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Ambika Bhuyan & Anr. -V- Saukat Alli & Anr.

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Bikash Sethy -V- Odisha Gramya Bank, Bhubaneswar & Ors.
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DR. D.Y. CHANDRACHUD, J & M.R. SHAH, J.

CIVIL APPEAL NOS. 5522 & 5523 OF 2019

GURMIT SINGH BHATIA ……...Appellant

.Vs.

KIRAN KANT ROBINSON & ORS. ……...Respondents

CODE OF CIVIL PROCEDURE, 1908 – Order 1 Rule 10 – Application for impleadment as a defendant in the suit – Suit for specific performance of contract – Property in question sold during pendency of the suit – Purchaser wanted to implead himself as defendant – The question arose as to whether the plaintiff can be compelled to implead a person in the suit for specific performance against his wish and more particularly with respect to a person against whom no relief is sought for ? – Held, No – Reasons explained.

"Therefore, the short question which is posed for consideration before this Court is, whether the plaintiffs can be compelled to implead a person in the suit for specific performance, against his wish and more particularly with respect to a person against whom no relief has been claimed by him? An identical question came to be considered before this Court in the case of Kasturi (supra) and applying the principle that the plaintiff is the dominus litis, in the similar facts and circumstances of the case, this Court observed and held that the question of jurisdiction of the court to invoke Order 1 Rule 10 CPC to add a party who is not made a party in the suit by the plaintiff shall not arise unless a party proposed to be added has direct and legal interest in the controversy involved in the suit. It is further observed and held by this Court that two tests are to be satisfied for determining the question who is a necessary party. The tests are – (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (2) no effective decree can be passed in the absence of such party. It is further observed and held that in a suit for specific performance the first test can be formulated is, to determine whether a party is a necessary party there must be a right to the same relief against the party claiming to be a necessary party, relating to the same subject matter involved in the proceedings for specific performance of contract to sell. It is further observed and held by this Court that in a suit for specific performance of the contract, a proper party is a party whose presence is necessary to adjudicate the controversy involved in the suit. It is further observed and held that the parties claiming an independent title and possession adverse to the title of the vendor and not on the basis of the contract, are not proper parties and if such party is impleaded in the suit, the scope of the suit for specific performance shall be enlarged to a suit for title and possession, which is impermissible. It is further observed and held that a third party or a stranger cannot be added in a suit for specific performance, merely in order to find out who is in possession of the contracted property or to avoid multiplicity of the suits. It is further observed and held by this Court that a third party or a stranger to a contract cannot be added so as to convert a suit of one character into a suit of different character." *(Paras 5.1 & 5.2)*

Case Laws Relied on and Referred to :-

1. (2018) 15 SCC 614 : Robin Ramjibhai Patel .Vs. Anandibai Rama @ Rajaram Pawar.
2. 2014 (2) Mh. L.J 968 : Shri Swastik Developers .Vs. Saket Kumar Jain.
3. (2005) 6 SCC 733 : Kasturi .Vs. Iyyamperumal.
4. (1996) 10 SCC 53 : Vijay Pratap .Vs. Sambhu Saran Sinha.

For Appellant (s) : Mr. Parshanto Chandra Sen, Sr. Adv.,
Mr. P.S. Sudheer, AOR.
Mr. Rishi Maheshwari, Ms. Anne Mathew,
Mr. Kaustab Singh & Ms. Raj Lakshmi.

For Respondent(s) : Mr. M. Shoeb Alam, AOR, Ms. Fauzia Shakil,
Mr. Ujjwal Singh, Mr. Gautam Prabhakar.
Mr. Mojahid Karim Khan & Mr. Kunal Verma, AOR.

JUDGMENT Date of Judgment : 17.07. 2019

M.R. SHAH , J.

Feeling aggrieved and dissatisfied with the impugned judgment and order dated 3.7.2013 passed in Writ Petition No. 856/2012 and order dated 5.8.2013 passed in Review Petition No. 169/2013 in Writ Petition No. 856/2012 by the High Court of Chhattisgarh at Bilaspur, by which the High Court has allowed the said writ petition preferred by the original plaintiffs and has quashed and set aside the order passed by the learned trial Court allowing the application preferred by the appellant herein for impleading him as a necessary party to the suit filed by respondent nos. 2 & 3 herein – the original plaintiffs, the original applicant – appellant has preferred the present appeals.

2. The facts of the case leading to these appeals in nutshell are as follows:

Respondent nos. 2 & 3 herein – the original plaintiffs filed a suit against respondent no.1 herein – original defendant no.1 for specific performance of the agreement to sell/contract dated 3.5.2005 executed by respondent no.1 – original defendant no.1 in the Court of learned 4th Additional District Judge, Bilaspur. That during the pendency of the aforesaid suit and despite the injunction against respondent no.1 herein – original defendant no.1 – original owner not to alienate or transfer the suit property, respondent no.1 herein – original defendant no.1 executed a sale deed in favour of the appellant herein vide sale deed dated 10.07.2008. The appellant herein – purchaser who purchased the suit property during the pendency of the suit filed an application in the pending suit under Order 1 Rule 10 of the CPC for impleadment as a defendant in the suit. It was the

case on behalf of the appellant herein that he has purchased the suit property and is a necessary and proper party to the suit as he has a direct interest in the suit property. That by an order dated 5.11.2012, the learned trial Court allowed the said application and directed the original plaintiffs to join the appellant as a defendant in the suit.

2.1 Feeling aggrieved and dissatisfied with the order passed by the learned trial Court dated 5.11.2012 allowing the application and permitting the appellant herein to be joined as a party defendant in the suit filed by the original plaintiffs – respondent nos. 2 & 3 herein, respondent nos. 2 & 3 herein filed writ petition No. 856/2012 before the High Court of Chhattisgarh. By the impugned judgment and order dated 3.7.2013, the High Court has allowed the said writ petition and has quashed and set aside the order passed by the learned trial Court allowing the impleadment application preferred by the appellant herein by holding that as regards the relief claimed against the original defendants and as no relief has been claimed against the appellant herein, the appellant cannot be said to be a necessary or formal party. That thereafter the appellant preferred a review application which came to be dismissed. Hence, the present appeals by way of special leave petitions.

3. Shri Prashanto Chandra Sen, learned Senior Advocate has appeared on behalf of the appellant and Shri M. Shoeb Alam, learned Advocate has appeared on behalf of the original plaintiffs.

3.1 Learned Senior Advocate appearing on behalf of the appellant has vehemently submitted that once the learned trial Court allowed the impleadment application submitted by the appellant herein under Order 1 Rule 10 of the CPC holding that the appellant is a necessary and proper party, the High Court, in exercise of powers under Article 227 of the Constitution of India, ought not to have interfered with the same.

3.2 It is vehemently submitted by the learned Senior Advocate appearing on behalf of the appellant that as such the appellant has purchased the suit property from the same vendor and, in fact, the appellant was prior agreement to sell holder and to protect the interest of the appellant the appellant is a necessary and proper party. It is submitted that therefore the learned trial Court rightly allowed the impleadment application submitted by the appellant.

3.3 Making the above submissions and relying upon the decision of this Court in the case of *Robin Ramjibhai Patel v. Anandibai Rama @ Rajaram Pawar, reported in (2018) 15 SCC 614* and the decision of the Bombay High

Court in the case of *Shri Swastik Developers vs. Saket Kumar Jain, reported in 2014 (2) Mh. L.J 968,* it is prayed to allow the present appeals and quash and set aside the impugned judgments and orders passed by the High Court and restore the order passed by the learned trial Court.

4. The present appeals are vehemently opposed by Shri M. Shoeb Alam, learned Advocate appearing on behalf of the original plaintiffs. It is vehemently submitted that in fact the appellant purchased the suit property during the pendency of the suit and that too in violation of the injunction granted by the learned trial Court. It is submitted that as such the prior agreement to sell upon which reliance has been placed by the appellant is a concocted and forged one. It is submitted that in any case the appellant cannot be impleaded as a defendant in a suit filed by the original plaintiffs for specific performance of the agreement to sell/contract to which the appellant is not a party. It is submitted that the original plaintiffs are the *dominus litis* and without their consent nobody can be permitted to be impleaded as defendant.

4.1 It is vehemently submitted that as such the issue involved in the present case is squarely covered against the appellant in view of the decision of this Court in the case of *Kasturi v. Iyyamperumal, reported in (2005) 6 SCC 733*.

4.2 Insofar as the reliance placed upon the decision of this Court in the case of *Robin Ramjibhai Patel (supra)* as well as the decision of the Bombay High Court in the case of *Shri Swastik Developers* (*supra)* by the learned Senior Advocate appearing on behalf of the appellant, it is vehemently submitted by Shri M. Shoeb Alam, learned Advocate appearing on behalf of the original plaintiffs that the said decisions shall not be applicable to the facts of the case on hand. It is submitted that in the aforesaid two cases, it was an application by the original plaintiff to implead the subsequent purchaser who purchased the property during the pendency of the suits. It is submitted that as held by this Court in the case of *Kasturi(supra)*, it is for the plaintiff/plaintiffs to implead a particular person/persons as defendant/defendants and if he/they does not/do not join then it will be at the risk of the plaintiff/plaintiffs. It is further submitted that the plaintiff cannot be forced to implead any other person, more particularly who is not a party to the contract, against the wish of the plaintiff. It is submitted that therefore the aforesaid two decisions, upon which reliance has been placed by the learned Senior Advocate appearing on behalf of the appellant, shall not be applicable to the facts of the case on hand. It is submitted that as such the decision of

this Court in the case of *Kasturi (supra)* clinches the issue and shall be squarely applicable to the facts of the case on hand.

4.3 Making the above submissions and relying upon the decision of this Court in the case of *Kasturi(supra)*, it is prayed to dismiss the present appeals.

5. We have heard the learned counsel for the respective parties at length.

5.1 At the outset, it is required to be noted that the original plaintiffs filed the suit against the original owner – vendor – original defendant no.1 for specific performance of the agreement to sell with respect to suit property dated 3.5.2005. It is an admitted position that so far as agreement to sell dated 3.5.2005 of which the specific performance is sought, the appellant is not a party to the said agreement to sell. It appears that during the pendency of the aforesaid suit and though there was an injunction against the original owner – vendor restraining him from transferring and alienating the suit property, the vendor executed the sale deed in favour of the appellant by sale deed dated 10.07.2008. After a period of approximately four years, the appellant filed an application before the learned trial Court under Order 1 Rule 10 of the CPC for his impleadment as a defendant. The appellant claimed the right on the basis of the said sale deed as well as the agreement to sell dated 31.3.2003 alleged to have been executed by the original vendor. The said application was opposed by the original plaintiffs. The learned trial Court despite the opposition by the original plaintiffs allowed the said application which has been set aside by the High Court by the impugned judgment and order. Thus, it was an application under Order 1 Rule 10 of the CPC by a third party to the agreement to sell between the original plaintiffs and original defendant no.1 (vendor) and the said application for impleadment is/was opposed by the original plaintiffs. Therefore, the short question which is posed for consideration before this Court is, whether the plaintiffs can be compelled to implead a person in the suit for specific performance, against his wish and more particularly with respect to a person against whom no relief has been claimed by him?

5.2 An identical question came to be considered before this Court in the case of *Kasturi (supra)* and applying the principle that the plaintiff is the *dominus litis*, in the similar facts and circumstances of the case, this Court observed and held that the question of jurisdiction of the court to invoke Order 1 Rule 10 CPC to add a party who is not made a party in the suit by the plaintiff shall not arise unless a party proposed to be added has direct and legal interest in the controversy involved in the suit. It is further

observed and held by this Court that two tests are to be satisfied fordetermining the question who is a necessary party. The tests are – (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (2) no effective decree can be passed in the absence of such party. It is further observed and held that in a suit for specific performance the first test can be formulated is, to determine whether a party is a necessary party there must be a right to the same relief against the party claiming to be a necessary party, relating to the same subject matter involved in the proceedings for specific performance of contract to sell. It is further observed and held by this Court that in a suit for specific performance of the contract, a proper party is a party whose presence is necessary to adjudicate the controversy involved in the suit. It is further observed and held that the parties claiming an independent title and possession adverse to the title of the vendor and not on the basis of the contract, are not proper parties and if such party is impleaded in the suit, the scope of the suit for specific performance shall be enlarged to a suit for title and possession, which is impermissible. It is further observed and held that a third party or a stranger cannot be added in a suit for specific performance, merely in order to find out who is in possession of the contracted property or to avoid multiplicity of the suits. It is further observed and held by this Court that a third party or a stranger to a contract cannot be added so as to convert a suit of one character into a suit of different character. In paragraphs 15 and 16, this Court observed and held as under:

> **"15.** As discussed hereinearlier, whether Respondents 1 and 4 to 11 were proper parties or not, the governing principle for deciding the question would be that the presence of Respondents 1 and 4 to 11 before the court would be necessary to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit. As noted hereinearlier, in a suit for specific performance of a contract for sale, the issue to be decided is the enforceability of the contract entered into between the appellant and Respondents 2 and 3 and whether contract was executed by the appellant and Respondents 2 and 3 for sale of the contracted property, whether the plaintiffs were ready and willing to perform their part of the contract and whether the appellant is entitled to a decree for specific performance of a contract for sale against Respondents 2 and 3. It is an admitted position that Respondents 1 and 4 to 11 did not seek their addition in the suit on the strength of the contract in respect of which the suit for specific performance of the contract for sale has been filed. Admittedly, they based their claim on independent title and possession of the contracted property. It is, therefore, obvious as noted hereinearlier that in the event, Respondents 1 and 4 to 11 are added or impleaded in the suit, the scope of the suit for specific performance of the contract for sale shall be enlarged from the suit for

specific performance to a suit for title and possession which is not permissible in law. In the case of *Vijay Pratap* v. *Sambhu Saran Sinha* [(1996) 10 SCC 53] this Court had taken the same view which is being taken by us in this judgment as discussed above. This Court in that decision clearly held that to decide the right, title and interest in the suit property of the stranger to the contract is beyond the scope of the suit for specific performance of the contract and the same cannot be turned into a regular title suit. Therefore, in our view, a third party or a stranger to the contract cannot be added so as to convert a suit of one character into a suit of different character. As discussed above, in the event any decree is passed against Respondents 2 and 3 and in favour of the appellant for specific performance of the contract for sale in respect of the contracted property, the decree that would be passed in the said suit, obviously, cannot bind Respondents 1 and 4 to 11. It may also be observed that in the event, the appellant obtains a decree for specific performance of the contracted property against Respondents 2 and 3, then, the Court shall direct execution of deed of sale in favour of the appellant in the event Respondents 2 and 3 refusing to execute the deed of sale and to obtain possession of the contracted property he has to put the decree in execution. As noted hereinearlier, since Respondents 1 and 4 to 11 were not parties in the suit for specific performance of a contract for sale of the contracted property, a decree passed in such a suit shall not bind them and in that case, Respondents 1 and 4 to 11 would be at liberty either to obstruct execution in order to protect their possession by taking recourse to the relevant provisions of CPC, if they are available to them, or to file an independent suit for declaration of title and possession against the appellant or Respondent 3. On the other hand, if the decree is passed in favour of the appellant and sale deed is executed, the stranger to the contract being Respondents 1 and 4 to 11 have to be sued for taking possession if they are in possession of the decretal property.

16. That apart, from a plain reading of the expression used in Subrule (2) Order 1 Rule 10 CPC "all the questions involved in the suit" it is abundantly clear that the legislature clearly meant that the controversies raised as between the parties to the litigation must be gone into only, that is to say, controversies with regard to the right which is set up and the relief claimed on one side and denied on the other and not the controversies which may arise between the plaintiff -appellant and the defendants inter se or questions between the parties to the suit and a third party. In our view, therefore, the court cannot allow adjudication of collateral matters so as to convert a suit for specific performance of contract for sale into a complicated suit for title between the plaintiffa-ppellant on one hand and Respondents 2 and 3 and Respondents 1 and 4 to 11 on the other. This addition, if allowed, would lead to a complicated litigation by which the trial and decision of serious questions which are totally outside the scope of the suit would have to be gone into. As the decree of a suit for specific performance of the contract for sale, if passed, cannot, at all, affect the right, title and interest of Respondents 1 and 4 to 11 in respect of the contracted property and in view of the detailed discussion made hereinearlier, Respondents 1 and 4 to 11 would not, at all, be necessary to be added in the instant suit for specific performance of the contract for sale."

That thereafter, after observing and holding as above, this Court further observed that in view of the principle that the plaintiff who has filed a suit for specific performance of the contract to sell is the *dominus litis*, he cannot be forced to add parties against whom, he does not want to fight unless it is a compulsion of the rule of law. In the aforesaid decision in the case of *Kasturi(supra)*, it was contended on behalf of the third parties that they are in possession of the suit property on the basis of their independent title to the same and as the plaintiff had also claimed the relief of possession in the plaint and the issue with regard to possession is common to the parties including the third parties, and therefore, the same can be settled in the suit itself. It was further submitted on behalf of the third parties that to avoid the multiplicity of the suits, it would be appropriate to join them as party defendants. This Court did not accept the aforesaid submission by observing that merely in order to find out who is in possession of the contracted property, a third party or a stranger to the contract cannot be added in a suit for specific performance of the contract to sell because they are not necessary parties as there was no semblance of right to some relief against the party to the contract. It is further observed and held that in a suit for specific performance of the contract to sell the *lis* between the vendor and the persons in whose favour agreement to sell is executed shall only be gone into and it is also not open to the Court to decide whether any other parties have acquired any title and possession of the contracted property. It is further observed and held by this Court in the aforesaid decision that if the plaintiff who has filed a suit for specific performance of the contract to sell, even after receiving the notice of claim of title and possession by other persons (not parties to the suit and even not parties to the agreement to sell for which a decree for specific performance is sought) does not want to join them in the pending suit, it is always done at the risk of the plaintiff because he cannot be forced to join the third parties as party defendants in such suit. The aforesaid observations are made by this Court considering the principle that plaintiff is the *dominus litis* and cannot be forced to add parties against whom he does not want to fight unless there is a compulsion of the rule of law. Therefore, considering the decision of this Court in the case of *Kasturi (supra)*, the appellant cannot be impleaded as a defendant in the suit filed by the original plaintiffs for specific performance of the contract between the original plaintiffs and original defendant no.1 and in a suit for specific performance of the contract to which the appellant is not a party and that too against the wish of the plaintiffs. The plaintiffs cannot be forced to add party against whom he does not want to fight. If he does so, in that case, it will be at the risk of the plaintiffs.

6. Now so far as the reliance placed upon the decision of this Court in the case of *Robin Ramjibhai Patel (supra)* and the decision of the Bombay High Court in the case of *Shri Swastik Developers (supra)*, relied upon by the learned Senior Advocate for the appellant is concerned, the aforesaid decisions shall not be applicable to the facts of the case on hand as in both the aforesaid cases, it was the plaintiff who submitted an application to implead the third parties/subsequent purchasers who claimed title under the vendor of the plaintiff. Position will be different when the plaintiff submits an application to implead the subsequent purchaser as a party and when the plaintiff opposes such an application for impleadment. This is the distinguishing feature in the aforesaid two decisions and in the decision of this Court in the case of *Kasturi(supra).*

7. In view of the above and for the reasons stated above, we are in complete agreement with the view taken by the High Court. No interference of this Court is called for. The appellant cannot be impleaded as a defendant in the suit for specific performance of the contract between the original plaintiffs and original defendant no.1 against the wish of the plaintiffs. Accordingly, the present appeals stand dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

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2019 (II) ILR - CUT- 457

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

O.J.C. NO. 4052 OF 2001

M/S. ANHEUSER BUSCH INBEV INDIA LTD. .....Petitioner

.Vs.

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

BOARD'S EXCISE RULES 1965 – Rule 38 read with Section 90 of the Bihar and Orissa Excise Act, 1915 – Provisions under – Power to make rules – Amendment – Challenge is made to the amendment of the Rule-38 (13-A) of Board's Excise Rules, 1965 by notification dated 17th April, 2001 thereby substituting the fees on bottling of beer @ Rs.3/- per bottle to be paid by the manufacturer after the beer is bottled and then be removed to the approved warehouse – Plea of competency of the Board questioned – Further plea that neither there being any power

conferred on the Board nor there being any charging section in the Act, 1915, to levy or impose fees on bottling of beer and therefore the Rule 38 (13-A) of the Rules, 1965 be held ultra vires of Section 90 of Act, 1915 – Court considered all pleas and held as under:

"We have heard learned counsel for both the sides. Before proceeding in the matter, on a conjoint reading of reading of Rule-38 of Board's Excise Rules,1965 and Section 90 of the Act, 1915 read with its Explanation, it is abundantly clear that the Board which is a delegated authority under the said Act, has the powers to levy impose/prescribe fees under Sub-section (7) of Section 90. Rule is to be framed under Sub-section (7) of Section 90 read with Rule-38 and Explanation of Section 90. In our considered opinion, Rule can be framed for prescribing fees for the contingencies under Sub-section (7), namely, for any licence, permit or pass. The further power which are given under the Explanation is to prescribe different rates of fees for different classes of licenses, permits or passes and storage and for different areas. On a combined reading of Sub-section (7) of Section 90 and explanation thereto, it is very clear that the power of making rule for the purpose Sub-section (1)(b) of Section 90, which has been contented by learned counsel for the State, is very clear from the opening word of Sub-section (1), i.e., for regulating the manufacturer, supply, or storage of any intoxicant. It does not give power to regulate or prescribe fees. Sub-section (7) read with the explanation, if read conjointly, cannot bring within its fold the power for prescribing fees for bottling of beer. Thus, notification dated 17th April, 2001 being violative of Section-90(7) of the Act,1915, is required to be quashed and set aside and the same is accordingly quashed and set aside." *(Para 5)*

Case Laws Relied on and Referred to :-

1. W.P.(C) No.2365 of 2003 disposed of on 28.09.2007 : M/s SKOL Breweries Ltd. Vs. State of Orissa & Ors.
2. (2004) 11 SCC 112 : State of Punjab Vs. Devans Modern Breweries Ltd.,
3. (2009) 10 SCC 755 : CIT Vs. McDowell and Co. Ltd.
4. (1998) 8 SCC 428 : Sir Shadi Lal Distillery & Chemical Works Vs. State of U.P.

For Petitioner : Mr. Manoj Mishra, Sr. Adv.
M/s. Tanmay Mishra, B.B.Mohanty & M.K.Rajguru.
For Opp. Parties : M/s B.Routray, A.K.Baral & B.Singh, Addl. Govt. Adv.

JUDGMENT Heard and Disposed of on 12.03.2019

BY THE COURT

By way of this writ petition, the petitioner-Company has challenged the action of the State Government in amending the Rule-38 (13-A) of Board's Excise Rules, 1965 by notification dated 17th April, 2001 (Annexure-1) thereby substituting the fees on bottling of beer @ Rs.3/- per bulk liter to be paid by the manufacturer after the beer is bottled; and also prays for refund of entire amount recovered towards bottling fee amounting to Rs.2,57,71,215/- for the financial year 2001-02 with interest. It also

challenges the introduction of sub-rule (13-A) to the Rules, 1965 imposing fees at the rate of Rs.1/- per bulk liter on bottling of beer.

2. Learned counsel for the petitioner submitted that there is no source of power imposing such fee. As it appears, by notification dated 17th April, 2001, the State Government has increased charge for bottling of bulk liter of beer from Rs.1/- to Rs.3/-.

3. Learned counsel for the petitioner further contended that initially the petitioner had not challenged the 1994 notification, but since the rate of bottling fee was increased in 2001, he is left with no other option but to challenge both the notifications. At the outset, we make it clear that we are not going to interfere with the fees the petitioner had already deposited pursuant to notification of 1994, since the same was challenged after a lapse of more than eight years.

3.1 The first notification came to be issued by the Board of Revenue under Board's Excise Rules,1965 vide Notification No.7023 dated 4th November, 1994 by way of amendment/insertion in Rule-38(13-A), which reads as follows:-

> "Amendment
>
> The following shall be inserted below 38 (13-A) of Board's Excise Rules, 1965.
>
> A fee at the rate of Rupee one for bulk litre on beer shall be paid by the manufacturer of such beer after beer is bottled and thereafter be removed to the approved Ware-house or store room.
>
> This Amendment shall come into force with immediate effect."

3.2 Subsequent amendment was brought in by notification No.1078 dated 17.04.2001 (Annexure-9), which is impugned in this petition. For ready reference, the amendment is quoted below:-

> "AMENDMENT
>
> The following shall be substituted for Rule 38
>
> (13-A) for FEE ON BOTTLING OF BEER:
>
> A fee at the rate of Rs.3/- (Rupees three) only per Bulk Litre of Beer shall be paid by the manufacturer of such beer after beer is bottled and thereafter be removed to the approved warehouse or storeroom."

3.3 Learned counsel for the petitioner contended that Section-38 of the Bihar and Orissa Excise Act, 1915 (for short, 'the Act, 1915') prescribes power to impose fees for, terms, conditions, and form of, and duration of, licenses, permits and passes. Power of the Board under Section 90 of the Act, 1915 to frame Rules for imposition of fees read with its explanation clearly

indicates that the Rule making power has been conferred on the Board under Sub-section (7) of Section 90 for prescribing scale of fees in respect of any license, permit, pass granted under the said Act. Further, it has been clarified in the explanation that fees may be prescribed under Sub-section (7) on different rates for different classes of license, permit, passes and storage for different areas. To support his argument, learned counsel for the petitioner relied upon a decision of this Court in the case of ***M/s SKOL Breweries Ltd. Vs. State of Orissa and others*** **[W.P.(C) No.2365 of 2003 disposed of on 28.09.2007**, which has been confirmed by the Hon'ble Supreme Court vide order dated 08.02.2008 passed in SLP(Civil) No(s).2359/2008. Paragraphs-26 to 35 of the said Division Bench Judgment of this Court is reproduced hereunder for ready reference:-

> "26. It has been held in the case of Calcutta Municipal Corporation v. Shrey Mercantile (P) Ltd. and others, reported in (2005) 4 SCC 245 that "where the Government intends to raise the revenue as the primary object, the imposition is a tax" (see paragraph 16 at page 258 of the report). In the instant case it is clear from the stand taken by the State in its affidavit that the primary object of the State is to augments the Excise revenue by imposition of franchise fee. Therefore, though it is called a 'fee', actually it is a tax.
>
> 27. Section 13 of the said Act provides for taking of licence for manufacturing and bottling and sale of liquor. The petitioner has got that licence.
>
> 28. "Board" has been defined under Section 2(2) of the Act which means the Board of Revenue. Under Section 38 the Board has been given power to prescribe the forms and particulars for issuance of licence. Section 38(1) Clause (a) and Clause (b) are as follows:
>
> "38. Fees for, terms conditions, and form of land duration of licence, 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."
>
> 29. Under Section 90 of the said Act, the Board has the power to make rules. In so far as the fees are concerned, the Board's power to make Rules is provided under sub-section (7) of Section 90, which is as follows:
>
> "90(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."
>
> There is an Explanation to Section 90 which is relatable to Sub-Section.
>
> (7) The said Explanation is as follows:
>
> "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."

30. On conjoint reading of Section 38 and Section 90(7) read with the Explanation, it is clear that the Board which is a delegated authority under the said Act, has the power to prescribed scale of fees or the manner of fixing of fees in respect of any licence, permit or pass and in exercise of that power the Board may fix different rates for different classes of licence, permits, passes etc. But even a conjoint reading of the said provisions does not show that the Board is empowered to prescribe a new fee which was not in existence in the past. Franchise fee was not in existence in the past. Board has no power to impose the same in exercise of its rule-making authority under Section 90(7) of the said Act. Admittedly the Board, being a delegated authority does not have the competence to create a new form of fee or permit which is not provided under the Act. Sub-rule (4) of Rule 104 under which the franchise fee has been allegedly levied, has been framed by the Board in exercise of its power under Section 90(7) of the Act. This Court finds that sub-section (7) of Section 90 does not authorize the Board to impose any new fee.

