of three years for the offence under section 506 (ii) IPC with the stipulation that the substantive sentences are to run concurrently.

3. Prosecution case in short is that on 15.09.2000 around 10.30 P.M. the victim P.W. 7 was proceeding to the house of her elder father to witness a picture in the television. It is stated that on her way near Laxmi temple, finding her alone, the accused persons obstructed her and pressing her mouth; lifted her to the side of the temple. It is further alleged that the accused persons thereafter undressed her, made on lie her ground by applying force and then unrobing her committed sexual

intercourse, one after another. It is the further case of the prosecution that the accused persons after fulfilling their sexual lust and desire left the victim near her house by extending threat that she would be killed in case of disclosure of the incident before any other. The victim on the day following the occurrence night disclosed the incident first to her mother who then decided to report the matter at Mahila Samiti of the village. A meeting though had been convened by the members of the Mahila Samiti, the accused persons despite call did not attend which finally led to the lodging of the FIR under Ext. 1 at Brajrajnagar Police Station.

Pursuant to the said FIR, police having registered the case, took up investigation. In course of investigation, the statement of the victim P.W. 7 was recorded and she was medically examined. Her wearing apparels were seized and sent for chemical examination. The accused persons being apprehended and medically examined, were forwarded in custody to the court. On completion of investigation, the charge sheet having been submitted, the case committed to the court of Sessions where the accused persons faced the trial being charged for offence under sections 376(g) and 506 (ii) IPC.

The accused persons took the plea of denial and false implication.

4. The trial court analyzing the evidence of nine prosecution witnesses as also on going through the documents admitted in evidence more importantly, the FIR and medical report, has recorded the finding of guilt against all the accused persons for the offence for which they stood charged and accordingly they have been sentenced as aforestated. Hence these appeals being heard together is being disposed by this common judgment.

5. I have heard Miss Reena Nayak, learned counsel (JCRA 41 of 2002), Mr. B.P. Satapathy, learned counsel (JCRA No.42 of 2002) and Mr. B.K. Pattnaik, learned counsel (CRA No. 54 of 2002) on behalf of the appellants (accused persons-convicted). I have also heard Mr. K.K. Nayak, learned Addl. Standing Counsel.

6. Learned counsel for the appellants (accused persons-convict) assailing the finding of the trial court as to the establishment of the case of the prosecution for the commission of rape upon the victim by the accused persons and the criminal intimidation submit that the evidence on record have not been properly appreciated so as to arrive at a conclusion with regard to the role of these accused persons. According to them, the trial court ought not to have placed reliance upon the evidence of P.W. 7 who happens to be the victim of the case in the absence of any such corroboration on material particulars more particularly from the medical evidence, providing such support to the allegations. They further submit that the evidence on record especially the evidence of P.W. 7, the victim with regard to the incident right from the time of her lifting till being left near her house is not believable. According to them, even though it was during night, when the victim has

said that she was going to witness the picture in the television in the house of her elder father which obviously shows that all the villagers by then were not fast asleep, as it is not stated that anyone has seen the incident which has stretched over quite some time or any of its part, the incident as projected is highly improbable. It is therefore submitted that the trial court ought not to have held the accused persons guilty on the basis of the sole testimony of P.W. 7 which does not receive any corroboration. According to them, although such contentions had been raised before the trial court, those have not been properly taken into consideration in the touchstone of the facts and circumstances of the case as those emanate from the evidence piloted by the prosecution. In that view of the matter, they urge that the judgment of the conviction is unsustainable and consequently, the order of sentence is liable to be set aside.

7. Learned Addl. Standing Counsel referring to the evidence of P.W. 7 submits that she has in a very natural manner stated about the entire incident when no such material surfaces that she had any axe to grind against the accused persons to go to state against the accused persons falsely arraigning them in an incident, at the cost of chastity inviting stigma for whole of her life putting her future at stake. He further submits that the position of law being well settled that in every case corroboration to the testimony of rape, victim is not necessary, present is not a case for seeking corroboration so as to fasten the guilt upon the accused persons as there appears no such circumstances so as to raise suspicion for even a moment on the version of P.W. 7 or on any part. It is further submitted that absence of any such injury on the person of P.W. 7, in the facts and circumstances as those emanate from the evidence on record stands well explained and therefore the trial court did commit no mistake in placing implicit reliance on the evidence of P.W. 7 so as to hold the complicity of these accused persons in commission of the above offences.

8. The star witness for the prosecution is P.W. 7. She being aged about eighteen years has been examined before the trial court on 20.08.2001. It has been stated that during the relevant night when she was going to her elder father's house to watch a picture in television, on the village road, the accused persons suddenly appeared and lifted her by gagging and having so taken her to the side of Laxmi temple which situates nearby, they made her lie on the ground on her back and then having undressed her fulfilled their sexual lust and desire. It has been categorically stated by her that the accused persons removed her inner garment and then first it is accused Kanda who squeezed her breasts and pushed his penis into her vagina in having the sexual intercourse. The victim has stated to have struggled to escape but failed in view of the threat of life given by the accused persons. She has further stated that in the said situation in presence of three accused persons, she had to lie in a helpless condition being even unable to shout as her month was closed. It is next stated that after accused Kanda finished his part enjoyment, turn of the accused Kanhu came and thereafter at the end accused Chudamni retravelled the same path

by then already travelled by those other two. It is her further evidence that being threatened, she had to put on her garment and then being taken to their sahi was left by the accused persons there giving threat that if she would disclose the incident before others, she would be killed. It is her evidence that at that dead hour of night going to the house instead of showing her reaction in any manner she went for sleep and on the next morning finding her mother, she reported the matter who in turn told the members of Mahila Samiti which did not yield any such fruit where after she had orally reported the incident to the police which has been reduced into writing taken as FIR, admitted in evidence as Ext. 1. This P.W. 7 has been cross-examined at length. During cross-examination, she has further repeated what she had stated in her evidence-in-chief that she was made to lie on the ground and ravished by the accused persons one after another. After removal of her wearing apparels at the beginning near that place, she has stated to have sustained no injury on any part of her body and finding helpless, in the situation still to have also tried for some time to escape. She has also stated about the time of return to her house during the midnight hour. Although, it has been stated by her that she was ravished over a stony surface, she had no such injury on her person. Her evidence is that all the accused persons were together at the place although. There appears no such suspicious circumstances in the evidence of P.W.7. This being the evidence of the victim, her brother has been examined as P.W. 1 who has stated to have learnt about the incident from his mother. He has supported the evidence of P.W. 7 that they had been to the police station where P.W. 7 reported the matter orally before the police and then was sent for medical examination. Evidence of P.W. 2, the co-villager is to the effect that the mother of the victim had stated about the fact that her daughter P.W. 7 had been raped by the accused persons standing together and by one after the other as told by her daughter, P.W.7. It has been stated by P.W. 3, the local people representative that the meeting could not be held because of the absence of the accused persons. P.W. 4, another member of the Mahila Samiti of the village has also deposed as regards the reporting of the matter to the President of the Mahila Samiti. The mother of the victim P.W. 8 has corroborated the evidence of P.W. 7 to the extent that she had narrated the incident as to the role of the accused persons in ravishing her on the previous night and then she has also stated that P.W.7 had gone to P.S. and informed. It is also her evidence that she had told another villager who in turn had told to the Ward member and the members of the Mahila Samiti.

Going through the evidence of these prosecution witnesses, it is seen that nothing substantial has been brought out thereby to show that the members of the family of P.W. 7 had any animosity with the accused persons so as to create the situation like the one in falsely implicating the accused persons.

9. The position of law is well settled that the evidence of rape victim if found to be reliable and trust worthy, the same can form the foundation of guilt against the persons ravishing her even without corroboration, either from the oral testimony of

other witnesses or from the evidence of expert. Where, however in a given case there appears some such future to raise any finger so as to entertain a doubt in the mind on the reliability of the evidence of the victim, the court would look for some corroboration from other sources.

It is also the settled position of law that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration from material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is physical, psychological and emotional. However, if the Court of fact finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would suffix.

To put it in the exact words as expressed by Hon'ble Apex Court in case of **State of Assam vs. Ramen Dowarah**; AIR 2016 SC 341 and **State of Punjab vs. Gurmit Singh & others**; (1996) 2 SCC 384:-

> "The Courts must, while evaluating evidence, remain alive to the fact that in case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is invalid in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case of even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook……"

10. On a careful reading of the evidence of the P.W. 7 coupled with the evidence of other witnesses as to the actual state of affair in the happening of the incident, this Court finds the evidence of P.W. 7 to be reliable and trust worthy. Moreover, in a case of allegation with regard to gang rape, presumption arises that it was without consent of the victim and merely because no such injury is seen on the person of the victim, even in case of successive sexual intercourse by different person its not permissible to accept it for a moment that the victim had freely and voluntarily consented to and it was thus a case of consensual sex and then it is for those persons against whom such allegations are labeled to rebut either by leading evidence or showing such surrounding circumstance emerging from evidence on record.

In view of all the aforesaid, as per the independent analysis of evidence on record, this Court finds no such reason and justification to accord its disagreement with the finding of guilt recorded by the trial court against the accused persons.

In the wake of above, the challenge made by the accused persons to the judgment of conviction fails and consequently, the order of sentence awarding the minimum substantive sentence as provided for the principal offence with the fine, and for the other offence with all the stipulations is found to be just and proper.

11. Resultantly, all the appeals stand dismissed.

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2019 (I) ILR - CUT- 787

D. DASH, J.

CRLREV NO. 722 OF 2018

BASANTA KISAN .....Petitioner

.Vs.

STATE OF ORISSA .....Opp. Party

(A) INDIAN PENAL CODE, 1860 – Section 376 read with section 90 – Offence of rape with consent – Consent – Definition thereof – Section 90 of the IPC defines "consent" given under fear or misconception – A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception – Distinction – Held, Section 90 though does not define "consent", but describes what is not "consent" – Consent may be express or implied, coerced or misguided, obtained willingly or through deceit – If the consent is given by the complainant under misconception of fact, it is vitiated – Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but also after having fully exercised the choice between resistance and assent – Whether there was any consent or not is to be ascertained only on a careful study of all relevant circumstances. (Para 7)

(B) CRIMINAL TRIAL – Offence U/s 376 I.P.C. – Rape – Consent – Accused and victim are distantly related and used to talk each other regularly – The occurrence took place in a Kendu leaf godown near to the festival field where both had gone to enjoy the festival along with

other family members – Both accused and victim entered into the godown and sister of the victim remained outside – Victim in her statement stated that, when the accused disrobed her, she objected but with the promise of marriage, accused committed sexual intercourse without consent – F.I.R. lodged after seven months delay after development of pregnancy – Sole testimony of victim – Non examination of the sister of the victim, who was present outside the place of occurrence – Determination as to whether the victim had consent or not needs to be ascertained from the facts of the present case – Discussed. (Para- 10)

Case Laws Relied on and Referred to :-

1. (2005) 1 SCC 88 : Deelip Singh alias Dilip Kumar .Vs. State of Bihar.
2. 2008 (14) SCC 763 : Vijayan .Vs. State of Kerala.
3. 2013 (9) SCC 113 : Kaini Rajan .Vs. State of Kerala.

For Petitioner : M/s. Akshya Sahoo, A.K.Parida & B.K.Nayak
For Opp. Party : Mr.Karunakar Nayak, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment :03.04.2019

D. DASH, J.

The petitioner, by filing this revision, has assailed the judgment dated 16.07.2018 passed by the learned Additional Sessions Judge, Deogarh in Criminal Appeal No.09 of 2018/04 of 2018 confirming the judgment of conviction and order of sentence dated 22.2.2018 and 7.3.2018 respectively passed by the learned Assistant Sessions Judge (S.T.C.), Deogarh in Sessions Trial No.46/14 of 2015.

The petitioner has been convicted for offence under section 376(1) of the Indian Penal Code (in short, 'the IPC') and sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.5,000/- in default to undergo rigorous imprisonment for three months. The appellate court, being moved by the petitioner-accused, has refused to interfere with the said finding of the conviction recorded by the trial court, so also the order of sentence.

2. The prosecution case, in short, is that the accused and the victim come from the same caste. The accused once having forcibly committed sexual intercourse with the victim; she became pregnant and when was carrying five months of pregnancy, the accused, who had then promised to marry her, refused to go for marriage. So, a meeting was convened in the village and as nothing could be decided, ultimately the victim (P.W.4) lodged the F.I.R. (Ext.6).

3. The defence plea is that of complete denial and false implication.

4. The trial court, on analysis of evidence of eleven witnesses examined from the side of the prosecution as against nil from the side of the defence as also the documents more importantly the F.I.R., Ext.6; the medical examination report of the victim (Ext.7), besides other documents, has come to conclude that the accused is liable for commission of offence under section 376 IPC for his act of having forcible sexual intercourse with the victim with the promise of marriage, which led to her pregnancy. With such finding, the accused has been convicted.

The lower appellate court has also taken the same view on analysis of evidence at its level while judging the sustainability of the finding of the trial court.

5. Learned counsel for the petitioner submitted that the finding of the courts below that the accused is guilty of commission of offence under section 376(1) of the IPC has not been the outcome of just and proper appreciation of evidence. It is his submission that even as per the evidence of the victim and keeping in view the surrounding circumstances, which emanate from the evidence of the victim (P.W.4) and other witnesses, if it is accepted that the accused had the sexual relationship with the victim, which has led to her pregnancy, the same clearly appears to be with consent of the victim (P.W.4) knowing fully well about consequences. He thus submits that the findings of the conviction, as has been recorded by the court below, are perverse and unsustainable.

Learned counsel for the State submits that when it has been proved by the prosecution through clear, cogent and acceptable evidence that the accused having forcibly committed sexual intercourse upon the victim on the promise of marriage which has ultimately been breached by him, the courts below have rightly convicted the accused for commission of offence under section 376 of the IPC.

6. In order to address the rival submission, let us straight way proceed to have a look at the evidence of the victim (P.W.4). It is her evidence that she and accused had known each other since the year 2009. The elder sister of the accused is married to a distant relation of the victim. They used to talk when the accused used to come to her village. It has been stated by her that the accused, by telephoning, asked her to come to witness Lulang Dussehera festival to which she agreed and accordingly, she with her parents, sister and

other guests went. It is her further evidence that when she was in the festival field with others, the accused called her by giving a ring on her mobile to the kenduleaf godown situated near the said field. Responding and accepting to the call, she went near the kenduleaf godown when she found the accused to be present. It has been further stated that she and the accused entered into the godown when her sister remained outside. The allegation is that inside the godown, the accused disrobed her to which she objected and then the accused having told that he would marry her, had sexual intercourse without her consent. Thereafter, all returned to the festival field. After few months of the said act, it came to the light that the victim has become pregnant, which her parents could know and on asking by her mother, the incident was narrated. It is next stated that her father, having come to know about it, he with others went to the village of the accused to settle the matter and convened a meeting of their caste people where the accused flatly denied to have any involvement in the matter.

Police having been reported about the incident, the case has been initiated. This is all the evidence of the victim.

So, here is a case where the victim states to have finally participated in having the sexual relationship with the accused as if placing belief upon his promise as to marriage. Such relationship is said to be on that solitary occasion. The conduct of the victim as has been expressed by her are that she went to village to the festival field on the request of the accused over phone and then leaving the family members there in the field, proceeded with her sister to the kenduleaf godown on being asked by the accused giving her a ring in her mobile. She went inside into the godown with the accused leaving of her sister outside. All these go to show that till her move inside the godown, it was on her own accord and there was no force, compulsion or instigation for that.

The victim is aged around 23 years. It is her evidence that when the accused disrobed her, she raised the protest and then the accused told her that they would marry. Next, it is said that the accused committed rape on her without her consent. The sister of the victim has not been examined. The sister of the victim, who during the incident, was outside the godown and who after the incident again returned to the field with the victim has not been examined to say as to the hearing about the said protest said to have been raised by the victim or to say as to if the victim had told all these developments which took place inside the godown and more particularly, as

to under what circumstance the victim moved to the godown with the accused.

Admittedly the F.I.R. has been lodged after five months of the said incident.

7. Let us now come to the legal position holding the field.

Section 375 defines the offence of rape and enumerates six descriptions of the offence. The first clause operates where the women is in possession of her senses and, therefore, capable of consenting but the act is done against her will and the second where it is done without her consent; the third, fourth and fifth when there is consent but it is not such a consent as excuses the offender, because it is obtained by putting her, or any person in whom she is interested, in fear of death or of hurt. The expression "against her will" means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of.

Section 90 of the IPC defines "consent" given under fear or misconception:- A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception.

Thus, Section 90 though does not define "consent", but describes what is not "consent". Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. If the consent is given by the complainant under misconception of fact, it is vitiated. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but also after having fully exercised the choice between resistance and assent. Whether there was any consent or not is to be ascertained only on a careful study of all relevant circumstances.

In *Deelip Singh alias Dilip Kumar v. State of Bihar, (2005) 1 SCC 88,* the Apex Court framed the following two questions relating to consent:-

> *(1) "Is it a case of passive submission in the face of psychological pressure exerted or allurements made by the accused or was it a conscious decision on the part of*

the prosecutrix knowing fully the nature and consequences of the act she was asked to indulge in?

(2) Whether the tacit consent given by the prosecutrix was the result of a misconception created in her mind as to the intention of the accused to marry her"?