31. Reference in this connection has been made to the judgment of the Supreme Court in the case of ***Bimal Chandra Banerjee v. State of Madhya Pradesh and others***, reported in (1970) 2 SCC 467. That was also a case under the Excise Act. In paragraph 13 at page 472 of the report, the Hon'ble Supreme Court held that no tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorizes the imposition, even if it is assumed that the power to tax can be delegated to the executive. The learned Judges made very clear that the basis of the statutory power conferred by the statute cannot be transgressed by the rule-making authority and learned judges categorically held that the rule-making authority has no plenary power, it has to act within the limits of the power to it by the statute.

32. Following the said principles, we find that while acting under Sub-Section (7) of Section 90 of the Act, the Board cannot impose a new fee which is in the nature of a tax, as has been discussed above, since it has not been authorized to do so under the Act.

33. Same principles have been reiterated by the Supreme Court in the case of Indian Express Newspapers (Bombay) Pvt. Ltd. and others v. Union of India and others, reported in AIR 1986 SC 515. In paragraph 73 at page 542 of the report the learned Judges, while dealing with the piece of subordinate legislation, held that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute. It has also been held that subordinate legislation must yield to plenary legislation and subordinate legislation must be framed in accordance with the plenary legislation. In the instant case, Rule 104 (4) goes beyond the authority given to the Board under Section 90 (7) of the Act and the Rule 104 (4) is ultra vires Section 90(7) of the Act.

34. In the case of Agriculture Market Committee v. Shalimar Chemical Works Ltd., reported in (1997) 5 SCC 516, the same principles have been reiterated in paragraph 25 and 26 of the report. In paragraph 26, the learned Judges held that the principles of confining subordinate legislation within the parameters of the parent statute is applicable in Taxation law. Learned Judges further clarified that the effect of this principles is that the delegate which has been authorized to make subsidiary rules and regulations has to work within the scope of its authority and cannot widen or constrict the scope of the Act or the policy laid down thereunder. It is beyond all controversy that a delegated authority cannot, in the garb of making rules, legislate on a field not covered by the Act.

35. A reading of various provisions of the said Act makes it clear that the power of imposition of tax or duty on excise items vests in the State Government and not in the Board (see Section 27, 27-A and 28 of the Act). The Board is merely authorized under Section 90 to prescribe the scale of fees or the manner of fixing the fees but it cannot, in the garb of that power, imposed a new fee, which is in the nature of a tax."

3.4 Learned counsel for the petitioner further contended that under Board's Excise Rules, 1965, under Rule 38, which stipulates as under:

"**38. Procedure for receipt and disposal of foreign liquor.—**

xx xx xx

(13A) After the operations under Sub-rule (13) is over, the licensee shall pay a fee at the rate of Rupee one per Bulk Litre as Blending and Bottling fee and the bottled I.M.F.L. shall thereafter be removed to the approved warehouse or store room."

However, he contended that Rule-13-A be held contrary to Section-90 of Act, 1915, which gives power to Board to make rules.

3.5 Section-90(7) of Bihar and Orissa Excise Act, 1915 is relevant for our consideration, which is quoted below.

"90(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."

3.6 He, therefore, submitted that neither there being any power conferred on the Board nor there being any charging section in the Act, 1915, to levy or impose fees on bottling of beer, Rule 38 (13-A) of the Board's Excise Rules, 1965 be held *ultra vires* of Section 90 of Act, 1965.

4. An endeavour is made by learned counsel for the State to take us to Section-90 and support their stand to the effect that in view of provisions of Section-90(1)(b) which prescribes that the Board may make rules regarding bottling of liquor for purposes of sale, Rule-38 (13-A) cannot be held *ultra vires*. For better appreciation of facts, Section 90(1)(b) of the Act, 1915 is quoted below:-

"90. **Power of Board to make rules** - The Board may make rules; (1) for regulating the manufacturer, supply, or storage of any intoxicant, and in particular, and with prejudice to the generality of this provision may make rules for regulating.-

xx xx xx

the bottling of liquor for purposes of sale;

xx xx xx"

4.1 Therefore, on a conjoint reading of Board's power under Section-90(7) and Section- 90 (1)(b) they have power to levy or impose fees on bottling of beer also.

4.2 He has taken us to the affidavit in reply filed by them, more particularly paragraphs-6 and 7, which are reproduced hereunder:-

> "6. That in reply to the averments at paragraph-5 and 8 of the writ petition, it is humbly submitted that the petitioner has misconstrued the provisions of the Act. It is submitted that on the contrary the provisions of the Act has specifically given power to the Board of Revenue powers in Sub-section (7) of Section-90 of Bihar & Orissa Excise Act, 1915. The Board has power for prescribing the scale of fees or the manner of fixing the fees payable in respect of any license, permit or pass granted under the Act, or in respect of the storing of any intoxicant. In Section-90(1)(b) of Bihar & Orissa Excise Act-1915, Board is empowered to make Rules for regulating the bottling of liquor for the purpose of sale. In exercising such power, the Board has made Ruyle-38(13-A) of Boards Excise Rules, 1965 for collection of fee from the licensee as Blending and Bottling Fee after the operations under sub-rule (13) is over and thereafter the bottled IMFL shall be removed to the approved warehouse. Sub-rule(13) provides for rendering of service i.e., the Officer-in-Charge of the Unit shall satisfy himself that the proper number of bottles are placed in each case and shall see that the packed cases are closed at once and fastened. In the Excise Policy for the year 2001-12, Government have decided for collection of Bottling Fee @Rs.3/'- per Bulk Liter for bottling of Beer in the Brewery. Board of Revenue, in exercise of power conferred under Section-90, has amended Rule-38(13-A) of Boards Excise Rules, 1965 vide Notification No. 1078 dated 17.04.2001 as "A fee at the rate of Rs.3/- (Rupees Three) only per Bulk Liter of Beer shall be paid by the manufacturer of such Beer after Beer is bottled and thereafter be removed to the approved warehouse of storeroom. "Further, State Governments have been empowered by the Constitution to prescribe fee, duty, etc. as it comes within their legislative competence their own subject. It is submitted that brew of Beer and bottling of Beer are two separate activities of a Brewery. It may kindly be appreciated from the decision of the Hon'ble Supreme Court in the case of Sir Shadilal Distillery & Chemical Works vrs. State of Uttar Pradesh in (1998) 8 SCC 428, bottling is a distinct activity, charging of license fee for grant of license for bottling is valid. Therefore, the contentions raised by the petitioner in these paragraphs have no merit and are liable to be rejected.
>
> 7. That in reply to averments at paragraphs–9 to 12 of the writ petition, it is humbly submitted that the State Government on proper application of mind and after careful consideration have prescribed the fee for bottling of Beer, which is the consideration for parting of privilege by State to deal in liquor order to increase revenue. Hence, the comparative statement with other States submitted by the petitioner is not acceptable."

4.3 Learned counsel for the State has relied upon judgment of reported in the case of ***State of Punjab Vs. Devans Modern Breweries Ltd.,*** reported in (2004) 11 SCC 112, wherein Hon'ble Supreme Court at paragraph-112 observed as under:-

> "112. The learned counsel for the respondent submitted that there is no source of power for imposition of import fee over and above the countervailing duty and that the appellant State was not able to show that under which authority or provision of the Punjab Excise Act, 1914, they can impose the import fee over and above the countervailing duty. It is further submitted that a combined reading of Section 33-A of the Punjab Excise Act, 1914, Articles 301 and 304 of the Constitution and Entry 51 of

List II of the Seventh Schedule to the Constitution makes it clear that the State of Punjab has no authority to impose the import fee over and above the countervailing duty. This contention, in my opinion, has no force for the reasons stated and the discussions made in paragraphs supra."

4.4 Hon'ble Supreme Court in the case of ***CIT v. McDowell and Co. Ltd.,*** (2009) 10 SCC 755, in which it is observed as follows:-

"23. This Court in the light of decisions starting from State of Bombay v. F.N. Balsara [AIR 1951 SC 318] held that the expression "fee" is not used in the State excise laws or rules in the technical sense of the expression. By "licence fee" or "fixed fee" under excise laws relating to potable liquors/intoxicants is meant the price or consideration which the Government charges to the licensees for parting with its exclusive privilege and granting them to the licensees. There is no fundamental right to do trade or business in intoxicants. The State under its regulatory powers has the right to prohibit absolutely every form of activity in relation to intoxicants, its manufacture, storage, export, import, sale and possession in all their manifestations these rights are vested in the State. The decision was reiterated in Har Shankar v. Dy.Excise and Taxation Commr. [(1975) 1 SCC 737: AIR 1975 SC 1121] and State of U.P. v. Sheopat Rai [1994 Supp (1) SCC 8: AIR 1994 SC 813]."

4.5 Hon'ble Supreme in the case of ***Sir Shadi Lal Distillery & Chemical Works v. State of U.P.,*** reported in (1998) 8 SCC 428, in which it is observed as under:-

3. The appellants submit that under the U.P. Excise Act, 1910, there is no power to impose a licence fee for bottling of liquor. Hence, the imposition of such a fee is ultra vires the U.P. Excise Act of 1910. Under Section 17(d) of the U.P. Excise Act, 1910, there is an express provision, inter alia, to the effect that no intoxicant shall be manufactured and no liquor shall be bottled for sale except under the authority and subject to the terms and conditions of a licence granted in that behalf by the Excise Commissioner under Section 18. Section 24 provides that the Excise Commissioner may grant to any person a licence for the exclusive privilege, inter alia, of manufacturing or of supplying by wholesale or of both, or of selling by wholesale or by retail, or of manufacturing or of supplying by wholesale, or both, and of selling by retail any liquor or intoxicating drug within any local area. The activity of bottling is an integral part of the activity of manufacture and supply of such liquor. In fact, a very similar provision in the Karnataka Excise Act, 1965 has been interpreted by this Court in the case of Khoday Distilleries Ltd. v. State of Karnataka [(1996) 10 SCC 304 : (1995) 7 Scale 262] as covering all activities which regulate the activity of manufacture, distribution and sale of liquor. Section 28(d) of the U.P. Excise Act, 1910 also provides that an excise duty or a countervailing duty may be imposed on any excisable article, inter alia, manufactured, cultivated or collected under any licence granted under Section 17. Under Section 41(c), the Excise Commissioner has been empowered to make rules, inter alia, prescribing the scale of fees or the manner of fixing the fees payable for any licence, permit or pass. It is in the exercise of this power that the U.P. Bottling of Foreign Liquor Rules, 1969 have been framed. There is, therefore, no merit in the contention that the levy of a fee for a bottling licence is beyond the scope of the U.P. Excise Act of 1910.

This extract is taken from Sir Shadi Lal Distillery & Chemical Works v. State of U.P., (1998) 8 SCC 428 at page 429

4. It is next submitted that in the plant of the appellants/petitioners, bottling is done as a part of the manufacturing activity. Since they already possessed a manufacturing licence, and since a duty of excise is levied on the liquor manufactured, an additional fee for a bottling licence should not be imposed. This argument also has no merit. Bottling is a distinct activity for which a licence is required under the provisions of the U.P. Bottling of Foreign Liquor Rules, 1969. There is an express power under the U.P. Excise Act, 1910 to levy such a fee as set out above. In the premises and in view of the ratio of the judgment of this Court in Khoday Distilleries v. State of Karnataka [(1996) 10 SCC 304 : (1995) 7 Scale 262] which applies to these cases also, there is no merit in these appeals/petitions. The same are accordingly dismissed with costs."

5. We have heard learned counsel for both the sides. Before proceeding in the matter, on a conjoint reading of Rule-38 of Board's Excise Rules,1965 and Section 90 of the Act, 1915 read with its Explanation, it is abundantly clear that the Board which is a delegated authority under the said Act, has the powers to levy impose/prescribe fees under Sub-section (7) of Section 90. Rule is to be framed under Sub-section (7) of Section 90 read with Rule-38 and Explanation of Section 90. In our considered opinion, Rule can be framed for prescribing fees for the contingencies under Sub-section (7), namely, for any licence, permit or pass. The further power which is given under the Explanation is to prescribe different rates of fees for different classes of licenses, permits or passes and storage and for different areas. On a combined reading of Sub-section (7) of Section 90 and explanation thereto, it is very clear that the power of making rule for the purpose Sub-section (1)(b) of Section 90, which has been contented by learned counsel for the State, is very clear from the opening word of Sub-section (1), i.e., for regulating the manufacture, supply, or storage of any intoxicant. It does not give power to regulate or prescribe fees. Sub-section (7) read with the explanation, if read conjointly, cannot bring within its fold the power for prescribing fees for bottling of beer liquor. Thus, notification dated 17th April, 2001 being violative of Section-90(7) of the Act, 1915, is required to be quashed and set aside and the same is accordingly quashed and set aside. The amount paid pursuant to 2001 notification is to be refunded to the petitioner and will be refunded within a period of six weeks from the date of production of certified copy of this order. If the amount that is to be worked out for refund is not refunded within the stipulated period, it will be collected from the concerned erring officer/official whoever is found responsible with interest at the rate of 8% per annum from the date it becomes due.

6. With the aforesaid observation and direction, the writ petition stands allowed to the extent indicated above.

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2019 (II) ILR - CUT- 466

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

W.P.(C) NO. 2120 OF 2018
SATYA SAI CONSTRUCTION .....Petitioner

.Vs.

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

For the petitioner : M/s Upendra Kumar Samal, C.D.Sahoo, S.P.Patra, S.Naik, M.R.Mohapatra & B.Bal

For Opp. Parties : Addl. Govt. Adv.
M/s. P.C.Nayak, S.K.Rout & A.K.Patra
M/s. S.S.Padhy, A.P.Rath

W.P.(C) NO. 20113 OF 2018
MAA SANTOSHI CONSTRUCTION .....Petitioner

.Vs.

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

For the petitioner : M/s. P.C.Nayak, S.K.Rout & A.K.Patra

For Opp. Parties : Addl. Govt. Adv.
M/s Upendra Kumar Samal, C.D.Sahoo, S.P.Patra, S.Naik, M.R.Mohapatra & B.Bal.

CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Writ petition – Tender matter – Challenge is made to the award of contract in favour of the Partnership Firm which inducted a Schedule Caste Partner and availed the benefit as provided under the Govt. Resolution by utilizing the individual experience of that Partner – Further plea that the experience of individual partner cannot be taken as the experience of the Partnership Firm – Whether such a proposition is correct? – Held, No – Reasons indicated – New Horizons Limited and another Vs. Union of India and others, reported in (1995) 1 SCC 478 and M/s MAA Nabadurga Construction Vs. Saroj Kumar Jena and others, reported in 2015(II) OLR (SC) 610 followed.

Case Laws Relied on and Referred to :-

1. 2018(1) ILR Cuttack 475 : Suresh Chandra Sahoo Vs. State of Odisha.
2. (1995) 1 SCC 478 : New Horizons Limited & Anr. Vs. Union of India & Ors.
3. 2015(II) OLR (SC) 610 : M/s MAA Nabadurga Construction Vs. Saroj Kumar Jena & Ors.

ORDER Heard and Disposed of on 30.04.2019

BY THE BENCH

In writ petition bearing W.P.(C) No.2120 of 2018, the petitioner being a Partnership Firm has challenged the letter dated 30.01.2018

(Annexure-3) issued by opposite party No.1-Chief Engineer in directing the opposite party No.5-M/s Maa Santoshi Construction [petitioner in W.P.(C) No.20113 of 2018], another Partnership Firm to submit its willingness for availing price preference entitled for SC/ST contractor after opening the financial bid and the proceeding of the tender committee meeting dated 24.02.2018 under Annexure-7 and work order dated 07.03.2018 issued under Annexure-8, as well. Moreover, petitioner prayed for cancellation of license of opposite party No.5 as a Super Class Contractor.

2. In W.P.(C) No.20113 of 2018, the petitioner, which is a Partnership Firm, inter alia challenges the alleged illegal, arbitrary decision of opposite party No.3, i.e., Superintending Engineer, Rural Works Circle, Kendrapara-Jajpur, who neither being the tender inviting authority nor a signatory to the agreement, in letter No.593 dated 08.06.2018 (Annexure-1) directed opposite party No.4-Executive Engineer, Rural Works Division No.1, Jajpur to stop the work, on a plea that W.P.(C) No.2120 of 2018 filed by opposite party No.5- Satya Sai Construction, Binjharpur, Jajpur and CONTC No.839 of 2018 are pending before this Court.

3. Since the crux of the dispute that revolves around both the writ petitions and issues involved is similar, as agreed upon by learned counsel for the parties, both the writ petitions are taken up together for analogous hearing and decided by a common order. For convenience W.P.(C) No.2120 of 2018 is to be hereinafter called '1st Writ Petition' and W.P.(C) No.20113 of 2018 is to be hereinafter called '2nd Writ Petition'.

4. Learned counsel for the petitioner in the 1st Writ Petition submitted that with an intent to avail benefit of the concession(s) granted to Scheduled Caste and Scheduled Tribe Contractor by virtue of Government of Odisha in Works Department Resolution dated 11th October, 1977, a scheduled caste partner has been inducted by the petitioner in the 2nd Writ Petition on 21st of July, 2017. Taking undue advantage of the experience and concession granted by the Government of Odisha, the petitioner-partnership firm in the 2nd Writ Petition applied for the work in question and become successful. Whereas, the petitioner-partnership firm who was more qualified, was ignored. It is his contention that the experience which was gained by the SC partner of the firm, i.e., the Super Class Contractor, R.C. issued vide office Order No.24318 dated 19.05.2014 of the Chairman of the Committee of CEs & Engineer in Chief (Civil), Odisha, is deemed to have been cancelled on an from the date he was inducted as a partner. The experience of earlier partnership firm right from 2014, prior to induction of partner (SC), who is a

major partner to the extent of 52%, cannot be considered. Reliance is also placed on the document Annexure-A/4 (in the 1st Writ Petition) annexed to the counter filed by opposite parties 1 to 4, i.e., the registration of the partnership firm, Clause-5 of which stipulates that the partnership shall be and deemed to be/have commenced with effect from the appointed date which is 1st day of Feb' 2017. Clause-17 stipulates that the initial Capital investment of the firm is Rs.20,00,000/-, which is as per the share percentage mentioned against each partner:

i.	Partner of the 1st part	@38%
ii.	Partner of the 2nd part	@10%
iii.	Partner of the 3rd part	@52%

Our attention is also drawn to sub-clause (5) of Clause 2.1 of the Tender document, which is quoted below:-

> "2. **GENERAL INSTRUCTIONS TO TENDERS**
>
> 2.1 **Eligibility Criteria**
>
> xx xx xx
>
> (5) The intending tender(s) should have executed **similar nature of work** worth 75% of the estimated cost put to tender (as in Col-3 of the Table) during any three financial years taken together of the last preceding five years. **In case of Contract spanning for more than one financial year, the breakup of execution of work in each of financial year should be furnished.** A certificate to this effect must be enclosed from the officer not below the rank of Executive Engineer as per enclosed Format-I."

5. Strong reliance is also placed on a judgment of Division Bench judgment of this Court in the case of ***Suresh Chandra Sahoo Vrs. State of Odisha***, reported in 2018(1) ILR Cuttack 475, in paragraphs 12, 14 and 15 of which, this Court observed as under:

> "10. In our opinion, if with such change of constitution of the partnership firm, the benefit of a super class contractor is permitted to be continued and the benefit of government resolution dated 11.10.1977 is given, then in our view the very object of reservation or benefit to be granted in favour of scheduled caste person or firms would be frustrated. A firm is granted special status of super class contractor because of composition of its partner and their experience. If subsequently the entire composition is changed and the fresh partners are inducted, then in this way the firm would take the benefit of being registered as a super class contractor at the time when it had highly qualified partners and thereafter change the composition to induct scheduled caste partner to take the benefit of concession granted by the government by its resolution dated 11.10.1977. Take for example that a partnership firm is constituted with five qualified engineers, who successfully carry out certain works and because of such experience, get the firm registered as super class contractor firm, and thereafter taking the benefit of its registration as super class contractor, change the composition of its partners to reduce the qualified engineers as partners to one or two and may be nil, and

induct a scheduled caste person with 51% or more as shareholders, then in this way very conveniently fraud can be played by first getting the firm registered as super class contractor firm, and then induct new partner(s) to avail the benefit of the reservation given to the scheduled caste and scheduled tribe persons. This cannot be permitted in law. Giving registration as super class contractor is with a purpose that qualified persons/firms alone should get such registration so that quality of high value contract work is maintained. Such benefit cannot be transferred when the composition of the firm is changed and a new majority shareholder is inducted with the purpose of getting benefit under the circular of the State Government dated 11.10.1977.

xx xx xx

12. It is thus clear that super class contractor registration was awarded in favour of Ramesh Chandra Naik as Managing Partner of firm M/s Jagannath Construction Company in the year 2010-11, and the firm was reconstituted subsequently on 01.04.2016 so as to avail the benefit of the resolution of the State Government dated 11.10.1977. Thus, in our view, opposite party no.5, in the present facts and circumstances, ought not to have been granted the benefit of the resolution of the State Government dated 11.10.1977 and if at all any such benefit is granted, it is to be granted as if the firm had been constituted w.e.f. 01.04.2016 as has been specifically provided in paragraph4 of the reconstituted deed of partnership. If the firm is treated as having come into existence w.e.f. 01.04.2016, it would neither have five years experience as required in tender call notice nor could it be treated as super class contractor for which registration was granted in the year 2010-11.

xx xx xx

15. In the aforesaid facts and circumstances, we are of the opinion that this writ petition deserves to be allowed. Accordingly the award of contract in favour of opposite party no.5 vide work order dated 19.05.2017 is quashed. The State opposite parties shall reconsider the matter and take a fresh decision of awarding the contract in favour of the lowest bidder who had qualified in the tender process, as expeditiously as possible, preferably within a period of three weeks from the date of filing of a certified copy of this order before opposite party no.3."

5.1 In view of the above, learned counsel for the petitioner in the 1st Writ Petition, contended that the writ petition deserves to be allowed.

5.2 However, learned counsel for opposite parties placed reliance on decision of the Hon'ble Supreme Court in the case of ***New Horizons Limited and another Vs. Union of India and others***, reported in ***(1995) 1 SCC 478***, in paragraph-23 of which, it has been observed as under:-

"23. Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22-4-1993 inviting tenders is a condition about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualise a situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration.

Similarly, a company incorporated under the Companies Act having past experience may undergo reorganisation as a result of merger or amalgamation with another company which may have no such past experience and the tender is submitted in the name of the reorganised company. It could not be the purport of the requirement about experience that the experience of the company which has merged into the reorganised company cannot be taken into consideration because the tender has not been submitted in its name and has been submitted in the name of the reorganised company which does not have experience in its name. Conversely there may be a split in a company and persons looking after a particular field of the business of the company form a new company after leaving it. The new company, though having persons with experience in the field, has no experience in its name while the original company having experience in its name lacks persons with experience. The requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company. While keeping in view the past experience he would also take note of the present state of affairs and the equipment and resources at the disposal of the company. The same has to be the approach of the authorities while considering a tender received in response to the advertisement issued on 22-4-1993. This would require that first the terms of the offer must be examined and if they are found satisfactory the next step would be to consider the credentials of the tenderer and his ability to perform the work to be entrusted. For judging the credentials past experience will have to be considered along with the present state of equipment and resources available with the tenderer. Past experience may not be of much help if the machinery and equipment is outdated. Conversely lack of experience may be made good by improved technology and better equipment. The advertisement dated 22-4-1993 when read with the notice for inviting tenders dated 26-4-1993 does not preclude adoption of this course of action. If the Tender Evaluation Committee had adopted this approach and had examined the tender of NHL in this perspective it would have found that NHL, being a joint venture, has access to the benefit of the resources and strength of its parent/owning companies as well as to the experience in database management, sales and publishing of its parent group companies because after reorganisation of the Company in 1992 60% of the share capital of NHL is owned by Indian group of companies namely, TPI, LMI, WML, etc. and Mr Aroon Purie and 40% of the share capital is owned by IIPL a wholly-owned

subsidiary of Singapore Telecom which was established in 1967 and is having long experience in publishing the Singapore telephone directory with yellow pages and other directories. Moreover in the tender it was specifically stated that IIPL will be providing its unique integrated directory management system along with the expertise of its managers and that the managers will be actively involved in the project both out of Singapore and resident in India.

5.3 Further, reliance is also placed on another decision of the Hon'ble Supreme Court in the case of ***M/s MAA Nabadurga Construction Vs. Saroj Kumar Jena and others***, reported in ***2015(II) OLR (SC) 610***, wherein this Court held as under:-

"We find that the matter is no more res-integra and is covered by the decision of this Court in New Horizons Limited and Anr. (supra). In that case, the Court was considering whether the joint venture firm which had submitted a tender was entitled to have the experience of one of its constituents counted as the necessary experience required by the tenderer. The Tender Evaluation Committee had ignored the experience on the ground that the said experience was not in the name of Nabadurga Construction Limited but of its constituents and, therefore, New Horizons Limited and Anr. (supra) did not fulfill the conditions about the eligibility of the award for the contract. This Court in para 23 of New Horizons Ltd and Anr. (supra observed as follows:

"Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22-4-1993 inviting tenders is a condition about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualise a situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past experience in its own name. <u>That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration….</u>"

This Court further observed that:-

"Once it is held that NHL is a joint venture, as claimed by it in the tender, the experience of its various constituents, namely, TPI, LMI and WML as well as IIPL had to be taken into consideration if the Tender Evaluation Committee had adopted the approach of a prudent businessman."

This Court was of the view that the experience of a joint venture is akin to the experience of a partnership and further observed as under:

"the expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses."

> Having regard to the decision, we find that the Tender Evaluation Committee had rightly decided to take into account the experience of Shri Ramesh Das one of the partners of the appellant firm and on that basis held the appellant to be eligible.
>
> Black's Law Dictionary, relied on by the learned counsel for the appellant gives the following meaning of "experience" as follows:-
>
> "Experience.- A state, extent, or duration of being engaged in a particular study or work; the real life as contrasted with the ideal or imaginary. A word implying skill, facility, or practical wisdom gained by personal knowledge, feeling and action, and also the course or process by which one attains knowledge or wisdom."
>
> It is clear that the view of the High Court that 'experience' is something which cannot be an asset of the firm and, there, not capable of being attributed to a firm is not correct. It is settled law that a partnership has been held to be a compendious name for its partners and that experience is a human attribute which does not form part of the assets or property of the firm in the usual sense. This is also obvious since it is not, and in any case not capable of, distribution as assets; on the dissolution of the firm. This Court in New Horizons Limited and Anr. (supra) considered the extent of experience in a partnership as follows:
>
> "While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company. While keeping in view the past experience he would also take note of the present state of affairs and the equipment and resources at the disposal of the company."
>
> In this view of the matter, we are of the view that the appeal must be allowed. The learned counsel for the appellant also raised the issue about the ineligibility of the respondent No.1. In the view we have taken we see no reason to decide the same. In the result, the appeal is allowed. The impugned order dated 17.07.2012 passed by the High Court in Writ Petition (C) No.6135 of 2012 is set aside. There shall be no order as to costs."

Thus, learned counsel for the petitioner in the 2nd Writ Petition submitted that the experience gained by the partner (SC) and the concession granted as per the resolution stated above, are equally applicable to the partnership firm. Hence, he prays for a direction to dismiss the 1st Writ Petition and to allow the 2nd Writ Petition.

6. Heard learned counsel for the parties and perused the materials as well as case laws produced before us.

7. This Court in the case of ***Suresh Chandra Sahoo (supra)*** has not taken into consideration the case of ***New Horizon (supra)*** and ***MAA Nabadurga Construction (supra)***. Hence, we are persuaded to rely upon the case law decided in ***New Horizon (supra)***, which according to us is the correct position of law. Thus, the Tender Selection Committee has committed no wrong in accepting the experience of the opposite party No.5 (in the 1st Writ Petition) and granting concession to it, in view of the fact that the major partner belongs to SC community.

7.1 In the result, the 1st Writ Petition stands dismissed being devoid of any merit and the 2nd Writ Petition stands allowed setting aside the letter No.593 dated 08.06.2018 (Annexure-1 to the 2nd Writ Petition).

7.2 In view of dismissal of the 1st Writ Petition, interim order dated 14.03.2018 passed in Misc. Case No.1894 of 2018 stands vacated.

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2019 (II) ILR – CUT- 473

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

W.P.(C) NO. 15435 OF 2008

MALLIKA PATNAIK …….Petitioner

.Vs.

MANAGING DIRECTOR, OSFC & ORS. …….Opp.Parties

STATE FINANCIAL CORPORATION ACT, 1951 – Section 31 and 32 – Provisions under – Non-compliance – Loan incurred for purchasing of a mini Truck – Loanee and Guarantor both dead – Mortgaged property sold in consequence of notice under section 29 of the SFC Act – Infraction of the provisions under section 31 and 32 of the Act – The question arose as to whether the sale of mortgaged property of the guarantor is legal and justified – Held, No, sale declared to be invalid.

Case Laws Relied on and Referred to :-

1. 2012(I)OLR-374 : Smt. Sukanti Mohapatra & Anr .Vs. Orissa State Financial Corporation & 2 Ors.

For Petitioner : M/s. Basudev Mishra, B.L. Tripathy & S. Patnaik.
For Opp.Parties : M/s. Nibash Ch. Mishra, S.Behera & Mr. Sankarsan Rath

JUDGMENT Date of Judgment: 18.07.2019

P.PATNAIK, J.

The writ application has been filed assailing the sale notice published by the Orissa State Financial Corporation (herein after referred in short 'OSFC') to sell the property mortgaged by the late husband of the petitioner for obtaining loan from OSFC for purchase of a Mini Truck. Further, challenge has been made to the action of the OSFC in selling the house situated over Plot No.752 under Khata No.250 old/1322(New) measuring an area Ac.0.016 decs. of Mouza Jagadhatripur in Jeypore town in favour of the opp.party no.4.

2. The petitioner has inter alia prayed for quashing of the sale notice so far as the mortgaged property and the sale of land together with house mentioned in Lot No. IIILB of Sl.No.3 under Annexure-8 in favour of the opp.party no.4 vide deed No.183 of 2008 dated 17.09.2008.

The undisputed facts as delineated in the writ application in a nutshell is that the husband of the petitioner late Pramod Kumar Patnaik made an application for loan from OSFC for purchase of a Mini Truck and loan was sanctioned for the said purpose and the mother of the husband of the petitioner stood as a guarantor for the said loan by mortgaging the property. Out of the sanction loan the husband of the petitioner has purchased the Mini Truck. The mother in-law of the petitioner died in the year 1993 leaving behind the husband of the petitioner. Since the husband of the petitioner was not regular in payment of the installments, opp.party no.2 issued notice to show cause as to why the loan along with the interest will not be recalled and also the husband of the petitioner was noticed to clear the outstanding dues as revealed from Annexure-2 to the writ application. Thereafter, the vehicle bearing Registration No. OR-10-0110 was seized by the OSFC in the year 1995 under section 29 of the SFC Act and the vehicle was sold to one Gouranga Patra. While the matter stood thus the husband of the petitioner requested OSFC for permission to sell the mortgaged property for repayment of the balanced loan amount. But the opp.party did not take any action in that regard.

Again the vehicle was seized from OSFC and sold to one Tejeswar Panda. The husband of the petitioner died in the year 2002 and the petitioner did not have any knowledge about the loan obtained by her late husband for purchase of Mini Truck from OSFC and subsequent sale of the vehicle. For the first time, the petitioner came to know about the sale of the mortgaged property from the sale notice published in Daily Oriya Sambad dated

19.03.2008 and immediately the petitioner intimated opp.party no.2 requesting him not to sell the mortgaged property but to the utter surprise the opp.party sold the land with house to opp.party no.4.

It has been averred in the writ application that the petitioner is possessing the house situated over the aforesaid plot and there is no other place of residence.

Being aggrieved by the illegal sale notice vide Annexure -8, the petitioner left with no alternative has been constrained to invoke the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India for redressal of her grievance.

3. Controverting the averment made in the writ application a counter affidavit has been filed on behalf of the opp.party nos. 1 to 3. In the counter affidavit it has been submitted that since no step was taken for release of the seized collateral property, a loan settlement dues letter was issued intimating that the seized assets have been advertised for disposal through the Branch Level Disposal Committee meeting to be held on 12.03.2008 and the mortgagor was requested to clear up the outstanding dues along with interest and other charges. Again, the sale rescheduled on 12.03.2008 was deferred and readvertised again to be sold through meeting dated 26.03.2008 and again deferred to 20.08.2008. The loan settlement notices for Branch Level Disposal Committee meeting dated 26.03.2008 and 20.08.2008 were also issued again vide letters dated 20.03.2008 & 11.08.2008 to settle the loan account and to get the seized assets released. Finally, in Branch Level Disposal Committee meeting held on 20.08.2008 the Lot-1 property was sold at Rs. 2,87,300/- on outright payment basis in favour of Op. party no.4 and the sale letter was issued vide letter no.147 dated 20.08.2008. Thereafter, after receipt of the entire sale consideration, possession was handed over to opp.party no.4 vide letter no. 180 dated 12.09.2008 and subsequently deed of transfer was executed in favour of opp.party no.4 dated 17.09.2008. However, lot- 2 and 3 properties are still laying unsold.

It is further submitted that even if borrower and mortgager had died and the petitioner being the legal heirs of mortgager is aware of all developments and having all notices etc. in her custody, is liable to pay back the dues which she has failed to do so and the action taken by the opp.parties with respect to seizure/sale of the vehicle and the collateral properties is fully justified and legal.

It has also been submitted that after adjustments to the sale proceeds to the loan account there was outstanding of Rs.6,85,806/- as on 31.12.2008 to be recovered from the borrower.

4. Learned counsel for the petitioner during course of hearing has vehemently submitted that the impugned action of the opp.parties is infraction of Section 31 & 32 of the State Financial Corporation Act. In that view of the matter the impugned sale notice and subsequent sale to opp.party no.4 is not legally sustainable. Learned counsel for the petitioner has referred to decision reported in ***2012(I)OLR-374 Smt. Sukanti Mohapatra & another –vrs- Orissa State Financial Corporation & 2 others***.

As against the submission of the learned counsel for the petitioner, learned counsel for the O.S.F.C. has vociferously submitted that due to default on the part of the husband of the petitioner and subsequently by the petitioner in payment of installments, the opp.parties were left with no alternative but to sell the properties to recover the loan.

5. Learned counsel for the OSFC further submits that the petitioner though was cognizant of the fact there was outstanding loan account but she never took any prompt action for squaring up the loan.

After hearing the learned counsel for the respective parties and on perusal of the records, the questions falls for determination is as to whether the petitioner is entitled to the relief, i.e., for quashing of the sale of the mortgaged property belonging to the petitioner's mother-in-law in view of infraction of Section 31 & 32 of the said Financial Corporation Act?

6. For better appreciation, it would be apposite to refer Sections 31 & 32 of the SFC Act which is quoted hereunder:

> "Section 31 of the SFCs Act deals with special provisions for enforcement of claims by the Financial Corporation-(1) Where an industrial concern, in breach of any agreement, makes any default in repayment of any loan or advance or any installment thereof or in meeting its obligations in relation to any guarantee given to the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation or where the Financial Corporation requires an industrial concern to make immediate repayment of any loan or advance under Section 30 and the industrial concern fails to make such repayment, then without prejudice to the provisions of Section 29 of the this Act and Section 69 of the Transfer of Property Act, 1882, any officer of the Financial Corporation, generally or specially authorized by the Board in this behalf, may apply to the District Judge within the limits of whose jurisdiction the industrial concern carries on the whole or a substantial part of its business for one or more of the following reliefs, namely:-

(a) for an order for the sale of property pledged, mortgaged, hypothecated or assigned to the Financial Corporation as security for the loan or advance; or

(aa) for enforcing the liability of any surety; or

(b) for transferring the management of the industrial concern to the Financial Corporation; or

(c) for an ad interim injunction restraining the industrial concern from transferring or removing its machinery or plant or equipment from the premises of the industrial concern without the permission of the Board, where such removal is apprehended.

(2) An application under Sub-section (1) shall state the nature and extent of the liability of the industrial concern to the Financial Corporation, the ground on which it is made and such other particulars as may be prescribed.

Section 32 deals with the procedure of District Judge in respect of application under Section 31. Sub-section (1) provides that when the application is for the reliefs mentioned in clauses (a) and (c) of Sub-section (1) of Section 31, the District Judge shall pass an ad interim order attaching the security, or so much of the property of the industrial concern as would on being sold realize in his estimate an amount equivalent in value to the outstanding liability of the industrial concern to the Financial Corporation, together with the costs of the proceedings taken under Section 31, with or without an ad interim injunction restraining the industrial concern from transferring or removing its machinery, plant or equipment."

Admittedly on perusal of the aforesaid Section provisions of State Financial Corporation Act, there has been no compliance of Section 31 & 32 of the State Financial Corporation Act and the decision cited (supra) by the learned counsel for the petitioner is squarely applicable to the case in hand.

7. In view of the aforesaid factual and legal position as enunciated in the foregoing paragraphs, we are of the considered view that the impugned sale notice of the mortgaged property mentioned Sl.No.3under Anneuxre-8 and the sale of the land together with house mentioned in Lot No. IIILB are liable to be held as not valid. We accordingly hold the same to be not valid. Resultantly, the writ petition stands allowed.

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2019 (II) ILR – CUT- 477

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

W.A NO. 225 OF 2018

THE CHAIRMAN, ODISHA GRAMYA BANK ……..Appellant

.Vs.

ABDUL AHAD ……Respondent

COMPASSIONATE APPOINTMENT – Petitioner's father who was a driver in the Bank died at the age of 49 years – Petitioner made application seeking appointment on compassionate ground – Rejected by bank on the ground that there was no vacancy at that point of time – Vacancy occurred just after rejection of the application of the petitioner, however the Bank did not consider his application as it has already rejected the same – Writ petition – Writ court directed payment of compensation and for consideration of the application of the petitioner for appointment as the delay if any was of no consequence – Writ appeal – Up held the order and directed to implement the order in letter and spirit. (Paras 7 & 8)

Case Laws Relied on and Referred to :-

1. AIR 1996 SC 2226 : (Himachal Road Transport Corporation .Vs. Dinesh Kumar
2. AIR 1997 SC 123 : Hindustan Aeronautics Ltd. .Vs. A. Radhika Thirumalai.
3. 2010(Vol-11) SCC 671 : State Bank of India & Anr. .Vs. Raj Kumar
4. AIR 1991 S.C. 469 : Smt. Phoolwati .Vs. Union of India & Ors.
5. AIR 2015(S.C.) 2411 : Canara Bank & Anr. Vs. M. Mahesh Kumar.
6. (1989) 4 SCC 468 : Smt. Sushma Gosain and Ors .Vs. Union of India & Ors

For Appellant : M/s. Dinesh Ku. Panda & A.K. Mishra-2 .
For Respondent : M/s. Manoj Ku. Mohanty, M.R. Pradhan, T. Pradhan & M. Mohanty.

JUDGMENT Date of Hearing : 11.01.2019 : Date of Judgment : 08.02.2019

J.P.DAS, J.

The intra Court appeal has been filed assailing the judgment dated 03.04.2018 passed by the learned Single Judge in W.P.(c) No.9871 of 2004 directing the present appellant, who was the opposite party in the aforesaid writ application to provide the petitioner's family with a sum of Rs.1,50,000/- (rupees one lakh fifty thousand) as interim compensation and to make the petitioner entitled to a suitable post commensurating to his education in its any Branch in the Cuttack district, within a period of two months from the date of the order when the petitioner files an affidavit of his unemployment in the meantime.

2. The writ petition was filed by the present respondent with the submissions that while his father Abdul Rojak working as a Driver in Cuttack Gramya Bank died in harness at the age of 49 years on 26.04.2001, leaving behind the widow mother of the petitioner, one married daughter, three unmarried daughters including two minors besides the petitioner. The family of the petitioner having no other source of livelihood, the petitioner, who was 21 years old at the relevant point of time, made an application to the

Chairman of Cuttack Gramya Bank for an appointment on compassionate ground under the provisions of the scheme floated on 29.09.2001 by the Cuttack Gramya Bank, which provided for employment for the dependents of the deceased employee on compassionate ground in case of death after 1st May of 1996. The matter was enquired into as per procedure and it was found that the petitioner's family was in dire financial distress. On 05.01.2002, the Chairman of the Bank intimated the petitioner that since there was no vacancy available in their Bank, the case of the petitioner for compassionate appointment could not be considered. The mother of the petitioner made another representation on 16.08.2002 and the petitioner also submitted subsequent representations on 29.11.2003 and 22.06.2004 bringing to the notice of the authority that he had passed +3 Arts in the meantime and was willing to accept any post in the Bank. Every time the bank authority was answering him with the same reply that there was no vacancy. Ultimately, the petitioner filed the writ application seeking a direction from the Court to the Bank Authority for providing him with an appointment as a Junior Clerk, or Messenger or any other post in the Bank on compassionate ground. It was contended on behalf of the opposite party-appellant, in the writ application that providing employment on compassionate ground is not a matter of right and the petitioner could not be accommodated due to non-availability of vacancy at the relevant point of time. It was further contended that the scheme of compassionate appointment was subject to availability of vacancy in the Bank and as per instructions of the sponsored Bank of Cuttack Gramya Bank, namely, UCO Bank, the compassionate appointment was to be considered subject to availability of vacancy and since there was no vacancy at the relevant point of time, the claim of the petitioner in the writ application could not be considered.

3. Learned counsel appearing for the opposite party-appellant relying upon a number of decisions of Hon'ble Apex Court submitted that the compassionate appointment is always subject to availability of vacancy and hence, no illegality was committed in rejecting the application of the petitioner, so as to call for any interference by the Writ Court. Thus, it was submitted that the impugned judgment passed by the learned Single Judge is not sustainable in law and is liable to be set aside.

4. It was not in dispute that the scheme for appointment of the dependents of the deceased employees on compassionate ground covering the cases of death since 1st of May, 1996 was floated by the Cuttack Gramya Bank and it was also not in dispute that the father of the petitioner died while

he was in service at the age of 49 years and therefore, as per the floated scheme, the petitioner was entitled for appointment under the scheme on compassionate ground. The only contention raised on behalf of the present appellant-opposite party was that the employment was subject to availability of vacancy and since there was no vacancy at the relevant point of time, the case of the petitioner-respondent could not be considered. The learned Single Judge quoting the scheme has found out that as per the scheme, the petitioner had a sustainable claim and as per the scheme, he was also entitled for compensation of lump sum amount as per the Clause-6 of the said scheme. The learned Single Judge referring to certain decisions of the Hon'ble Apex Court and considering the observations made therein came to a conclusion that for no proper and timely consideration of the case of the petitioner in spite of positive recommendation by the Chairman, even though the petitioner had a sustainable claim, the sufferings of the petitioner and his family remained unexplainable. Considering the fact that the petitioner has reached the age of 38 years in the meanwhile and lifting a family from distress having been lost after so many years, the learned Single Judge directed the appellant-opposite party to find out a placement of the petitioner commensurating to his educational qualification in its organization and considering the delay in disposal of the writ application and taking into account the sufferings of the family of the petitioner during all these years, a direction was further given to the appellant-opposite party to provide a sum of Rs.1,50,000/- as financial support to the petitioner's family to over-come the miseries they have suffered in the meantime.

5. The sole contention raised by the learned counsel for the appellant before us was that the findings of Hon'ble Apex Court, those have been relied upon by the learned Single Judge, were always subject to availability of vacancies for providing employment on compassionate ground. Relying on the decisions, reported in **AIR 1996 Supreme Court 2226** (***Himachal Road Transport Corporation vrs. Dinesh Kumar***), **AIR 1997 Supreme Court 123** (***Hindustan Aeronautics Ltd. vrs. A. Radhika Thirumalai***), **2010(Vol-11) SCC 671** (***State Bank of India & Anr. vrs. Raj Kumar***), it was submitted by learned counsel for the appellant that the appointment under compassionate scheme is always subject to availability of the post. It was further submitted by learned counsel for the appellant that in the meantime, Cuttack Gramya Bank and Balasore Gramya Bank amalgamated into a single entity as Kalinga Gramya Bank and subsequently, having merged along with other banks was re-designated as Odisha Gramya Bank. Hence, the scheme available at the relevant point of time being not in force, the petitioner's claim cannot be considered.

6. It was submitted on behalf of the respondent that the sole contention raised on behalf of the appellant as opposite party in the writ application that there was no vacancy was not correct. In the rejoinder filed by the petitioner to the counter-affidavit filed by the present appellant-opposite party in the writ application, it was specifically averred by the petitioner that the vacancies arose in different posts due to resignation, dismissal and death of certain employees since the year 2002 and subsequent thereto. In reply thereto, in the additional affidavit filed on behalf of the opposite party-appellant, it was submitted that arising of vacancies as submitted by the petitioner was after the opposite party Bank accorded finality to the request of the petitioner for compassionate appointment in its letter dated 05.01.2002 due to non-availability of vacancy at the specific point of time. The vacancies as pointed out by the petitioner were subsequent to the rejection of the application of the petitioner. Hence, it was contended that the claim of the petitioner could not have been allowed to subsist for indefinite period or to be considered as and when vacancies would arise in absence of any such provision in the scheme. It was further submitted that after a lapse of 12 years, i.e., in the year 2013, the father of the petitioner having died in the year 2001, there was no such emergency to be considered in favour of the petitioner. Similar contentions were raised on behalf of the opposite party-appellant before us also in course of hearing of the appeal.

7. We are unable to accept such contentions made on behalf of the appellant for the reason that the vacancies arose shortly after the application of the petitioner was rejected. At the first instance, the case of the petitioner was treated to be closed since it was rejected due to non-availability of the vacancies. But, it is not disputed and is on record that the petitioner as well as his widow mother were making representations till 2004 and ultimately the petitioner filed the writ application having received no response from the side of the appellant-Bank. The submissions and the materials on record made it abundantly clear that the scheme of compassionate appointment for the family members of the deceased employee was in vouge during the relevant period and that the petitioner so also his widow mother made repeated representations for such appointment and that even though there was no vacancy when the first application was made, still vacancy arose immediately subsequent thereto. It has been repeated observations of the Hon'ble Apex Court that in all claims for appointment on compassionate grounds, there should not be any delay in making such appointment, since it is for the purpose of mitigating the hardship of the family due to death of the bread

earner (**AIR 1991 S.C. 469** (***Smt. Phoolwati vrs. Union of India and Ors***). In the similar line, it can be said that the employer rejecting such an application due to non-availability of vacancy at the specific point of time cannot close its eyes for all times to come shrugging off its shoulder the responsibility of providing appointment on compassionate ground under the existing scheme even though vacancies arose shortly thereafter as in the present case. It has been specific observation of the Hon'ble Apex Court in the case of ***Canara Bank & Anr. vrs. M. Mahesh Kumar*** reported in **AIR 2015(S.C.) 2411** that the employer is not justified in contending that the application for compassionate appointment cannot be considered in view of passage of time. As stated earlier, it is on record that the petitioner mentioning his educational qualification kept on making representations to the employer-Bank for any appointment to a suitable post. In the case of ***Smt. Sushma Gosain and others vrs. Union of India & Ors*** reported in **(1989) 4 SCC 468**, the Hon'ble Apex Court even went on to direct for creation of supernumerary post to give appointment to the daughter of the deceased whose application was illegally rejected on the ground that no female member could have been appointed against the available post and such direction was after a lapse of seven years from the date of the application. All the case laws cited on behalf of the appellant related to the position that appointment on compassionate ground is always subject to availability of vacancies. The said position is not disputed but the same is not applicable to the present case for the reasons discussed hereinbefore.

8. Thus, we find no ground to take a separate view from what has been taken by the learned Single Judge that the petitioner is entitled to be considered for an appointment despite the passage of time.

Another contention raised on behalf of the appellant was that in the meantime, the original employer, namely, Cuttack Gramya Bank has lost its existence and has merged along with three other Banks to another entity of Odisha Grama Bank. The relevant notification dated 7th of January, 2013 of the Government of India, Ministry of Finance (Department of Financial Services) was annexed as Annexure-A to the Additional Affidavit filed on behalf of the appellant-opposite party before the learned writ Court. It is seen from the clause-5(a) of the said notification that "*the undertakings of the transferor Regional Rural Banks shall include all assets, rights xx xx xx xx xx xx xx and also be deemed to include all borrowings**, liabilities and obligations of whatever kind** then subsisting of the transferor Regional Rural Banks*". Thus, submitting that the original employer Bank is no more in

existence due to the merger, the appellant-Bank cannot escape the liability which shifted to its shoulder at the time of merger as per notification stated above. The direction of the learned Single Judge for payment of a lump sum amount as compensation was quite justified in view of the sufferings of the petitioner's family during all these years.

9. In view of the aforesaid findings of facts and position of law, we find no merit in this writ appeal to interfere with the findings and directions of the learned Single Judge in the writ application to be carried out in letter and spirit and accordingly, the writ appeal being devoid of merit stands rejected.

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2019 (II) ILR – CUT- 483

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

WA NOS. 28 OF 2019 & 509 OF 2018

M/S. GLOBAL FEEDS (in WA No. 28 of 2019)
FEEDBACK ENERGY DISTRIBUTION (in WA No. 509 of 2018)
COMPANY PVT. LTD. (FEDCO) & ANR. .....Appellants.

.Vs.

COMMISSIONER-CUM-SECRETARY, (in WA No. 28 of 2019)
GOVT. OF ODISHA, ENERGY DEPT. & ORS. (in WA No. 509 of 2018)
M/S. GLOBAL FEEDS & ORS. .....Respondents.

THE ELECTRICITY ACT, 2003 – Section 126 Explanation (a) – Assessing officer – Who can be? – Whether the officers of the Franchisee can act as or to be regarded as assessing officer? – Held, No. – Reasons discussed.

"*Our independent reasoning ascribed to the analysis of learned Single Judge leads to the same conclusion that the officer of the franchisee cannot be designated as an assessing officer and the notification dtd.11.1.2013 made contrary to that vide Annexure-1 suffers from illegality and liable to be quashed. Learned Single Judge in the impugned judgment having done so, has not committed any error either on Law or fact.*" *(Para 10)*

Case Laws Relied on and Referred to :-

1. (2012) 2 SCC 108 : Executive Engineer & Anr. Vs. M/s.Sri Seetaram Rice Mill
2. (1998) 8 SCC 1 : Whirlpool Corporation Vs. Registrar of Trade Marks
3. (2002) 5 SCC 440 : Rakesh Wadhawan & Ors. Vs. Jagdamba Industrial Corporation & Ors.
4. AIR 1975 BOMBAY 20 : Yeshbai & Ors. Vs. Ganpat Irappa jangam & Ors.
5. AIR 2005 SC 3066 : State of Kerala & Ors. Vs. P.V. Neelakandan Nair & Ors.
6. (2017) 6 SCC 263 : State of Karnataka Vs. J. Jayalalitha & Ors.
7. AIR 2007 Cal 298 : Narayan Chandra Kundu Vs. State of West Bengal & Ors.

For Appellants : M/s. Anand Ch. Swain and L. N. Rayatsingh
(in WA No.28 of 2019)
M/s. S. Roy, B. Das, S. Das and S. S. Mohanty
(in WA No.509 of 2018)

For Respondents : M/s.Durga Pr. Nanda, R. K. Kanungo, B. P. Panda, S. Moharana and Mr. Dewaranjan Ray
(In WA No.28 of 2019)
M/s. Ananda Ch. Swain, L. Rayatsingh. Mr. Dewaranjan Ray. M/s.Durga Pr. Nanda, R. K. Kanungo, B. P. Panda, S. Moharana
(in WA No.509 of 2018)

JUDGMENT Date of Hearing: 24.04.2019 : Date of Judgment : 17.05.2019

DR. A. K. MISHRA, J.

This common judgment is passed for both the writ appeals being preferred against the common judgment dtd.30.08.2018 in W.P.(C) No.13047 of 2017 whereby and wherein the learned Single Judge has allowed the writ petition by quashing the Government notification dtd.11.01.2013 and extended the consequential relief to the petitioner.

2. Summarized succinctly, the facts giving rise to these writ appeals are stated thus:-

Petitioners M/s. Global Feeds entered into an agreement on 24.06.2015 with opposite party nos.1 to 3 who are Commissioner-cum-Secretary to Government of Odisha, Chief General Manager, CESU, Bhubaneswar and Executive Engineer (Electrical) CESU for a contract demand of 460 KVA / 414 KW to supply energy to the premises situated at Paniora for industrial purpose coming under large industry category. On 30.03.2017 the power supply was disconnected for non-payment of dues and it was restored on 31.3.2017. On 1.4.2017 the power supply was again disconnected. The petitioner filed complaint case before the Consumer Grievance Redrassal Forum, Khurda and in course of that hearing, the Provisional Assessment Notice, purported to be U/s.126 of the Electricity Act, 2003 (for brevity the 'E Act, 2003'), was issued. The direction of Consumer Forum for restoration of electricity was not complied with. The petitioner filed objection to the provisional assessment notice before the Assessing Officer. The same was rejected. The petitioner put forth grievance before OMBUDSMAN vide CR Case No.51 of 2017. On the direction of the OMBUDSMAN, the power supply was restored. The final assessment order dtd.17.04.2017 was served upon the petitioner on 24.4.2017. The petitioner filed writ petition, W.P.(C) No.8081 of 2017. This Court quashed the final

assessment order and directed to consider the objection afresh. The Assessing Officer again confirmed the final assessment order. That final assessment order was challenged in W.P.(C) No.13047 of 2017 wherein besides the three opposite parties, the Assessing Officer and Divisional Manager, FEDCO were made opposite party nos.4 and 5.

In that writ petition, the petitioner challenged the jurisdiction of the authority in exercising assessment power conferred U/s.126 of the E. Act, 2003 and specifically urged that the officers of the Franchisee could not be designated as Assessing Officers by notification of the Energy Department Dtd.11.01.2013, as such the inspection and assessment made by such Franchisee Officer was illegal and without jurisdiction and the said notification dtd.11.1.2013 vide Annexure-1 was required to be quashed.

2-(a). Learned Single Judge made anatomical survey of relevant provisions of the E. Act, 2003 and its Legilative object. Relying upon the decisions reported in **(2012) 2 SCC 108, Executive Engineer & Anr. Vrs. M/s.Sri Seetaram Rice Mill** and **(1998) 8 SCC 1, Whirlpool Corporation Vrs. Registrar of Trade Marks,** learned Single Judge has concluded as follows:-

(i) The writ petition Under Article 226 of the Constitution of India was maintainable as petitioner had raised question about the jurisdiction of the Franchisee acting as an Assessing Officer;

(ii) Giving purposive interpretation to the explanation (a) of Section 126 of the E. Act, 2003, it was held that the State Government could not designate the Officers of the Franchisee to act as Assessing Officer because quasi judicial power was required to be exercised while doing assessment. Accordingly the notification dtd.11.01.2013, so far as it relates to conferring power to Franchisee to act as an Assessing Officer was held to be inconsistent with Explanation (a) to the provision of Section 126 of the E. Act, 2003 and being without jurisdiction, the same was quashed.