8. In case of *Vijayan –V- State of Kerala; 2008 (14) SCC 763*, the prosecutrix who was aged about 17 years was the neighbour of the accused. In her testimony the prosecutrix set up the case that accused has raped her when no one else was there in the house and she was raped in the house. The accused-appellant was alleged to have been told that she need not worry as he will marry her. She did not give any complaint either to her parents and police in view of the promise. She became pregnant and while she was carrying a child of 7 months, she requested the accused to marry her. The accused declined. Thereafter a complaint was filed after 7 months. On these fact sthis court noted that no complaint or grievance was made either to the police or the parents thereto. The explanation for delay in lodging the FIR was noted namely that the accused promised to marry her and therefore the FIR was not filed. The Apex Court held as follows:

".....In cases where the sole testimony of the prosecutrix is available, it is very dangerous to convict the accused, specially when the prosecutrix could venture to wait for seven months for filing the FIR for rape. This leaves the accused totally defenceless. Had the prosecutrix lodged the complaint soon after the incident, there would have been some supporting evidence like the medical report or any other injury on the body of the prosecutrix so as to show the sign of rape. If the prosecutrix has willingly submitted herself to sexual intercourse and waited for seven months for filing the FIR it will be very hazardous to convict on such sole oral testimony. Moreover, no DNA test was conducted to find out whether the child was born out of the said incident of rape andthat the appellant-accused was responsible for the said child. In the face of lack ofany other evidence, it is unsafe to convict the accused."

In the case of *Kaini Rajan v. State of Keralareported in 2013 (9) SCC 113*, on 17.9.1997 at about8.30 a.m. it was alleged the prosecutrix was raped at a site which was by the side of a public road. It was the case of the prosecutrix that she tried to make hue and cry but was silenced by the accused by stating tha the would marry her. Even after this incident he hadsexual intercourse on more than one occasion. The prosecutrix became pregnant, gave birth to a child and accused did not keep his promise to marry her. It is thereafter that on 26.7.1998 nearly 10 months after the alleged rape that a case was registered. The Court referred the Vijayan's case (supra), took note of the place being on the side of a public road, the aspect of delayed filing of the report and also the behavior of the parents of the prosecutrix in

not approaching the family members of the accused for marrying the prosecutrix and instead lodging the report. The Court also found that having regard to the site, if the prosecutrix has made any resistance or made hue and cry it would have attracted large number of people from the locality. The appeal filed by the accused was allowed.

9. In the present case, the victim is 23 years old and the age of the accused is around 24. She has passed Class-IX. It is her specific evidence that she had not agreed for the marriage although it was so proposed by the accused in the kenduleaf godown. The accused and the victim hail from the rural background with their house in two different villages at a distance of 2 km apart. It is not stated by the victim in her evidence that after meeting, she and the accused had any further met or they had such relationship any more. The pregnancy was detected five months after the meeting between them in the godown. It is said that when the pregnancy was detected, the accused being contacted, denied to be the author of the same for which the F.I.R. was lodged at the police station.

10. There is a delay of seven months. This becomes clear from the evidence of doctor (P.W.9) who has stated that as on the date of examination of the victim, she was pregnant and the height of the uterus was of seven months of pregnancy. On a plain reading of the evidence of the victim, it does not appear to be a case that the accused had forcibly raped her. If her evidence as to the happened events in a chronological manner is tracked, it appears to be her consensus decision after active application of mind to the things that had happened. It is not her evidence that basing upon the promise of marriage given by the accused, she surrendered to his demand. Rather she states to have given her dissenting note to the said proposal of marriage given by the accused, which on the face of her evidence is not acceptable more so when her sister present during the incident in the godown has been withheld from the witness box. Having indulged in a closer look at the evidence in the proceedings having regard to the need to do so in view of this long delay in making the complaint, it is seen that there was tacit consent and the tacit consent given by her was not the result of a misconception created in her mind or believing in good faith, any misrepresentation. The view taken by the lower appellate court that the predominant reason that weighed with the victim (P.W.4) in agreeing with sexual intimacy with the accused was the hope generated in her about the prospect of marriage with the accused is not in consonance with the evidence of P.W.4 and other surrounding circumstances, which emanate from evidence coupled with the conduct of the victim.

In view of all the above, the evidence adduced by the prosecution in my considered view falls short of the test of reliability and acceptability and as such it is highly risky to act upon it even in seisin of this revision. Thus, I am led to hold that the prosecution has failed to establish a case against the accused that he has committed rape upon the victim and the finding of the trial court, as has been confirmed by the lower appellate court, as such cannot be sustained being not the result of just and proper appreciation of evidence in the touchstone of the settled position of law holding the field of commission of the offence as alleged in such given facts and circumstances.

11. Accordingly, the judgment dated 16.07.2018 passed by the Additional Sessions Judge, Deogarh in Criminal Appeal No.09 of 2018/04 of 2018 confirming the judgment of conviction and order of sentence dated 22.2.2018 and 7.3.2018 respectively passed by the learned Assistant Sessions Judge (S.T.C.), Deogarh in Sessions Trial No.46/14 of 2015 is set aside.

12. Resultantly, the CRLREV is allowed. The accused, if is in custody, be set at liberty forthwith in case his detention is not so required in any other case.

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2019 (I) ILR - CUT- 794

BISWANATH RATH, J.

ARBA NO. 47 OF 2018

M/S. INDIAN FARMERS FERTILIZER CO-OPERATIVE LTD. .....Appellant

.Vs.

M/S. BHADRA PRODUCTS .....Respondent

(A) ARBITRATION AND CONCILIATION ACT, 1996 – Section 21 read with Section 43 – Commencement of arbitral proceedings vis-a-vis Limitations – Distinction between – Held, the period of limitation for commencing an arbitration runs from the date on which the "cause of arbitration" accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned – The period of limitation for the commencement of the arbitration runs from, the date on which, had there been no arbitration clause, the cause of action would have accrued: "Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the

date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued" – Even if the arbitration clause contains a provision that no cause of action shall accrue in respect of any matter agreed to be referred until an award is made time still runs from the normal date when the cause of action would have accrued if there had been no arbitration clause., State of Orissa & another vrs. Damodar Das reported in (1996) 2 SCC 216 followed. (Para 18)

(B) ARBITRATION AND CONCILIATION ACT, 1996 – Section 21 read with Section 43 – Limitation in commencement of arbitral proceedings – Plea of limitation raised by respondent in an arbitration proceeding – Matter travelled from Arbitrator to Apex court – Finally the High court decided the issue as to from which date the cause of action arose and as to whether the arbitration proceeding is barred by limitation – From the fact situation it was held that there is no denial to the fact that the claimant vide notice dated 6.6.2011 made the claim for payment of balance sale price with interest as indicated therein, rather such claim was denied by the present appellant by its correspondence dated 27.9.2012 and finally the claimant-respondent issued a notice to opt for arbitration on 1.10.2014 and there appears no material in denial of any such notice by the appellant herein – Therefore, looking to the legal provision indicated above, this Court finds, even though there is no material/pleading as to when the notice dated 1.10.2014 by the claimant was received by the present appellant and further this Court not finding any dispute by the appellant on issuance of such notice, this Court finds, in the worse the cause of action in raising the arbitration proceeding at the minimum becomes 1.10.2014 – Direction to conclude the proceeding in four months. (Para 17 & 21)

Case Laws Relied on and Referred to :-

1. AIR 2003 SC 2629 : (2003) 5 SCC 705 : Oil & Natural Gas Corporation Ltd. .Vs. SAW Pipes Ltd.
2. (2015) 3 SCC 49 : Associate Builders.Vs. Delhi Development Authority
3. 2018 (4) ARb.LR210(SC) : Sutlej Construction Limited .Vs. Union Territory of Chandigarh.
4. AIR SCW 1377: (2006) 3 SCC 634 : Gunwantbhai Mulchand Shah & Ors.Vs. Anton Elis Farel and Ors. 2006
5. (2009) 5 SCC 462 : Ahmadsahab Abdul Mulla (2) (Dead) .Vs. Bibijan & Ors.
6. 2017 (6) Arb.LR41 (SC) : Chittaranjan Maity .Vs Union of India.
7. 2017(5)Arb. LR210(Delhi) : AEZ Infratech Pvt. Ltd. .Vs Vibha Goel & anr.
8. (2004)7 SCC 288 : Milkfood Ltd. .Vs. GMC Ice Cream (P) Ltd.
9. . 2018(1) Arb.LR 236 (SC) : Maharashtra State Electricity Distribution Company

Ltd. Vs Datar Switchgear ltd. & Ors
10. (1988) 2 SCC 338 : Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority.
11. (1996) 2 SCC 216 : State of Orissa & another .Vs. Damodar Das.
12. (2015) 3 SCC 49 : Associate Builders .Vs. Delhi Development Authority.
13. 2018 (4) Arb. LR 210 (SC) : Sutlej Construction Ltd. .Vs. Union Territory of Chandigarh.
14. 2017(5) Arb.LR 210 : Aez Infratech Pvt. Ltd. .Vs. Vibha Goel & Anr.
15. (2004) 7 SCC 288 : Milkfood Ltd. .Vs. GMC Ice Cream (P) Ltd.
16. 2018(1) Arb.LR 236 (SC) : Maharashtra State Electricity Distribution Company Ltd. .Vs. Datar Switchgear Ltd. & Ors

For Appellant : Sri Ashok Kumar Parija, Sr. Adv.
M/s. S.P. Sarangi, B.C. Mohanty, D.K. Das, P.K. Das, & T. Patnaik.

For Respondent : Sri S.D. Das, Sr. Adv.
M/s.N. Bisoi & H.S. Satpathy.

JUDGMENT Date of Hearing : 8.03.2019 :Date of Judgment : 12.03.2019

BISWANATH RATH, J.

This appeal involves a challenge to the judgment of the District Judge in ARBP No.21/2015 thereby confirming the First Partial Award by the learned Arbitrator in Arbitration Case No.DAC/665(D)/12-14, thereby rejecting the objection by the respondent therein to dismiss the arbitration proceeding on the ground of limitation.

2. The appellant is a Co-operative society limited under the provision of Multi State Co-operative Societies Act. Appellant is engaged in manufacture of different type of chemical fertilizer and having its factory at Musadia, Paradeep in the District of Jagatsinghpur.

For arising of a dispute between the appellant and the respondent on supply of Defoamer, an arbitration proceeding was initiated before the learned Arbitrator Mr. Justice Deepak Verma (Retd.) registered as Arbitration Case No.DAC/665(D)/12-14. In the Arbitration proceeding, the Arbitrator framed the following issues:

> "1. Whether claimant is entitled for the amounts as prayed for in Prayers Clause A to E in the Statement of Claim in the light of Agreement/Purchase Orders entered into between the parties?
>
> 2. Whether the claim of the Claimant is barred by limitation?
>
> 3. Whether each Purchase order would constitute a separate contract and in one arbitration claim all the seven Purchase orders could be clubbed together?

4. Whether C Forms of Sales Tax could be construed as an acknowledgement of debt or liability?

5. Cost and Relief."

3. For involvement of number of litigations involving the dispute at hand to this Court as well as to the Hon'ble Apex Court, this Court likes to bring the development through different litigation as of now which are narrated as herein below. It appears that both the parties pressed for prioritizing decision on issue no.2 as to whether the Arbitration proceeding remain barred by limitation? The learned Arbitrator prioritized the hearing on the issue no.2 as preliminary issue and by order dated 23.7.2015 passed the first partial award holding therein that the arbitration proceeding is not hit by limitation. Being aggrieved by this order of the Arbitrator the appellant preferred application U/s.34 of the Arbitration and Conciliation Act, 1996 in the Court of District Judge, Jagatsinghpur registered as ARBP No.21 of 2015. The proceeding U/s.34 of the Arbitration and Conciliation Act, 1996 was finally dismissed by the learned District Judge, Jagatsinghpur holding that, the proceeding U/s.34 of the Act, 1996 before it is not maintainable as the first partial award on the point of Limitaton cannot be treated as an interim award.

4. Being aggrieved by the order of the learned District Judge dismissing the proceeding U/s 34 of the Act, 1996 as not maintainable, the present appellant moved this Court U/s 37 of the Act, 1996, being registered as ARBA No.31 of 2015 and this appeal was dismissed by this Court on 30.6.2017 thereby confirming the above District Judge's order. Being aggrieved by the order dated 30.6.2017 involving Arbitration Appeal No.31 of 2015 the appellant moved Hon'ble Apex Court in Special Leave Petition vide SLP(C) no.19771/17 on admission subsequently registered as Civil Appeal No.824 of 2018. This Civil Appeal was allowed by the Hon'ble Apex Court by its judgment dated 23.01.2018 reported in 2018 SCC Online SC 38 holding that the first partial award of the Arbitrator falls in the trap of interim award and thus can be challenged U/s.34 of the Act, 1996 and thereby issuing a consequential direction to the District Judge for deciding the proceeding U/s.34 of the Act 1996 on merit involved therein. For no disposal of Section 34 proceeding even after direction of the Hon'ble Apex Court, present appellant filed W.P.(C) No.6352 of 2018 for issuing a direction to the District Judge for timely disposal of the Section 34 proceeding. On 18.4.2018 this Court passed an interim order involving W.P.(C) No.6352 of 2018 directing therein for stay of proceeding before the Arbitrator (DAC) Case

no.DAC/665(D)/12-14 and at the same time also directed the District Judge for taking a decision on the stay application at the instance of the appellant, in the meantime while fixing the case to 2.05.2018 for final hearing but under fresh admission category.

5. Being aggrieved by the order dated 18.04.2018 in W.P.(C) No.6352 of 2018 present respondent moved the Hon'ble Apex Court in Special Leave to Appeal (C) No.13264 of 2018. This Special Leave to Appeal (C) was taken up by the Hon'ble Apex Court on 9.07.2018 and on which date, after hearing the respective submissions the Hon'ble Apex Court by order dated 9.07.2018 directed the District Judge to decide the proceeding U/s.34 of the Act, 1996 involving a preliminary point within one month.

6. Based on the above direction of the Hon'ble Apex Court, the District Judge, Jagatsinghpur heard the proceeding U/s34 of the Act, 1996 ARBP No.21/15 on merit finally and by his judgment dated 24.08.2018 was pleased to dismiss the application under Section 34 and thereby confirming the first partial award of the learned Arbitrator dated 23.07.2015. Being aggrieved by the judgment dated 24.08.2018 in the Arbitration Petition No.21 of 2015 the present appellant preferred this Arbitration Appeal U/s.37 of the Act, 1996 bearing ARBA 47 of 2018. Entertaining the appeal this Court by order dated 7.12.2018 while directing for notice to the respondent also directed for stay of further proceeding involving Arbitration Case No.DAC/665(D)/12-14. In the meantime, involving SLP(C) No.13264 of 2018 by order dated 18.02.2019 the Hon'ble Apex Court while directing for disposal of the proceeding U/s 37 of the Act, 1996 on merit at earliest and preferably within a period of four weeks from the date of order, directed this Court for time bound disposal of the ARBA No.47 of 2018.

7. Coming to the facts involving the Arbitration proceeding, it reveals that the appellant-company being engaged in production and marketing of fertilizer with one of its unit located at Paradeep for production of phosphoric acid and respondent being a manufacturer of a range of Defoamers, with an intention of purchasing Defoamers the appellant company floated a tender enquiry. Pursuant to which, various suppliers including the respondent participated in the tendering process and submitted their sample of Defoamers for trial inspection. Following clause 8 in the tender inquiry, it was made clear that the order for required quantity of the Defoamer will be placed on the vendors whose trial run operation is found successful for the lowest quantity of the Defoamer consumed per tonne of P_2O_5 produced and

as per the clause no.9 it was again clarified that monthly progressive payment were to be released on the quantity of P_2O_5 produced and the lowest cost of the Defoamer per tonne of P_2O_5 achieved during the trial run. Respondent having understood the conditions therein along with others submitted its bid. It further reveals that during the trial run of production of P_2O_5 consumption of Defoamer applied by the respondent was found to be lowest i.e.2.59Kg. for each metric tonne of P_2O_5. It was thus agreed between the parties that the respondent to the supply of Defoamer on the payment in terms of Rs.217.76/- per tonne P_2O_5 produced irrespective of consumption of Defoamer /actual quantity of Defoamer received by the IFFCO. The appellant for the purpose of trial has issued a purchase order on 23.08.2006 on cost/supply basis and the price of the same was also duly paid. After the trial run, the appellant issued a letter of intent dated 2.11.2006 for 800 metric tonne of Defoamer on the existing rate i.e. Rs.217.76 per tonne of P_2O_5 produced irrespective of consumption of defoamer/actual quantity of defoamer received. The letter of intent issued on 2.11.2006 further reveals that on issuance of the letter of intent the respondent was to immediately commence the supply of Defoamer. On commencement of the item in terms of the letter of intent the appellant therein regularized letter of intent by issuing a purchase order on 24.01.2007. It is claimed that as per the clause 4 of the letter of intent dated 2.11.2006 the duration/validity of the contract was for a period of one year or consumption of 800 metric tonne of Defoamer whichever was earlier. It is also claimed that the purchase order even indicated that the consumption of 800 metric tonne of Defoamer was intended to be achieved for production of 3,08,880 metric tonne of P_2O_5, based on the standard set during the trial run. It also further claimed that as per the agreement by the parties the payments were to be released on the basis of production of P_2O_5 irrespective of consumption of Defoamer or supplied by the claimant the respondent herein. The appellant claimed that the respondent had supplied 800 metric tonne of Defoamer by 11.04.2007 but however, they could not achieve the targeted production of 3,08,880 metric tonne of P_2O_5 in terms of the subject letter of intent / purchase order. It is, at this point of time, the respondent approached the appellant and requested it to allow supply further. It had the further commitment in the same terms and conditions as in the previous letter of intent or purchase order. The pleadings further reveal that the respondent had been raising bills on a payment request term on the basis of production of P_2O_5 in every month. The appellant claimed that since the respondent could not achieve the targeted production on or before one year i.e. on or before 1.11.2007 and it is, in the meanwhile, final payment, as agreed payment

terms was made qua the letter of intent/purchase order dated 7.11.2007. It is further contended that the respondent remained silent for long period and after a delay of 1307 days on 6.06.2011 appearing at page 116 of the Appeal memorandum issued a legal notice to the appellants demanding payment of alleged outstanding amounting of Rs.6,35,74,245/- due under the letter of intent dated 2.11.2006 to be paid within 8 days from the date of notice with further intimation that on failure of clearing the payment respondent would resort to arbitration. The appellant, under the premises of a stale claim by the respondent, made a correspondence to the respondent on 29.07.2012 stating therein that no amount was due and payable besides also contended that the claim is even otherwise barred by limitation and afterthought. Finding a negative response from the appellant, the respondent by notice dated 1.10.2014 intimated its intention of opting Arbitration involving the unresolved dispute through the Arbitrator. Consequently, the respondent resorting to an arbitration proceeding submitted a claim statement on 9.12.2014 before the learned Arbitrator to arbitrate the dispute between the parties.

Considering the invocation of arbitration clause an arbitral tribunal was formulated with Justice Deepak Verma (Retd.) to act as the sole arbitrator and the proceeding was conducted under the aegis of Delhi International Arbitration Center (DIAC), High Court of Delhi. The appellant appearing therein while submitting written submission contended that the claim before the Arbitrator is grossly barred by limitation and the appellant, therefore, convinced the arbitrator to take up the issue relating to limitation as a preliminary issue on reiteration of its ground stated in the communication dated 29.07.2012. Apart from the above the appellant taking resort to the provision U/s.21 & 43 of the Arbitration and Conciliation Act, 1996 contended that the claim submitted by the respondent was grossly barred by limitation. The claim of the appellant that the claim statement is grossly barred by time was seriously contested by the respondent-claimant disclosing therein that there has been regular discussion between the parties and ultimately, a denial of the claim of the respondent was made by the appellant on 29.07.2012 indicating that there is no due payable and also denying the claim on the premises that the claim was grossly barred by limitation. Further for the provision at Section 21 of the Act, 1996 date of receipt of notice of respondent showing its interest for invoking the Arbitration based on communication dated 1.10.2014 should be the starting point of limitation.

8. Considering the rival contentions of the parties, learned Arbitrator by the first partial award dated 23.07.2015 declined the claim of the appellant on the premises of claim being barred by limitation and directed the parties to appear before the Tribunal on 23.07.2015 to decide the future course of action and to assist for determination on the other points involved in the arbitration proceeding. Resulting the appellant initiated a proceeding U/s.34 of the Arbitration and Conciliation Act, before the District Judge, Jagatsinghpur being registered as the Arbitration Petition No.21 of 2015 arising out of Arbitration Case No.DAC/665(D)/12-14. Even though there was some obstruction created in the proceedings of the District Judge, Jagatsinghpur involving the above petition by the present appellant but ultimately the arbitration petition was taken up for final adjudication on the direction of the Hon'ble Apex Court vide order dated 9.07.2018 in SLP(C) No.13264 of 2018. The District Judge, Jagatsinghpur upon hearing the contesting parties by the judgment dated 24.08.2018 (Annexure-2) while dismissing the arbitration proceeding confirmed the order of the learned Arbitrator on the question of limitation.

9. Shri Ashok Kumar Parija, learned Senior Advocate appearing on behalf of the appellant on reiteration of the ground taken before the learned Arbitrator and the learned District Judge, Jagatsinghpur, taking this Court to the provision at Sections 21 & 43 of the Arbitration and Conciliation Act, 1996 contended that for the clear provision in Section 21, the Arbitral proceeding in respect of the particular dispute commenced. When the dispute to be referred to arbitration is received by the respondent therein and for the provision in Section 43 of the Act, 1996 dealing with limitation, Shri Parija, learned Senior Advocate again contended that the arbitration shall be deemed to have been commenced on the date as referred in Section 21. On the premises that the claimant-respondent herein remained silent for several years and ultimately made a claim to the appellant on 6.06.2011 since admittedly after 3 years, 6 months and 30 days from the date of completion of the contract on 1.11.2007, Shri Parija, learned Senior Advocate justified his claim that the arbitration proceeding was grossly barred by time and as such contended that mere response of the appellant herein to the respondent herein on 29.07.2012 denying the claim or the intimation of respondent pressing for Arbitration of the dispute in 2014 could not have given rise to an arbitration proceeding and Shri Parija, thus contended that there is no proper consideration of the limitation issue by the sole arbitrator.

10. Further, taking this Court to the challenge to the judgment of the learned District Judge, Shri Parija, learned Senior Advocate placing the grounds raised in the proceeding U/s 34 particularly the question summarized in paragraph no.4 of the judgment impugned, limited his argument involving the appeal involving the challenge to the impugned judgment questioning the decision of the impugned judgment in absence of an answer to the question raised by the appellant in the Section 34 proceeding. Shri Parija, learned Senior Advocate further referring to some of the correspondences including proof of payment on particular dates from the materials available on record submitted that the claim of the claimant remain grossly time barred.

Shri Parija, learned Senior Advocate further submitted that for not attending to the questions raised by the appellant in the Section 34 proceeding as enumerated in paragraph no.4 of the impugned judgment, the impugned judgment becomes bad and claimed that in the interest of justice, the matter should be remitted back to the District Judge, Jagatsinghpur for disposing the proceeding U/s.34 of the Act, 1996 after attending to the questions taken note of in paragraph no.4 of the impugned judgment.

11. Shri Ashok Kumar Parija, learned Senior Advocate appearing on behalf of the appellant taking this Court to the developments through correspondences on 2nd November, 2006, 24.1.2007, the letter of intent and the purchase order condition between the parties at page-111 of the Appeal Memorandum, the notice dated 6.6.2011, the purchase order dated 23.8.2006, response of the appellant dated 27.9.2012, a notice for response dated 1.10.2014 contended that mere correspondence after long gap cannot give rise a cause of action.

12. In the first phase of the argument involving the Arbitration Appeal No.47 of 2018 Shri Nilamadhaba Bisoi, learned counsel for the respondent taking this Court to the stand of the respondent in the claim before the learned Arbitrator and more particularly reading the claim on the question of limitation and cause of action contended that for the detail plea substantiating the plea on the question of limitation through the materials available on record, learned Arbitrator on appreciation through the materials available on record has come to the correct findings holding that the claim is not barred by limitation. Shri Bisoi, learned counsel further, also taking this Court to the decision referred to before the learned Arbitrator and the District Judge, Jagatsinghpur and taken note of by both the learned Arbitrator as well as the learned District Judge submitted that the decision of both the learned

Arbitrator as well as the District Judge having support through the materials available on record as well as the law of land, both the orders of the learned Arbitral Tribunal as well as the judgment impugned herein are legally sustainable.

13. In the second phase of argument Shri S.D. Das, learned Senior Advocate being assisted by Shri Nilamadhab Bisoi, learned counsel for the claimant/respondent on the question raised by Shri Ashok Kumar Parija, learned Senior Advocate as to the sustainability of the impugned judgment for not answering on the question raised by the appellant and taken note of by the learned District judge, Jagatsinghpur in paragraph no.4 of the impugned judgment, Shri S.D. Das, learned Senior Advocate taking this Court to the discussions of the learned District Judge more particularly referring paragraph nos.11 & 12 of the impugned judgment submitted that the District Judge has clearly answered the questions referred to hereinabove being raised by the appellant. Shri Das, learned Senior Advocate again also taking this Court to the provision at Section 21 & 43 of the Act, 1996 contended that the judgment impugned are also otherwise perfect having not only support of the materials available on record but also the support of the law of the land. Shri Das, learned Senior Advocate taking this Court to the following judgments attempted to justify the impugned order:

In the case of ***Oil & Natural Gas Corporation Ltd.*** *versus* ***SAW Pipes Ltd.*** as reported in **AIR 2003 SC 2629 : (2003) 5 SCC 705**, in the case of ***Associate Builders*** *Versus* ***Delhi Development Authority*** as reported in **(2015) 3 SCC 49**, in the case of ***Sutlej Construction Limited*** *Versus* ***Union Territory of Chandigarh*** as reported in **2018 (4) ARb.LR210(SC)**, in the case of ***Gunwantbhai Mulchand Shah and others*** *Versus* ***Anton Elis Farel and Ors.*** as reported in **2006 AIR SCW 1377: (2006) 3 SCC 634**, in the case of ***Ahmadsahab Abdul Mulla (2) (Dead)*** *versus* ***Bibijan and others*** as reported in **(2009) 5 SCC 462**, in the case of ***Chittaranjan Maity*** *versus* ***Union of India*** as reported in **2017 (6) Arb.LR41 (SC)**, in the case of ***AEZ Infratech Pvt. Ltd.*** *versus* ***Vibha Goel and anr.*** as reported in **2017(5)Arb. LR210(Delhi)**, in the case of ***Milkfood Ltd.*** *versus* ***GMC Ice Cream (P) Ltd.*** as reported in **(2004)7 SCC 288** and in the case of ***Maharashtra State Electricity Distribution Company Ltd.*** *versus* ***Datar Switchgear ltd. & Ors.*** as reported in **2018(1) Arb.LR 236 (SC)**.

14. Considering the rival contentions of the parties, this Court finds, this case involves determination of the following two issues :-

I) Whether the first partial award of the learned Arbitrator holding that the claim is not barred by limitation and the consequential judgment of the learned District Judge in Arbitration petition No.21/2015 are sustainable ?

II) Whether the learned District Judge has answered the ground of challenge being raised by the appellant and as taken note by the learned District Judge in paragraph-4 of the impugned judgment?

15. Learned Arbitrator on the basis of pleading of respective parties formed the following issues for determination involving the arbitration proceeding (Page-86):

> "1. Whether claimant is entitled for the amounts as prayed for in Prayers Clause A to E in the Statement of Claim in the light of Agreement/Purchase Orders entered into between the parties?
>
> 2. Whether the claim of the Claimant is barred by limitation?
>
> 3. Whether each Purchase order would constitute a separate contract and in one arbitration claim all the seven Purchase orders could be clubbed together?
>
> 4. Whether C Forms of Sales Tax could be construed as an acknowledgement of debt or liability?
>
> 5. Cost and Relief."

Considering the joint request for taking the issue no.2 indicated herein as preliminary issue, the learned Arbitrator took up the said issue. This Court finds the learned Arbitrator taking into account the submission of respective parties, particularly on issue no.2 the information available through the materials produced by the respective parties, further taking into account the provisions at Sections-21 & 43 of the Act, 1996 and the citations shown by the respective parties, vide detailed discussion in paragraphs-39 to 45 observed that the claim of the claimant/respondent was not time barred. The learned District Judge in Appeal on consideration of the rival contentions in paragraph-12 of the impugned judgment observed as follows :-

> "12. Now going through the award of the learned Arbitrator, it is found that the facts of the case, evidence led by the parties have been discussed and basing on the material on record, the learned Arbitrator held that the claim of the claimant has not become time barred and this issue of time barred in favour of the claimant and against the respondent."

In para-13 the learned District Judge taking into account a decision of Hon'ble Supreme Court in the case of ***Oil & Natural Gas Corporation ltd. Vrs. Saw Pipe Ltd.*** reported in AIR 2003 SC 2629, observed for the limited scope with the learned District Judge involving proceeding U/s.34 of the Act,

1996, there is no scope with it to interfere in the first partial award, thus declined to interfere in the partial award.

16. Before proceeding to answer on issue no.I framed herein, this Court wants to take note of the provisions at Section-21 and Section-43 of the Arbitration and Conciliation Act, 1996, which are re-produced as herein below :-

> "21. Commencement of arbitral proceedings- Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.
>
> 43. Limitations. – (1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.
>
> (2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in section 21.
>
> (3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.
>
> (4) Where the court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (3 6 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted."

While Section-21 of the Act, 1996 makes it clear that arbitral proceeding in respect of a particular dispute commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent. Section-43 of the Act while ensuring application of provision of Limitation Act, 1963 to arbitration proceeding as it applies to courts also provide under Sub-Section (2), that for purpose of this Section and Limitation Act an arbitration shall be deemed to have commenced on the date referred to Section-21.

17. Now coming to factual aspect involving the claim of the respondent, this Court finds, it involves the following chronology of events:-

Respondent-claimant being a manufacturer and seller of Defoamer selected for supply of 800 MT of Defoamer for a total value of Rs.6,72,60,880/-. Letter of intent was issued on 2.11.2016, which followed

with a purchase order on 24.1.2007 with specific supply of 800 MT of Defoamer, total value is Rs.6,72,60,880/-. There appears, there were another six purchase orders with similar quantities. They were all clubbed together in seven purchase orders and in terms of minutes of meeting dated 6.6.2007 entered into between the parties. Claimant made a total sale of 1911 MT of Defoamer worth Rs.15,35,82,483/-, against which the present appellant-Company issued 'C' Form worth Rs.15,27,17,124/- for corresponding 1900 MT against which the claimant/respondent herein has already received till the date of claim petition, a total sum of Rs.9,00,08,238. In the meantime the claimant made a correspondence on 7.5.2007. Then again another correspondence dated 5.6.2007 agreeing therein to supply Defoamer till the proposed cycle of 308880 MT production of P2O5 gets over. It further reveals, the claimant has made a total supply of 911 MT shows worth Rs.15,35,82,483/- as on 26.11.2007. It further reveals that in the meeting between the parties on 6.6.2007 it was discussed and agreed that the claimant has completed supply of 800 MT Defoamer by 11.4.2007, but since the production of P2O5 was at lower side, the claimant had to supply Defoamer till expiry of the contract period of one year or completion of production of 3.08.880 MT of P_2O_5 at agreed rate, terms and conditions whichever is earlier. It is also borne from the record that the claimant's last sale was under bill no.07-0743 dated 26.11.2007. The materials and the pleading available on record further go to show that there were interactions in between the parties between November, 2007 till 6.6.2011 when the claimant issued a legal notice through its Advocate demanding its dues from the respondent. It also appears, for the denial of the present appellant to the demand under correspondence of the claimant, vide letter dated 6.6.2011 till 27.9.2012 when the present appellant declined the request of the respondent-claimant the issue on claim was kept alive. From the statement of claim, this Court on the claim of cause of action finds, the claimant-respondent has the following pleading.

> "25.The claimant says that even then the parties continued to have interactions and finally the Claimant by its Statement 2 dated 21.2.2014 re-submitted/re-explained its stand in general & stand on above said letter dated 27.9.12. The said Statement is self-explanatory and is filed herewith as a matter of record (Annexure-P).
>
> 29. The claimant specifically seeks the correct interpretation of the terms and conditions mentioned in the P.O. dated 24.1.2007 at Anne "E" which is applicable to all other 6 purchase orders. The claimant be allowed to lead evidence and argue on this point of interpretation which will fix responsibility of the respondent to make good the legitimate dues of this claimant + interest thereon till realization.

> 31. (d) The cause of action then continued to occur till 27.9.2012 when the technical director of the respondent through his even dated letter first expressed that the payment may not be made on technical grounds.
>
> (e) The cause of action thereafter continued till the claimant was asked to issue statement no.1 dated nil and statement no.2 dated 21.2.2014 during which period of about 2 years, the issue continued to get addressed from all angles from both sides.
>
> (f) The cause of action then arose when the claimant finally issued a notice dated 1.10.2014 calling for arbitration and it continued till filling of this claim before this Hon'ble Authority."

18. Above clear statement of the claimant/respondent leaves no doubt that the parties remain engaged in the matter of payment till 27.9.2012 and subsequent also till 21.2.2014 when the claimant was asked to submit further materials. Lastly on 1.10.2014 when the claimant-respondent herein served the notice opting for Arbitration. Thus, it appears, the date of notice pressing for arbitration is the date for the purpose of limitation continued even beyond 1.10.2014. Ultimately the claimant was constrained to give a notice dated 1.10.2014 showing its ultimate intimation to go for arbitration of the dispute between the parties. It is strange to note here that there is no contradiction to the claim of the claimant-respondent in paragraphs-25, 29 & 31(d)(e)(f) so also to the above developments, on the other hand, there is a casual reply by the appellant herein in its response to the claim application. Looking to the provisions contained in Section-21 and Section-43(2) of the Act, 1996 on conjoint reading of the provision at Section-21 & Section-43(2) goes to make it clear that the arbitration commences on the date, on which a request for the dispute to be referred to arbitration is received by the respondent. There is no denial to the fact that the claimant vide notice dated 6.6.2011 made the claim for payment of balance sale price with interest as indicated therein, rather such claim was denied by the present appellant by its correspondence dated 27.9.2012 and finally the claimant-respondent issued a notice to opt for arbitration on 1.10.2014 and there appears no material in denial of any such notice by the appellant herein. Therefore, looking to the legal provision indicated herein above, this Court finds, even though there is no material/pleading as to when the notice dated 1.10.2014 by the claimant was received by the present appellant and further this Court not finding any dispute by the appellant on issuance of such notice, this Court finds, in the worse the cause of action in raising the arbitration proceeding at the minimum becomes 1.10.2014.