(iii) Section 126 (1) of the E. Act, 2003 provides two parts; one for inspection and another for Assessment and the inspection made by the Franchisee was not illegal and directed the competent authority as per the notification dtd.21.5.2004 to take a fresh decision on the inspection report.

(iv) The Franchisees were held to be necessary parties to defend their act of inspection and liberty was given to them to defend themselves before the competent authority U/s.126 of E. Act, 2003.

(v) That in between the year 2013 to the date of judgment on 30.8.2018, several inspections might have been done and order might have been passed u/s.126 of the E. Act, 2003 and for that the judgment "will not affect the adjudication already made by the authority in exercise of powers conferred under Section 126 or 127 of the Act, 2003, keeping the legal position into consideration that the judgment will have its prospective over-ruling."

3. The Licensee and Franchisee as appellants, filed WA 509 of 2018 challenging the impugned judgment as an outcome of wrong, erroneous and

improper interpretation of the words 'Distribution Licensee' and 'Franchisee Licensee'.

3-(a). The original petitioner filed WA No.28 of 2019 to challenge that part of the impugned judgment which allowed the Licensee Franchisee to conduct inspection U/s.126(1) of the E. Act, 2003.

3-(b). In both the writ appeals, one Franchisee M/s.Enzen Global Solutions Private Ltd. is impleaded as intervener –respondent.

3-(c). In this judgment hereinafter to be followed, the original petitioner is to be referred to as consumer while CESU authorities are to be referred as Licensee, Commissioner-cum-Secretary to Government of Odisha as State and the interveners including FEDCO authorities as Franchisee.

4. Learned counsel for the consumer submits that Section 126(1) E. Act, 2003 does not make any distinction between inspection and assessment and learned Single Judge having allowed the inspection to be done by the Franchisee, has read the law contrary to the object of the statute. He also relied upon the paragraph 23 of the aforesaid **Seetaram Rice Mill** case (2012) 2 SCC -108 (supra) to contend that as per Hon'ble Apex Court, an Assessing Officer is to conduct inspection of a place or premise and the equipments, gadgets, machines, devices found connected or used in such place.

4-(a). Learned counsel for the Franchisee submits that the provisions of section 126 and 127 are wholesome in themselves, and for the purpose of effective workability of its provisions, purposive interpretation is to be given and the Franchisee being an agent U/s.182 of the Indian Contract Act, is competent to act on behalf of his principal licensee and thereby the notification dtd.11.1.2013 is no way contrary to law.

He further submitted that the officers as mentioned in the explanation U/s.126 of the E. Act, 2003 to define Assessing Officer includes the Franchisee of Licensee. He relied upon the aforesaid **Seetaram Rice Mill** case (supra) and other decisions reported in **(2002) 5 SCC 440, Rakesh Wadhawan and Ors. Vrs. Jagdamba Industrial Corporation and Ors.**, **AIR 1975 BOMBAY 20, Yeshbai and Ors. Vrs. Ganpat Irappa jangam and Ors.**, **AIR 2005 SC 3066, State of Kerala and Ors. Vrs. P.V. Neelakandan Nair and Ors.** and **(2017) 6 SCC 263, State of Karnataka Vrs. J. Jayalalitha and Others.**

Learned counsel for the Franchisee also relied upon a decision reported in **AIR 2007 Cal 298, Narayan Chandra Kundu Vrs. State of West Bengal and Others** to contend that Legislature has intended that the Assessing Officer must be a person who is actually a member of the inspection team.

4-(b). Learned Addl. Government Advocate Miss Sabitri Rath supporting the contention of learned counsel for the Franchisee submitted that the officers of the Franchisee can act as an assessing officer for having engaged by the licensee.

4-(c). Learned counsel appearing for CESU submits that even though judgment has given prospective effect, the licensee would be put into hardship if the Franchisee engaged by him is not allowed to make assessment.

5. We carefully perused the impugned judgment of learned Single Judge and patiently heard submissions advanced. Cited Judgments are read to find out ratio decidendi and applicability to the facts of the case at hand.

At the outset **Seetaram Rice Mill** case (supra) is relied upon by all the counsel to contend that the purposive interpretation is the solution to the problem at hand.

6. In order to fix the eye point, the following provisions of the Electricity Act, 2003, of which meaning is to be ascertained by purposive interpretation is extracted below.

> ***Section 126 – Explanation*** *– For the purposes of this section – (a) "assessing officer" means an* ***officer*** *of a State Government or Board or* ***licensee****, as the case may be, designated as such by the State Government.*

6-(a). The moot point for our consideration is:- whether an officer of a licensee means an officer of the Franchisee under Explanation (a) of Section 126 of the E. Act 2003?

6-(b). Learned Single Judge in the impugned judgment has extensively quoted the relevant provisions of the E. Act, 2003. He has also given purposive interpretation to the provisions of the Act to arrive at the decision he has delivered. To us, the method adopted is actualization of purposive interpretation to the provisions of E. Act, 2003.

6-(c). Learned counsel before us could not show as to where and how such purposive interpretation by learned Single Judge has been applied erroneously. Only because of the fact that the analysis made by learned

Single Judge giving purposive interpretation to the relevant provisions has not delivered the desired result, the said analysis cannot be said faulty or contrary to law. We do not find, on careful reading of the impugned judgment, any absurdity, incongruity and unreasonability in making such analysis and for that we subscribe our approval to the conclusion recorded by learned Single Judge.

7. Added to that, we want to assign our reasoning independently to the point raised depicted below:-

The officers of a State Government or Board or Licensee are not defined under the E. Act, 2003. There is no dispute with regards to officers of a State Government or officers of a Board. Only finger is raised as to the real connotation to the meaning of officers of Licensee.

The word 'Licensee' U/s.2(39) of E. Act, 2003 means a person who has been granted licence U/s.14. The provisions of Section 14, enumerates only grant of licence, i.e. transmission licence and distribution licence. Under seven proviso of Section 14, it is stated that "in a case where a distribution licensee proposes to undertake distribution of electricity for a specified area within his area of supply through another person, that person shall not be required to obtain any separate licence from the concerned State Commission and such distribution licensee shall be responsible for distribution of electricity in his area of supply."

It is noteworthy that the section 14 *inter alia* provides a category of deemed licensee who does not require to obtain a licence, amongst whom appropriate Government comes. On careful reading of that section with proviso-7, it is clear that the person through whom licensee is to undertake distribution of electricity is not required to obtain any separate licence though he is not under compartment of 'deemed licensee'.

Under Section 2(70) of the E. Act, 2003, "supply" in relation to electricity, means the sale of electricity to a licensee or consumer. So licensee is required to purchase electricity for the purpose of supply like consumer.

Under Section 2(17) "distribution licensee" means a licensee authorized to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply. So distribution of electricity involves "to operate and maintain a distribution system."

7(a). The authority to grant licence is the Appropriate Commission who is defined U/s.2(4) of the E. Act, 2003. "Franchisee" means a person authorized by a distribution licensee to distribute electricity on its behalf in a particular area within his area of supply U/s.2(27) of the E. Act, 2003.

Part IV of the E. Act, 2003 from Sections 12 to 24, deals with licensing which include procedure for grant of licence, conditions of licence, licensee not to do certain things, amendment of licence, revocation of licence, sale of utilities of licensees, directions to licensees and suspension of distribution licence and sale of utility. All these stipulations are to regulate the distribution licensee. There is no such stipulation provided to control or regulate the relationship between licensee and franchisee.

7-(b). Thus, the authorization by the licensee is an arrangement, may be by a contract which is not controlled or regulated by the provisions of the E. Act, 2003. The terms and conditions of such authority are privy to the licensee and franchisee.

The 'franchise' is a right, privilege, or grant given for a certain specific purpose. It cannot be given in derogation of statutory provisions.

8. Learned counsel for franchisee has advanced his argument that franchisee is an agency controlled U/s.182 and 188 of the Indian Contract Act, 1872.

8-(a). Authority is the corner stone of the agency relationship. Agent is vested with legal power to communicate his principal's legal relations with third person. The agency is based upon contractual relationship. It differs from the relationship between master and servant or employee and employer relationship. Agency is not under direct control or supervision of the principal whereas employee is under direct control and supervision of his employer. Importantly, an agent may work under the number of principals at the same time while an employee shall serve only under one master. The above distinction is warranted to find the underlying principle behind the explanation under Section 126(a) of the E. Act, 2003 to ascertain as to whether the officers of licensee include the officers of franchisee. The 'State Government' is found its meaning U/s.2(5)(b) of the E. Act, 2003. "Board" is defined U/s.2(7) of the E. Act, 2003 to mean a State Electricity Board constituted before the commencement of this Act under sub-section (1) of Section 5 of the Electricity (Supply) Act, 1948.

The aforesaid definition indicates that the officers are under the direct control of the authorities which are recognized by the Electricity Act, i.e. the "State Government" U/s.2(5)(a), "Board" U/s.2(5)(7) and "licensee" U/s.2(39), read with section 14 of the Act. The officers under direct control of these three authorities, are to be designated as Assessing Officer. This direct control of the officers under employee – employer relationship cannot be extended to the officer, who may be under contractual relationship with, the franchisee. Furthermore, the control of franchisee is not regulated by the Electricity Act but by the terms and conditions of a contract with Licensee. So, what legislature has clearly prescribed under the principle of direct-control for the officers, cannot be extended to others who are related by some others relationship such as agency. The employee and employer relationship to qualify the officers of licensee cannot be allowed to accommodate principal and agent relationship created by contract between the licensee and franchisee. The qualification for an assessing officer is the degree of control permitted to be exercised over the officers by three authorities from whom the officers derive its powers. Basing upon this principle, if the purposive interpretation is given effect to the explanation, the obvious conclusion is that the officers of the franchisee cannot act as an assessing officer.

Further, exercise of the power of the assessing officer by the officers of franchisee will be in derogation of the legislative purpose of which assessment U/s.126 for unauthorized use of electricity is brought in juxtaposition to the offence of theft of electricity U/s.135 of the E. Act, 2003. We cannot travel beyond the obvious meaning given by the legislature to the officers U/s. 126-Explanation (a) of Electricity Act.

After bestowing our most anxious consideration to the question raised we record our conclusion that the officers of the franchisee cannot be designated as assessing officers U/s.126 explanation (a) of the E. Act, 2003.

9. In **Seetaram Rice Mill** case (supra), before the Hon'ble Apex Court the provisional assessment order was challenged and question determined was :-

> "what is the action contemplated where the consumer consumes electricity in excess of the maximum of the contract load."

The ratio of that decision has been reiterated in paragraph 58 of the judgment which includes that the provisional assessment is not appealable and the High Court can entertain writ petition against the order raising a jurisdictional challenge to the notice / provisional assessment. In that judgment, while analyzing section 126 of the E. Act, 2003, in para 23

it is stated that Section 126 contemplates the steps to be taken which include that an assessing officer is to conduct inspection of a place or premises and the equipment, gadgets, machines, devices found connected or used in such place.

9-(a). In the case at hand, learned Single Judge has not stated that assessing officer cannot inspect U/s.126 of the E. Act. Learned Single Judge in answering point no.(iii) has stated that "thus it is evident that under the provision of Section 126(1) here are two parts; (i) first part is inspection and (ii) second part is its assessment. The aforesaid provision nowhere provides that the inspection and the assessment is to be done by the same person, meaning thereby it can be done by the same person or even by different person." So assessing officer can make inspection U/s.126(1) of the E. Act, 2003.

9-(b). In the **Narayan Chandra Kundu** case (supra) of Hon'ble Calcutta High Court, the virus of notification was not challenged and question was as to whether the prosecutor U/s.135 of the E. Act can be the assessing officer U/s.126 of the Act. While analyzing the same it is observed that "Legislature has intended that the assessing officer must be a person who was actually a member of the inspection team at the time of detecting the pilferage or the unauthorized use of electricity so that he can pass the order of assessment not on the basis of papers placed before him but after actually visiting the sight at the time of detection of the illegality."

In view of Hon'ble Apex Court's observation that Assessing Officer can make inspection and the Hon'ble Calcutta High Court's view that the Assessing Officer should be a member of the inspection team, the view taken by learned Single Judge in the impugned judgment to the effect that inspection and assessment can be done by the same person or even by a different persons does not run contrary.

10. Our independent reasoning ascribed to the analysis of learned Single Judge leads to the same conclusion that the officer of the franchisee cannot be designated as an assessing officer and the notification dtd.11.1.2013 made contrary to that vide Annexure-1 suffers from illegality and liable to be quashed. Learned Single Judge in the impugned judgment having done so, has not committed any error either on Law or fact.

By giving prospective over-ruling effect to the judgment, what is mitigated is the hardship in pursing the proceeding in respect of inspection already done. The effect having been addressed needs no intervention in the

appeal. The consequential direction to the competent authority in the facts of the case is just and proper. Since Learned Single Judge has taken the correct decision, no interference is warranted in these appeals. In the result, both the writ appeals stand dismissed. There shall be no order as to costs.

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2019 (II) ILR – CUT- 492

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

WA NO. 81 OF 2015

D.R.M., WALTAIR RLY. DIVISION & ANR. .....Appellants.

.Vs.

M/S. A.I.E. VALLEY TRADERS PVT. LTD. & ORS. .....Respondents.

THE RAILWAYS ACT, 1989 – Sections 2 (33), 2 (41) and 65 – Provisions under – Charging of wharfage in the Railway receipts – Whether wharfage charges can be included in the railway receipt issued u/s 2(33) & 65 of the Act? – Held, No, as there is no dispute that the indents were made duly on 1.1.1994, 5.1.1994 and on 7.1.1994 but the wagons were provided on 3.3.1994 – The Consigner had no fault to contribute for delayed supply of wagons – Charging of wharfage for such no fault is unreasonable.

For Appellants : Mr. Avijit Pal
For Respondents : Mr. S. P. Mishra(Sr. Adv.), M/s. Soumya Mishra, S. Modi, S. K. Sahoo, E. Agarwal, D.Priyanka & B.S. Panigrahi.

JUDGMENT Date of Hearing: 01.05.2019 : Date of Judgment :17.05.2019

DR. A. K. MISHRA, J.

Opposite party nos. 5 and 6 have assailed the Judgment dtd.23.12.2014 in OJC No.2525 of 1994 by learned Single Judge directing the Railway Authority to make refund of sum of Rs.13,86,248/- to the petitioner along with interest as the collection of wharfage through the Railways Receipt was bad.

The writ petitioner is the respondent no.1 while opposite party nos.1,2,3,4 and 7 are Proforma Respondents.

2. The undisputed facts leading to this appeal may be stated thus:-

The Respondent no.1 is a Company and deals with supply of Casurina ballies to paper industries. It placed indents bearing no.1 and 2 on 1.1.1994, Nos.9 to 12 on 5.1.1994 and nos.13 and 14 on 7.1.1994 for wagons with the Station Master,Vijayanagaram Railway Station for consignment to Brajarajnagar Railway Station to Consignee M/s. Orient Paper Mills.

The Respondent No.1 with permission of the Station Master, Vijayanagaram Railway Station had stacked the goods at the Commercial Plot situated far away from the goods-shed.

The Railway Authorities placed the wagons on 3.3.1994 and on the same day within permissible nine hours, loading was done.

The Railway Authorities demanded a sum of Rs.13,86,248/-, charging wharfage for 49 days, i.e., from 14.1.1994 to 3.3.1994.

The Respondent No.1 disputed the same on the ground that the goods were never stacked at the goods-shed but at the commercial plot and the wagons were supplied in delay without any of his fault. It was intimated that neither the Divisional Railway Manager nor the Chief Commercial Manager South Eastern Railways had power to consider such grievance. Accordingly, the Respondent no.1 by his letter dated 10.03.1994 put forth his grievance before the General Manager, South Eastern Railway.

The Railway Authority clandestinely recovered the above wharfage amount from Oriental Paper Mills - consignee including the same in the Railway receipt.

The consigner company filed writ petition claiming refund on the plea that wharfage charges could not be included in the Railway receipt issued U/s.2(33) and 65 of the Railway Act, 1989 and it was chargeable in respect of inward goods at the destination station after expiry of free time.

The opposite party no.2, filed show-cause contending that the writ petition was not maintainable in view of the availability of remedy under the Railways Claims Tribunal Act, 1987 and wharfage was levied on the basis of Railways Boards instruction at 8.9.1989.

2(a). Learned Single Judge referring the relevant provisions of the Railway Act held that;

(i) The petitioner had no fault for the delayed dispatch of the consignment and as the Railway authority had not provided the wagons in time, claim was not justified for unlawful stacking of goods in the goods shed,

(ii) The wharfage is chargeable at the destination station under the premises that no person should block at the destination station.

(iii) The railway receipt as defined U/s.65 of the Railway Act does not provide for the inclusion of the wharfage and the preparation of Railway receipt was wholly improper.

(iv) The collection of wharfage at the inward station on the basis of instruction/notification or circular is bad as the same can not supersede the statutory provisions.

(v) Learned Single Judge observed, on the question of maintainability, that " Learned Counsel for Railways dropped the question of maintainability and further in view of long pendency of the writ petition for over 20 years, the proceeding before the Railway Tribunal would be grossly barred by that time".

Learned Single Judge consequently allowed the writ directing refund with interest as noted above.

3. Learned counsel for appellant Mr. Pal submitted that;

(1) The railway circular dated 8.9.1989 and 21.6.1990 are statutory circulars and are not conflict with any of the statutory provisions of the Railways Act, 1989. The said circulars were neither challenged as ultravires nor learned Single Judge had given any such finding for which levy of wharfage could not be said illegal.

(2) A combined reading of Section 83(1), Section 74 read with Section 65 of the Railway Act would show that the statutory provisions give power to the Railways to recover the charge-due including wharfage and for that no illegality was committed for demanding the wharfage under the Railway receipt.

(3) The writ petition was not maintainable in view of the provisions of the Railway Claims Tribunal Act, 1987.

3(a). Learned Senior Counsel for Respondent No.1-Consigner Mr. S. Mishra would contend that;

(i) The question of maintainability was dropped during argument of the writ and accepting such not-pressed plea, learned Single Judge passed the impugned Judgment, as such re-agitating such maintainability plea after withdrawal in this appeal is not permissible.

(ii) The consigner cannot be made liable for the delayed supply of wagons and charging of wharfage on the railway receipt at the inward station is contrary to the provisions of the Railways Act.

(iii) Facts which were not raised before the writ court, cannot be raised for the first time in this appeal to sustain a plea of suppression of fact to dismiss writ petition.

Learned counsel for the Respondent no.1 cited the following decisions.

1. **M/s. Raichand Amulakh Shah and another Vrs. Union Of India – AIR 1964 SC 1268 (V 51 C 162)**
2. **Union of India Vrs. Indian Sugar Mills Association and another– AIR 1968 SC 22 (V 55 C 8)**
3. **Upper Doab Sugar Mills Ltd. Shamli (U.P) Vrs. Shahdara (Delhi) Saha Light Railway Co. Ltd. Calcutta– AIR 1963 SC 217(V 50 C 20)**
4. **Saha Mulji Deoji Vrs. Union of India – Air 1957 Nagpur 31(V 44 C 13 Feb)**
5. **The Merchantile Bank of India, Ltd. Vrs. The Central Bank of India, Ltd. – (1938) The Madras Law Journals Reports 268**
6. **Union of India Vrs. M/s. Khetwat Oil Mills and another – AIR 1988 Orissa 233**
7. **Union of India Vrs. The Steel Stock Holders Syndicate, Poona – AIR 1976 SC 879**

3(b). Out of the above cited decisions, only the Judgment in **M/s. Raichand Amulakh Shah** case reported in **AIR 1964 SC. 1268**(Supra) is relevant and would be referred to in appropriate place later.

4. On the question of maintainability, we do not feel it proper to doubt the observation of learned Single Judge made in Para-5 of the impugned Judgment. The said 'dropped' plea cannot be reignited in this appeal particularly when such observation is not shown incorrect. We accept the learned Single Judge's observation. Finding consequential to that is final. The maintainability of writ petition having attained finality does not warrant any interference in this appeal.

5. On the point of charging wharfage in the Railway receipt, there is no dispute that the indents were made duly on 1.1.1994, 5.1.1994 and on 7.1.1994 but the wagons were provided on 3.3.1994. The Consigner had no fault to contribute for delayed supply of wagons. Charging of wharfage for such no fault is unreasonable.

It is argued by the learned counsel for Railway authority that such action of levying wharfage was in consonance to the circular dated 8.9.1989 and 21.6.1990.

5(a). We carefully perused these circulars. In the circular dated 8.9.1989, on the subject "free time for goods brought to stations for dispatch but not loaded" it has been inter alia stated that;

> " A point has been raised as to whether the instructions contained in Board's letter No.TC I/83/201/14, dated 13.1.1986 in regard to permitting stacking in railway premises at nominated stations without payment of wharfage charge upto a maximum of seven days in advance of loading of commodities except those listed in that letter, will apply in cases where no indent has been placed by the party and whether indenting for wagons should be insisted upon before permission is given in such cases in terms of Board's letter No.TC I/1013/77/1 dated 24.8.78.
>
> 2. The matter has been examined and it has been decided that permission as envisaged in Board's letter No.TC I/83/201/14, dated 13.1.1986 may be given without insisting on prior placement of indent for wagons. The party can give a letter to the person in charge of the Goods Shed that he would be indenting for wagons within a maximum period of seven days and that he will be stacking the goods in advance at his own risk and responsibility."

5(b). In the letter dated 21.06.1990, response was given to the General Manager (Commercial) Central Railway Bombay's letter dated 6.2.1990 in the following manner:-

> " The matter has been examined. The present dispensation that all commodities except the specified commodities listed in Board's letter No.TCI/836201/14 dated 13.1.86 may be permitted to be stacked in railway premises of nominated stations without payment of wharfage charges upto a mximum period of 7 days in advance of loading, should not be relaxed further.
>
> 2. Where such permission has been given wharfage charges are leviale on expiry of the 7 days period even in cases where Railways have not been able to supply wagons.
>
> 3. The expression "Drugs and containers" referred to in Board's letter dated 13.1.86 quoted above includes ISO containers for which separate wharfage charges have been prescribed in respect of each inland container Depot."

In our considered view, both the letters were concerned with the treatment of a particular situation and were devoid of generality. Both the circulars are not issued U/s.83(1), Section-74 readwith Section-65 of the Railway Act as contended by learned counsel Mr. Pal. The question of declaring the same as 'Ultravires' does not arise.

6. It is pertinent to note that the statement of objects and reasons for bringing the Railways Act, 1989 states inter alia that;

> 2-(iii) In accordance with certain Judicial pronouncement, the bill provides for statutory recognition of the Railway receipt as a negotiable instrument".

Section-65 readwith Section 2(33) defines the Railway receipts. That does not state to include wharfage. Section-2(41) defines wharfage to mean

"the charge levied on goods for not removing them from the railways after the expiry of the free time for such removal". Section-2(ii) stipulates that "demurrage" means the charge levied for the detention of any rolling stock after the expiry of free time, if any, allowed for such detention".

It is relevant that the inclusive definition of "Terminals" as provided U/s.3(14) of the Railways Act, 1890 has not been found place in the new Railways Act, 1989.

On careful reading of the provisions, relating to wharfage, demurrage and Railway receipt, of the Railways Act, 1989, we do not find anywhere that for the no-fault of Consigner in making consignment, wharfage would be charged in the railway receipts.

In the Raichand Decision (Supra), the Hon'ble Apex Court, referring the provision of Old Railway Act, clarifies the concept of wharfage in the following words-

> "Demurrage is therefore a charge levied on the goods not unloaded from the wagons within the free time of six daylight hours and wharfage is the charge levied on goods not removed from the railway premises after the expiry of the free time allowed for that purpose. Indeed S. 46C(d) of the Act, which was inserted, by Act, 65 of 1945, has practically adopted the definition of the word "demurrage" given in the said rule. Wharfage and demurrage are, therefore, charges levied in respect of goods retained in the wagons or in the railway premises beyond the free time allowed for clearance under the rules."

What follows from the reading of the relevant provisions of the Railways Act, 1989 is that there is no command of statute to include the wharfage in the Railway receipts. Further the letters dated 08.09.1989 and 21.06.1990 do not instruct for the same.

We do not find any reason as to why fault of the Consigner should not be considered while charging wharfage. What is unreasonable should be avoided.

Ergo, learned Single Judge is found to have not committed any illegality in considering the law on the admitted facts advanced by the parties. The decision arrived at in the impugned judgment warrants no interference in this appeal. In the result, the writ appeal stands dismissed. There shall be no order as to costs.

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2019 (II) ILR – CUT- 498

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

MATA NO. 2 OF 2009

JAYANTI DEVI @ DAMAYANTI ……...Appellant

.Vs.

RAMDEO SHAW & ANR. .....Respondents

HINDU ADOPTIONS AND MAINTENANCE ACT, 1956 – Sections 20, 21 & 22 – Provisions under – Maintenance – Wife inherited the husband's estate after his death and also got the job on compassionate ground under the rehabilitation – Whether liable to maintain parents in law and other minor children? – Held, Yes.

"Thus, a conjoint reading of these three Sections of Hindu Adoptions and Maintenance Act, 1956 makes it abundant clear that the daughter-in-law in the event of death of her husband when she succeeds the estates of her husband is liable to maintain her parents-in-law. Since in this case the appellant has stepped into the shoes of her deceased-husband by availing rehabilitation assistance appointment, we are of the view that the judgment passed by the learned Judge, Family Court, Rourkela does not suffer from any infirmity or illegality, hence we are inclined to dismiss the appeal." *(Para 5(b))*

For Appellant : M/s. Maheswar Mohanty, R.K. Dash, P.Jena.
For Respondents : Mr. D.K. Sahoo-1, B.K. Behera & J.P. Singh, M/s. Bipin Ku. Choudhury, Anam Ch. Panda.

JUDGMENT Date of Hearing & Judgment : 23.07.2019

S.K. MISHRA, J.

In this appeal, the respondent before the Judge, Family Court, Rourkela in C.P. No.6 of 2007 assails the judgment dated 12.12.2008, whereby the court of original jurisdiction allowed the petition filed by the parents-in-law of the appellant and directed the appellant to pay a sum of Rs.500/- per month to each of the respondents for maintenance.

2. Case of the petitioners in C.P. No.6 of 2007 being the respondents herein is that the respondents are very old. Their son (appellant's husband) Pramod was working in Lathikata Rural Post Office. Pramod died by a vehicular accident on 22.04.1998. The appellant got the job of her deceased husband under rehabilitation scheme on compassionate ground with an undertaking before the postal authorities to look after the respondents and three minor children of respondents. The appellant also got all the death benefits of her deceased husband by way of Rs.80,000/- by order of the

Motor Accident Claims Tribunal, Life Insurance benefit of the deceased of Rs.50,000/- and death benefit of the deceased from the Postal Department amounting to Rs.1,00,000/-. But the appellant despite of getting the service of her deceased husband and his other death benefit refused to maintain and take care of the respondents-petitioners therein and lived separately from the respondents. The appellant is getting salary of Rs.4000/- per month.

3. The respondent in C.P. No.6 of 2007 is the appellant in this case. She has taken the plea that after the death of her husband, she was appointed by the postal authorities on her own application and not under any rehabilitation scheme. She has not given any undertaking before the postal authorities, at the time of her appointment, to maintain the respondents and the minor children of the respondents. The respondents have sold their landed property for Rs.5,00,000/- at their native place from which they get interest of Rs.5,000/- per month. The respondents have got two other living major earning sons who are liable to maintain the respondent but they have not been impleaded as parties in C.P. No.6 of 2007.

4. On such pleading, learned Judge, Family Court, Rourkela cast three issues. One is relating to maintainability of the application. Second is relating to the liability of the present appellant to maintain her father-in-law and mother-in-law and the quantum of maintenance. Third is relating to the other reliefs that the respondents are entitled to.

4.(a) Deciding issue no.2 and relying upon the provision of Section 20(1) and (3) of the Hindu Adoptions and Maintenance Act, 1956 and also placing reliance upon the decision reported in AIR 2007 (NOC) 898, (Rajasthan), learned Judge, Family Court, Rourkela held that after expiry of the husband of the appellant who happens to be the son of the respondents, the appellant being an earning member of the family, she has been given rehabilitation assistance by giving posting in the Postal Department after demise of her husband held that she is liable to pay the maintenance.

5. In this case, we have taken into consideration the evidence laid on behalf of the appellant and the respondents and come to the conclusion that there is enough material on record to show that the appellant has been given appointment under rehabilitation assistance scheme in the Postal Department in place of her husband. Therefore, she is liable inherits all the liabilities of her deceased husband.

5.(a) Moreover, there is no evidence on record to show that the respondents have any independent income to maintain themselves. Other two sons of the

respondents are not very well placed and not earning very huge amount of money to maintain their parents. On the contrary, the appellant herself has availed the rehabilitation assistance scheme. Therefore, she is liable to maintain. Moreover, in this connection, the provision of 20, 21 and 22 of the Hindu Adoptions and Maintenance Act, 1956 should be taken into consideration. We feel it appropriate to take note of the exact word used by the Parliament while enacting these particular provisions. The same are reproduced herein below for ready reference:-

> *"**Sec. 20. Maintenance of children and aged parents**:- (1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.*
>
> *(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.*
>
> *(3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property.*
>
> ***21. Dependants defined** – For the purpose of this Chapter "dependants" mean the following relatives of the deceased:-*
>
> *(i) his or her father;*
>
> *(ii) his or her mother;*
>
> *(iii) his widow, so long as she does not remarry;*
>
> *(iv) his or her son or the son of his predeceased son or the son of a predeceased son of his predeceased son, so long as he is a minor: provided and to the extent that he is unable to obtain maintenance, in the case of a grandson from his father's or mother's estate, and in the case of a great-grandson, from the estate of his father or mother or father's father or father's mother;*
>
> *(v) his or her unmarried daughter, or the unmarried daughter of his predeceased so or the unmarried daughter of a predeceased son of his predeceased son, so long as she remains unmarried: provided and to the extent that she is unable to obtain maintenance, in the case of a grand-daughter from her father's or mother's estate and in the case of a great-grand-daughter from the estate of her father or mother or father's father or father's mother;*
>
> *(vi) his widowed daughter; provided and to the extent that she is unable to obtain maintenance- (a) from the estate of her husband; or (b) from her son or daughter, if any, or his or her estate; or*
>
> *(c) from her father-in-law or his father or the estate of either of them;*
>
> *(vii) any widow of his son or of a son of his predeceased son, so long as she does not remarry: provided and to the extent that she is unable to obtain maintenance from her husband's estate, or from her son daughter, if any, or his or her estate; or in the case of a grandson's widow, also from her father-in-law's estate;*
>
> *(viii) his or her minor illegitimate son, so long as he remains a minor;*
>
> *(ix) his or her illegitimate daughter, so long as she remains unmarried.*

> ***22. Maintenance of dependants****-(1) Subject to the provisions of sub-section (2), the heirs of a deceased Hindu are bound to maintain the dependants of the deceased bout of the estate inherited by them form the deceased.*
>
> *(2) Where a dependant has not obtained, by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act, the dependant shall be entitled, subject to the provisions of this Act, to maintenance from those who take the estate.*
>
> *(3) The liability of each of the persons who takes the estate shall be in proportion to the value of the share or part of the estate taken by him or her.*
>
> *(4) Notwithstanding anything contained in sub-section (2) or sub-section (3), no person who is himself or herself a dependant shall be liable to contribute to the maintenance of others, if he or she has obtained a share or part the value of which is, or would, if the liability to contribute were enforced, become less than what would be awarded to him or her by way of maintenance under this Act."*

5.(b) Thus, a conjoint reading of these three Sections of Hindu Adoptions and Maintenance Act, 1956 makes it abundant clear that the daughter-in-law in the event of death of her husband when she succeeds the estates of her husband is liable to maintain her parents-in-law. Since in this case the appellant has stepped into the shoes of her deceased-husband by availing rehabilitation assistance appointment, we are of the view that the judgment passed by the learned Judge, Family Court, Rourkela does not suffer from any infirmity or illegality, hence we are inclined to dismiss the appeal.

6. Learned counsel for the respondents submits that quantum of maintenance i.e. Rs.500/- each per month should be enhanced. But we are of the opinion that, it is a fresh cause of action for which the respondents may approach the learned Judge, Family Court, Rourkela afresh for enhancement of the maintenance which shall be considered keeping in view the present pay and income of the appellant.

With such observation, the MATA is dismissed.

There shall be no order as to costs.

LCRs. be returned immediately to the lower court by the Registry.

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2019 (II) ILR - CUT- 501

C.R. DASH, J.

CRIMINAL APPEAL NO. 340 OF 2008

DUSASAN JENA ……..Appellant

.Vs.

STATE OF ORISSA ……Respondent

CONSTITUTION OF INDIA, 1950 – Article 21 – Fundamental right to speedy trial – Petitioner, a dealing clerk in the office of Tahsildar demanded a bribe of rupees one hundred for providing a certified copy of the demarcation report – Trap was in the year 1995 and charge sheet filed in 1996 – Delay in trial – Appeal disposed of after twenty four years – On merit no reasonable evidence available – Whether the petitioner has suffered? – Held, Yes.

"Another aspect of the case is that, charge-sheet in the case was filed on 06.07.1996 after ten months of the occurrence. Charge was framed by the trial court on 25.02.2002 and the judgment of conviction and order of sentence were passed on 18.07.2008. The Appeal was admitted by the High Court on 18.08.2008. In the meantime about 24 years from the date of detection have passed and the Appellant has suffered a lot for demanding bribe of a paltry amount of Rs.110/- (one hundred ten) only. For procrastination in the trial, gradual corrosion of the social reputation of the Appellant, deprivation of the Appellant of a reasonable livelihood due to his involvement in a Vigilance Case and stoppage of all the pensionary and retiral benefits (as the Appellant is stated to have retired from service in the meantime) including the extreme emotional and mental stress and strain for such reasons for such a long period, that too, for a paltry sum to afford an insignificant favour, it is to be held that denial of a speedy trial in such a case has impaired the fundamental rights of the Appellant under Article 21 of the Constitution of India."

For Appellant : M/s. D.K. Mishra & B. Behera. M/s. A.K. Sahoo, J.K. Dehury & C. Nath. M/s. B.P. Das, A. Kanungo & L.D.Swain. M/s. Prasanna Panda & T.K. Praharaj. M/s. Ambuja Bandhu Parida & B.B. Biswal.

For Respondent : Mr. Niranjan Moharana, Addl. Standing Counsel (Vig.).

JUDGMENT Date of Judgment : 19.06.2019

C.R. DASH, J.

Having been convicted and sentenced to suffer R.I. for two years and to pay fine of Rs.5,000/- (five thousand), in default, to suffer further R.I. for one month for the offence under Section 7 of the Prevention of Corruption Act, 1988 ("Act 1988" for short) and R.I. for three years and to pay fine of Rs.10,000/- (ten thousand), in default, to suffer further R.I. for two months for the offence under Section 13(2) read with Section 13(1)(d) of the Act, 1988 by the learned Special Judge (Vigilance), Jeypore in T.R. No.15 of 2007, the Appellant has preferred this Appeal.

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

One Laiban Jani was the owner of Ac.1.61 decimals of land appertaining to Plot No.503 under Khata No.299 of mouza Ekamba in the

district of Nabarangpur. That land was allegedly in forcible possession of one Jadu Damba. Trinath Jani (P.W.5) – the decoy claiming himself to be the sole surviving legal heir of said Laiban Jani, initiated R.M.C. No.138 of 1995 before the Tahsildar, Nabarangpur for demarcation of the land by filing application vide Ext.8. Order was passed for demarcation and the concerned R.I. submitted report accordingly. The present Appellant at the relevant time was working as the Dealing Assistant being attached to the office of the Tahsildar, Nabarangpur. It is alleged that, since 1 ½ years the Complainant (P.W.5) was approaching the Appellant for grant of certified copy of the Demarcation Report. The Appellant is alleged to have demanded Rs.110/- (one hundred ten) as bribe for grant of such certified copy of the Demarcation Report. The Complainant (P.W.5) paid Rs.10/- (ten) at the first instance and approached the Vigilance Authorities alleging demand of bribe by the Appellant. Accordingly, a trap was laid by the Inspector of Vigilance, Nabarangpur (P.W.6) on the instruction of the D.S.P. (Vigilance). P.W.1, P.W.3, P.W.5 and some other witnesses were the members of the trap party. The trap was laid at about Noon on 12.09.1995. On getting pre-arranged signal from the accompanying witness P.W.3, the trap party rushed to the spot and challenged the Appellant to have accepted bribe from the Complainant (P.W.5). At first the Appellant denied, but subsequently he admitted to have accepted the bribe. Both the hand washes of the Appellant and his pocket-wash were taken in chemical solutions separately. In all the three washes, trace of phenolphthalein was found and the washes turned red/ rose in colour. The bribe money was detected being kept under some Forms on a shelf adjacent to the seat of the Appellant. Detection Report was accordingly prepared, investigation was taken up and charge-sheet was filed against the Appellant.

3. The prosecution has examined seven witnesses to bring the charges to home against the Appellant. P.W.5 is the Complainant (decoy), P.W.3 is the accompanying / overhearing witness, P.W.1 is the witness to preparation, detection & seizure, P.W.2 is the Head-Clerk of the Tahsil Office and a chance witness, P.W.4 is the Tahsildar, Nabarangpur, P.W.6 is the Inspector of Vigilance, Nabarangpur who laid the trap and prepared Detection Report, P.W.7 is the Establishment Officer of Nabarangpur Collectorate who has proved the sanction order.

4. The defence plea is one of denial and false implication.

5. Learned counsel for the Appellant taking me through the lower court's record, points out to many 'ifs' and 'buts' in the prosecution case, like

the Duty Card in respect of the Appellant wherein he has not been assigned any duty for preparation of certified copy, Copy Register wherein the copy application of the Complainant (decoy) has not been entered, and discrepancies in the evidence of the witnesses here and there. Curiously, none of the documents relied on by the learned counsel for the Appellant has been brought on record by way of evidence either by the prosecution or the defence.

6. Learned counsel for the Respondent (Vigilance Department) on the other hand submits with vehemence that, there being clinching evidence regarding demand and acceptance of bribe by the Appellant, there is no scope of interference so far as the trial court's judgment is concerned.

7. Law is well settled that, mere receipt of the amount by the accused in a Trap Case is not sufficient to fasten the guilt, in absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Demand is the sine-qua-non for offence under Section 7 and Section 13 (2) and 13 (1)(d) of the Act, 1988.

8. In the present case, the decoy (P.W.5) has testified that, since 1 ½ years he was running after the Appellant for grant of certified copy of the Demarcation Report. Ext.8 is the Demarcation Application. It contains no date except the signature of P.W.5, which has been proved vide Ext.8/1. The Tahsildar, Nabarangpur has testified that he received the Demarcation Report from the R.I. in the Demarcation Case on 20.04.1995. There is nothing on record to prove that the Appellant was in-charge of granting certified copy of the Demarcation Report. Further, there is nothing on record to prove as to when and on which date the Appellant demanded bribe from the Complainant decoy (P.W.5). The factum of demand by the Appellant was reported to the Vigilance Authorities for the first time at 4.00 P.M. on 11.09.1995, and the trap was laid at about noon hour on 12.09.1995.

9. P.W.1, P.W.2 (who has turned hostile), P.W.3 and P.W.5 have testified that, at the time of demand and acceptance of bribe, the Appellant was in the office, the trap party on seeing the pre-arranged signal from the accompanying witness P.W.3, rushed to the office of the Appellant and challenged him there.

10. P.W.6, the Inspector of Vigilance, who laid the trap, on the other hand has testified that when they (trap party) rushed to the office of the Appellant, they found the Appellant and the decoy (P.W.5) standing together near a tea-stall adjacent to the Tahsil Office. They went there and challenged the

Appellant. At first the Appellant denied to have accepted money, but subsequently he admitted to have accepted the bribe money from the Complainant. The trap party brought the Appellant to his office and recovered the tainted G.C. Notes which were kept beneath some Forms on the rack / shelf near the seat of the Appellant.

There is also some discrepancies on this aspect. Some of the witnesses have stated that the Appellant accepted the money, counted by his hands and put those Notes in his shirt pocket and then kept under the Forms in the shelf. Some witnesses have testified that the Appellant was asked to bring out the money from the place where he had hidden. This evidence go to show that, tainted G.C. Notes were recovered after a thorough search from the wooden shelf at the instance of the Appellant and he was asked to deal with the money with his hands.

11. There being much delay in the trial, almost about 10 years by the time the witnesses were examined, the sequence of events have not been properly proved. Whether hand-wash and pocket-wash of the Appellant were taken before recovery or after recovery, whether the Appellant was challenged by the trap party to bring out the money with his hand and thereafter the hand-wash was taken or before that, all these aspects including the prevaricating statements of the witnesses regarding the spot where the Appellant was challenged (whether it was in his office or it was near the tea-stall) create a doubt regarding the manner in which the trap was laid, and there is also nothing on record regarding the previous demand of bribe.

12. Another aspect of the case is that, charge-sheet in the case was filed on 06.07.1996 after ten months of the occurrence. Charge was framed by the trial court on 25.02.2002 and the judgment of conviction and order of sentence were passed on 18.07.2008. The Appeal was admitted by the High Court on 18.08.2008. In the meantime about 24 years from the date of detection have passed and the Appellant has suffered a lot for demanding bribe of a paltry amount of Rs.110/- (one hundred ten) only. For procrastination in the trial, gradual corrosion of the social reputation of the Appellant, deprivation of the Appellant of a reasonable livelihood due to his involvement in a Vigilance Case and stoppage of all the pensionary and retiral benefits (as the Appellant is stated to have retired from service in the meantime) including the extreme emotional and mental stress and strain for such reasons for such a long period, that too, for a paltry sum to afford an insignificant favour, it is to be held that denial of a speedy trial in such a case

has impaired the fundamental rights of the Appellant under Article 21 of the Constitution of India.

13. Regard being had to the discussions supra, I am constrained to hold that the Appellant deserves acquittal on this score also, besides on merit.

14. In the above premises, the impugned judgment and order of sentence are set aside and the Criminal Appeal is allowed accordingly. The Appellant be discharged of the bail bond forthwith.

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2019 (II) ILR - CUT- 506

DR. A.K. RATH, J.

MACA NO. 570 & MACA NO. 640 OF 2018

MACA NO.570 OF 2018

D.M, RELIANCE GENERAL INSURANCE CO. LTD., BHUBANESWAR ……..Appellant

.Vs.

MANJUSHREE MOHAPATRA & ANR. ……..Respondents

For Appellant : Mr. G.P. Dutta.
For Respondent : Mr. K. Panigrahi.

MACA NO.640 OF 2018

MANJUSHREE MOHAPATRA & ANR. ……..Appellants

.Vs.

DURYADHAN SAHU & ANR. ……...Respondents

For Appellants : Mr. K. Panigrahi.
For Respondent : Mr. G.P. Dutta.

(A) MOTOR ACCIDENT CLAIM – Deceased was a bachelor and was aged 30 years 10 months of age at the time of accident and was working as Manager in the State Bank of India – Award – Appeal by Insurance Company – Plea that while calculating the amount of compensation the age of the parents should have been taken into account – The question arose for consideration was that when a bachelor died in a motor vehicle accident, whether his age or his parents age shall be taken into account while applying multiplier? – Held, the irresistible conclusion is that when a bachelor died in a motor vehicle accident, his age shall be taken into account while applying multiplier."

(B) MOTOR ACCIDENT CLAIM – Deceased was a bachelor – Whether filial consortium should have been granted? – Held, Yes.

"In Magma General Insurance Co. Ltd. vs. Nanu Ram alias Chuhru Ram and others, 2018 (4) T.A.C. 345 (SC), the apex Court went in-depth into the matter and held that parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training. Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit."

Case Laws Relied on and Referred to :-

1. 1994 (1) T.A.C. 323 : K.S.R.T.C. Vs. Susama Thomas.
2. 1996 (2) T.A.C. 286 (SC) : U.P.S.R.T.C.& Ors Vs. Trilok Chandra & Ors.
3. AIR 2003 SC 3696 : State of Haryana Vs. Jasbir Kaur & Ors.
4. AIR 2005 SC 752 : Central Board of Dawoodi Bohra Community & Anr Vs. State of Maharashtra & Anr.
5. 2006 AIR SCW 1116 : Bijay Kumar Dugar Vs. Bidyadhar Dutta & Ors.
6. 2007 (4) T.A.C. 17 (SC) : New India Assurance Company Ltd. Vs. Smt. Shanti Pathak & Ors.
7. 2009 (2) T.A.C. 677 (SC) : Smt. Sarala Verma & Ors. Vs. Delhi Transport Corporation & Anr.
8. 2013 (2) T.A.C. 369 (SC) : Reshma Kumari & Ors. Vs. Madan Mohan & Anr.
9. 2017 (4) T.A.C. 673 (SC) : National Insurance Company Ltd. Vs. Pranay Sethi & Ors.
10. SLP (C) No.34648 of 2015 disposed of on 15.02.2017: Mina & Ors. Vs. Rani Ammal & Anr.
11. 2008 AIR SCW 143 : National Insurance Co. Ltd. .Vs. Indira Srivastava & Ors.
12. 2011 (1) T.A.C. 861 (SC) : P.S. Somanathan & Ors. Vs. District Insurance Officer & Anr.
13. 2012 (4) T.A.C. 775 (SC) : Amrit Bhanu Shali & Ors Vs. National Insurance Co. Ltd. & Ors.
14. 2017 (II) ILR-CUT-998 (SC) : National Insurance Company Ltd. Vs. Pranay Sethi & Ors.
15. 2018 (4) T.A.C. 345 (SC) : Magma General Insurance Co. Ltd. Vs. Nanu Ram alias Chuhru Ram & Ors.

JUDGMENT Date of Hearing: 25.01.2019 : Date of Judgment: 06.02.2019

DR. A.K. RATH, J.

Both the appeals arise out of a common award dated 27.2.2018 passed by the learned 5th M.A.C.T., Khurda in M.A.C.T. Case No.7 of 2017. They were heard together and are disposed of by this judgment.

02. Claimants-respondent nos.1 and 2 filed an application under Sec.166 of the Motor Vehicles Act, 1988 ("M.V. Act") for compensation on account

of accidental death of their son, Choudhury Harihar Gajendra Mohapatra. The case of the claimants was that on 24.12.2016 while Choudhury Harihar Gajendra Mohapatra was proceeding on a motor cycle bearing regd. No.OD-02-F-4855 from Pipili to State Bank of India, Nayahata Branch, via-Nimapara on the left side of the road. At about 10 A.M. a truck bearing regd. No.OD-07-J-7545 came in a rash and negligent manner and dashed against the motor cycle, as a result of which, he sustained severe bodily injuries and succumbed to death on the spot. The deceased was 30 years of old at the time of accident. He was working as Manager in the State Bank of India, Nayahata Branch, Gop and getting salary of Rs.65,000/- per month. After his death, the family received a serious set back.

03. The owner of the vehicle, opposite party no.1, was set exparte. The insurer of the offending vehicle, opposite party no.2, appellant herein, entered contest and filed written statement pleading inter alia that the deceased was negligent in driving inasmuch as he was not wearing protective headgear as mandatory under Sec.129 of the M.V. Act. He died due to his own negligence and as such the insurer is exempted from its liability.

04. Stemming on the pleadings of the parties, learned Tribunal struck four issues. To substantiate the case, the claimants had examined three witnesses and on their behalf fifteen documents had been exhibited. No evidence was adduced by the opposite parties. On an anatomy pleadings and evidence, learned Tribunal came to hold that the accident had occurred due to rash and negligent driving of the truck. The offending vehicle was insured with opposite party no.2-insurer. The driver of the offending vehicle had valid licence at the time of accident. The deceased was 30 years 10 months of age at the time of accident. He was working as Manager in the State Bank of India, Nayahat Branch, Gop. Learned Tribunal awarded an amount of Rs.80,31,168/- in the following manner.

Sl. No.	Heads	Calculation
(i)	Monthly income after deduction of professional tax and Income tax.	Rs.55,572/-
(ii)	Annual income of the deceased.	Rs.6,66,764/-
(iii)	50% of (ii) above to be added as future prospective.	Rs.6,66,764/- + Rs.3,33,382/- = Rs.10,00,146/-
(iv)	50% of (iii) deducted as personal expenses of the deceased per annum.	Rs.10,00,146.00 – Rs.5,00,073.00 = Rs.5,00,073/-
(v)	Annual contribution to family after 50% addition as future prospects and 50% deduction as personal expenses.	Rs.5,00,073/-
(vi)	Compensation after application of multiplier 16.	Rs.5,00,073/- X 16 = Rs.80,01,168/-
(vii)	Addition of Rs.15,000/- towards loss of estate.	Rs.80,01,168/- + Rs.15,000/- = Rs.80,16,168/-
(viii)	Addition of Rs.15,000/- towards funeral expenses of the deceased.	Rs.80,16,168/- + Rs.15,000/- = Rs.80,31,168/-

05. The insurer has assailed the award in MACA No.570 of 2018, whereas the claimants filed MACA No.640 of 2018 for enhancement of compensation amount.

06. Heard Mr. G.P. Dutta, learned Advocate for the appellant-Insurance Company and Mr. K. Panigrahi, learned Advocate for the claimants-respondent nos.1 and 2.

07. Mr. Dutta, learned Advocate for the insurer, submitted that the deceased was negligent in driving. He had not put headgear as manadatory under Sec.129 of the M.V. Act. The insurer is exempted from its liability. His alternative submission was that the deceased was a bachelor at the time of accident. Learned Tribunal fell into patent error of law in applying multiplier '16' taking into account the age of the deceased, instead of parents. To buttress his submission, he placed reliance on the decision of the apex Court in the cases of *K.S.R.T.C. vs. Susama Thomas,* 1994 (1) T.A.C. 323, *U.P.S.R.T.C. and others vs. Trilok Chandra and others,* 1996 (2) T.A.C. 286 (SC), *State of Haryana vs. Jasbir Kaur and others,* AIR 2003 SC 3696, *Central Board of Dawoodi Bohra Community and another vs. State of Maharashtra and another,* AIR 2005 SC 752, *Bijay Kumar Dugar vs. Bidyadhar Dutta and others,* 2006 AIR SCW 1116, *New India Assurance Company Ltd. vs. Smt. Shanti Pathak and others,* 2007 (4) T.A.C. 17 (SC), *Smt. Sarala Verma and others vs. Delhi Transport Corporation and another,* 2009 (2) T.A.C. 677 (SC), *Reshma Kumari and others vs. Madan Mohan and another,* 2013 (2) T.A.C. 369 (SC), *National Insurance Company Limited vs. Pranay Sethi and others,* 2017 (4) T.A.C. 673 (SC) and *Mina and others vs. Rani Ammal and another,* SLP (C) No.34648 of 2015 disposed of on 15.02.2017.

08. Per contra, Mr. Panigrahi, learned Advocate for the respondent nos.1 and 2, submitted that the income of the deceased towards his perk from the month of April, 2016 to December, 2016 was Rs.74,117.31. Learned Tribunal ought to have added Rs.5,478/- towards perk from his monthly salary income. If the same is added, monthly income of the deceased comes to Rs.55,572/-. He further submitted that the age of the deceased shall be taken into account while calculating the multiplier. He placed reliance to the decision of the apex Court in the cases of *National Insurance Co. Ltd. vs. Indira Srivastava and others,* 2008 AIR SCW 143, *P.S. Somanathan and others vs. District Insurance Officer and another,* 2011 (1) T.A.C. 861 (SC), *Amrit Bhanu Shali and others vs. National Insurance Co. Ltd. and others,* 2012 (4) T.A.C. 775 (SC) *National Insurance Company Ltd. vs. Pranay Sethi and others,* 2017 (II) ILR-CUT-998 (SC).

09. Neither the insurer nor the owner of the offending vehicle had adduced evidence. At a belated stage, an attempt was made by the insurer to defeat the claim on the ground that the deceased was not wearing the protective headgear. The same is not per se a ground to exonerate the insurer from its liability.

10. Next question arises for consideration is that when a bachelor died in a motor vehicle accident, whether his age or his parents age shall be taken into account while applying multiplier ?

11. An identical matter came up for consideration before this Court in the case of *National Insurance Company Ltd. vs. Emerenciana Soy and others,* (MACA No.955 of 2016 disposed of today). This Court held:

> **"8.** There are divergent views of different High Courts as well as apex Court with regard to application of multiplier in a case where the deceased was a bachelor and died in a motor vehicle accident. The same has been set at rest by a Constitution Bench of the apex Court in National Insurance Company Limited v. Pranay Sethi, (2017) 16 SCC 680. The apex Court held:
>
> "59.5. For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paras 30 to 32 of Sarla Verma which we have reproduced hereinbefore.
>
> 59.6. The selection of multiplier shall be as indicated in the Table in Sarla Verma read with para 42 of that judgment.
>
> 59.7 The age of the deceased should be the basis for applying the multiplier.
>
> xxx xxx xxx
>
> (Emphasis laid)
>
> **9.** An identical matter came up for consideration before the apex Court in the case of Nagar Mal. In the said case, the deceased was a bachelor. A contention was raised by the counsel appearing on behalf of the appellants that the multiplier to be adopted should have been based on the age of the deceased and not on the age of the parents. The contention was repelled. Taking a cue from Pranay Sethi, the apex Court held:
>
> "7. However, we find merit in the submission which has been urged on behalf of the appellants that the Tribunal failed to apply the correct multiplier and erred in not granting the benefit of future prospects in computing the income of the deceased and the loss of dependency. Having due regard to the judgment delivered by the Constitution Bench of this Court in National Insurance Company Limited v Pranay Sethi, (2017) 13 Scale 12 : 2017 (4) TAC 673 and in Sarla Verma v Delhi Transport Corporation, (2009) 6 SCC 121 : 2009 (2) TAC 677, the correct multiplier should be 17 having regard to the age of the deceased.
>
> xxx xxx xxx
>
> (Emphasis laid)
>
> xxx xxx xxx
>
> **13.** In view of the authoritative pronouncement of the apex Court in the cases of *Pranay Sethi* & *Nagar Mal,* the irresistible conclusion is that when a bachelor died in a motor vehicle accident, his age shall be taken into account while applying multiplier."

12. The deceased was the Manager in the State Bank of India. His salary slips for the months of October, November and December, 2016 were exhibited as Ext.10. Learned Tribunal deducted the income tax and other taxes from the same and calculated the monthly salary for the purpose of computation of compensation. There is no material on record as to whether the deceased was getting perk every month. In view of the same, learned Tribunal is justified in not adding the same towards the monthly income.

13. But then, the learned Tribunal committed a patent error in not awarding any amount towards filial consortium. In *Magma General Insurance Co. Ltd. vs. Nanu Ram alias Chuhru Ram and others,* 2018 (4) T.A.C. 345 (SC), the apex Court went in-depth into the matter and held that parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training."

Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world over have cognized that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child. In the said case, Rs.80,000/- was awarded towards filial consortium to the parents.

14. Thus the claimants are entitled to Rs.80,000/- towards filial consortium. So calculated, the compensation comes to Rs.81,11,168/-.