This Court here going through the decision of the Hon'ble apex Court in the case of ***Major (Retd.) Inder Singh Rekhi vrs. Delhi Development Authority*** reported in (1988) 2 SCC 338 from paragraph-4 finds as follows :-

> "4. Therefore, in order to be entitled to order of reference under Section 20, it is necessary that there should be an arbitration agreement and secondly, difference must arise to which this agreement applied. In this case, there is no dispute that there was an arbitration agreement. There has been an assertion of claim by the appellant and silence as well as refusal in respect of the same by respondent. Therefore, a dispute has arisen regarding non-payment of the alleged dues of the appellant. The question is for the present case when did such dispute arise. The High Court proceeded on the basis that the work was completed in 1980 and, therefore, the appellant became entitled to the payment from that date and the cause of action under Article 137 arose from that date. But in order to be entitled to ask for a reference under Section 20 of the Act there must not only be an entitlement to money but there must be a difference or dispute must arise. It is true that on completion of the work a right to get payment would normally arise but where the final bills as in this case have not been prepared as appears from the record and when the assertion of the claim was made on 28th February, 1983 and there was non-payment, the cause of action arose from that date, that is to say, 28th of February, 1983. It is also true that a party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill had not been finally prepared, the claim made by a claimant is the accrual of the cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an arbitrator under Section 8 or a reference under Section 20 of the Act. See Law of Arbitration by R.S. Bachawat, 1st Edition, page 354. There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion in denying, not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case."

This case has clear support to the case of the claimant/respondent and supports the first partial award of the learned Arbitrator.

Similarly in the case of ***State of Orissa & another vrs. Damodar Das*** reported in (1996) 2 SCC 216, Hon'ble apex Court in paragraphs-5 & 6 has the following discussions :-

> "5. *Russell on Arbitration* by Anthony Walton (19th Edition) at page 4-5 states that the period of limitation for commencing an arbitration runs from the date on which the "cause of arbitration" accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned. The period of limitation for the commencement of the arbitration runs from, the date on which, had there been no arbitration clause, the cause of action would have accrued:

> "Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued".
>
> Even if the arbitration clause contains a provision that no cause of action shall accrue in respect of any matter agreed to be referred until an award is made time still runs from the normal date when the cause of action would have accrued if there had been no arbitration clause.
>
> 6. In *Law of Arbitration* by Justice Bachawat at page- 549, commenting on Section 37, it is stated that subject to the Limitation Act, 1963, every arbitration must be commenced within the prescribed period. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date. when the cause of action accrues, so in the case of arbitrations the claim is not to be put forward after the expiration of" a specified number of years from the date when the claim accrues. For the purpose of Section 37(1) 'action' and 'cause of arbitration' should be construed as arbitration and cause of arbitration. The cause of arbitration arises when the claimant becomes entitled to raise the question, that is, when the claimant acquires the right to require arbitration. An application under Section 20 is governed by Article 137 of the schedule to the Limitation Act, 1963 and must be made within 3 years from the date when the right to apply first accrues. There is no right to apply until there is a clear and unequivocal denial of that right by the respondent. It must, therefore, be clear that the claim for arbitration must be raised as soon as the cause for arbitration arises as in the case of cause of action arisen in a civil action."

In the circumstance and for the rulings of the Hon'ble apex Court as narrated herein above, this Court finds, there is no infirmity in the order passed by the learned Arbitrator on 23.7.2015 involving the first partial award. The learned District Judge having decided the matter in approval of the findings of the learned Arbitrator for the reason assigned herein above, this Court also observes, there is no infirmity in the order of the learned District Judge involving Arbitration Proceeding No.21/2015. Issue No.1 framed by this Court is answered accordingly.

19. It is at this stage, this Court takes into account some of the decisions relevant for the purpose, more particularly looking to the restrictions imposed on the authority deciding the matters under Section 34 of the Act, 1996. In the case of ***Oil & Natural Gas Corporation Ltd. vrs. SAW Pipes Ltd.*** reported in AIR 2003 SC 2629, the Hon'ble apex Court in paragraph-31 has observed as follows :-

> "31. Therefore, in our view, the phrase 'public policy of India' used in S.34 in context is required to be given a wider meaning. It can be sated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or

harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it patently in violation of statutory provision cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term public policy in Renusagar's case (supra), it is required to be held that the award could be set aside if it is patently illegal. Result would be-award could be set aside if it is contrary to :-

(a) Fundamental policy of Indian law ; or
(b) The interest of India ; or
(c) Justice or morality, or
(d) In additional, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void."

In the case of ***Associate Builders vrs. Delhi Development Authority*** reported in (2015) 3 SCC 49, the Hon'ble apex Court in paragraphs-15, 16 & 17 has observed as follows :-

"15. This section in conjunction with Section 5 makes it clear that an arbitration award that is governed by Part I of the Arbitration and Conciliation Act, 1996 can be set aside only on grounds mentioned under Section 34(2) and (3), and not otherwise. Section 5 reads as follows :

5. *Extent of judicial intervention*-Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this part.

16. It is important to note that the 1996 Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration; also to provide that the tribunal gives reasons for an arbitral award; to ensure that the tribunal remains within the limits of its jurisdiction; and to minimize the supervisory roles of courts in the arbitral process.

17. It will be seen that none of the grounds contained in sub-section (2)(a) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances."

In the case of ***Sutlej Construction Ltd. vrs. Union Territory of Chandigarh*** reported in 2018 (4) Arb. LR 210 (SC) the Hon'ble apex Court in paragraph-10 has observed as follows :-

> "10. We are not in agreement with the approach adopted by the learned single Judge. The dispute in question had resulted in a reasoned award. It is not as if the arbitrator has not appreciated the evidence. The arbitrator has taken a plausible view and, an in our view, as per us the correct view, that the very nature of job to be performed would imply that there has to be an area for unloading and that too in the vicinity of 5 kilometres as that is all that the appellant was to be paid for. The route was also determined. In such a situation to say that the respondent owed no obligation to make available the site cannot be accepted by any stretch of imagination. The unpreparedness of the respondent is also apparent from the fact that even post termination it took couple of years for the work to be carried out, which was meant to be completed within 45 days. The ability of the appellant to comply with its obligations were inter dependent on the respondent meeting its obligations in time to facilitate appropriate areas for unloading of the earth and for its compacting. At least it is certainly a plausible view."

In the case of ***Aez Infratech Pvt. Ltd. vrs. Vibha Goel & another*** reported in 2017(5) Arb.LR 210 (Delhi), in paragraphs-10 & 26, the Delhi High Court observed as follows :-

> "10. I may now deal with the submissions of learned counsel for the petitioner. The first plea raised is that the agreement dated 9.9.2009 is actually an agreement for the purpose of offering a security to the respondents. It has been urged that this plea was not taken in the reply to the claim petition but an amendment was sought to the reply by filing an appropriate application which the learned Arbitrator had wrongly declined. A perusal of the Award would show that the learned Arbitrator has dealt with the said contention of the petitioner. Hence, even though the application for amendment of the reply was dismissed, the award deals with the said contentions of the petitioner. There is hence no merit in the contention of the petitioner that the amendment sought to the reply was wrongly dismissed by the learned Arbitrator.
>
> 26. Hence, there is no merit in the contentions of the petitioner. The Award is a plausible award based on the facts placed on record. There are no reasons to interfere in the Award. The petition is accordingly dismissed. All pending applications, if any, also stand disposed of."

Though the case involved here was under the provision of 1940 Act, yet in paragraphs-24, 26, 27, 45, 46, 49, 66 & 86, the Hon'ble apex Court in the case of ***Milkfood Ltd.*** vrs. ***GMC Ice Cream (P) Ltd.*** reported in **(2004) 7 SCC 288** observed as follows :-

> "24. We may notice that Section 14 of the English Arbitration Act 1996 deals with commencement of arbitral proceedings. Sub-section (1) of Section 14 provides that the parties are free to agree when arbitral proceedings are to be regarded as commenced for the purpose of this Part and for the purposes of the Limitation Act. Section 14(3) provides that in the absence of such agreement, the provisions contained in sub-sections (3) to (5) shall apply. Both the 1940 Act and the English Arbitration Act place emphasis on service of the notice by one party on the other party or parties requiring him or them to submit the matter to arbitration rather than

receipt of the request by the respondent from the claimant to refer the dispute to arbitration. Commencement of an arbitration proceedings for certain purposes is of significance. Arbitration proceedings under the 1940 Act may be initiated with the intervention of the court or without its intervention. When arbitration proceeding is initiated without intervention of a Court, Chapter II thereof would apply. When there exists an arbitration agreement the resolution of disputes and differences between the parties are to be made in terms thereof. For the purpose of invocation of the arbitration agreement, a party thereto subject to the provisions of the arbitration agreement may appoint an arbitrator or request the noticee to appoint an arbitrator in terms thereof. In the event, an arbitrator is appointed by a party, which is not opposed by the other side, the arbitrator may enter into the reference and proceed to resolve the disputes and differences between the parties. However, when despite http://JUDIS.NIC.IN SUPREME COURT OF INDIA Page 8 of 32 service of notice, as envisaged in sub-section (1) of Section 8 of the 1940 Act, the appointment is not made within fifteen clear days after service of notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be. By reason of sub-section (2) of Section 8 of the 1940 Act, a legal fiction has been introduced to the effect that such an appointment by the court shall be treated to be an appointment made by consent of all parties. Section 8, therefore, implies that where an appointment is not made with the intervention of the court but with the consent of the parties, the initiation of the arbitration proceeding would begin from the service of notice. Section 37 of the 1940 Act provides that all the provisions of the Indian Limitation Act, 1908 shall apply to arbitrations and for the purpose of the said section as also the Indian Limitation Act, 1908, an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator or where the agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated.

26. The commencement of an arbitration proceeding for the purpose of applicability of the provisions of the Indian Limitation Act is of great significance. Even Section 43(1) of the 1996 Act provides that the Limitation Act, 1963 shall apply to the arbitration as it applies to proceedings in court. Sub-section (2) thereof provides that for the purpose of the said section and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred to in section 21.

27. Article 21 of the Model Law which was modelled on Article 3 of the UNCITRAL Arbitration Rules had been adopted for the purpose of drafting Section 21 of the 1996 Act. Section 3 of the 1996 Act provides for as to when a request can be said to have been received by the respondent. Thus, whether for the purpose of applying the provisions of Chapter II of the 1940 Act or for the purpose of Section 21 of the 1996 Act, what is necessary is to issue/serve a request/notice to the respondent indicating that the claimant seeks arbitration of the dispute.

45." Commencement of an arbitration proceeding" and "commencement of a proceeding before an arbitrator" are two different expressions and carry different meanings.

46. A notice of arbitration or the commencement of an arbitration may not bear the same meaning, as different dates may be specified for commencement of arbitration for different purposes. What matters is the context in which the expressions are used. A notice of arbitration is the first essential step towards the making of a default appointment in terms of Chapter II of the Arbitration Act, 1940. Although at that point of time, no person or group of persons was charged with any authority to determine the matters in dispute, it may not be necessary for us to consider the practical sense of the term as the said expression has been used for a certain purpose including the purpose of following statutory procedures required therefor. If the provisions of the 1940 Act apply, the procedure for appointment of an arbitrator would be different than the procedure required to be followed under the 1996 Act. Having regard to the provisions contained in Section 21 of the 1996 Act as also the common-parlance meaning given to the expression "commencement of an arbitration" which, admittedly, for certain purpose starts with a notice of arbitration, is required to be interpreted which would be determinative as regards the procedure under te one Act or the other required to be followed. It is only in that limited sense the expression "commencement of an arbitration" qua "a notice of arbitration" assumes significance.

49. Section 21 of the 1996 Act, as noticed hereinbefore, provides as to when the arbitral proceedings would be deemed to have commenced. Section 21 although may be construed to be laying down a provision for the purpose of the said Act but the same must be given its full effect having regard to the fact that the repeal and saving clause is also contained therein. Section 21 of the Act must, therefore, be construed having regard to Section 85(2)(a) of the 1996 Act. Once it is so construed, indisputably the service of notice and/or issuance of request for appointment of an arbitrator in terms of the arbitration agreement must be held to be determinative of the commencement of the arbitral proceeding.

66. Commencement of arbitration proceeding for the purpose of limitation or otherwise is of great significance. If a proceeding commences, the same becomes relevant for many purposes including that of limitation. When Parliament enacted the 1940 Act, it was not in its contemplation that 46 years later it would re-enact the same. The court, therefore, while taking recourse to the interpretative process must notice the scheme of the legislations concerned for the purpose of finding out the purport of the expression "commencement of arbitration proceeding". In terms of Section 37 of the 1940 Act, law of limitation will be applicable to arbitrators as it applies to proceedings in court. For the purpose of invoking the doctrine of lis pendens, Section 14 of the Limitation Act, 1963 and for other purposes presentation of plaint would be the date when a legal proceeding starts. So far as the arbitral proceeding is concerned, service of notice in terms of Chapter II of the 1940 Act shall set the ball in motion whereafter only the arbitration proceeding commences. Such commencement of arbitration proceeding although in terms of Section 37 of the Act is for the purpose of limitation but it in effect and substance will also be the purpose for determining as to whether the 1940 Act or the 1996 Act would apply. It is relevant to note that it is not mandatory to approach the court for appointment of an arbitrator in terms of sub-section (2) of Section 8 of the 1940 Act. If the other party thereto does not concur to the arbitrator already appointed or nominates his

> own arbitrator in a given case, it is legally permissible for the arbitrator so nominated by one party to proceed with the reference and make an award in accordance with law. However, in terms of sub-section (2) of Section 8 only a legal fiction has been created in terms whereof an arbitrator appointed by the court shall be deemed to have been nominated by both the parties to the arbitration proceedings.
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> 86. It is one thing to say that the parties agree to take recourse to the procedure of the 1996 Act relying on or on the basis of tenor of the agreement as regards applicability of the statutory modification of re-enactment of the 1940 Act but it is another thing to say, as has been held by the High Court, that the same by itself is a pointer to the fact that the appellant had agreed thereto. If the arbitral proceedings commenced for the purpose of the applicability of the 1940 Act in September 1995, the question of adopting a different procedure laid down under the 1996 Act would not arise."

In the case of ***Maharashtra State Electricity Distribution Company Ltd. vrs. Datar Switchgear Ltd. & others*** reported in 2018(1) Arb.LR 236 (SC), the Hon'ble apex Court in paragraph-43 has observed as follows :-

> "43. Categorical findings are arrived at by the Arbitral Tribunal to the effect that insofar as respondent No.2 is concerned, it was always ready and willing to perform its contractual obligations, but was prevented by the appellant from such performance. Another specific finding which is returned by the Arbitral Tribunal is that the appellant had not given the list of locations and, therefore, its submission that respondent No.2 had adequate lists of locations available but still failed to install the contract objects was not acceptable. In fact, on this count, the Arbitral Tribunal has commented upon the working of the appellant itself and expressed its dismay about lack of control by the Head Office of the appellant over the field offices which led to the failure of the contract. These are findings of facts which are arrived at by the Arbitral Tribunal after appreciating the evidence and documents on record. From these findings it stands established that there is a fundamental breach on the part of the appellant in carrying out its obligations, with no fault of respondent No.2 which had invested whooping amount of Rs.163 crores in the project. A perusal of the award reveals that the Tribunal investigated the conduct of entire transaction between the parties pertaining to the work order, including withholding of DTC locations, allegations and counter allegations by the parties concerning installed objects. The arbitrators did not focus on a particular breach qua particular number of objects/class of objects. Respondent No.2 is right in its submission that the fundamental breach, by its very nature, pervades the entire contract and once acted committed, the contract as a whole stands abrogated. It is on the aforesaid basis that the Arbitral Tribunal has come to the conclusion that the termination of contract by respondent No.2 was in order and valid. The proposition of law that the Arbitral Tribunal is the master of evidence and the findings of fact which are arrived at by the arbitrators on the basis of evidence on record are not to be scrutinised as if the Court was sitting in appeal now stands settled by catena of judgments pronounced by this Court without any exception thereto."

20. Reading of aforesaid judgments, this Court finds, the power of the District Judge dealing with matter under Section 34 of the Act, 1996 is very very restricted and as such, this Court approves the observation of the District Judge on its scope in deciding such matters. Coming to issue no.2 framed by this Court particularly on the allegation of Sri Parija, learned senior counsel that it was required for the learned District Judge to answer the question taken note of in paragraph-4 of the impugned judgment, on Perusal of the discussions in paragraphs-11 & 12, this Court finds, the question taken note of by the learned District Judge in paragraph-4 of the impugned judgment has been taken care of. Thus this issue is also answered against the appellant. For the observation of this Court on the question as to whether the claim of the respondent affected by limitation taking into account the provision of law under Sections-21 & 43(2) of the Act, 1996 and for the plethora of decisions restricting interference in the award may be though here involves a partial award supporting the view of the learned District Judge involving the impugned order, this Court finds, there is no infirmity in the impugned judgment dated 28.8.2018 as well as the first partial award dated 23.7.2017 requiring interference by this Court. As a consequence the Arbitration Appeal stands dismissed for having no substance.

21. Considering that the arbitration proceeding before the learned Arbitrator involved lot of litigations not only to the District Court but also to the High Court so also to the Hon'ble apex Court in several forms, this Court finds, there is sufficient loss of time in resolving the main dispute involved herein. In the process, to avoid any further loss of time, this Court directs both the parties to appear before the learned Arbitrator along with a copy of this judgment in the week commencing 24th of March and to take the date of further proceeding involving the Arbitration Claim No.DAC/665(D) 6-12 of 2014.

Keeping in view the delay, the learned Arbitrator is also requested to conclude the arbitration proceeding pending before it within a period of four months. Both the parties are restrained from resorting to dilly dally tactics and are directed to cooperate with the learned Arbitrator for timely disposal of the Arbitration Case involving the other issues involved therein.