15. In *Jasbir Kaur and others* (supra), the apex Court held that it has to be borne in mind that the compensation is not expected to be a windfall for the victim. Statutory provisions clearly indicate the compensation must be "just" and it cannot be a pittance. The Courts and Tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. It further held that the expression "just" denotes equitability, fairness

and reasonableness and non-arbitrary. There is no quarrel over the proposition of law.

16. In *K.S.R.T.C.* (supra), the apex Court held that the multiplier-method logically sound and legally well-established.

17. In *U.P.S.R.T.C. and others* (supra), the apex Court held that the calculation of compensation and the schedule appended thereto for calculation of compensation suffers from several defects. The multiplier cannot exceed 18 years purchase factor.

18. In *Bijay Kumar Dugar* (supra), the apex Court taken into account the age of the parents. The same view was taken in *Smt. Shanti Pathak and others* (supra).

19. In *Smt. Sarla Verma and others* (supra), the apex Court went in-depth into the matter and held that from the quantum of compensation specified in table, it is possible to infer that a clerical error has crept in the schedule and the 'multiplier' figures got wrongly typed. The same was rectified and succinctly stated in column no.4 of paragraph 20 with regard to the application of the multiplier.

20. In *Reshma Kumari and others* (supra), the age of the deceased was 15 years. The apex Court held that the learned Tribunal shall select the multiplier as indicated in column no.4 of the table as prescribed in *Sarala Verma*. It further held that the appropriate multiplier should be 15.

21. In *Meena and others (SLP No.34648 of 2015),* the apex Court held that age of the deceased should not have been taken for the purpose of determining the multiplier.

22. In *Amrit Bhanu Shali and others* (supra), the deceased was a bachelor. His age was taken into account.

23. In *P.S. Somanathan and others* (supra), the age of the deceased was taken into account.

24. As held above in paragraph 11, when a bachelor dies, his age shall be taken into account while applying multiplier.

25. For the foregoing reasons, MACA No.570 of 2018 is dismissed. MACA No.640 of 2018 is allowed to the extent indicated above. There shall be no order as to costs.

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2019 (II) ILR - CUT- 513

DR. A.K. RATH, J.

S.A. NO. 44 OF 1989

M/S. BHARAT HEAVY PLATE & VESSELS, VISAKHAPATNAM, ANDHRA PRADESH .....Appellant

.Vs.

ORISSA STEEL CORPORATION, BHUBANESWAR & ANR. .....Respondents

INDIAN CONTRACT ACT, 1872 – Section 7 – Provisions under – Acceptance must be absolute – Contract on the basis of terms and conditions of the Tender documents not concluded – EMD amount forfeited on the ground that the Plaintiff did not act as per the tender conditions – Materials available in the correspondences between the parties suggest that there was no concluded contract – Held, the inescapable conclusion is that there was no concluded contract between the parties, thus, the question of forfeiture of earnest money does not arise at all – The judgment of the lower appellate court upheld.

Case Laws Relied on and Referred to :-

1.(1994) 4 SCC 711 : Oil and Natural Gas Commission Vs.Utpal Kumar Basu & Ors.
2. AIR 1999 SC 504 : M/s. Rickmers Verwaltung Gimb H. .Vs. Indian Oil Corporation Ltd.
3. AIR 2015 Ori.46 : M/s. Chandaneswar Enterprises Ltd. .Vs. Industrial Promotion &Investment Corporation of Orissa Ltd.
4. AIR 1984 Ori. 182 : M/s. Pattnaik Industries Pvt. Ltd. .Vs. Kalinga Iron Works & Anr.
5. 1979 CLT. 104 : M/s.Surajmall Shibvhagawan .Vs. M/s. Kalinga Iron Works.

For Appellant : Mr. M. Mohapatra.
For Respondents : None

JUDGMENT Date of Hearing & Judgment :25.04.2019

DR. A.K. RATH, J.

Defendant no.1 is the appellant against a reversing judgment in a money claim.

02. Plaintiff-respondent no.1 instituted the suit for realization of Rs.12,750/- with P.I. and F.I. @18% per annum from the defendants. The case of the plaintiff is that the defendant no.1, a Government of India undertaking, issued an advertisement in the newspaper inviting tenders for purchase of different types of mild steel and boiler quality plate cuttings. The last date for accepting tender as well as the opening of the tender was

5.12.1979. On 5.12.1979, the plaintiff submitted the tender and deposited the earnest money of Rs.10,000/- with a condition that free lifting time shall be 90 days instead of 30 days as offered by the defendants. On 5.12.1979 the tenders were opened. The plaintiff was not present at the time of opening. The plaintiff sent a letter on 24.12.79 to the defendants as to the result of the tender submitted by it and intimated that if the rates quoted were not acceptable to the defendants, then the earnest money of Rs.10,000/- be refunded to it. The defendant no.1 sent a telegram on 27.12.79 to the plaintiff to attend the office at 10.30 a.m. on 31.12.1979 for price negotiation. The plaintiff was not present on that day. On 3.1.1980, the defendant no.1 sent a telegram intimating the plaintiff that his tender for lots 'c' and 'h' had been accepted at Rs.2600/- each per tonne. The plaintiff was directed to deposit the money before 13.1.1980 and lift the materials. In the letter confirming this telegram there was certain terms and conditions, such as, period of free lifting time as 30 days which was not acceptable to the plaintiff and the payment of whole of the amount for the entire lots on 12.1.1980 was also not acceptable to him. Since the additional terms and conditions were not acceptable to the plaintiff, the plaintiff did not proceed with the further negotiation and claimed the refund of the earnest money of Rs.10,000/-. With this factual scenario, it instituted the suit seeking the reliefs mentioned supra.

03. The defendants filed joint written statement stating that the suit was not maintainable. There was no cause of action. The courts at Bhubaneswar had no jurisdiction to entertain the suit. The courts at Visakhapatnam had the jurisdiction. It pleaded that there was a concluded contract. Since the plaintiff did not fulfil its part of the contract, the security deposit was forfeited. The defendants suffered loss of resale of the materials.

04. On the interse pleadings of the parties, learned trial court struck five issues. Parties led evidence, oral and documentary. Learned trial court dismissed the suit holding that it has no jurisdiction to entertain the suit. The plaintiff is not entitled to refund the earnest money deposit. Plaintiff appealed before learned Additional District Judge, Bhubaneswar. Learned lower appellate court came to hold that the court has jurisdiction to entertain the suit. There was no concluded contract between the parties. The defendants did not accept absolutely the terms offered by the tenderer with regard to the free lifting time of 90 days. The question of forfeiture of either earnest money or security deposit does not arise. Held so, it allowed the appeal.

05. The second appeal was admitted on the substantial questions of law enumerated in ground nos.2, 3 and 4 of the memorandum of appeal. The same are:

"2. For that the learned lower appellate court grossly erred in law in reversing the decision of the learned Subordinate Judge and holding that the Subordinate Judge's Court at Bhubaneswar had jurisdiction to entertain the suit. It is submitted that in view of the specific terms and conditions in the tender paper, Ext.3 providing that any dispute arising out of the transaction thereof shall be entertained in Visakhapatnam Courts only, the learned lower appellate court misconstrued the materials on record and erroneously held that as there was no concluded contract it could not be said that the Bhubaneswar Court would not have jurisdiction to entertain the suit. Further, the learned lower appellate court erred in holding that it could not be said that the plaintiff had waived its right to file the suit in Bhubaneswar court by submitting the tender. It is further humbly submitted that the learned lower appellate court has not correctly interpreted the decisions cited before him on the question of jurisdiction.

3. For that the learned lower appellate court also erred in law in holding that there was no concluded contract between the parties and by so holding it further erroneously reversed the decision of the learned trial court. It is humbly submitted that the learned lower appellate court had lost sight of two important letters written by the plaintiff itself dated 5-12-79 and 9-1-80 which would conclusively prove and establish that the plaintiff was bound by the terms of the contract. It is further submitted that the plaintiff's tender having been accepted by the defendants, the earnest money deposited by it would become automatically security deposit and therefore the plaintiff had become liable to forfeiture of the said amount on its failure to comply with the terms and conditions of the contract. In the other words, it is humbly submitted that the plaintiff having become a defaulter the defendants were entitled to forfeit the earnest money and the learned trial court had rightly held that the plaintiff was not entitled to refund of the earnest money. It is submitted that the decision of the learned lower appellate court on this aspect of the case is vitiated by errors of law and fact on record as material documents had not been referred to and the correct position of law was not kept in view.

4. For that the learned appellate court grossly erred in law in decreeing the suit with a stipulation of payment of interest at the rate of 12% per annum. It is humbly submitted that under the code of civil procedure the learned court had no jurisdiction to grant interest exceeding 6% per annum from the date of the decree till the date of payment or such earlier date as the court thinks fit."

06. Heard Mr. M. Mohapatra on behalf of Mr. D. Mohapatra, learned Advocate for the appellant. None appears for the respondents.

07. Mr. Mohapatra, learned Advocate for the appellant submits that in the tender call notice there is a clause that any dispute arising out of the transaction thereof shall be subject to Visakhapatnam jurisdiction. Learned Subordinate Judge, Bhubaneswar has no jurisdiction to entertain the suit. No part of cause of action has been treated. Since the plaintiff has not lifted the materials within the stipulated time, his earnest money has been forfeited in accordance with the clause of the tender call notice. He places reliance on the decision of the apex Court in the case of *Oil and Natural Gas Commission vs. Utpal Kumar Basu and others,* (1994) 4 SCC 711.

08. Tender Call Notice has been exhibited as Ext.1. Clause 13 of the Ext.1 provides that the unsuccessful tenderers EMD will be refunded within 20 days from the day of the opening of the tenders. Clause 17 provides that failure to comply with the satisfactory clearance of the material will result in forfeiture of the security deposit and also right on the material. Clause 19 provides that any other dispute arising out of the transaction shall have the legal validity in the jurisdiction of Visakhapatnam court only.

09. Admittedly, the defendant no.1 floated tender for lifting mild steel and boiler quality plate cuttings on 5.12.1979 vide Ext.1 and added certain conditions for accepting the tender vide Ext.4. There was a counter proposal by the plaintiff that free lifting time would be 90 days. The earnest money shall be refunded immediately otherwise interest @18% shall be charged. The offer was valid for 30 days from the date of opening of the tender. On 24.12.79 the plaintiff sent a letter, vide Ext.5, to the defendants to let him know about the result of the tender. It was also mentioned that in case the rates quoted by the plaintiff was not acceptable, the earnest money should be refunded. The defendants sent a telegram on 27.12.79 vide Ext.6 requesting the plaintiff to be present at the defendants' place at 10.30 a.m. on 31.12.79 for price negotiation. But then, the plaintiff did not attend the defendants' office. On 3.1.80, the defendants sent a telegram to the plaintiff vide Ext.7 stating that his offer was accepted on 5th December for lots (c) and (h) at Rs.2600/- each per tonne for 70 plate cuttings, deposit the money before 12.1.1980 and lift the materials. The telegram was confirmed by the letter vide Ext.8 on the same date sent by the defendant. This carried the terms and conditions, some of which are found to have been newly added.

10. Learned lower appellate court held that as per the terms and conditions of the tender document, charging of interest @18% was not there. Secondly there was no stipulation for any fixed date for deposit of the price for the material, whereas under Ext.7 the plaintiff was required to deposit the amount before 12.1.80 though according to the tender document he was required to deposit the money before lifting. By Exts.7 and 8, the defendants forced the plaintiff to accept a new offer with regard to the charging of interest which was not there in the original tender document. The proposal of the plaintiff allowing 90 days as free lifting time was not accepted. The defendants also forced the plaintiff with regard to investment of rupees one lakh by demanding the deposit before 12.1.80. The subsequent offer with regard to payment by a particular date was not acceptable to the plaintiff. There was no justification for compelling the plaintiff to deposit the money

by 12.1.80 while allowing free lifting time for 30 days. There was counter offer from the side of the defendant which the plaintiff did not accept.

11. Sec.7 of the Indian Contract Act, 1872 provides acceptance must be absolute. The same is quoted hereunder.

> "7. Acceptance must be absolute—In order to convert a proposal into a promise, the acceptance must--
>
> "(1) be absolute and unqualified;
>
> (2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise, but, if he fails to do so, he accepts the acceptance."

12. In *M/s. Rickmers Verwaltung Gimb H. vs. Indian Oil Corporation Ltd.,* AIR 1999 SC 504, the apex Court held that the cardinal principle to remember is that it is the duty of the Court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the Court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence. The Court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement, upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence.

13. A Division Bench of this Court in the case of *M/s. Chandaneswar Enterprises Ltd. vs. Industrial Promotion & Investment Corporation of Orissa Ltd.,* AIR 2015 Ori.46 held:

> "6. Section 7 of the Indian Contract Act, 1872 provides that in order to convert a proposal into a promise, the acceptance must be absolute, unqualified and without conditions. The offer and acceptance must correspond. The acceptance must match with the terms of the offer. When there is a variation between the offer and acceptance even

> in respect of any material term, acceptance cannot be said to be absolute. It does not result in the formation of a contract. An acceptance does not convert a proposal into a promise, if it is qualified by conditions."

14. In view of the same, the inescapable conclusion is that there was no concluded contract between the parties. Thus, the question of forfeiture of earnest money does not arise at all.

15. In *M/s. Pattnaik Industries Pvt. Ltd. vs. Kalinga Iron Works and another,* AIR 1984 Ori.182, this Court held:

> "6. In this case, there may have been a breach, the contract may have been rescinded but the clause relating to jurisdiction does not perish, it subsists to regulate the jurisdiction of the Court where the dispute can be tried. There is another answer also to the argument. The plaintiff relies upon the contract for the enforcement of his claim. It cannot bypass the clause relating to jurisdiction. So, I hold, though the Courts at Keonjhar and at Bhubaneswar, both, have jurisdiction to entertain the suit, the parties agreed that the Court at Keonjhar alone shall have jurisdiction to entertain the suit.
>
> It is well settled that it is not open to the parties by agreement to confer jurisdiction on a Court which it does not possess under the Code; but where two Courts or more have under the Code jurisdiction to try a suit or proceeding, an agreement between the parties that the dispute between them shall be tried in one of such Courts, is not contrary to public policy. It does not contravene S. 28 of the Contract Act (see Hakam Singh v. M/s. Gammon (India) Ltd., AIR 1971 SC 740).
>
> xxx xxx xxx
>
> 8. The principle that can be culled from the aforesaid decisions is that the agreement between the parties does not oust the jurisdiction of the Court. It may operate as an estoppel against the parties but it cannot deprive the Court of its power to do justice. Ordinarily the Court would have regard to the choice of the parties: where, however, the Court whose jurisdiction has been ousted is satisfied that the stipulation would operate harshly, is oppressive in character, inequitable or unfair, for the ends of justice, it can relieve the party of the bargain. The ouster clause can be ignored."

16. In *M/s.Surajmall Shibvhagawan vs. M/s. Kalinga Iron Works,* 1979 CLT-104, this Court held that ouster of Court's jurisdiction should not be easily construed and cannot be assumed or presumed very easily. Ouster of jurisdiction must be proved by express word or by necessary or inevitable implications. Merely mentioning, "All subject to Calcutta jurisdiction" by one of the parties at the top of his purchase order, it cannot be said that the jurisdiction of other Courts, which can be legally approached by the other parties under the CPC or under any other law, is ousted by the said words.

17. In the instant case, there was no concluded contract between the parties. Learned lower appellate court is perfectly justified in holding that the terms in the tender call notice would have been enforced only when the parties had entered into a contract. But this cannot be enforced when there is

no contract. There is no document from the side of the defendant in express terms from the side of the plaintiff accepting the jurisdiction clause. The matter did not progress between the parties beyond certain limit. The plaintiff nowhere accepted the jurisdiction clause and therefore was entitled to file the suit in the court at Bhubaneswar.

18. The decision cited by learned Advocate for the appellant is distinguishable on facts. In the said case, no part of cause of action arose within the jurisdiction of Calcutta High Court. The apex Court held that the expression "cause of action" means that bundle of facts which the petitioner must prove, if traversed, to entitle him to a judgment in his favour by the Court. Therefore, in determining the objection of lack of territorial jurisdiction the court must take all the facts pleaded in support of the cause of action into consideration albeit without embarking upon an enquiry as to the correctness or otherwise of the said facts. There was no quarrel over the proposition of law. Since no part of the cause of action arose within the jurisdiction of Calcutta High Court, the apex Court held that it has no jurisdiction to entertain the writ application. The substantial questions of law are answered accordingly.

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

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2019 (II) ILR - CUT- 519

DR. A.K. RATH, J.

C.M.P. NO. 740 OF 2018

M/S. BHARAT MOTORS, CANTONMENT ROAD, & ORS. .....Petitioners

.Vs.

SAVITRI @ SAVITRI DEVI BHAWSINKA & ORS. .....Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order 6 Rule 17 read with Order 21 Rule 17 – Provisions under – Suit for eviction, arrear house rent and damages – Suit decreed and Execution case filed as per the decree – Appellate court confirmed the decree of eviction, but modified the arrear rent – Decree Holders filed an application under Order 6 Rule 17 CPC for amendment instead of Order 21 Rule 17 CPC – Allowed by the Executing court – Challenge is made to the order allowing amendment

on several grounds – Held, merely because the defendants have filed RSA No.337 of 2017 before this Court, the same is not per se a ground to reject the application for amendment of the execution petition – The conclusion is irresistible that if the decree passed by the learned trial court is modified by the appellate court, then the executing court has ample power to amend the execution petition under Order 21 Rule 17 CPC by treating the application under Order 6 Rule 17 to be one under Order 21 Rule 17.

Case Laws Relied on and Referred to :-

1. (2010) 13 SCC 158 :Omprakash Verma & Ors. .Vs. State of Andhra Pradesh & Ors.
2. AIR 1985 Ori 224: D.R. Gupta .Vs. Steel Authority of India Ltd.
3. (1994) 2 SCC 642 : Ramankutty Guptan Vs. Avara.
4. AIR 2004 SC 904 : Ravinder Kaur .Vs. Ashok Kumar & Anr.
5. Atma Ram Properties (P) Ltd. .Vs. Federal Motors (P) Ltd., (2005) 1 SCC 705
6. 2013 (II) OLR (SC) 585 : Satyabati .Vs. Rajinder Singh & Anr.
7. AIR 1964 Ori 182, 2005 : Harekrushna Harichandan Mohapatra .Vs. Dolgovinda Sahu,
8. AIR 1986 Orissa 235 : Netramani Dibya & Ors. Vs. Dasarathi Misra & Ors.
9. AIR 2006 Ori. 7 : Bhabatosh Sinha .Vs. Prava Sinha & Ors.
10. 2016 (I) OLR – 165 : Ajit Singh @ Arit Singh Chhabra .Vs. Anil Kumar Mishra.
11. (2005) 1 SCC 705 : Atma Ram Properties (P) Ltd. .Vs. Federal Motors (P) Ltd.
12. (1974) 2 SCC 453 : Gojer Bros. (P) Ltd. .Vs. Ratan Lal Singh.

For Petitioners : Mr. P.K. Rath & Mr. A.Behera
For Opp. Parties : Mr. S.P. Mishra, Sr. Adv. & Mr. S. Mishra.

JUDGMENT Date of Hearing : 18.04.2019 : Date of Judgment :29.04.2019

DR. A.K.RATH, J.

This petition challenges the order dated 04.01.2018, passed by the learned Civil Judge (Senior Division), First Court, Cuttack in Execution No.25 of 2016, whereby, the application filed by the D.Hrs.-opposite parties under Order 6 Rule 17 CPC for amendment of the execution petition has been allowed.

2. Bereft of unnecessary details, the short facts of the case are that plaintiffs-opposite parties instituted C.S. No.6785 of 2014 before the learned Civil Judge (Senior Division), Cuttack, for eviction of defendants from the suit premises, delivery of possession, arrear house rent and damages with interest. The suit was decreed. The defendants were directed to deliver vacant possession of the suit premises within three months, pay arrear rent of Rs.40,000/- per month from November, 2013 to March, 2014 and damages @Rs.80,000/- per month from 1.4.2014 till delivery of vacant possession.

Decree was drawn up on 25.06.2016. D.Hrs. levied Execution Case No.25 of 2016. Felt aggrieved, defendants filed RFA No.10 of 2016 before the learned District Judge, Cuttack. Plaintiffs-respondents had filed cross-objection. The appellate court did not interfere with the finding of the learned trial court except to the order pertaining to fair and equitable rent and modified the same to Rs.30,000/- instead of Rs.40,000/- per month from August, 2008 to October, 2013. The other findings of the trial court were affirmed. The cross-objection was dismissed. Consequent upon the modification of the decree passed by the learned First Appellate Court, the D.Hrs. filed an application under Order 6 Rule 17 CPC for amendment of the execution application to incorporate the mathematical calculation of the arrear rent. J.Drs. filed objection stating inter alia that the calculation made by the D.Hrs. is erroneous. They have filed R.S.A. No.337 of 2017 before this Court assailing the judgment passed by the learned appellate court. The application is premature.

3. By order dated 04.01.2018, the Executing Court allowed the application holding that the proposed amendment is essential for execution of the decree. Mere filing of RSA No.337 of 2017 before this Court is not a ground to reject the amendment. No stay of further proceeding in the execution case has been passed. The court is duty bound to calculate correctly the arrear house rent at the time of execution of the decree.

4. Heard Mr.P.K.Rath along with Mr.A.Behera, learned advocates for the petitioners and Mr.S.P.Mishra, learned Senior Advocate along with Mr.S.Mishra, learned advocate for the opposite parties.

5. Mr. Rath, learned advocate for the petitioners submitted that the provision contained in Order 6 Rule 17 CPC has no application in a petition for execution of the decree. The judgment passed by the learned First Appellate Court is assailed before this Court in RSA No.337 of 2017. The doctrine of res sub-judice applies for which, the finality of the judgment passed by the learned First Appellate Court stands destroyed. The decree passed by the courts below is stayed under the principle of res sub-judice and loses its finality. He placed reliance on the decisions in the case of *Omprakash Verma and others Vrs. State of Andhra Pradesh and others,* (2010) 13 SCC 158 and *D.R. Gupta Vrs. Steel Authority of India Limited,* AIR 1985 Ori 224.

6. Per contra, Mr. Mishra, learned Senior Advocate submitted that the execution petition can be amended by invoking the provision contained in Order 21 Rule 17 CPC. There was a defect in the execution petition. The

defect can be cured by filing an amendment petition subsequently. Decree passed by the learned trial court was modified by the learned appellate court by judgment dated 30.06.2017. The proposed amendment was to incorporate the mathematical calculation in accordance with the judgment of the appellate court. Though the application was filed under Order 6 Rule 17 CPC to amend the execution petition, but the same is essentially a petition under Order 21 Rule 17 CPC. Only by use of a wrong nomenclature in that petition, such power cannot be taken away. The petition was filed in time. He further submitted that the executing court has inherent power to allow the application for amendment on the basis of change of facts, which occurred during proceeding and to avoid multiplicity of proceedings. The question of applicability of the principle of res sub-judice is not applicable to the instant case. A decree of the court can be enforced in execution case, unless stayed by the higher court. Mere filing an appeal does not operate as stay of the decree. The J.Drs. preferred RSA No.297 of 2017 before this Court, but they withdrew the same on 08.09.2017. Thereafter, they filed RSA No.337 of 2017. No order of stay of further proceeding in Execution Case No.25 of 2016 has been passed in the said case. Therefore, there is no impediment on the part of the executing court to proceed with the execution case. Reliance has been placed on the decisions in the case of *Ramankutty Guptan Vrs. Avara,* (1994) 2 SCC 642, *Ravinder Kaur Vrs. Ashok Kumar & Another,* AIR 2004 SC 904, *Atma Ram Properties (P) Ltd. Vrs. Federal Motors (P) Ltd.,* (2005) 1 SCC 705, *Satyabati Vrs. Rajinder Singh & another,* 2013 (II) OLR (SC) 585 and *Harekrushna Harichandan Mohapatra Vrs. Dolgovinda Sahu*, AIR 1964 Ori 182, 2005, *Netramani Dibya and others Vrs. Dasarathi Misra and others,* AIR 1986 Orissa 235, *Bhabatosh Sinha Vrs. Prava Sinha and others,* AIR 2006 Ori. 7, and *Ajit Singh @ Arit Singh Chhabra Vrs. Anil Kumar Mishra*, 2016 (I) OLR – 165.

7. Before proceeding further, it is necessary to refer to the provision contained in Order 21 Rule 17 CPC. Sub-rule 1 of Rule 17 of Order 21 CPC provides:

> "(1) On receiving an application for the execution of a decree as provided by Rule 11, Sub-rule(2), the Court shall ascertain whether such of the requirements of Rules 11 to 14 as may be applicable to the case have been complied with ; and , if they have not been complied with [the Court shall] the defect to be remedied then and there or within a time to be fixed by it.

8. Rule 17 is a procedural provision and should be interpreted liberally. The executing court has ample power to allow amendment.

9. Taking a cue from *Bhabatosh Sinha* (supra), this Court in the case of *Ajit Singh @ Arit Singh Chhabra* (supra) held that if the court has power only by use of wrong nomenclature in the petition, such power cannot be taken away. The duty of the court is to impart justice. The substance of the petition matters, not nomenclature. Thus, in all intents and purposes, the petition for amendment has been filed under Order 21 Rule 17 CPC.

10. In *Ramankutty Guptan (supra),* the apex Court held that the decree of the appellate court would be construed to be the decree passed by the court of first instance.

11. In *Atma Ram Properties (P) Ltd. Vrs. Federal Motors (P) Ltd., (*2005) 1 SCC 705, the apex Court held that mere preferring an appeal does not operate as stay on the decree or order appealed against nor on the proceeding in the court below.

12. In *Harekrushna Harichandan Mohapatra* (supra), this Court held that the court has discretion to allow the amendment of execution petition under Order 21 Rule 17 CPC.

13. In *Netramani Dibya and others Vrs. Dasarathi Mishra and others,* AIR 1986 Orissa 235 by invoking Sec.151 CPC, this Court has allowed the application for amendment of the execution petition.

14. Reverting to the facts of this case and keeping in view the law laid down in the decisions cited supra, this Court finds that the suit was filed for eviction of the defendants, arrear house rent and damages. The suit was decreed. The appellate court confirmed the decree of eviction, but modified the arrear rent. Thereafter, the D.Hrs. filed an application under Order 6 Rule 17 CPC for amendment of the decree, instead of Order 21 Rule 17 CPC. Merely because the defendants have filed RSA No.337 of 2017 before this Court, the same is not per se a ground to reject the application for amendment of the execution petition.

15. In *D.R. Gupta*, (supra), this Court held that the decision liable to appeal may be final within the meaning of Sec.11 CPC until an appeal is preferred, but once an appeal is filed, the decision loses its character and finality and what was once res judicata again become subjudice, i.e. matter under judicial enquiry. But in view of the decision of the apex Court in the case of *Atma Ram Properties (P) Ltd. (supra)*, mere preferring an appeal does not operate as stay of the decree or order appealed against, nor on the proceeding of the court below.

16. The conclusion is irresistible that if the decree passed by the learned trial court is modified by the appellate court, then the executing court has ample power to amend the execution petition under Order 21 Rule 17 CPC.

17. In *Omprakash Verma and others (supra)*, the apex Court referred to the earlier decision in the case of *Gojer Bros. (P) Ltd. Vrs. Ratan Lal Singh*, (1974) 2 SCC 453, where it was held that the juristic justification of the doctrine of merger may be sought in the principle that there cannot be, at one and the same time, more than one operative order governing the same subject-matter. Therefore, the judgment of an inferior court, if subjected to an examination by the superior court, ceases to have existence in the eye of the law and is treated as being superseded by the judgment of the superior court. In other words, the judgment of the inferior court loses its identity by its merger with the judgment of the superior court. There is no quarrel over the proposition of law.