22. Ultimately, the Arbitration Appeal stands dismissed and in the circumstance, there is no order as to cost.

*SLP No. 7861/2019, filed against this judgment has ben dismissed vide order dated 01.04.2019 by the Hon'ble Supreme Court.

2019 (I) ILR - CUT- 816

BISWANATH RATH, J.

W.P.(C) NO.13148 OF 2016

SMT. SUKANTI MALIK .....Petitioner

.Vs.

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

FOREST ACT, 1972 – Section 56 read with Rule 21 of the Orissa Timber and other Forest Produce Transit Rules, 1980 – Pickup Van was seized within the State of Odisha for carrying timber alleged to be illegally transported without having a Timber Transit Permit from West Bengal to Odisha – Initiation of proceeding under section 56 of the Forest Act and direction for confiscation of the vehicle as well as the forest produce – Appeal against the confiscation order dismissed – Writ petition challenging such orders – Petitioner had the transit permit from the appropriate authority of West Bengal Govt. – Held, the initiation of proceeding under section 56 of the Act illegal, the impugned orders set aside, however the proceeding initiated under Rule 21 of the Orissa Timber and other Forest Produce Transit Rules, 1980 shall continue in accordance with law as the transportation has effected within the State of Odisha without having a transit permit from Odisha Govt. (Para 5)

For Petitioner : M/s. U.C. Mishra, A. Mishra, A. Bal, J.K. Mohapatra, B.P. Sasmal.

For Opp. Parties : Mr. S.N. Mishra, Addl. Govt. Adv.

JUDGMENT Date of Hearing & Judgment : 25.03.2019

BISWANATH RATH, J.

This writ petition has been filed challenging the order passed by the learned District Judge, Balasore in FAO No.74/2015 and further seeking a direction to the opposite parties more particularly the opposite party no.4 to release the seized Ashok Leyland Pickup Van bearing registration No.OD-01-D-2137.

2. Short background and the undisputed fact involving the case is that the petitioner is the owner of the Ashok Leyland Pickup Van bearing registration No.OD-01-D-2137. The vehicle of the petitioner was seized for carrying timber alleged to be illegally transported with the knowledge and connivance of driver without having a Timber Transit Permit. The pickup van appears to have been firstly detected by the Nilagiri Police and on information the Forest officials seized the vehicle alongwith forest produces.

On seizure and upon entering into enquiry an Offence case vide No.13K dated 7.10.2014 was initiated for confiscation of the vehicle as well as the forest produces appearing to be a proceeding U/s.56 of the Forest Act. Defending the case, the opposite party herein examined seven witnesses and the petitioner herein examined two witnesses. The competent authority rejected the claim of the petitioner and directed for confiscation of both the vehicle involved as well as goods involved. On filing of an appeal, the District Judge also rejected the appeal. Record further reveals, in the meantime, a proceeding U/s.21 of the Orissa Timber and other Forest Produce Transit Rules, 1980 has also been initiated.

3. Shri Mishra, learned counsel for the petitioner challenging the orders of the original authority as well as the appellate authority submitted that the transportation of the goods was made from Nimain Nagar in the State of West Bengal to Chintamanipur, Nilagiri in the State of Odisha and admittedly, the transportation of the materials involved was made after obtaining Timber Transit Permit from the competent authority at the West Bengal end but however, for transportation inside the State of Odisha there was no Timber Transit permit obtained. Shri Mishra, learned counsel contended that for bona fide transportation of Timber under the cover of T.T. Permit granted by the authority in West Bengal, the Forest authority instead of initiating the case U/s.56 of the Forest Act should have asked the driver involved for obtaining a Timber Transit permit for further transportation of the materials inside Odisha. Shri Mishra, thus contended that it is, for the above background of the case and particularly keeping in view that the goods transported did possess a Timber Transit permit from the West Bengal end for the initial phase of journey, obtaining a Timber Transit Permit inside the State of Odisha was a mere formality. Learned counsel for the petitioner, therefore, taking this Court to the provision at Section 56 of the Act, 1972 and Rule 4 of the Rules, 1980 contended that there is no question of attracting the provision of Section 56 of the Orissa Forest Act and it is, on the other hand, taking this Court to the criminal proceeding already initiated involving the petitioner U/s.21 of the Rules, 1980, Shri Mishra, learned counsel for the petitioner contended that the Forest authority took right step in proceeding against the Driver in initiating a proceeding under Rule 21 of the Rules, 1980 but however failed to appreciate the non-involvement of the proceeding U/s.56 of the Act. It is, in the above premises, learned counsel for the petitioner contended that the Section 56 proceeding becomes illegal and therefore, this Court interfering in both the orders of the original authority as

well as the appellate authority involving the Section 56 of the Act, 1972 proceeding should set aside the same.

4. Shri S.N. Mishra, learned Additional Government Advocate for the State opposite parties, while not disputing that the first phase of the Transportation of the goods under confiscation did possess a valid Timber Transit Permit issued by the competent authority, on the other hand, taking this Court to the provision at Section 56 of the Act submitted that once the transportation of the wood is found to be without having any Timber Transit permission, the provision at Section 56 of the Act is automatically attracted. In the circumstance, Shri S.N. Mishra, learned Additional Government Advocate contended that there being no Timber Transit permit for transportation of the materials inside the State of Odisha, there is no illegality in initiating a proceeding U/s.56 of the Act. Shri S.N. Mishra, learned Additional Government Advocate thus contended that there is no illegality in either of the impugned orders requiring interference in the same.

5. Considering the rival contentions of the parties, this Court finds, there is no denial that the seized goods being transported in the vehicle belonging to the petitioner from the West Bengal end but however, with a Timber Transit permits up to the border of the State of Odisha. It is only the vehicle reaching the border of the Odisha, it was ascertained that the vehicle involved was not having the Timber Transit permit to transport the goods inside the state of Odisha. This Court here taking into account the provision at Section 56 of the Orissa Forest Act, 1972 and the Rules 4 & 21 of the Orissa Timber & OFP Transit Rules, 1980, finds both the provisions reads as follows:

> "56. Seizure of property liable to confiscation. — (1) When there is reason to believe that a forest offence has been committed in respect of any forest produce, such produce, together with all tools, ropes, chains, boats, vehicles or cattle used in committing any such offence may be seized by any Forest Officer or Police Officer.
>
> (2) Every officer seizing any property under this section shall place, on such property a mark indicating that the same has been so seized and shall as soon as may be, except where the offender agrees in writing to get the offence compounded, 16[either produce the property seized before an officer not below the rank of an Assistant Conservator of Forests authorised by the State Government in this behalf by notification (hereinafter referred to as the authorised officer) or] make a report of such seizure to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made :
>
> Provided that, when the forest produce with respect to which such offence is believed to have been committed is the property of Government, and the offender is

unknown, it shall be sufficient if the officer makes, as soon as may be, a report of the circumstances to his official superior and the Divisional Forest Officer.

[(2-a) Where an authorised officer seizes any forest produce under sub-section (1) or where any such forest-produce is produced before him under sub-section (2) and he is satisfied that a forest offence has been committed in respect thereof, he may order confiscation of the forest produce so seized or produced together with all tools, ropes, chains, boats, vehicles or cattle used in committing such offence.

(2-b)No order confiscating any property shall be made under sub-section (2-a) unless the person from whom the property is seized is given —

(a) a notice in writing informing him of the grounds, on which it is proposed to confiscate such property;

(b) an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds for confiscation; and

(c) a reasonable opportunity of being heard in the manner.

(2-c) Without prejudice to the provisions of sub-section (2-b), no order of 14 Ins. by Orissa Act 9 of 1983. 15 Re-numbered by Orissa Art 2 of 1991. 16 Ins. by Orissa Act 9 of 1983. 17 Ins. by idid. 20 confiscation under sub-section (2-a) of any tool, rope, chain, boat, vehicle or cattle shall be made if the owner thereof proves to the satisfaction of the authorised officer 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 the tool, rope, chain, boat, vehicle or cattle, in committing the offence and that each of them had taken all reasonable and necessary precautions against such use.

(2-d) Any Forest Officer not below the rank of a Conservator of Forests empowered by the Government in this behalf by notification, may, within thirty days from the date of the order of confiscation by the authorised officer under sub-section (2-a), either suo motu or on application, call for and examine the records of the case and may make such inquiry to be made and pass such orders as he may think fit:

Provided, that no order prejudicial to any person shall be passed without giving him an opportunity of being heard.

(2-e) Any person aggrieved by an order passed under sub-section (2-d) or subsection (2-d) may, within thirty days from the date of communication to him of such order, appeal to the District Judge having jurisdiction over the area in which the property has been seized, and the District Judge shall after giving an opportunity to the parties to be heard, pass such order as he may think fit and the order of the District Judge so passed shall be final.]

(3) The property seized under this section shall be kept in the custody of a Forest Officer or with any third party, until the compensation for compounding the offence is paid or until an order of the Magistrate directing its disposal is received."

[Provided that the seized property shall not be released during pendency of the confiscation proceeding or trial even on the application of the owner of the property for such release.]

Rule 4 and 21 of the Orissa Timber & OFP Transit Rules, 1980 reads as follows:

> "**4.Transit permits –** Except as provided in Rule 5, all forest produce in transit by land, rail or water shall be covered by a permit hereinafter called the "Transit Permit" to be issued free of cost by the Divisional Forest officer or by Assistant Conservator of Forests authorized by him in that behalf:
>
> Provided that the Range Officer or a Forester when duly authorized in that behalf by the Divisional Forest Officer may issue transit permit in cases where no verification at the stump site is necessary:
>
> Provided further that in respect of a minor forest produce collected by the Orissa State Tribunal Development Co-operative Corporation Ltd., a Branch Manger or a Divisional Manager and in respect of tassar cocoom collected by the State Tassar Co-operative Society Ltd., Orissa, the Assistant Director of Sericulture can issue transit permits:
>
> [Provided also that for the removal of timber and fire-wood obtained from trees (excluding those species mentioned in Schedule-II) up to two hundred and fifty in number raised in "Farm Forestry" or "Forest Farming for the Rural Poor" plantations under the Orissa Social Forestry Project, the Range Officer may issue the transit permit]:
>
> [Provided also that for removal of bamboos for industrial and commercial purposes from the Sale depots of the Orissa Forest Development Corporation Ltd., the Supervisors of the said Corporation who have passed Matriculation may issue the transit permit.]
>
> **21.Penalties –** Whoever contravenes any of the provisions of these rules shall be punished with imprisonment for a term which may extend to five years and with fine which may extend to five thousand rupees:
>
> Provided that where offence is committed after sunset and before sunrise, or after preparation for resistance to lawful authority or where the offender has been previously convicted for a like offence, the offender shall be inflicted punishment with imprisonment for a term which shall not be less than three years but which may extend to seven years and with fine which may extend to ten thousand rupees.

Taking into account the facts involving the seizure of goods with vehicle on the premises of not having the T.T. permit for further part of its journey inside the State of Odisha and for the vehicle had the T.T. permit for transportation of goods therein uptill the border of Odisha being granted by the competent authority and going through the provision at Section 56 of the Act, 1972, this Court finds, there did not involve any offence U/s.56 of the Act, 1972.

It is, at this stage of the matter, considering that the petitioner was already granted with a Timber Transit permit by the West Bengal authorities, this Court finds, there involved no offence U/s.56 of the Act, 1972. Thus, this Court observes, there was no question of initiating any proceeding U/s.56 of the Act, 1972. This Court, accordingly, interfering in the initiation of the proceeding as well as the order passed by the competent authority involving the OR case No.13K dated 7.10.2014 and the consequential order passed by the appellate authority, sets aside the both.

This Court, however, observes, for the petitioner having no the further Timber Transit permit to transport the goods so seized within the territory of Odisha, the proceeding initiated under Rule 21 of the Rules, 1980 will continue and will be decided in accordance with law and providing opportunity of contest and hearing to the petitioner.

6. The writ petition succeeds. No cost.

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2019 (I) ILR - CUT- 821

BISWANATH RATH, J.

ARBA NOS. 28, 29 & 30 OF 2014

IN ARBA NO.28 OF 2014

SUPERINTENDING ENGINEER,
RENGALI CANAL CIRCLE & ANR. ……..Appellants

.Vs.

GOKULANANDA JENA ……...Respondent

IN ARBA NO.29 OF 2014

CHIEF ENGINEER & BASIN MANAGER,
BRAHMANI LEFT BASIN & ANR. ……Appellants

.Vs.

GOKULANANDA JENA ……Respondent

IN ARBA NO.30 OF 2014

SUPERINTENDING ENGINEER,
RENGALI CANAL CIRCLE & ANR. ……Appellants

.Vs.

GOKULANANDA JENA ……Respondent

ARBITRATION AND CONCILIATION ACT, 1996 – Section 34 – Application challenging the award filed after the prescribed period – Delay – Application filed under Section 5 of the Limitation Act for condonation of such delay – Whether maintainable? – Held, no, the provision of Section 5 of the Limitation Act not applicable to arbitration proceeding. (Simplex Infrastructure Ltd. vrs. Union of India reported in (2019) 2 SCC 455 followed.)

Case Laws Relied on and Referred to :-

1. (2019) 2 SCC 455 : Simplex Infrastructure Ltd. Vs. Union of India

For Appellants : Sri S.N.Mishra, Addl. Govt. Adv.
For Respondent :M/s.A.K.Mishra, T.Mishra & A.Sahu

JUDGMENT Date of Hearing & Judgment : 29.03.2019

BISWANATH RATH, J.

These Arbitration Appeals involve a challenge to the order dated 27.12.2013 passed by the learned District Judge, Angul involving all the three proceedings initiated under Section 34 of the Arbitration & Conciliation Act, 1996 involved therein and dismissing all such proceedings on the ground of delay.

2. Taking this Court to the provision at Section 34 of the Act, 1996 application, the limitation application and the grounds taken therein, Sri S.N.Mishra, learned Additional Government Advocate for the appellants involving all the three cases submitted that for the ground involved therein, in spite of sufficient reason for condonation of delay having failed to appreciate, the learned District Judge, Angul has arrived at the wrong impugned order, which unless be interfered with and set aside, the State will be at great loss.

3. Sri A.K.Mishra, learned counsel for the respondent on the other hand taking this Court to the grounds taken in the limitation petition, the provision contained in Sections 31(5) & 34 of the Arbitration and Conciliation Act and further the observation made in the impugned order contended that there is right appreciation of the issue involved therein and there has been right refusal of condonation of delay involving Arbitration Case Nos.18, 17 & 19 of 2012 by the learned District Judge. It is in the above premises, Sri Mishra, learned counsel for the respondent prayed this Court for dismissal of the three Arbitration Appeals for having no substance.

4. Considering the rival contentions of the parties and taking into account the plea involving the limitation petition filed before the learned District Judge, Angul in the Section 34 proceeding, this Court finds, the plea

of the State in paragraphs-4 to 12 of the Section 5 application therein as follows :-

> "4. That, in the instant case, it is the Government of Odisha in the DOWR which is the 'party referred to in Sub-Section (3) of Section 34 of the Act, 1996. The Government of Odisha was not a party before the Arbitral Tribunal, even though the agreement was executed with the Government of Odisha and all payments were being made by the Government of Odisha in the Department of Water Resources.
>
> 5. That, for the first time the Government of Odisha in the Department of Water Resources received the copy of the Award dtd.15.11.2011 on 19.3.2012 from the Appellant No.2 2hich was received by the Appellant No.2 on 19.11.2011.
>
> 6. That, prior to 19.3.2012, the Government of Odisha in the Department of Water Resources had no knowledge about the arbitral award dtd.15.11.2011.
>
> 7. That, since the Government of Odisha in DOWR was not a party and for the first time came to know about the award on 19.3.2012, the learned Court below ought to have condoned the delay in filling the application U/S.34 of the Act, 1996.
>
> 8. That, the impugned order was passed on 27.12.2013. The certified copy of the Order was applied on 3.1.2014, made ready on 7.1.2014 and the same was received on 7.1.2014.
>
> 9. That on 28.1.2014, the opinion of the learned Govt. Pleader, Angul was received.
>
> 10. That, after receipt of the opinion of the learned Government Pleader as well as the connected papers, the record was placed before the Law Department for necessary approval for filing of Arbitration Appeal.
>
> 11. That, the approval of the Law Department was received vide letter dtd.28.4.2014. Thereafter, the records were handed over to the Office of the learned Advocate General on 14.5.2014.
>
> 12. That, after discussion, the Appeal is made ready on 25.6.2014 and the same is filed on 25.6.2014. Thus, there is a delay of 85 days in filing the accompanying Arbitration Appeal."

5. At this stage, taking into consideration the provision applied herein, this Court finds, the provision at Section 31(5) of the Arbitration & Conciliation Act, 1996 reads as follows :-

> "31. Form and contents of arbitral award-(5) After the arbitral award is made, a signed copy shall be delivered to each party."
>
> Further Sub-Section (3) of Section 34 of the Act reads as follows :-
>
> "34. Application for setting aside arbitral award. –
>
> (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

> Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

Considering the plea involving the application for condonation of delay and the aforesaid provisions, this Court finds, there is no doubt, there is scope for condonation of delay but subject to however the condition imposed in Sub-Section (3) of Section 34 of the Arbitration & Conciliation Act, 1996, i.e., in the first step time for filing of the Appeal beyond 90 days can be extended up to 30 days, further in the event there is any delay on the part of the party applying under Section 34 for its bona fide moving a wrong forum, the time spent therein can also be taken into account while considering application for condonation of delay. Looking to the reason assigned in the limitation petition, this Court finds, there is no satisfaction to the extent of delay beyond the limitation period of 120 days. This Court observes that for limited scope involving condonation of delay, no ground except the time on spending bona fidely in a wrong court can be entertained. Application for condonation of delay involved herein fails the above test and as such could not have been considered.