18. The second appeal has not been admitted till date. Even otherwise also, when the higher court stays further proceeding of the execution case, the executing court has power to consider the interim application for amendment.

19. Before parting with this case, it is apt to refer to the decision of the Privy Council that about 150 years back, the Privy Council in the case of *The General Manager of the Raj Durbhunga under the Court of Wards Vrs. Maharajah Coomar Ramaput Sing, (*1871-72) 14 MOO 1A 605 held :

> ".....The difficulties of a litigant in India begin when he has obtained a decree."

20. The same view was echoed in *Ravinder Kaur and Satyawati*(supra). The apex Court held that the Courts of Law should be careful enough to see through the diabolical plans of the J.Drs. to deny the D.Hrs. the fruits of the decree obtained by them.

21. In the wake of the aforesaid, the petition sans merit, deserves dismissal. Accordingly, the same is dismissed. There shall no order as to cost.

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2019 (II) ILR - CUT- 525

DR. A.K. RATH, J.

C.M.P. NO. 784 OF 2018

CORPORATION BANK, REPRESENTED THROUGH CHIEF MANAGER,BBSR. ……..Petitioner

.Vs.

SMT. SAILABALA PRADHAN & ORS. ……Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order 6 Rule 17 – Application for amendment – Prayer to correct the cause title – Petitioner filed a petition for amendment of the cause title of the petitions filed under Order 1 Rule 10 CPC as well as under Order 7 Rule 11 CPC stating that due to inadvertence, application under Order 1 Rule 10 CPC was filed to implead the Chief Manager, Corporation Bank, as defendant instead of Corporation Bank represented through Chief Manager – Objection that it will change the nature and character of the suit – Held, No. – Impugned order quashed.

"The apex Court held that the plaint has not been properly drafted inasmuch as in the memo of the parties, the plaintiff has been described as Varun Pahwa through Director of Siddharth Garments Pvt. Ltd. though it should have been Siddharth Garments Pvt. Ltd. through its Director Varun Pahwa. Thus, it is a mistake of counsel, may be on account of lack of understanding as to how a private limited company is to sue in a suit for recovery of the amount advanced. The memo of the parties is thus clearly inadvertent mistake on the part of the counsel who drafted the plaint. Such inadvertent mistake cannot be refused to be corrected when the mistake is apparent from the reading of the plaint. The rules of procedure are handmaid of justice and cannot defeat the substantive rights of the parties. It is well settled that amendment in the pleadings cannot be refused merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amendment the pleadings even if a party is negligent or careless as the power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed any such narrow or technical limitations. The apex Court further held that it was an inadvertent mistake in the plaint. The learned trial court should have allowed to be corrected so as to permit the private limited company to sue as plaintiff as the original plaintiff has filed suit as Director of the said Private Limited Company. Therefore, the ratio in the said case proprio vigore applies to the facts of this case as well.'

Case Laws Relied on and Referred to :-

1. 2017 (Supp-I) OLR 1073 : Brahmananda Sahu .Vs. Laxman Kumar Saha & Anr.

For Petitioner : Mr.S.D.Das, Sr.Adv.

For Opp. Party : Mr. S.S.Das, Mr.R.K.Sahoo & Mr.K.C.Mohapatra,

JUDGMENT Date of Hearing:24.04.2019 : Date of Judgment :01.05.2019

DR.A.K.RATH, J.

By this petition under Article 227 of the Constitution of India, challenge is made to the order dated 31.3.2018 passed by the learned Civil

Judge (Sr.Division), Angul in C.S.No.358 of 2014, whereby and whereunder, learned trial court has rejected the application of defendant no.11-petitioner for amendment of the cause title of the petitions under Order 1 Rule 10 CPC and Order 7 Rule 11(d) CPC.

2. Plaintiff-opposite party no.1 instituted the suit for partition and permanent injunction impleading the defendants-opposite party nos.2 to 11. By order dated 8.1.2015, learned trial court directed the parties to maintain status quo over the suit property. Pursuant to issuance of summons, the defendants appeared. On the basis of a joint memo filed by the parties, learned trial court directed the parties to maintain status quo over the suit property till disposal of the suit.

3. Thereafter, the petitioner-bank filed an application under Order 1 Rule 10 CPC for impleadment stating inter alia that defendant nos.1, 6 and 10 had availed a loan from the bank and created equitable mortgage in respect of a part of the suit schedule property in favour of the petitioner-bank. The loan account became NPA. The bank issued notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act'). The bank obtained an order under Section 14 of the SARFAESI Act to take possession of the secured assets. Before taking delivery of possession of the equitable mortgage of land and building, it received a letter from the District Officer, Angul that a civil suit is sub-judice, wherein the order of status quo has been passed. By order dated 18.7.2016, learned trial court allowed the application for impleadment. The petitioner has been impleaded as defendant no.11. The plaintiff filed C.M.P.No.1156 of 2016 before this Court, which was eventually dismissed. While matter stood thus, the petitioner filed an application under Order 7 Rule 11 (d) CPC to reject the plaint on the ground that the suit is not maintainable in view of embargo contained in Section 34 of the SARFAESI Act. The opposite party no.1 filed objection to the same.

4. Thereafter the petitioner filed a petition for amendment of the cause title of the petitions under Order 1 Rule 10 CPC as well as Order 7 Rule 11 CPC stating that due to inadvertence, application under Order 1 Rule 10 CPC was filed to implead the Chief Manager, Corporation Bank, Bhubaneswar Main Branch, Kharvel Nagar, Bhubaneswar as defendant no.11 instead of Corporation Bank represented through Chief Manager, Bhubaneswar Main Branch, Kharvel Nagar, Bhubaneswar.

5. Taking a cue from the decision of this Court in the case of *Brahmananda Sahu v. Laxman Kumar Saha and another, 2017 (Supp-I) OLR*

1073, learned trial court held that application under Order 6 Rule 17 CPC is not maintainable for amending an application under Sec.47 CPC. There is no such defendant no.11, Corporation Bank represented through Chief Manager, Bhubaneswar Main Branch, Kharvel Nagar as a party in the suit. Held so, it rejected the petition.

6. Heard Mr.S.D.Das, learned Senior Advocate for the petitioner and Mr.S.S.Das, Mr.R.K.Sahoo and Mr.K.C.Mohapatra, learned Advocates for opposite party no.1.

7. Mr.S.D.Das, learned Senior Advocate for the petitioner submitted that the petitioner has been impleaded as defendant no.11. Inadvertently in the cause title, the petitioner has been described as Chief Manager, Corporation Bank, Bhubaneswar Main Branch instead of Corporation Bank represented through the Chief Manager, Bhubaneswar Main Branch, Kharvel Nagar. The proposed amendment is formal in nature. The same will not change the nature and character of the suit. To buttress the submission, he placed reliance on a decision of the apex Court in the case of Varun Pahwa v. Mrs.Renu Chaudhary, 2019(3) Supreme 93.

8. Per contra, Mr.S.S.Das, learned Advocate for opposite party no.1 submitted that the petitioner filed an application to implead the Chief Manager, Corporation Bank, Bhubaneswar Main Branch, Kharvel Nagar, Khurda. The same was allowed. The petitioner has been impleaded as defendant no.11. The Corporation Bank has not been impleaded as defendant no.11. Furthermore, petition under Order 1 Rule 10 CPC was verified by K.N.Narasimha, the Chief Manager, Corporation Bank, Main Branch, Kharvel Nagar, Bhubaneswar, Khurda. He was the power of attorney holder of the bank. In the present petition, the affidavit has been filed by Tapan Kumar Sahoo, Chief Manager, Corporation Bank, Bhubaneswar Branch, Kharvel Nagar, Bhubaneswar, Khurda said to be the power of attorney holder of the bank. The proposed amendment will change the nature and character of the suit.

9. In Varun Pahwa, the appellant as Director of Siddharth Garments Pvt. Ltd. filed a suit for recovery of money. It was averred that the plaintiff had given power of attorney to Sri Navneet Gupta. The defendant raised preliminary objections in the written statement that the suit had not been filed by the plaintiff and even the alleged authorized representative has not filed any document showing that he had been authorized by the plaintiff. The Special Power of Attorney is neither valid nor admissible. Navneet Gupta

appeared as power of attorney of the plaintiff and examined as P.W.1. It was at that stage, an order was passed by the learned trial court to furnish address of the plaintiff and why the plaintiff should be examined through an attorney when the plaintiff is a resident of Delhi. Thereafter the plaintiff filed an application for amendment of the plaint on the ground that the counsel had inadvertently made the title of the suit wrongly as the loan was advanced through the company, therefore, the suit was to be in the name of the company. Therefore, the plaintiff sought to substitute para 1 and para 2 of the plaint that the plaintiff is a Private Limited Company having its registered office at Delhi. The plaint was filed through the authorized representative of the plaintiff namely, Navneet Gupta, who had been authorized by board resolution dated 12.5.2016 to sign, verify and execute all the documents, papers, complaints, applications, plaint, written statement, counter claim, affidavits, replies revisions, etc and to institute, pursue and depose all legal proceedings and court cases on behalf of Siddharth Garments Pvt. Ltd. against the respondent-defendant. Learned trial court declined the amendment on the ground that the application is an attempt to convert the suit filed by a private individual into a suit filed by a Private Limited Company, which is not permissible as it completely changes the nature of the suit. The high court declined to interfere with the order. The matter travelled to the apex Court.

9.1 The apex Court held that the plaint has not been properly drafted inasmuch as in the memo of the parties, the plaintiff has been described as Varun Pahwa through Director of Siddharth Garments Pvt. Ltd. though it should have been Siddharth Garments Pvt. Ltd. through its Director Varun Pahwa. Thus, it is a mistake of counsel, may be on account of lack of understanding as to how a private limited company is to sue in a suit for recovery of the amount advanced. The memo of the parties is thus clearly inadvertent mistake on the part of the counsel who drafted the plaint. Such inadvertent mistake cannot be refused to be corrected when the mistake is apparent from the reading of the plaint. The rules of procedure are handmaid of justice and cannot defeat the substantive rights of the parties. It is well settled that amendment in the pleadings cannot be refused merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amendment the pleadings even if a party is negligent or careless as the power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed any such narrow or technical limitations. The apex Court further held that it was an inadvertent mistake in the plaint. The learned trial court should have allowed to be corrected so as to permit the private limited company to

sue as plaintiff as the original plaintiff has filed suit as Director of the said Private Limited Company. Therefore, the ratio in the said case proprio vigore applies to the facts of this case as well.

10. The ratio in Varun Pahwa proprio vigore applies to the facts of this case

11. The submissions of Mr.S.S.Das, learned Advocate for opposite party no.1 that the application for amendment was verified by one person and the application for amendment has been made by another person and as such the amendment petition is liable to be rejected has no legs to stand. The Corporation Bank is a Government of India undertaking. When the suit was filed, K.N.Narasimha was the Chief Manager of the bank and verified the petition. Thereafter his successor, Tapan Kumar Sahoo, Chief Manager of the bank filed an application for amendment.

12. The petitioner has committed an inadvertent mistake in filing the petition for amendment in a disposed of petition instead of filing an application for amendment of the cause title of the plaint. In order to give quietus to the issue, the same shall be treated as the application for amendment of the cause title of the plaint.

13. In view of the foregoing discussions, the impugned order dated 31.3.2018 is quashed. The petition for amendment is allowed subject to payment of cost of Rs.10,000/-(Ten thousand) to Mr.S.S.Das, learned Advocate for opposite party no.1. Learned trial court shall incorporate necessary amendment in the plaint. The petition is allowed.

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2019 (II) ILR - CUT- 529

DR. A.K. RATH, J.

C.M.P.NO. 386 OF 2019

KUNTALA BEURA & ANR. ……..Petitioners

.Vs.

BAIKUNTHA BHOL ……Opp. Party

CODE OF CIVIL PROCEDURE, 1908 – Order 21 Rule 32 – Executing court directs for removal of obstruction and recovery of possession – Suit for permanent injunction and/or in the alternative for recovery of possession – Suit decreed with the finding that the defendants have

not been able to establish the fact of possession – Execution proceeding for removal of obstruction – Allowed by executing court – Not illegal – No interference called for.

"the plaintiff has instituted the suit for permanent injunction and in the alternative recovery of possession. Learned trial court held that defendant nos.1, 2 and 4 have failed to establish that they are in possession of the suit land and declined to grant the prayer for recovery of possession. The suit for permanent injunction was decreed. The Court did not feel it necessary to direct recovery of possession in view of its finding that the defendants have failed to establish the fact that they are in possession of the suit land. The decree has attained finality. In view of the same, decree for permanent injunction can be executed, where the D.Hr. has been dispossessed and to that extent the executing court is within its jurisdiction to direct recovery of possession." *(Para 8)*

Case Laws Relied on and Referred to :-
1. AIR 1997 SC 3765 : Jai Dayal & Ors. Vs. Lal Garg & Anr.
2. 1993(I) OLR 139 : Gopal Barik Vs. Bhima Barik & Anr.

For Petitioner: Mr. N.N. Mohapatra

JUDGMENT Date of Hearing & Judgment: 01.05.2019

DR. A.K. RATH, J.

This petition challenges the order dated 21.3.2018 passed by the learned Civil Judge (Junior Division), 1st Court, Cuttack in Execution Case No.15 of 2015, whereby and whereunder, learned executing court directed the J.Drs.-petitioners to deliver the vacant possession of Ac.0.02 dec. of land to the D.Hr. by removing the encroachment.

2. The plaintiff-opposite party instituted C.S.No.311 of 2013 for permanent injunction and recovery of possession in the event he is dispossessed during pendency of the suit. Learned trial court held that the plaintiff has not adduced any evidence that defendant nos.1, 2 and 4 have failed to establish that they are in possession of the suit land. The plaintiff is not entitled to recovery of possession. Held so, it decreed the suit on 8.5.2014.

3. Thereafter the D.Hr levied Execution Case No.15 of 2015. A petition was filed by the D.Hr for recovery of possession of Ac.0.02 dec. of land out of Ac.0.12 dec. of land appertaining to khata no.481 plot no.787 which is a part of the suit land. It is stated that after decree dated 8.5.2014, the J.Drs. have forcibly encroached upon an area Ac.0.02 dec. of land towards west of the suit plot no.787 on 21.1.2015. Learned executing court allowed the petition and directed the J.Drs. to deliver the vacant possession.

4. Heard Mr.N.N.Mohapatra, learned counsel for the petitioners.

5. Mr.Mohapatra, learned counsel for the petitioners submits that the suit was filed for permanent injunction. In a suit for permanent injunction, no recovery of possession can be made. Learned executing court cannot go behind the decree. He further submits that by the time the decree was passed, J.Drs. had taken over possession of the suit land and constructed the house.

6. In *Jai Dayal and others v. Lal Garg and another, AIR 1997 SC 3765,* the appellant had filed the Suit No.1023/61 againt the respondent for perpetual injunction and also for mandatory injunction restraining him from blocking passage of 5ft. between the house of the appellant and that of respondents and for removal of the obstruction. The suit was decreed. The decree was confirmed by the appellate court. When the appellants filed an application for execution under Order 21, Rule 32 C.P.C., the respondent had removed the obstruction and, consequently, the execution case was struck out. The order was upheld by the appellate court. Subsequently, a shop was constructed. The same had completely blockage the passage. Thereafter the appellant again filed an execution petition under Order 21, Rule 32 C.P.C. The executing court had directed to remove the obstruction. On appeal, the learned Additional District Judge confirmed the same. In the second appeal, the learned Single Judge reversed the decree and remitted the matter back. Thereafter, the petitioner approached the Supreme Court. The Supreme Court held that once the decree of perpetual injunction and mandatory injunction has become final, the J.Dr. is required to obey the decree. In whatever form he obstructs, it is liable to removal for violation and the natural consequence is the execution proceedings under Order 21, Rule 32 C.P.C. It would be no defence for the respondent to plead that he has not obstructed the passage etc. or that, a part of the property in which the present shop was constructed was not a part of the property in the original suit. If a J.Dr. has suffered the decree, no attempt to circumvent the perpetual injunction and mandatory injunction, can be permitted. The D.Hr. cannot be pushed to another round of litigation. In the second suit, the same will amount to encouraging the persons to take the law into their own hands and drive the decree-holder to another suit. It can never be facilitated to circumvent the law and relegate the party for tardy process of the civil action.

7. In Gopal Barik v. Bhima Barik and another, 1993(I) OLR-139, the plaintiff instituted the suit for declaration of title, confirmation of possession and recovery of possession, in the event he is dispossessed during pendency of the suit and permanent injunction. The suit was decreed with the findings

that the plaintiff has title and possession of the property. The defendant was permanently restrained. Thereafter he filed execution for recovery of possession. The J.Dr. filed objection. Petition was allowed. The J.Dr. approached this Court. This Court held that the executing court can grant recovery of possession.

8. Reverting to the facts of the case and keeping in view the law laid down by the apex Court, this Court finds that the plaintiff has instituted the suit for permanent injunction and in the alternative recovery of possession. Learned trial court held that defendant nos.1, 2 and 4 have failed to establish that they are in possession of the suit land and declined to grant the prayer for recovery of possession. The suit for permanent injunction was decreed. The Court did not feel it necessary to direct recovery of possession in view of its finding that the defendants have failed to establish the fact that they are in possession of the suit land. The decree has attained finality. In view of the same, decree for permanent injunction can be executed, where the D.Hr. has been dispossessed and to that extent the executing court is within its jurisdiction to direct recovery of possession.

9. The impugned order does not suffer from any illegality or infirmity warranting interference of this Court under Article 227 of the Constitution of India. The petition is dismissed. There shall be no order as to costs.

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2019 (II) ILR - CUT- 532

BISWAJIT MOHANTY, J.

W.P.(C) NO. 10026 OF 2009

IRC NATURAL RESOURCES PVT. LTD., (Rep.BIJAY CHANDRA PANDEY.) ……Petitioner

.Vs.

DISTRICT MAGISTRATE & COLLECTOR, SAMBALPUR & ORS. ……...Opp. parties

MOTOR VEHICLES ACT, 1988 – Section 53 read with section 113 and 114 – Provisions under – Show cause notice for suspension of registration of vehicles followed by order of suspension – Confirmed in appeal – Material shows before suspension the provisions of section 113 and 114 of the Act has not been complied with – Held, order of suspension bad in law. (Para 8)

For Petitioner : M/S. Sanjit Mohanty (Sr. Advocate), N.C. Sahoo, S.P.Panda, P.K.Muduli, R.R.Swain & S.Pattnaik.

For Opp. Parties : Mr. Bigyan Kumar Sharma,(Standing Counsel,Transport)

JUDGMENT Date of Judgment: 01.03.2019

BISWAJIT MOHANTY, J.

This writ application has been filed by the petitioner praying for quashing of the order dated 11.10.2007 under Annexure-3 suspending the registration certificate of 14 vehicles belonging to the petitioner. It has further challenged order dated 22.4.2009 under Annexure-5 issued by the District Magistrate and Collector, Sambalpur (opp. party No.1) dismissing M.V. Appeal No.03 of 2007 challenging the order under Annexure-3.

2. The petitioner was earlier known as M/s. Avian Overseas Pvt. Ltd. The case of the petitioner is that it operated a number of trailers transporting the coals from different coal mines. In its earlier form, it received a show cause notice dated 29.8.2007 under Annexure-2 basing on a report received from the Deputy Director Mines, Sambalpur intimating it to show cause within seven days as to why the registration of 14 vehicles belonging to the petitioner in its earlier form shall not be suspended under Section 53 of the Motor Vehicles Act, 1988, for short, "the Act" on account of carrying overload. After receipt of such notice under Annexure-2, on 11.9.2007, the petitioner in its earlier form submitted an application before opp. party No.2 praying for time to submit reply. Time was granted till 20.9.2007. Since the petitioner in its earlier form was unable to file a reply on 20.9.2007, it filed another petition for grant of time to file show cause and the matter was posted to 01.10.2007. Again on 01.10.2007, the petitioner filed an application seeking time to file reply. However on 11.10.2007 vide Annexure-3, an order was passed suspending the registration certificates of 14 vehicles on the ground of overloading. Challenging the same, M.V. Appeal No.03 of 2007 was filed before the opp. party No.1, the Collector, Sambalpur, who happens to be the Chairman, Regional Transport Authority. A petition for amending such appeal was filed vide Annexure-4/1. The said appeal having been dismissed vide Annexure-5 on 22.4.2009 vide Annexure-5, the present writ application has been filed challenging both the original order of suspension under Annexure-3 and the appellate order under Annexure-5.

3. Here, despite long pendency, no counter has been filed.

4. Mr. Sanjit Mohanty, learned Senior Counsel appearing for the petitioner submitted that both the impugned orders are legally vulnerable for

not following the requirements of Section 114 of the Motor Vehicles Act, 1988, for short "the Act". According to him, Section 53 of "the Act" authorizes the authority to suspend the registration of a motor vehicle if its use in a public place constitutes dangers to the public or if it fails to comply the requirements of "the Act" and the Rules made thereunder. In the instant case, it is not disputed that Annexure-3 was passed on account of overloading of the vehicles belonging to the petitioner. Section 113 of "the Act" delineates limits of weight and limitations on use. Section 114 of "the Act" deals with power to have a vehicle or trailer weighed by an authorized officer belonging to the motor vehicles department when he has reason to believe that a goods vehicle or trailer is used in contravention of Section 113 of "the Act". Section 114 of "the Act" further provides that if on such weighment it is found that the vehicle has contravened the provision of Section 113 of "the Act" regarding weight, the authorised officer may, inter alia, direct the driver to off-load the excess weight at his own risk. Section 194 of "the Act" deals with penal provision with regard to violation of Sections 113 and 114 of "the Act" wherein it says that any such contravention would invite fine and other charges. In such background, he submitted that "the Act" itself provides a mechanism to deal with overloading of vehicles and in the present case since the requirement of Section 114 of "the Act" has not been followed, the original order under Annexure-3 is liable to be set aside. In this context, he submitted that since suspension order has been passed on the basis of overloading relying on weighment figures furnished by Deputy Director of Mines not on the basis of weighment figures supplied by authorised officer of the Motor Vehicle Department as required under Section 114 of "the Act", there has been infraction of the procedure and accordingly Annexure-3 ought to be quashed.

With regard to the appellate order under Annexure-5, Mr.Mohanty submitted that the same is equally legally vulnerable as the same has been passed merely on the ground of disobeying the interim order dated 17.10.2007 passed by the opp. party No.1 in the said appeal ignoring the order dated 23.10.2007 passed by this Court in W.P. (C) No.13317 of 2007. Elaborating on this, he submitted that when original order of suspension dated 11.10.2007 was passed under Annexure-3, challenging the same the petitioner in its earlier form filed M.V. Appeal No.03 of 2007. In that appeal on 17.10.2007 a conditional stay order was passed by the opp. party No.1 subject to the petitioner furnishing the following undertakings before lower court.

> "(1) the vehicles will not carry over load during hearing of this case. Since the loading is done mechanically minor overloading should be brought to the notice of the R.T.A. and fines, if any, imposed should be paid forthwith.
>
> 2) One weekly statement of tonnage carried by each vehicle per trip will be submitted to the R.T.A. by the appellant.
>
> (3) One line marking the level of optimum load permitted by Govt. will be made by issuing colour paint so that excess loading can be prevented by visual estimation, and
>
> (4) the portion of the carriage (Dala) above this line may be perforated so that overloading is easily avoided."

Challenging such direction, the petitioner in its erstwhile form filed W.P. (C) No.13317 of 2007 and in the said writ application on 23.10.2007, this Court directed that the petitioner may not be compelled to abide by the undertakings given by it pursuant to order dated 17.10.2007. The opp. party No.1 withdrew the order dated 17.10.2007 on 2.7.2008 basing on report dated 10.6.2008 of the opp. party No.2 wherein it was stated that the petitioner has not complied a single condition as directed by opp. party No.1 vide its order dated 17.10.2007. While rejecting the appeal, such disobedience has only weighed in the mind of the appellate authority, i.e., opp. party No.1. Accordingly, appeal has been dismissed without referring to the order dated 23.10.2007 passed by this Court in W.P. (C) No.13317 of 2017 by which as indicated earlier, this Court had directed that the petitioner may not be compelled to abide by the undertakings given by him. Therefore, Mr.Mohanty pointed out that the appellate order under Annexure-5 has been passed without proper application of mind and therefore the same ought to be set aside. Further, he submitted that the direction to impose fine of Rs.2,00,000/- (two lakhs) by the opp. party No.1 is also without jurisdiction inasmuch as such a course of action is nowhere authorized under "the Act".

5. Mr. Sharma, learned Standing Counsel, Transport defended the impugned orders.

6. Heard learned counsel for the respective parties.

7. The un-disputed facts of the case is that the petitioner in its earlier form was issued a show cause notice under Section 53 of "the Act" under Annexure-2 in respect of 14 vehicles for carrying overload. Despite several opportunities, the petitioner could not file its show cause. Accordingly, the impugned order under Annexure-3 putting the registration certificates of 14 vehicles under suspension on the ground of overloading was passed.

8. A perusal of show cause notice under Annexure-2 and order of suspension under Annexure-3 show that the R.T.O., Sambalpur (opp. party

No.2) came to a conclusion of overloading on the basis of report received from the Deputy Director Mines, Sambalpur. There is nothing to show that in coming to such a conclusion regarding overloading, any report of authorized officer of Motor Vehicle Department who conducted weighing has been relied upon. Section 114 of "the Act" empowers only the authorized officer of the Motor Vehicle Department to get a goods vehicle or trailer weighed if he has reason to believe that the same is being used in contravention of Section 113 of "the Act". Thus, there has been violation of mandatory requirement of Section 114 of "the Act". In such ground, the order under Annexure-3 is liable to be set aside. Though no more is required to be said in the matter, however, for the sake of completeness, this Court is inclined to scan the appellate order. The appellate authority even otherwise has gone wrong in rejecting the appeal merely on the ground that the petitioner had not obeyed the conditions imposed by him though vide order dated 23.10.2007 passed by this Court in W.P. (C) No.13317 of 2007, it was directed that the petitioner may not be compelled to abide by the undertakings given by it pursuant to order dated 17.10.2007. In such background, the petitioner was not supposed to abide by the undertakings vis-à-vis the conditions imposed in the order dated 17.10.2007 passed by the Collector-cum-Chairman, Regional Transport Authority, Sambalpur (opp. party No.2) in M.V. Appeal No.03 of 2007. This shows that there has been total non-application of mind on the part of opp. party No.2 in rejecting the appeal. Similarly, nothing has been brought to the notice of this Court that while disposing of an appeal, the appellate authority can impose fine under law.

9. For all these reasons, the original order under Annexure-3 as well as the appellate order under Annexure-5 are quashed. Thus, the writ application is allowed. No cost.

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2019 (II) ILR - CUT- 536

DR. B.R. SARANGI, J.

W.P.(C) NO. 13755 OF 2016

BIKASH SETHY …….Petitioner

.Vs.

ODISHA GRAMYA BANK BHUBANESWAR & ORS. …..…..Opp. Parties

(A) WORDS AND PHRASES – Service law – 'Probation' – Meaning of – Held, "Probation" means testing of a person's capacity, conduct or character especially before he is admitted to regular employment – "Probation' means 'trial' and a probationer is an employee who has been provisionally employed to fill a permanent vacancy and whose probation, i.e., fitness for the post, has not been confirmed or declared – The concept of 'fitness for the post' includes three main ingredients, viz, performance or productivity, discipline or conduct and attendance." (Para 12)

(B) SERVICE LAW – Termination – Petitioner appointed as an Officer of a Bank on probation for a period of two years – Allegations against his performance – Show cause asking reply within seven days – Termination just after two days of the show cause notice – Plea of the Bank that the termination is a simplicitor one as per the terms and conditions of the appointment – The question arose as to whether the termination was a simplicitor one or it has the stigmatic effect? – Held, the termination cannot be a simplicitor one – Reasons explained.