6. It is at this stage, this Court taking into account the decision of the Hon'ble apex Court in the case of ***Simplex Infrastructure Ltd. vrs. Union of India*** reported in (2019) 2 SCC 455 finds, the Hon'ble apex Court taking the case of this nature vis-à-vis consideration of the application under Section 5 of the Limitation Act has categorically held that there is no application of Section 5 of the Limitation Act to the Arbitration Proceeding and delay can only be condoned subject to the extent indicated in Section 34 of the Arbitration & Conciliation Act, 1996 alone.

7. In the circumstance, for the clear provision of law in the Act, 1996, for the settled position of law by the Hon'ble apex Court involving the decision indicated herein above and for the discussions in rejecting the application for condonation of delay by the learned District Judge, this Court finds, there is no infirmity in the impugned order requiring interference in the same. Consequently, all the Arbitration Appeals mentioned herein above stand dismissed for having no merit.

In the circumstances, there is no order as to cost.

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2019 (I) ILR - CUT- 825

S. K. SAHOO, J.

CRLMC NO. 1157 OF 2013

GITASHREE DEY ……Petitioner

.Vs.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power – Exercise of – Offence alleged under section 337 of the Indian Penal Code – Head Mistress asking the peon to prepare tea in an electrical heater – Peon got injured while preparing tea – FIR by wife of peon – Charge sheet submitted and cognizance taken – Materials available indicate that if the person concerned does not take proper care while preparing tea and got injured, it cannot be said that it was within the knowledge of the petitioner or that she had any intention to cause hurt to the injured person – Criminal proceeding quashed.

For Petitioner : Mr. Suryakanta Dwibedi
For State : Mr. Priyabrata Tripathy, Addl. Govt. Adv.
For Opp. Party No.2 : None

JUDGMENT Date of Hearing & Judgment: 30.07.2018

S. K. SAHOO, J.

The petitioner Gitashree Dey has filed this application under section 482 of Cr.P.C. for quashing the entire criminal proceeding in C.T. Case No.2254 of 2011 pending in the Court of learned Special Judicial Magistrate, Balasore in which as per the order dated 20.03.2012 on receipt of the charge sheet, cognizance of offence has been taken under section 337 of the Indian Penal Code.

2. The prosecution case, in short, is that the petitioner was the Headmistress of Shyam Sundar High School, Motiganj, Balasore and she asked the husband of the informant namely Sanatan Pradhan to prepare tea on 02.12.2011 and while preparing tea in the heater, the husband of the informant sustained injuries.

The first information report was lodged by Tilotama Pradhan (opposite party no.2) on 03.12.2011 before the IIC, Balasore Town police station, Balasore and accordingly, Balasore Town P.S. Case No.348 of 2011 was registered under sections 341/506/337 of the Indian Penal Code and ultimately after completion of investigation, charge sheet was submitted under section 337 of the Indian Penal Code.

3. Mr. Suryakanta Dwibedi, learned counsel appearing for the petitioner contended that the petitioner has already retired from her service and even accepting the entire prosecution case for the sake of argument, the ingredients of offence under section 337 of the Indian Penal Code are not attracted and it cannot be said that the petitioner has acted in a rash and negligent manner by asking the husband of the informant to prepare the tea for which while preparing the tea, the later received some injuries. Learned counsel for the petitioner further submitted that the materials rather indicate that the petitioner offered Rs.50/- (rupees fifty only) to the injured and asked him to bring tea from outside along with biscuits but instead of bringing the tea from outside, the husband of the informant tried to prepare the tea in a heater which was there in the school and he sustained injuries. It is further submitted that since mens rea is absent, the order of taking cognizance and issuance of process should be quashed.

Learned counsel for the State on the other hand submitted that the petitioner being the Headmistress of the school should not have asked the peon to prepare the tea in a heater as there was every likelihood of getting injured by coming in contact with electric current and therefore, the Investigating Officer rightly submitted charge sheet under section 337 of the Indian Penal Code and there is no illegality in the impugned order and therefore, the application should be dismissed.

Section 337 of the Indian Penal Code deals with causing hurt by act endangering life or personal safety of others. The necessary ingredients are (i) hurt must have caused to a person (ii) the causing of hurt must be due to the act of the accused and (iii) such act must have been done with rashness and negligence.

The materials available on record indicate that the petitioner asked the informant's husband to prepare the tea. By asking somebody to prepare the tea, it cannot be said that the petitioner had not done anything rashly or negligently. If the person concerned does not take proper care while preparing tea and got injured, it cannot be said that it was within the knowledge of the petitioner or that she had any intention to cause hurt to the injured person and therefore, I am of the humble view that the ingredients of the offence under section 337 of the Indian Penal Code are not attracted.

Therefore, invoking my inherent powers under section 482 Cr.P.C. and to prevent the abuse of process, I am inclined to accept the prayer made by the petitioner and quash the entire criminal proceeding in C.T. Case No.2254 of 2011 pending before the learned Special Judicial Magistrate, Balasore. Accordingly, the CRLMC application is allowed.

2019 (I) ILR - CUT- 827

S. K. SAHOO, J.

CRLMC NO. 1763 OF 2018

SUSHAMA MEHER …… Petitioner

.Vs.

STATE OF ORISSA (VIG.) ……Opp party

CRIMINAL PROCEEDINGS – Issuance of NBWs and making observations – Duty of the courts and the circumstances to be considered – Indicated.

"When on 24.04.2018 the service return was not back and the Court directed for issuance of fresh summons, at the later stage when the service return was back without proper service, there was no justification on the part of the Special Judge to pass a different type of order than which he had already passed at the first instance on the very same day. There was no material before the Court that the petitioner was keeping away from service of summons. Such type of observation which is based on no material reflects the non-application of mind and arbitrary exercise of judicial discretion which is not envisaged under law. Personal liberty is paramount and the Courts are not expected to issue warrant in a casual manner without proper application of mind. As there is question of deprivation of personal liberty guaranteed under Article 21 of the Constitution of India, the Court has to carefully go through all the papers produced by the prosecution and the report of the process server, if any, before passing the order."

For Petitioner : Mr. H.S.Mishra, A.K. Mishra, R. Dash
For Opp. Party : Mr.Prasanna Ku.Pani
Addl. Standing Counsel (Vigi. Deptt.)

JUDGMENT Date of Hearing & Judgment: 31.07.2018

S. K. SAHOO, J.

This is an application under section 482 of Cr.P.C. filed by the petitioner Sushama Meher challenging the order dated 24.04.2018 passed by the learned Special Judge(Vigilance), Bhubaneswar in T.R. No. 44 of 2017 in issuing non-bailable warrant of arrest against her. The said case arises out of Cuttack Vigilance Cell P.S. Case No.07 of 2016.

It is submitted by the learned counsel for the petitioner that during course of investigation of the case, the petitioner approached this Court in an application under section 438 Cr.P.C. in ABLAPL No. 7686 of 2016 and this Court vide order dated 17.05.2016 the following order was passed:

> "Heard learned counsel for the petitioner and learned counsel appearing for the Vigilance Department.

> Considering the nature of allegations made against the petitioner and keeping in view the fact that the petitioner is the wife of a public servant, it is directed that in the event of arrest of the petitioner in Cuttack Vigilance P.S. Case No. 07 of 2016, corresponding to V.G.R. Case No. 10 of 2016, pending in the court of learned Special Judge(Vigilance), Cuttack,she shall be released on bail by the arresting officer on such terms and conditions as the arresting officer may deem just and proper.
>
> It is needless to say that the petitioner shall appear before the Investigating Officer as and when required and cooperate in the investigation of the case.
>
> The ABLAPL is disposed of."

It is further submitted that charge sheet was submitted on 29.08.2017 under section 13(2) read with section 13(1)(e) of the Prevention of Corruption Act, 1988 read with section 109 of the Indian Penal Code against the petitioner and co-accused Sukadev Meher who is the husband of the petitioner and after receipt of the charge sheet, the learned Special Judge (Vigilance), Bhubaneswar vide order dated 31.10.2017 has been pleased to take cognizance of the offences under which charge sheet was submitted and issued summons against both the accused persons. It is further submitted that even though the Court issued summons against the petitioner and there is no service of summons, when the case was posted on 24.04.2018 and the service return was not back, the Court directed issuance of fresh summons and posted the case to 30.05.2018 for appearance of the petitioner but on the very day, at a later stage when the service return was back without proper service, the learned Court held that the petitioner was keeping away from service of summons and accordingly issued non-bailable warrant of arrest fixing 10.05.2018 for her production. It is contended that the impugned order suffers from non-application of mind and it cannot stand under the judicial scrutiny inasmuch as without proper service of summons on the petitioner, the learned Special Judge was not justified in observing that the petitioner was keeping away from service of summons. It is further contended that even section 438(3) of Cr.P.C. provides that while when the accused is on anticipatory bail, if the Court after taking cognizance of offence decides to issue a warrant in the first instance against that accused, he has to issue a bailable warrant in conformity with the direction of the Court who has passed the order under sub-section (1). It is further contended that the impugned order was also passed in respect of co-accused Sukadev Meher and the said accused challenged the order before this Court in an application under section 482 of Cr.P.C. in CRLMC No. 1707 of 2018 and this Court disposed of the matter on 12.06.2018 holding that in the event the co-accused surrenders

before the learned Special Judge(Vigilance), Bhubaneswar and moves for bail, he shall be released on such terms and conditions as the learned Special Judge, Bhubaneswar may deem fit and proper. Learned counsel further submitted that the petitioner being a lady, there is every chance of her being arrested in pursuance of the impugned order and since the petitioner has not flouted the terms and conditions of the order of anticipatory bail and she is also ready and willing to appear before the learned trial Court on any date fixed by this Court as well as to cooperate in the trial, unless the impugned order is quashed and the petitioner is directed to be released on bail on surrendering before the Court below, she will be seriously prejudiced.

Mr. P.K. Pani, learned Addl. Standing Counsel for the Vigilance Deptt. has no serious objection to the prayer made in this application, particularly in view of the order passed in respect of the co-accused in CRLMC No. 1707 of 2018.

Chapter-VI of the Cr.P.C. deals with processes to compel appearance and it is specifically provided as to how a summons is to be served and when and how a warrant of arrest has to be issued by the Court. When the petitioner has been released on anticipatory bail during course of investigation and after submission of charge sheet, the learned Special Judge took cognizance of the offences and issued summons against the petitioner, it was the duty on the part of the learned Special Judge to adopt different methods which are prescribed under the Code for service of summons and if the petitioner would have defaulted in her appearance even after receipt of summons then Court would have issued bailable warrant and in spite of such order, if the Court would have been fully satisfied that the petitioner is avoiding to appear before the Court intentionally, the process of issuance of non-bailable warrant of arrest would have been resorted to. When on 24.04.2018 the service return was not back and the Court directed for issuance of fresh summons, at the later stage when the service return was back without proper service, there was no justification on the part of the Special Judge to pass a different type of order than which he had already passed at the first instance on the very same day. There was no material before the Court that the petitioner was keeping away from service of summons. Such type of observation which is based on no material reflects the non-application of mind and arbitrary exercise of judicial discretion which is not envisaged under law.

Personal liberty is paramount and the Courts are not expected to issue warrant in a casual manner without proper application of mind. As there is question of deprivation of personal liberty guaranteed under Article 21 of the Constitution of India, the Court has to carefully go through all the papers produced by the prosecution and the report of the process server, if any, before passing the order.

In view of the foregoing discussions, in my considered opinion the issuance of non-bailable warrant of arrest was totally illegal and unjustified and therefore, invoking the inherent powers under section 482 of Cr.P.C., I quash the order of issuance of NBW against the petitioner as per the order dated 24.04.2018. Since the husband of the petitioner who is a co-accused in the case has already been directed to be released on bail in the event of his surrendering before the trial Court and there is no distinguishing feature between the two accused persons, I direct that if the petitioner surrenders before the learned Special Judge, Bhubaneswar in the aforesaid case within a period of four weeks from today, she shall be released on bail by the Court on suitable terms and conditions. Accordingly, the CRLMC application is allowed.

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2019 (I) ILR - CUT- 830

S. K. SAHOO, J.

JCRLA NO. 16 OF 2013

DURGA SOREN ……. Appellant

.Vs.

STATE OF ORISSA ……Respondent

CRIMINAL TRIAL – Offence under Section 307 – Conviction – Ingredients of offence alleged not available – Medical evidence – Role of the Doctor while preparing report – Indicated.

"A medical expert has a great responsibility in a criminal trial and therefore, he should be careful while making any note in his report. He should consider the pros and cons of the case and draw his conclusions correctly and logically. A hasty and illogic statement made during trial at the instance of the Public Prosecutor or defence counsel may have a serious repercussion on the result of the case. It is the settled principle of law that to justify a conviction under section 307 of the Indian Penal Code, it is not essential that bodily injury capable of causing death should be inflicted. The nature of injury actually caused very often gives considerable

assistance in coming to a finding relating to the intention of the accused. However, such intention can also be deduced from other circumstances without even any reference to the actual wounds. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. The Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. In view of the nature of evidence available on record, the nature of injury sustained by the injured which has been opined by Doctor to be simple in nature and absence of any other medical documents from any other hospital or any material to show the after effects of such injury, I am of the considered opinion that the conviction of the appellant under section 307 of the Indian Penal Code is not sustainable in the eye of law. In my humble view, the case squarely falls within the ambit of section 324 of the Indian Penal Code." (Para 8

For Appellant : Mr. Satyanarayan Mishra
For State : Mr. Purna Chandra Das, Addl. Standing Counsel

JUDGMENT Date of Hearing and Judgment: 14.02.2019

S. K. SAHOO, J.

The appellant Durga Soren has preferred this appeal challenging the judgment and order dated 14.03.2012 passed by the learned Additional Sessions Judge, Rairangpur in S.T. Case No.34 of 2010 in convicting him under sections 307 and 448 of the Indian Penal Code and sentencing him to undergo R.I. for a period of ten years and to pay a fine of Rs.1,000/- (rupees one thousand), in default, to undergo further R.I. for a period of one year under section 307 of the Indian Penal Code and R.I. for a period of one year under section 448 of the Indian Penal Code and directing both the sentences to run concurrently.

2. The prosecution case, in short, is that on 14/15.01.2010 during midnight while the injured P.W.9 Sarfa Soren was sleeping with her husband Gujai Soren (P.W.8) on the verandah of their house situated in village Bhulupahadi, Kuder Sahi under Rairangpur Rural police station in the district of Mayurbhanj, the appellant came there and dealt a blow by means of a Budia (axe) near the right ear of P.W.9 and also dragged her. When P.W.9 shouted, her husband (P.W.8) got up whereafter the appellant fled away from the spot. P.W.9 was shifted to S.D. Hospital, Rairangpur where he was treated by P.W.3 Dr. Debendra Nath Tudu, Asst. Surgeon. She was then taken to Baripada Hospital and Cuttack Hospital.

On 30.01.2010 P.W.8 Gujai Soren lodged the first information report before Hatbadra Outpost which was received by P.W.10 Gayadhar Behera, A.S.I. of Police attached to the said Outpost who after making S.D.E. No.468 dated 30.01.2010, sent the F.I.R. to Rairangpur Rural police station where the

Officer in charge of the said police station registered Rairangpur Rural P.S. Case No.04 of 2010 under sections 448, 307 and 506 of the Indian Penal Code against the appellant and directed P.W.10 to take up investigation of the case. P.W.10 examined the informant (P.W.8), visited the spot and prepared spot map (Ext.4). He examined other witnesses, seized one axe (M.O.I) under seizure list Ext.2. He issued injury requisition to S.D. Hospital where P.W.9 was earlier treated and received the injury report. On 02.02.2010 he arrested the appellant and forwarded him to Court. He sought for the opinion from the Medical Officer of S.D. Hospital regarding possibility of injury on P.W.9 with the seized axe and received opinion vide Ext.5/2. After completion of investigation, he submitted charge sheet on 13.04.2010 against the appellant under sections 448, 307 and 506 of the Indian Penal Code.

3. After submission of charge sheet, the case was committed to the Court of Session for trial after observing due committal procedure where the learned Trial Court charged the appellant under sections 448, 307 and 506 of the Indian Penal Code on 05.10.2010 and since the appellant refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

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

P.W.1 Sarat Kumar Giri is the scribe of the first information report and a witness to the seizure of axe under seizure list (Ext.2).

P.W.3 Dr. Debendra Nath Tudu was the Asst. Surgeon, S.D. Hospital, Rairangpur who examined P.W.9 and proved the injury report (Ext.3).

P.W.8 Gujai Soren is the husband of the injured and he is also the informant in the case.

P.W.9 Sorfa Soren is the injured eye witness.

P.W.10 Gayadhar Behera was the A.S.I. of Police, Hatbadra Outpost who is the Investigating Officer.

The prosecution exhibited five documents. Ext.1 is the first information report, Ext.2 is the seizure list of the axe, Ext.3 is the injury report of P.W.9, Ext.4 is the spot map and Ext.5 is the query report.

The prosecution also proved the weapon of offence i.e. axe as M.O.I.

5. The defence plea of the appellant was one of denial.

6. The learned trial Court after assessing the evidence on record though acquitted the appellant of the charge under section 506 of the Indian Penal

Code but mainly relying upon the evidence of P.W.8 and P.W.9 found the appellant guilty under sections 448 and 307 of the Indian Penal Code.

7. Mr. Satyanarayan Mishra, learned counsel for the appellant contended that there is absolutely no material on record to attract the ingredients of both the offences. The doctor's evidence indicates that the injured (P.W.9) has sustained a simple injury and therefore, the appellant should not have been convicted under section 307 of the Indian Penal Code particularly when no medical reports of any other hospital than S.D. Hospital, Rairangpur has been proved in the case. He further submitted that the injured and her husband were sleeping on the verandah of their house and there is no evidence of any house trespass and therefore, conviction of the appellant under section 448 of the Indian Penal Code is not sustainable in the eye of law.

Mr. Purna Chandra Das, learned Additional Standing Counsel on the other hand supported the impugned judgment and contended that the nature of injury sustained by the injured cannot be the sole factor to determine the ingredients of offence under section 307 of the Indian Penal Code.

8. P.W.9 is the injured. She stated that on the date of occurrence at 10 p.m. while she was sleeping with her husband (P.W.8), the appellant inflicted a blow by means of a Budia (axe) near her right ear and dragged her. When she shouted, her husband got up and found the appellant running away. On the next day, she was taken to Rairangpur Hospital and from Rairangpur, she was taken to Baripada and thereafter to Cuttack for her treatment. She further stated that M.O.I is the axe by which the appellant inflicted injury on her on the night of occurrence. In the cross-examination, she has stated that it was a dark night and she was sleeping on the verandah of her house where the lamp was lighted near the door. She further stated that it was a winter night.

P.W.8 Gujai Soren stated that when he heard shout of P.W.9, he found her in an injured condition and the appellant was running away from the house. He further stated that there was nobody else in that night and on the next day, he took P.W.9 to Rairangpur Hospital and then she was referred to D.H.H., Baripada and then to Cuttack. In the cross-examination, he stated that the verandah where they were sleeping was close to the village road and villagers were going on that road as it was a festive day.

The doctor (P.W.3) who examined P.W.9 on 15.01.2010 found one lacerated wound of size 6 c.m. X 2 c.m. X 1 c.m. on the anterior aspect of the right ear vertically. He opined the injury to be simple in nature and further opined that such injury was possible by means of a hard and cutting object. In

the cross-examination, he has stated that P.W.9 was treated as an outdoor patient and when he asked P.W.9 as to how she sustained injury, she did not tell him anything.

Even though the injured and her husband have stated that after initial treatment at Rairangpur Hospital, she was taken to Baripada as well as Cuttack for treatment but there is no corresponding medical document in that respect showing her treatment in any other hospital except S.D. Hospital, Rairangpur. P.W.3 has also not stated that he referred the patient to any other hospital. The injury report (Ext.3) is also silent that the patient was referred to any other hospital. It was the duty of the prosecution to substantiate in a case of this nature regarding the treatment of the injured in different hospitals, if any, by examining the concerned doctors as well as proving the medical documents. It may be the laches of the investigating officer but if otherwise, the evidence relating to the treatment of the injured in different hospitals as well as nature of treatment provided to her is not clinching, in absence of any oral or documentary evidence, it is difficult to accept the statement of the injured and her husband that the injured was treated either at Baripada Hospital or in any hospital of Cuttack.

So far as the blow given by the appellant to P.W.9 by means of Budia (axe) is concerned, nothing has been elicited in the cross-examination to disbelieve the same. The evidence of P.W.9 in that respect is clear. P.W.8 also corroborates the version of the injured that on hearing the shout of his wife, he found the injury on her head and also found the appellant was running away from the spot. The doctor (P.W.3) has noticed one injury on the head of P.W.9 which has been opined to be *simple* in nature, however, he stated that the injury was sufficient in ordinary course of nature to cause death. An injury ‘sufficient in the ordinary course of nature to cause death’ merely means that death would be the 'most probable' result of the injury having regard to ordinary course of nature. In other words, it envisages a high probability of death. The expression does not mean that death must result in which such an injury is caused or the injury should invariably or inevitably lead to death. The expression ‘sufficient in the ordinary course of nature’ is a species of the genus 'likely'. There is no material on record as to what sort of internal damage it caused or relating to the after effects of the head injury sustained by P.W.9. The medical report (Ext.3) proved by P.W.3 does not mention that the head injury was sufficient in ordinary course of nature to cause death. A medical expert has a great responsibility in a criminal trial and therefore, he should be careful while making any note in his report. He

should consider the pros and cons of the case and draw his conclusions correctly and logically. A hasty and illogic statement made during trial at the instance of the Public Prosecutor or defence counsel may have a serious repercussion on the result of the case.

It is the settled principle of law that to justify a conviction under section 307 of the Indian Penal Code, it is not essential that bodily injury capable of causing death should be inflicted. The nature of injury actually caused very often gives considerable assistance in coming to a finding relating to the intention of the accused. However, such intention can also be deduced from other circumstances without even any reference to the actual wounds. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. The Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section (**Ref: A.I.R. 1983 S.C. 305, State of Maharashtra -Vrs.- Balaram Bama Patil**).

In case of **Rekha Mandal -Vrs.- State of Bihar, reported in 1968 (Volume 8) Supreme Court Decisions 208** wherein seventeen injuries consisting of incised and punctured wounds were caused on the injured by different weapons such as farsa, spear and lathi and none of the injuries was grievous and only two of them were located on the head and neck, it was held as follows:-

> "2.....Medical evidence did not disclose that any of the injuries was cumulatively dangerous to life and the question therefore is whether in these circumstances it could be held that the offence disclosed was one under S. 307 of the Indian Penal Code. That section requires that the act must be done with such intention or knowledge or under such circumstances that if death be caused by that act, the offence of murder will emerge."

The Hon'ble Court in that case altered the conviction from section 307 to section 324 of the Indian Penal Code.

In view of the nature of evidence available on record, the nature of injury sustained by the injured (P.W.9) which has been opined by P.W.3 to be simple in nature and absence of any other medical documents from any other hospital or any material to show the after effects of such injury, I am of the considered opinion that the conviction of the appellant under section 307 of the Indian Penal Code is not sustainable in the eye of law. In my humble view, the case squarely falls within the ambit of section 324 of the Indian Penal Code. Accordingly, the conviction of the appellant is altered from

section 307 of the Indian Penal Code to one under section 324 of the Indian Penal Code.

9. So far as the conviction of the appellant under section 448 of the Indian Penal Code is concerned, such section deals with punishment for house trespass. 'House trespass' has been defined under section 442 of the Indian Penal Code. The occurrence stated to have taken place on the outer verandah of the house which was close to the village road. There is no evidence that the appellant has committed any house trespass as defined under section 442 of the Indian Penal Code. Therefore, the conviction of the appellant under section 448 of the Indian Penal Code is not sustainable in the eye of law.

10. Accordingly, the appeal is allowed in part. The conviction of the appellant under section 448 of the Indian Penal Code is set aside. The conviction under section 307 of the Indian Penal Code is altered to one under section 324 of the Indian Penal Code and the sentence is modified from R.I. for ten years and payment of fine of Rs.1,000/- and in default, to undergo R.I. for one year to R.I. for one year simplicitor. The appellant has remained in custody for more than nine years. He should be released forthwith from custody, if his detention is not required in any other case and if he has not yet been released as per the order of this Court dated 01.02.2019. In the result, the JCRLA is allowed in part.

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2019 (I) ILR - CUT- 836

DR. A. K. MISHRA, J.

CRLA NOS. 234 & 638 OF 2010

MADHAB @ MADHABA CH. PRADHAN .....Appellant
(In CRLA No.234 of 2010)
KULAMANI MOHAPATRA .....Appellant
(In CRLA No.638 of 2010)

.Vs.

THE STATE OF ORISSA .....Respondent

CONVICTION AND DEFAULT SENTENCE – Appellants convicted and Sentenced under Section 20(b)(c) of Narcotic Drugs Psychotropic Substances Act (NDPS), 1985 to undergo rigorous imprisonment for 10 years and to pay fine of Rs.1,00,000/-, in default to undergo rigorous

imprisonment for 1 year – Appellants served the substantive sentence of ten years – Wife pleads about the inability to pay the fine and prays for reduction of default sentence period – Whether can be considered? – Held, yes, When the appellant-accused persons have already undergone substantive period of 10 years and have not paid of Rs.1 lakh till now, it cannot be said that their love of liberty is outweighed by love of money – Their inability to pay fine amount is glaring their incarceration – The grievance of the wife of one of the appellant about the poverty and inability to pay the fine amount tells its own tale – Both the appellants, as record reveals, are not repeaters of crime and for the poverty, they are going to embrace imprisonment in lieu of taking refuge of money deposit – Period of default sentence reduced to two months.

Case Laws Relied on and Referred to :-

1. (2007) 11 SCC 243 : Shantilal Vs. State of Madhya Pradesh.
2. 2012 (10) SCALE 21 : Shahejadkhan Mahebubkhan Pathan Vs. State of Gujarat.
3. 2016 CRI. L. J. 1510 : in the case of Mukesh Pradhan Vs. State of Orissa

For Appellants : M/s. Smt. G.Sahoo, M.K. Mallick, D.P. Pattnaik, A.Mohanty, M/s. P.K.Mohanty, P.K.Das, M/s. P.Swain, S.P. Mohanty, P.Nanda M/s. S.N. Sahani, K. Pradhan (In CRLA No.234 of 2010)

M/s.P.K.Mohanty, P.K.Das, M/s.J.Pradhan, P.Prusty, D.K.Pradhan. (In CRLA No.638 of 2010)

For Respondent : Addl. Govt. Adv.

JUDGMENT Date of Hearing and Judgment : 12.02.2019

DR. A.K.MISHRA, J.

In view of the cessation of the Court work as per the resolution dated 08.02.2019 of the High Court Bar Association, neither the learned counsel for the appellant nor the learned counsel for the State is present in the Court. Mrs. Urmila Pradhan, wife of appellant Madhab Ch. Pradhan (CRLA No.234 of 2010) is present in person.

Both appeals are taken up together for analogous hearing as per order dated 07.01.2019 passed in Criminal appeal no.234 of 2010. Judgment dated 06.05.2010 in 2(a)CC No.1 of 2008 by learned Sessions Judge-Cum-Judge, Special Court, Phulbani in convicting both the appellants under Section 20(b)(c) of Narcotic Drugs Psychotropic Substance Act (NDPS), 1985 and sentencing each of the appellant to under to rigorous imprisonment for 10 years and to pay fine of Rs.1,00,000/- in default to undergo rigorous

imprisonment for 1 year is assailed in these appeals preferred separately but heard analogously.

2. One Urmila Pradhan, wife of appellant Madhab Chandra Pradhan appears and submits that as her husband, accused Madhab Chandra Pradhan has already undergone substantive sentence of 10 (Ten) years imprisonment and she is unable to pay the fine amount of Rs.1,00,000/- (Rupees one lakh) due to poverty, the default sentence may be reduced. She further submits that the co-accused-appellant in CRLA No.638 of 2010, Kulamani Mohapatra is also unable to pay the fine amount and her submission may be considered to save the starving children in disarray.

She further submits that one of her daughter at the marriageable age is not given marriage for the long incarceration of the father in the custody.

3. It appears from the record that on 03.09.2012, the argument was heard in extenso. On 07.01.2019 having heard learned counsel for both the appellants, a report was called for from the learned Sessions Judge-cum-Judge, Special Court, Phulbani in the following manner:-

> " Be that as it may, considering the aforesaid facts and submission made, the learned Sessions Judge-cum-Judge, special Court, Phulbai is directed to verify the matter and call for a report from the concerned Jail Authority and furnish a report in this regard to this Court and if it is found that the appellants have already undergone the substantive sentence as well as the default sentence, they shall be released on bail forthwith without awaiting further order from this Court in this regard. Such report must reach this Court by 12th of February, 2019.
>
> List both the matters on 12.02.2019."

> 3-(a). The report of District Judge vide letter dated 714 dated 31.01.2019 is received as follows :-
>
> "Convict Kulamani Mahapatra, aged about 23 years, son of Babaji Mahapatra of village Subarnapur, PS-Banki, District-Cuttack and Madhab Chandra Pradhan, aged about 38 years, son of Bhikari Pradhan of village Darudhipa, PS-Phategrah, District- Nayagarh were in jail custody since 24.12.2008 and their substantive sentence of 10 (Ten) years have already been completed on 23.12.2008 and now they are suffering R.I. for 1 (one) year against default sentence for non-payment of fine of Rs.1,00,000/- (Rupees one lakh) each and the same will be completed on 23.12.2019.
>
> I am to further submit that Superintendent, Special Jail, Bhubaneswar vide his office Memo No.602 dated 26.01.2019 and Superintendent, District jail, Puri vide his office Memo No.359 dated 26.01. 2019 have informed that the convicts are not entitled to any remissions as per Section 32A of the NDPS Act."

As the matter is already heard and is only confined to the question of default sentence, I heard Mrs. Urmila Pradhan, present today in Court with copy of Aadhaar Card and Voter Identity Card.

4. As per prosecution on 23.12.2008 at about 3:30P.M. near Sarangada Police Station a Tata Indica Car was detained by the Excise Officer. Both the appellants were found therein and on search as per procedure the Excise Officer found 175Kg. 700Gms Ganja. Sample was collected and chemical examination was done. After completion of investigation prosecution report was submitted against both the accused persons. In trial both of them took a plea of denial but examined none. Prosecution examined five witnesses. P.W.3 was the Inspector of Excise, P.W.4, Rajanikanta Mallik was the OIC, Sarangada P.S., P.W.5 was the owner of the seized car, P.W.1 was the Tahasildar-cum-Executive Magistrate, before whom the search and seizure was made. P.W.2 was the witness to the search and seizure. Learned special court analyzing all the evidence in proper perspective held that both the accused persons were in conscious possession of 175kg 700gms of Ganja and held them guilty of offence under section 20(b) of the NDPS Act, 1985. The learned Lower Court sentenced both the appellants as stated above after hearing on the question of sentence where the plea of first offender was advanced.

4-(a). From the conspectus of the facts stated and the contention urged, no infirmity is found in the order of conviction. The appeal is now confined to the question of default sentence as both the appellants have already undergone substantive sentence of 10 years and have not paid the fine amount for which they have already undergone default sentence 1 month 19 days till date.

5. When the appellant-accused persons have already undergone substantive period of 10 years and have not paid of Rs.1 lakh till now, it cannot be said that their love of liberty is outweighed by love of money. Their inability to pay fine amount is glaring their incarceration. The grievance of the wife of the appellant Madhab Chandra Pradhan about the poverty and inability to pay the fine amount tells its own tale.

6. Both the appellants, as record reveals, are not repeaters of crime and for the poverty, they are going to embrace imprisonment in lieu of taking refuge of money deposit.

6-(a). The imposition of default sentence for non-payment of fine for the offence under NDPS Act is no more ***res integra***. The Hon'ble Supreme Court in the case of **Shantilal vrs. State of Madhya Pradesh,** *(2007) 11 SCC 243* considered the imposition of imprisonment for default in making payment of fine with response to various provisions of Indian Penal Code and Criminal Procedure Code, 1973. Relying upon the said decision, the Hon'ble Apex Court in the case of **Shahejadkhan Mahebubkhan Pathan vrs. State of Gujarat,** reported in 2012 (10) SCALE 21, at para-12 observed as follows:-

> "12. it is clear and reiterated that the term of imprisonment in default of payment of fine is not a sentence. To put it clear, it is a penalty which a person incurs on account of non-payment of fine. On the other hand, if sentence is imposed, undoubtedly, an offender must undergo unless it is modified or varied in part or whole in the judicial proceedings. However, the imprisonment ordered in default of payment of fine stands on a different footing. When such default sentence is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. Accordingly, he can always avoid to undergo imprisonment in default of payment of fine by paying such an amount. In such circumstances, we are of the view that it is the duty of the Court to keep in view the nature of offence, circumstances in which it was committed, the position of the offender and other relevant considerations such as pecuniary circumstances of the accused person as to character and magnitude of the offence before ordering the offender to suffer imprisonment in default of payment of fine. The provisions of Sections 63 to 70 of IPC make it clear that an amount of fine should not be harsh or excessive. We also reiterate that where a substantial term of imprisonment is inflicted, an excessive fine should not be imposed except in exceptional cases."

In the decision reported in 2016 CRI. L. J. 1510 in the case of **Mukesh Pradhan vrs. State of Orissa**, his Lordship in the similar circumstances while confirming the conviction, modified the sentence to the extent of default only.

7. Having carefully gone through the material on record and bestowing the thought over the submissions advanced, I do not find any reason for interference with the finding of the learned court below. Accordingly, the convictions of both the appellant-accused persons are upheld. The sentence is nothing but minimum prescribed by the statute under Section 20(ii)(c) of NDPS Act. The substantive sentence of 10 years and amount of fine are hereby confirmed. But terms of default sentence i.e. rigorous imprisonment for one year is reduced to 2 (two) months.

In the result, both appeals are allowed in part.

The judgment of conviction dated 06.05.2010 in 2(a)CC No.1 of 2008 passed by learend Sessions Judge-cum-Judge, Special Court, Phulbani is confirmed, the sentence imposed therein stands heareby modified to the extent that in default in making payment of Rs.1,00,000/-(Rupees one lakh), the appellants shall undergo 2 (two) months rigorous imprisonment instead of 1 (one) year.

This order be communicated to the Superintendent, Special Jail, Bhubaneswar, District Jail Puri and all concerned immediately.

Send back the L.C.R.

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2019 (I) ILR - CUT- 841

DR. A. K. MISHRA, J.

CRLMC NOS. 2544 OF 2010 & 2410 OF 2011

DAMODAR ROUT .....Petitioner

.Vs.

STATE OF ORISSA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power – Prayer for quashing of FIR – Offence alleged is under section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act,1989 – Petitioner uttered "*Now our A.D.M. is one Harijan. The MLA, Jagatsinghpur is one Harijan and our M.P. Bibhu Tarai has entered his name in Harijan List. They have joined against me.*" – Whether utterance of such words constitute the offence as alleged? – Held, No. – FIR quashed – Reasons indicated.

"If the words are innocents in them-selves and not intended derogatory to the named persons in the F.I.R., no third person can cast a meaning on it to bring within compartment of insult, intimidation and humiliation because he belongs to the same caste or class."

Case Laws Relied on and Referred to :-

1. (2004) 4 SCC 231 : M.A. Kuttappan Vr. E. Krishnannayanar & Anr .
2. 2004(I) OLR 665 : Kailash Gupta Vr. State & Anr.,
3. 2008 AIR SCW 6901 : Gorige Pentaiah Vr. State of A.P. & Ors.,
4. 2011 AIR SCW 2285 : Asmathunnisa Vr. State of A.P.,
5. AIR 2019 SC 210 : Anand Kumar Mohatta & Anr. Vr. State (Govt. of NCT of Delhi) Department of Home & Anr.
6. (2017) 13 SCC 439: Manju Devi Vr. Onkarjit Singh Ahluwalia alias Omkarjeet Singh & Ors.

For Petitioner : Mr. B.Ray, Sr. Adv. & M/s. Milan Kanungo, D.Pradhan, Y.Mohanty & S.K.Mishra.

For Opp. Party : Mr. D.Mishra, A.G.A
For the Informant : Mr. Debasis Panda, Sr.Counsel

JUDGMENT Date of Hearing : 07.03.2019 : Date of Judgment: 13.03.2019

DR. A. K. MISHRA, J.

This judgment is to address both the above numbered cases filed under Section 482 Cr.P.C. for having preferred to quash the proceeding in G.R. Case No. 574 of 2010 corresponding to Kujanga P.S. Case No. 233 dated 21.08.2010 pending in the court of learned J.M.F.C., Kujang.

2. Facts are catalogued with precision as follows:-

On 21.08.2010 one F.I.R, was lodged by one Manoj Kumar Bhoi to the effect that:- (extracted)

"On 18.08.2010 Mr. Damodar Rout, Minister of Agriculture and Co-operation held one public meeting at Kujang Block Padia, who delivered speech accusing Mr. Upendranath Mallick, Additional District Magisitrate, Jagatsinghpur, Mr. Bishnu Charan Das, MLA, Jagatsinghpur and Mr. Bibhu Prasad Tarai, Member of the Parliament, Jagatsinghpur and others who belong to members of the scheduled caste. During his such delivery of speech he intentionally insulted the members of the scheduled caste and such speech was intended to humiliate the aforesaid persons as well as he had insulted entire people belonging to members of scheduled caste of the country as a whole by saying "*Ebe amara ADM gotae Harijan. Jagatsinghpur Bidhayak Jane Harijan ebong amara MP Bibhu Tarai Harijana Talikare na lekhaichi. Emane misi mo birudhare lagichhi*". This statement of Mr. Rout degraded the dignity of human being aspersing casteism. The statement creates disharmony between different classes of peoples and incites clash amongst members of scheduled caste and other castes of the society. I am humiliated by such accusation of my caste and such statement creates hatred to the members of scheduled caste. I therefore, pray that the matter be investigated and necessary action be taken against Mr. Damodar Rout and punish him in accordance to law by prosecuting him in court of law."

(The vernacular portion of the above is translated into English as follows:-

"*Now our A.D.M. is one Harijan. The MLA, Jagatsinghpur is one Harijan and our M.P. Bibhu Tarai has entered his name in Harijan List. They have joined against me*.")

3. The said F.I.R. was registered as Kujanga P.S. Case No. 233 dated 21.08.2010 under Sec. 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act,1989 (to be referred hereinafter as "SC/ST Act") and investigation was ensued.

4. CRLMC No. 2544 of 2010 was filed by accused petitioner on 16.09.2010 praying to quash the F.I.R. On 29.10.2010 stay of further proceeding in G.R. Case No. 574 of 2010 pending before the learned J.M.F.C., Kujang was granted. On 23.2.2011 a clarification order was passed to the effect that "*This direction does not in any manner prevent the investigation into the case*."

5. On 28.07.2011, CRLMC No.2410 of 2011 was filed for quashment of the cognizance order dated 08.07.2011 passed in that G.R. Case No. 574 of 2010 on the ground that taking of cognizance on 08.07.2011 of the offence under section. 3(1)(x) of the SC/ ST Act and issuing summons to the accused-petitioner was in violation of this Court's stay order dated 23.02.2011 in CRLMC No. 2544 of 2010. A report was called for from the learned J.M.F.C., Kujang vide order dated 27.03.2014 passed in CRLMC 2410 of 2011. Learned J.M.F.C., Kujang submitted his report vide letter No. 427 dated 07.04.2014. It is stated therein that "CSI*, Kujang while presenting the record before me did not bring to my notice about the stay of proceeding for which the order for issuance of process was passed. However, after scanning the materials on record it is found that inadvertently the order for issuance of process was made*."

6. Mr. B.Ray, learned Senior Advocate did not challenge the report of the learned J.M.F.C., Kujang submitting that the mistake due to inadvertence may be accepted. Mr. D.Mishra, learned A.G.A. for the State and Mr. D.Panda, learned Senior Counsel for the informant did not dispute such mistake made by the learned J.M.F.C., Kujang. This Court accepts the act of learned J.M.F.C. as an unintended error in the record. But the act of the Court shall prejudice no one.(Actus curie neminem gravabit) Therefore, the order taking cognizance dtd.8.7.2011 in G.R. Case No. 574 of 2010 is treated as non-est.

7. The point is now close to:-

Whether the F.I.R. in Kujang P.S. Case No. 233 dated 21.08.2010 for offence under section 3(1)(x) of the SC/ST Act, corresponding to G.R. Case No. 574 of 2010 pending in the court of J.M.F.C., Kujang is to be quashed?.

8. In order to assail the above F.I.R., it is averred in the petition inter alia as follows:-

(i) That the petitioner is a veteran politician of the State and is currently a MLA from Paradeep Constituency belonging to the ruling BJD party. The petitioner is

presently working as Minister of Agriculture and Cooperation, Government of Orissa and is the Vice-President of the BJD party.

(ii) That before adumbrating the facts of the case it is necessary to state that the district of Jagatsinghpur is a hot bed for politics between parties. Many a time false, fabricated, and motivated criminal cases are instituted against politicians to achieve political interests. In the present case, the petitioner being a current MLA and Minister in the Government, a criminal conspiracy has been foisted by his detractors to dislodge him from the Ministry as well as to jeopardize his political standing.

(iii) That delving into the soul of the issue it is humbly submitted here that Harijan (Child of God) was a term used by Mahatma Gandhi for Dalits. The term can also be attributed to Dalits of Pakistan called the haris, who are a group of mud-hut builders. It is submitted here that Mahatma Gandhi said it was wrong to call people 'untouchable' and hence he called them 'Harijans', which means children of God. It is still in wide use especially in Gandhi's home state of Gujrat.

(iv) That in the present case there is no justification to say that the words allegedly uttered by petitioner encouraged his audience to practice untouchability or that the complainant practiced untouchability. The scriber of the FIR/complainant was neither insulted nor attempted to be insulted on the ground of untouchability for which the provisions of Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 are not attracted.

(v) That assuming, the petitioner uttered the words imputed to him by no stretch of imagination it can be concluded that by uttering those words the petitioner either insulted or attempted to insult the complainant or any member of the Scheduled Castes on the ground of untouchability or in any other manner.

(vi) That if the FIR is read as a whole then it clearly appears that there was no intention for an attempt to insult the complainant or the members of the Scheduled Castes on the ground of untouchability.

(vii) That the allegations as made out in the complaint if taken at their face value and accepted in their entirety, do not prima facie constitute the offence or make out a case against the petitioner. That a bare perusal of the FIR/complaint would show that no case under any of the criminal law is made out against the petitioner.

9. Mr. B.Ray, Learned Senior Advocate on behalf of the petitioner strenuously urged that the persons named to have been aggrieved were not present as revealed from the F.I.R. and there is no mention that accused-petitioner was not a member of the scheduled caste or scheduled tribe. Added to that, neither the word "Harijan" was intended to be used to insult anybody nor had any aggrieved named in the F.I.R. come forward to allege such insult, intimidation or humiliation. In such backdrop Mr. B.Ray, learned Senior Advocate submitted that when the F.I.R. itself does not disclose any offence and is found to have been lodged out of political hostility, the same should be quashed to prevent abuse of the process of the Court.

In support of his contention learned counsel for the petitioner relied upon the decision reported in (1)- (2004) 4 SCC 231: **M.A. Kuttappan Vr. E. Krishnannayanar and Another**, (2)- 2004(I) OLR 665: **Kailash Gupta Vr. State & Anr.**, (3)- 2008 AIR SCW 6901, **Gorige Pentaiah Vr. State of A.P. & Ors**., (4)- 2011 AIR SCW 2285: **Asmathunnisa Vr. State of A.P**., (5)- AIR 2019 SC 210: **Anand Kumar Mohatta & Anr. Vr. State (Govt. of NCT of Delhi) Department of Home & Anr**.

10. Per contra, learned A.G.A. Mr. D.Mishra for the State submitted that the speech of the accused-petitioner using word "Harijan" was nothing but intentional, to insult his political opponents and public officers belonging to the scheduled castes and as F.I.R. makes out offence, the same should not be quashed. He also referred to the letters of the Government of India Ministry Welfare O.M.-1205/14/90-SCD (R.L.Cell) dated 16.08.1990 and Government of India Ministry of Social Justice and Empowerment Department of Social Justice and Empowerment letter No. 17020/64/2010-SCD (R.L.Cell) dated 22.11.2012 to submit that "Government has issued direction, to ensure the non-use of the word "Harijan" not only in caste certificates but also otherwise."

He also relied upon a decision reported in (2017) 13 SCC 439: **Manju Devi Vr. Onkarjit Singh Ahluwalia alias Omkarjeet Singh & Others** to contend that the word "Harijan" is nowadays used to insult and abuse and not to denote a caste but to humiliate someone. Accordingly, he submitted that the petitioner being a Minister was aware of the law but preferred to use the word "Harijan" in a manner as stated in the F.I.R. only to insult the people belonging to scheduled castes and scheduled tribes and thereby offence under Section 3(1)(x) of the SC/ST Act is rightly made out in the F.I.R. and the proceeding ignited from the F.I.R. should not be quashed.

11. Mr. D.Panda, learned senior counsel for the informant advanced his argument supporting the above contention of the learned Special Counsel for the State. To supplement, it is contended by him that on bare reading of the F.I.R. offence under Section 3(1)(x) of the SC/ST Act is prima facie made out and the same having already been investigated into, the proceeding should not be quashed.

12. Before proceeding further it may be noted that in course of argument on 22.02.2019 in CRLMC No. 2410 of 2011, Mr. D.Mishra. learned Additional Government Advocate took time to file text of the speech, but it could not be made available to the Court, by the time argument concluded on next date.

13. In **M.A. Kuttappan** case (supra) for the use of word "Harijan" in course of speech by the Chief Minister of the State, the Hon'ble Supreme Court held that:-

> "*Assuming, Respondent No.1 uttered the words imputed to him, but no stretch of imagination it can be concluded that by uttering those words he either insulted or attempted to insult the appellant on the ground of untouchability."*

The said M.A. Kuttappan decision has been relied upon by this Court in **Kailash Gupta** case (supra) where the remark to an employee that "*he got service by virtue of a caste certificate"* is found to have not attracted offence under section 3(1)(x) of the SC/ST Act, as there was no intention to insult the complainant on the ground of untouchability.

In **Gorige Pentaiah** case (supra) their Lordships have stated in paragraph-9 that:-

> "*In the instant case, the allegation of respondent No.3 in the entire complaint is that on 27.5.2004, the appellant abused them with the name of their caste. According to the basic ingredients of Section 3(1)(x) of the Act, the complainant ought to have alleged that the accused-appellant was not a member of the Scheduled Caste or a Scheduled Tribe and he(respondent No.3) was intentionally insulted or intimidated by the accused with intent to humiliate in a place within public view. In the entire complaint, nowhere it is mentioned that the accused-appellant was not a member of the Scheduled Caste or a Schedule Tribe and he intentional insulted or intimidated with intent to humiliate respondent No.3 in a place within public view. When the basic ingredients of the offence are missing in the complaint, then permitting such a complaint to continue and to compel the appellant to face the rigmarole of the criminal trial would be totally unjustified leading to abuse of process of law."*

In **Asmathunnisa** case (supra) their Lordships have stated in paragraph-10 that:-

> " *The aforesaid paragraphs clearly mean that the words used are " in any place but within public view", which means that the public must view the person being insulted for which he must be present and no offence on the allegations under the said section gets attracted if the persons is not present*."

In **Anand Kumar Mohatta** case (supra) the Hon'ble Supreme Court has stated in paragraph-17 that:-

> "*There is nothing in the words of this Section which restricts the exercise of the power of the Court to prevent the abuse of process of court or miscarriage of justice only to the stage of the FIR. It is settled principle of law that the High Court can exercise jurisdiction under Section 482 Cr.P.C. even when the discharge application is pending with the trial court. Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered with at the stage of*

FIR but not if it has advanced, and the allegations have materialized into a charge sheet. On the contrary it could be said that the abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge sheet after investigation. The power is undoubtedly conferred to prevent abuse of process of power of any court."

In **Manju Devi** case (supra) cited by learned Special Counsel for the State also relied upon by the learned counsel for the informant, while their Lordships refused to invoke Section 438 Cr.P.C. in view of Section 18 of the ST/SC Act have stated in paragraph-16 that:-

"*In the above context, it is now easy to understand the factual matrix of the case. The use of the word "Harijan", "Dhobi", etc. is often used by people belonging to the so-called upper castes as a word of insult, abuse and derision. Calling a person by these names is nowadays an abusive language and is offensive. It is basically used nowadays not to denote a caste but to intentionally insult and humiliate someone. We, as a citizen of this country should always keep one thing in our mind and heart that no people or community should be today insulted or looked down upon, and nobody's feelings should be hurt*."

14. The F.I.R. in this case has been registered under Section 3(1)(x) of the SC/ST Act. The relevant portion of the said section reads as follows:-

"3. **Punisahments for offences of atrocities**-(1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,-

xx xxx xx

(x) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;"

15. From the reading of the F.I.R. what is recognizable at sight is that after three days of the occurrence it was filed. There is nothing in the F.I.R. that the persons named therein were present in such meeting. As per **Asmathunnisa** case (supra), "*no offence is attracted if the person is not present*". There is also no mention in the F.I.R. that accused-appellant was not a member of the Scheduled Caste or Scheduled Tribe and thereby the ratio in **Gorige Pentaiah** case (supra) is attracted. What is stated in the Manju Devi case (supra) is that "*the use of the word "Harijan", "Dhobi" etc. is often used by people belonging to the so-called upper castes as a word of insult, abuse and derision*." The Government notification of the year, 2012 to ensure the non-use of the word "Harijan" is meant for official communication and transaction.

16. What is mentioned in the F.I.R. that Minister had used word "Harijan" in respect of ADM, MLA and M.P. but whether it was intended to insult, is still obscured? Despite direction, the full text of the speech was not

made available to ascertain the textual intention of the petitioner. When the words are affected by public use, the hearer of the same should come forward to express his feeling. The text must be trusted and tasted by the feelings of the aggrieved. In such matter, the thing that counts is not what one believes to be insulting but what the aggrieved reasonably believes.

17. Words are innocents, they are vehicles of thought. A word may mean one thing in one context and another thing in another context. The speech alleged to have been made in the case at hand was extempore. In determining whether the unguarded words uttered by the petitioner had beyond the standard of the everyday believe and the habit, one should read the whole F.I.R. In doing so, it is found that the petitioner had not uttered word "Harijan" intentionally to insult anybody including informant. There is no need to mark the content of the F.I.R. by unvarying or a rigid line. It is enough to indicate that the word "Harijan" does not fall within the limit of offence under section 3(1)(x) of the SC/ST Act in the context it was used in course of a speech.

18. It is apt to quote the following by SRI AUROBINDO for the relevancy to the doubt debated in the case at hand:-

> "A doubt corroded even the means to think,
> Distrust was thrown upon Mind's instrument,
> All that it takes for reality's shining coin,
> Proved fact, fixed inference, deduction clear,
> Firm theory, assured significance"
>
> (Savitri by Sri Aurobindo, Twenty-first impression, Book-Two Conto- XIII, Verse-65, Page-284.)

19. If the words are innocents in them-selves and not intended derogatory to the named persons in the F.I.R., no third person can cast a meaning on it to bring within compartment of insult, intimidation and humiliation because he belongs to the same caste or class.

20. Tested in the touchstone of above parameter of law, the contents of the F.I.R. taken at their face value and accepted in its entirety do not constitute the offence under Section 3(1)(x) of the SC/ST Act. Consequently criminal proceeding in G.R. Case No. 574 of 2010 corresponding to Kujanga P.S. Case No. 233 dated 21.08.2010 pending in the court of J.M.F.C., Kujanga is quashed.

21. Accordingly, the CRLMC No.2410 of 2011 is disposed of in terms of observation made in para-6 of this judgment.

22. The CRLMC No. 2544 of 2010 is allowed.

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