"The services of a probationer can be lawfully brought to an end before the expiry of the period of probation by way of simplicitor termination. But the termination will be illegal if it was really brought about to punish the employee for misconduct or the termination casts a stigma on him. The documents which have been annexed to the writ petition clearly justify the factum that on the allegation of misconduct, negligence and inefficiency, the action has been taken against the petitioner.In view of the aforesaid facts and circumstances of the case, as well as the law discussed above, this Court is of the considered view that during probation period since the order of termination dated 18.10.2013 in Annexure-9, which is stigmatic and punitive, was issued, and consequential order in Annexure-10 dated 30.06.2006 rejecting the appeal, cannot sustain in the eye of law and are liable to be quashed. Accordingly, the same are hereby quashed." *(Paras 13 & 18)*

Case Laws Relied on and Referred to :-

1. (2013) 3 SCC 607 : State Bank of India .Vs. Palak Modi.
2. (1983) 2 SCC 217 : Ajit Singh .Vs. State of Punjab.
3. (1994) 5 SCC 177 : Commissioner, Food and Civil Supplies, Lucknow, U.P., .Vs. Prakash Chandra Saxena.
4. (1999) 2 SCC 21 : AIR 1999 SC 609 : Radheshyam Gupta .Vs. U.P. State Agro Industries Corporation Ltd.
5. (1991) 1 SCC 691 : State of Uttar Pradesh .Vs. Kausal Kishore Sukla.
6. (2018) 2 SCC (L & S) 760 : Director Aryabhatta Research Institute of Observational Sciences (ARIES) .Vs. Devendra Joshi.
7. (2005) 5 SCC 561: AIR 2005 SC 3066 : State of Kerala .Vs. P.N. Neelkandan Nair.
8. (1999) 8 SCC 44 : AIR 1999 SC 3775 : State of Haryana .Vs. Kamal Singh Saharwat.
9. (1977) 1 LL.J 1 3-4 (SC) : Hindustan Steel Ltd. .Vs. State of Orissa.
10. AIR 1983 SC 494 : (1983) 2 SCC 217 : Ajit Singh .Vs. State of Punjab.

11. AIR 1958 SC 36 : Parshotam Lal Dhingra .Vs. Union of India.
12. (1996) 4 SCC 504: AIR 1996 SC 2030 : Allahabad Bank Officers' Association .Vs. Allahabad Bank.
13. (1999) 3 SCC 60 : AIR 1999 SC 983 : Dipti Prakash Banerjee .Vs. Satyendra Nath Bose, National Centre for Basic Sciences, Calcutta.
14. (2007) 10 SCC 71 : AIR 2008 SC 15 : Jaswantsingh Pratapsingh Jadeja .Vs. Rajkot Municipal Corporation.

For Petitioner : Mr. Asok Mohanty, Sr. Adv., M/s. B. Senapati & M.K. Panda.
For Opp. Parties : M/s. K.C. Kanungo & H.V.B.R.K. Dora,

JUDGMENT Date of Hearing: 20.06.2019 : Date of Judgment: 09.07.2019

DR. B.R. SARANGI, J.

The petitioner, who was a Scale-II Officer of Odisha Gramya Bank, has filed this writ application to quash the order of his termination dated 18.10.2013 in Annexure-9 and consequential order of rejection of his appeal by the appellate authority dated 30.06.2016 in Annexure-10, which was passed without giving any opportunity of hearing and compliance of principles of natural justice.

2. The brief facts of the case in hand is that the petitioner belongs to Scheduled Caste community. On being duly selected for the post of Officer Scale-I, on 29.09.2008 he was posted as Probationary Officer in the Oriental Bank of Commerce at Dhamtari in the State of Chhatishgarh, where he continued as an officer till 11.01.2012. After completion of probation period, as is evident from the certificate issued by Oriental Bank of Commerce dated 11.01.2012 in Annexure-1, while the petitioner was so working, he came across an advertisement issued by the Neelachal Gramya Bank, Bhubaneswar (after merger with Baitarani Gramya Bank renamed as "Odisha Gramya Bank") for filling up the post of 'Officer MMGS-II'. Being desirous to work in the State of Odisha, he applied for the said post and appeared in the written test held on 12.06.2011. On being successful in the written test, he appeared in viva voce test and was selected. Consequentially, vide order dated 12.01.2012, he was appointed as Manager in Talcher Branch in the scale of pay of Rs.19,400/-.

2.1. While the petitioner was continuing as Manager at Talcher, he passed Junior Associate Indian Institute of Banking (JAIIB) on 26.11.2012. As a consequence of which, he got one increment and his basic pay became Rs.20,100/-. Thereafter, he was transferred to Unit-I Branch at Bhubaneswar on 05.06.2012 and again to Unit-IV Branch on 31.12.2012. Due to his satisfactory service he got an increment and his basic pay became Rs.20,900/-

on 30.01.2013. The petitioner, on 29.04.2013, passed Certified Associate Indian Institute of Banking (CAIIB) for which he got another increment and his basic salary became Rs.21,700/-. On 21.07.2013, he was transferred to Kendrapara Branch, which is a Regional Branch, where he joined on 31.07.2013, and opposite party no.3-Regional Manager posted him at Jajpur, where the petitioner joined on the same day, i.e., 31.07.2013.

2.2. After joining at Jajpur Branch, the petitioner faced a lot of problems to the extent that opposite party no.4-Branch Manager asked the petitioner to grant indiscriminate agricultural loans under Kissan Credit Card (KCC) even without "no due certificate" to which the petitioner refused. Consequentially, the Branch Manager took the same amiss and instigated opposite party no.3 against the petitioner to oust him from the bank. On instigation of opposite party no.4, opposite party no.3 wrote letter to the petitioner alleging that he was remaining unauthorized absent from the Branch and cautioned him to be attentive and regular in duties. This letter was fabricated just to create an adverse document during his probation period though he was not absent in the Branch even in a single day from the date of his joining.

2.3. On 05.09.2013, Kartika Chandra Nayak, applied for agricultural loan under KCC to opposite party no.4-Branch Manager, who forwarded the said application to the petitioner, without "no due certificate", and told him to process the loan and open the account, to which the petitioner refused. As the Branch Manager-opposite party no.4 pressurized the petitioner to disburse loan without "no due certificate", the petitioner wrote letter to opposite party no.3-Regional Manager on 23.09.2013 seeking his guidance. Opposite party no.3, instead of giving guidance, sought explanation from the petitioner on 20.09.2013 regarding his absence from the Branch on 17.09.2013, and moving at Regional Branch, Chandikhol at 5.30 P.M., alleging the same to be gross indiscipline. Before giving reply to the aforesaid notice, opposite party no.3 again on 16.10.2013 issued notice to show cause within seven days from the date of receipt of the letter as to why disciplinary action shall not be initiated against him for submitting loan proposals on 11.10.2013, instead of 10.10.2013, thereby harassing valuable customers of the bank. Before the petitioner submitted reply to aforesaid notice of show-cause, he was terminated from service by opposite party no.1-Chairman just after two days of issuance of notice to show-cause, i.e. on 18.10.2013. Against the said order of termination dated 18.10.2013, the petitioner preferred appeal before the appellate authority which was also rejected on 30.06.2016. Hence this application.

3. Mr. Asok Mohanty, learned Senior Counsel appearing along with Mr. B. Senapati, learned counsel for the petitioner contended that the order of termination passed on 18.10.2013 by opposite party no.1-Chairman, Odisha Gramya Bank smacks mala fide. As such, vide letter dated 16.10.2013, opposite party no.3 had issued notice to show-cause within seven days from the date of receipt of the letter for initiation of disciplinary action against the petitioner and just after two days of issuance of the aforesaid letter, i.e., 18.10.2013, opposite party no.1-Chairman of the Bank, who claims to be the appointing authority, passed the order of termination without giving opportunity of hearing to him. It is further contended that though the petitioner was continuing as a probationer, he was granted three increments from the date of joining, i.e., 12.01.2012 till his joining at Jajpur Branch on 31.07.2013 in quick succession because of his performance. But, how he became unfit within two months of service at Jajpur Branch because he was pressurized by the Branch Manager, Jajpur Branch to do some illegalities and grant KCC loan without any no due certificate. It is further contended that the order of termination suffers from vice of mala fide and non-compliance of principles of natural justice. More particularly, the allegation of indiscipline conduct casts stigma on the career of the petitioner and termination of service, without giving opportunity of hearing, is a nullity. It is further contended that without application of mind, the appellate authority has rejected his appeal by not assigning any reason thereof. Therefore, the order of termination dated 18.10.2013 in Annexure-9 and consequential rejection of appeal on 30.06.2016 in Annexure-10 are liable to be quashed, particularly when the same have been passed while petitioner was on probation.

It is further contended that during probation period, when termination order was effected, which is prima facie a non-stigmatic one, but the Court can lift the veil and examine whether in the garb of termination simpliciter, the employer has, in fact, punished the employee for an act of misconduct. If that be so, the termination order so passed by the authority cannot sustain in the eye of law. It is further contended that dismissal from service on the ground of misconduct is stigmatic and therefore, there should be compliance of principles of natural justice. For non-compliance thereof, the order of termination cannot sustain in the eye of law.

To substantiate his contentions, he has relied upon ***State Bank of India V. Palak Modi***, (2013) 3 SCC 607; ***Ajit Singh V. State of Punjab***, (1983) 2 SCC 217; ***Commissioner, Food and Civil Supplies, Lucknow, U.P., V. Prakash Chandra Saxena***, (1994) 5 SCC 177; ***Radheshyam Gupta V.***

U.P. State Agro Industries Corporation Ltd., (1999) 2 SCC 21 : AIR 1999 SC 609; and ***State of Uttar Pradesh V. Kausal Kishore Sukla,*** (1991) 1 SCC 691.

4. Per contra, Mr. K.C. Kanungo, learned counsel for the opposite parties argued with vehemence stating that the probationer has no right to the post and, as such, the order of termination has been passed in compliance with the terms and conditions of the appointment letter. The service condition of the petitioner is regulated by Neelachal Gramya Bank Officers' and Employees Service Regulation, 2010. Under Regulation-8, an officer directly appointed in Group-A post shall be on probation for a period of two years, which may be extended by the appointing authority for a period not exceeding one year. As per sub-regulation (b)(ii) of Regulation-10, if termination is required, one month notice to the officer or employee, who is on probation, is to be given. The petitioner, being a probationer and belonged to officer category, the competent authority is justified in passing the impugned order, which does not require interference of this Court at this stage. It is further contended that the impugned order of termination has been passed as work of the petitioner was not satisfactory, and not under stigmatic ground. The unsatisfactory work can be referred from the letters issued to the petitioner dated 20.09.2013 and 16.10.2013, which indicate untimely departure from the Branch Office, moving at Regional Office, Chandikhol at 5.30 P.M., disobedience of office order and harassment of valuable customers. The appointing authority, finding the performance and duties discharged by the petitioner, during probation period, to be unsatisfactory, terminated him from service in terms of the letter of appointment. Thereby, no illegality or irregularity has been committed by the authority so as to warrant interference of this Court.

It is further contended that the order of termination is not a stigmatic one rather it is in consonance with the terms of appointment, thereby it cannot be said that any illegality or irregularity has been committed by issuing such order. Against such order of termination when the petitioner preferred appeal he had expressed his apprehension that he may not get another job, but at present he is serving in one of the nationalized banks and posted at Amravati. Therefore, the apprehension is unfounded, and as such, the order of termination cannot be said to be stigmatic one. Rather due to unsatisfactory performance, the termination simpliciter was passed by the competent authority, which was challenged in W.P.(C) No. 26152 of 2013 and while disposing of the said writ petition, this Court vide order dated

04.05.2016 directed the opposite party-Bank to extend personal hearing. In obedience to such direction, the petitioner was advised to be present before the Board on 24.06.2016 and considering the relevant records vis-à-vis the appeal so preferred, the same was rejected. Thereby, the order of termination passed by the authority on 18.10.2013 in Annexure-9 and consequential order of rejection of appeal on 30.06.2016 in Annexure-10 are well justified.

To substantiate his contention, he has relied upon ***Director Aryabhatta Research Institute of Observational Sciences (ARIES) V. Devendra Joshi***, (2018) 2 SCC (L & S) 760.

5. This Court heard Mr. A. Mohanty, learned Senior Counsel appearing along with Mr. B. Senapati, learned counsel for the petitioner, and Mr. K.C. Kanungo, learned counsel for the opposite parties. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the matter is being disposed of at the stage of admission.

6. The admitted fact is that while the petitioner was continuing as a probationer, his services were terminated on 18.10.2013. Against the said order, the petitioner preferred appeal, which was also rejected vide order dated 30.06.2016. As has been admitted by the opposite parties in Annexure-A, the offer of appointment in Officer Scale-II Cadre issued by the Chairman and Appointing Authority on 05.11.2011 is applicable to the petitioner. For the purpose of proper adjudication of the case, Clauses 1, 2, 3, 4, 5, 10 and 12(i) of offer of appointment are quoted below:

> "1. **PROBATION**: You will be on probation for a period of two year.
>
> 2. **EXTENTION OF PROBATION PERIOD**: The period of two year probation may be extended for a further period of one year, if your service during the probation period is not found satisfactory in the opinion of the Appointing Authority.
>
> 3. **CONFIRMATION**: On satisfactory completion of probation, including the period of extension of probation, if any, you will be confirmed in the Bank's service in OFFICER SCALE-II CADRE subject to obtention of police verification report.
>
> 4. **TERMINATION OF SERVICE**:
>
> (a) Where during the period of probation, including the period of extension of probation, if any, the Appointing Authority is of the opinion that you are not fit for confirmation in the said post, you may be terminated after giving one month's notice or pay in lieu thereof;
>
> (b) Your services are liable to be terminated if your work and conduct are found unsatisfactory and if the certificates produced by you are found to be forged, tampered with particulars furnished in this regard are misrepresented, even after the expiry of the probation period, with one month's notice or on payment of a month's pay and allowances in lieu of notice.

5. **TERMINATION OF SERVICE by notice**:

(a) No employee shall leave or discontinue his service in the Bank without first giving notice in writing to the Appointing Authority of his intention to leave or discontinue his service in the Bank without first giving notice in writing to the Appointing authority of his intention to leave or discontinue his service or resign;

(b) The period of notice required shall be,-

(i) Three months, in the case of confirmed employee

(ii) One month, in the case of employee who is on probation.

In case of breach of clause 5 above, you are required to give to the Bank as compensation a sum equal to your pay for the period of notice required.

xxx xxx xxx

10. **PERFORMANCE REVIEW**: Your performance during the probation period will be reviewed periodically.

xxx xxx xxx

12. **OTHER CONDITIONS**:

(I) On appointment you will be governed by Neelachal Gramya Bank Officers' and Employees' Service Regulation 2010, which may be revised, altered or amended from time to time by the Bank.

7. Above being the provisions of law governing the field to be followed by terms of the offer of appointment in Officer Scale-II Cadre in Annexure-A dated 05.11.2011, the petitioner was posted at Talcher Branch on 12.01.2012 with basic pay of Rs.19,400/-Thereafter, he was transferred to Unit-1 Branch, Bhubaneswar on 05.06.2012. On passing of Junior Associate Indian Institute of Banking (JAIIB), he got one increment and his basic pay became Rs.20,100/-. He was transferred to Unit-IV Branch on 31.12.2012. Due to his satisfactory performance in service, he got another increment and his basic pay became Rs.20,900/-. Thereafter, he passed Certified Associate Indian Institute of Banking (CAIIB), for which he got another increment on 29.04.2013, and his basic salary became Rs.21,700/-. Therefore, the petitioner during his probation period was allowed three increments successively.

8. The petitioner was transferred to Kendrapara Branch on 31.07.2013, which is a Regional Branch, where he joined on the very same day. The fact of receiving three increments by the petitioner from the date of his joining till his transfer to Kendrapara Branch, during probation period, has not been disputed. But, fact remains action has been taken against the petitioner on the allegation of regularly irregular in attending his duties which hampers the business growth of the Branch and the Branch in question is a District Headquarter Branch, the disbursement of loans is affected due to his unauthorized absence from duty. This contention has been fortified vide letter dated 20.09.2013 in Annexure-7 on the allegation of untimely departure from

the Branch, moving at Regional Office, Chandikhol at 5.30 P.M and subsequent letter dated 16.10.2013 with regard to disobedience of office order and harassment of valuable customers. Though the petitioner was called upon to submit his explanation pursuant to letter dated 16.10.2013 in Annexure-8, within seven days, before expiry of such period the order of termination was issued on 18.10.2013 stating that:

> "*But it is disheartening to note that your work performance and conduct during the probation period are found to be unsatisfactory. Being your Appointing Authority, I am of the opinion that you are not fit for confirmation in the said post and not fit to continue in bank's job. Hence, your services from our bank is terminated with immediate effect on payment of one month's pay and allowances, as per the terms and conditions of appointment letter*."

This clearly indicates that when in one hand the Regional Manager calls for explanation on 16.10.2013 in Annexure-8 within seven days from the petitioner, but within two days thereafter the Chairman & Appointing Authority has taken drastic step of termination from service on 18.10.2013 in Annexure-9.

9. Mr. K.C. Kanungo, learned counsel for the opposite parties emphatically submitted that the employer has every right to terminate the services of the petitioner, being a probationer, if his performance is unsatisfactory. To that, Mr. A. Mohanty, learned Senior Counsel appearing for the petitioner contended that this is not a termination simplicitor, rather the order of termination, having been passed with mala fide intention for unsuitability, stigmatic or misconduct, the Court would/should lift the veil and find out the nature of order itself. Therefore, abrupt termination from service on the ground of unsatisfactory performance is to be examined whether it is stigmatic or not. Further, declaring an employee's performance unsatisfactory may amount to unsuitable or misconduct with a mala fide intention to deprive him to continue in service. There is no dispute on the factual matrix of the case, in hand, that from the date of joining, i.e., 12.01.2012 till 31.07.2013, he was granted three increments. This grant of increments shows that the petitioner's performance was satisfactory.

10. In ***State of Kerala V. P.N. Neelkandan Nair***, (2005) 5 SCC 561: AIR 2005 SC 3066, the apex Court held as follows:

> *"Increment has a definite concept in service laws. It is conceptually different from revision of pay scale. It is an increase or addition in a fixed scale. It is a regular increase in salary on such a scale."*

Therefore, the increase of salary successfully during period of probation is attached to the performance of the employee concerned.

11. The contention advanced by the learned counsel for the opposite parties is that because of acquisition of qualification by passing the examination the increments have been granted, that cannot be substantiated in view of law laid down by the apex Court.

In ***State of Haryana V. Kamal Singh Saharwat***, (1999) 8 SCC 44: AIR 1999 SC 3775, the apex Court held that mere acquisition of educational qualifications for a post will not result in entitlement to the higher pay scale applicable to that post without being appointed to that post.

12. It is the consistent plea of the opposite parties that the petitioner is a probationer. As his performance was not satisfactory, he was terminated from service and the said termination is termination simplicitor. Now, it is to be seen what the meaning of "probation".

"Probation" means testing of a person's capacity, conduct or character especially before he is admitted to regular employment.

In ***Hindustan Steel Ltd. V. State of Orissa***, (1977) 1 LL.J 1 3-4 (SC), the apex Court held as follows:

> *"'Probation' means 'trial' and a probationer is an employee who has been provisionally employed to fill a permanent vacancy and whose probation, i.e., fitness for the post, has not been confirmed or declared. The concept of 'fitness for the post' includes three main ingredients, viz, performance or productivity, discipline or conduct and attendance."*

In ***Ajit Singh V. State of Punjab***, AIR 1983 SC 494: (1983) 2 SCC 217, the reason as to why a period of probation is prescribed and how such period has been understood in service jurisprudence has been elaborately discussed by the Supreme Court. The apex Court explained that the concept of probation acquired importance in the developing master servant relationship in public service where it became difficult for the employer to dispense with the services of an employee without following certain procedural safeguards like natural justice, etc. it was further observed that in order that an incompetent or inefficient servant is not foisted upon an employer because the charge of incompetence or inefficiency is easy to make but difficult to prove, the concept of probation was devised to the following effect:

> *"To guard against errors of human judgment in selecting suitable personnel for service, the new recruit was put on test for a period before he is absorbed in service or gets a right to take post. Period of probation gave a sort of locus poenitentiae to the employer to observe the work, ability, efficiency, sincerity and competence of the servant and if he is found not suitable for the post, the master*

reserved a right to dispense with his service without anything more during or at the end of the prescribed period which is styled as period of probation".

In ***Parshotam Lal Dhingra vrs. Union of India***, AIR 1958 SC 36, the concept has been enunciated in these words:

"An appointment to a permanent post in Government Service on probation means, as in the case of a personnel appointed by a private employer, that the servant so appointed is taken on trial."

13. In view of the above judicial pronouncements, there is no iota of doubt that the probationer has no right to the post. As such, a probationer does not acquire any substantive right to the post and cannot complain if his service is terminated at any time during the probationary period i.e. before confirmation. It is the admitted case that the petitioner's service has not been confirmed and action has been taken for termination during the probation period by the opposite parties. But looking at the materials available on record, this cannot be construed that it is a termination simplicitor. Rather the documents which have been annexed in Annexure-4 dated 19.08.2013, Annexure-7 dated 29.09.2013 and consequence thereof the show-cause which was issued on 16.10.2013 clearly indicate that termination order has been issued by way of punishment.

The services of a probationer can be lawfully brought to an end before the expiry of the period of probation by way of simplicitor termination. But the termination will be illegal if it was really brought about to punish the employee for misconduct or the termination casts a stigma on him.

The documents which have been annexed to the writ petition clearly justify the factum that on the allegation of misconduct, negligence and inefficiency, the action has been taken against the petitioner.

14. In ***Parshotam Lal Dhingra***, (supra), the apex Court observed that such a termination for misconduct etc. "puts an indelible stigma on the Officer affecting his future career".

In ***Allahabad Bank Officers' Association V. Allahabad Bank***, (1996) 4 SCC 504:AIR 1996 SC 2030, the apex Court observed as follows:

"Stigma, according to the dictionary meaning, is something that detracts from the character or reputation of a person, a mark, sign etc. indicating that something is not considered normal or standard. It is a blemish, defect, disgrace, disrepute, imputation, mark of disgrace or shame and mark or label indicating deviation from a norm. in the context of an order of termination or compulsory retirement of a government servant stigma would mean a statement in the order indicating his misconduct or lack of integrity." (Emphasis supplied)

The topic was again extensively reviewed by the Supreme Court in ***Dipti Prakash Banerjee V. Satyendra Nath Bose, National Centre for Basic Sciences, Calcutta***, (1999) 3 SCC 60 : AIR 1999 SC 983 and the principles in ***Radhey Shyam Gupta*** (supra) were reiterated. It was further pointed out that stigma might be inferred from the references quoted in the termination order although the order itself might not contain anything offensive.

In ***Jaswantsingh Pratapsingh Jadeja V. Rajkot Municipal Corporation***, (2007) 10 SCC 71 : AIR 2008 SC 15, the apex Court held that where there is a discharge from service after prescribed probation period was over and the discharge order contained allegations against him and surrounding circumstances also showed that discharge was not based solely on assessment of the employee's work and conduct during probation, the termination was held to be stigmatic and punitive. The distinction between "motive" or "foundation" is thin and overlapping and that ultimately the question as to whether or termination is simplicitor or punitive is to be decided having due regard to the facts and circumstances of each case. This approach is far more satisfactory than the confusing test of 'motive' of 'foundation'.

15. In ***Palak Modi*** (supra), the apex Court held in para-36 as follows:

> *"36. There is a marked distinction between the concepts of satisfactory completion of probation and successful passing of the training/test held during or at the end of the period of probation, which are sine qua non for confirmation of a probationer and the Bank's right to punish a probationer for any defined misconduct, misbehaviour or misdemeanour. In a given case, the competent authority may, while deciding the issue of suitability of the probationer to be confirmed, ignore the act(s) of misconduct and terminate his service without casting any aspersion or stigma which may adversely affect his future prospects but, if the misconduct/misdemeanour constitutes the basis of the final decision taken by the competent authority to dispense with the service of the probationer albeit by a non-stigmatic order, the Court can lift the veil and declare that in the garb of termination simpliciter, the employer has punished the employee for an act of misconduct."*

Therefore, on consideration of the law laid down by the apex Court, after lifting the veil relying upon the judgments in ***Prakash Saxena, Radheshyam Gupta*** and ***Kausal Kishore Sukla*** (supra), the termination of the petitioner from service is because of misconduct alleged against him, which is apparent from the nature of order passed by the opposite party in Annexure-9.

16. To examine the nature of the order of termination dated 18.10.2013 in Annexure-9 passed by the Chairman-cum-Appointing Authority, this Court directed vide order dated 22.02.2019 to the following effect:-

"Let Mr. K.C. Kanungo, learned counsel for opposite parties produce the record to find out the conduct of the petitioner as has been stated in the order of termination of service dated 18.10.2013 in Annexure-9."

In compliance of the said order, the opposite parties produced the relevant file, along with an affidavit, in sealed cover on 25.06.2019, duly sworn in by opposite party no.2, containing 85 pages. This Court, when examined the purport of the order on perusal of the document itself in Annexure-9, on the face of it, was not inclined to open the sealed cover and examine the records submitted before this Court. Therefore, the documents, which were submitted in a sealed cover, are returned to Mr. K.C. Kanungo, learned counsel appearing for the opposite parties.

17. In ***Director Aryabhatta Research Institute of Observational Sciences*** (supra), the apex Court, while considering the order of termination issued on 31.12.2008, observed that it is an innocuous order terminating the services of respondent No.1 at the end of the probation period. As no allegations of misconduct are made in the order, there is no stigma. Even the High Court is of the opinion that there is no stigma. The fact remains that there was a preliminary inquiry conducted by the Management in which there was a prima facie finding recorded against the respondent No.1 of his involvement in an act of misconduct. The appellants decided not to proceed further and hold a detailed inquiry to prove the misconduct of respondent No.1. However, the service of respondent No.1 was terminated at the end of the period of probation which cannot be said to be punitive. Therefore, the order dated 31.12.2008 is an order of termination simpliciter. In view of the above, it cannot be said that misconduct was the foundation for the order of termination.

The factual matrix of the case in ***Director Aryabhatta Research Institute of Observational Sciences*** mentioned supra is absolutely different than that of the present one, which has also been discussed in preceding paragraph. As such, the order of termination precedes by the letter dated 20.09.2013, calling for explanation, speaks about untimely departure from the Branch, moving at Regional Office, Chandikhol and subsequent show-cause notice dated 16.10.2013 on the basis of an alleged misconduct, disobedience of order and harassment to valuable customers. Once show-cause notices were issued calling upon the petitioner to explain his conduct on the aforesaid allegations within seven days, two days thereafter, on 18.10.2013 the termination order has been issued on the ground of his unsatisfactory performance and conduct during the period of probation, though during the probation period, the petitioner was granted three increments. It casts a stigma to such termination dated 18.10.2013 and as such, the termination has been effected as punitive one, and if that is so, then compliance of principles of natural justice is a must. Having not complied with the same, the order of termination cannot sustain.

18. In view of the aforesaid facts and circumstances of the case, as well as the law discussed above, this Court is of the considered view that during probation period since the order of termination dated 18.10.2013 in Annexure-9, which is stigmatic and punitive, was issued, and consequential order in Annexure-10 dated 30.06.2006 rejecting the appeal, cannot sustain in the eye of law and are liable to be quashed. Accordingly, the same are hereby quashed.

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

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2019 (II) ILR - CUT- 549

DR. B.R. SARANGI, J.

W.P.(C) NO. 194 OF 2008

LALIT KUMAR DALUA ……Petitioner

.Vs.

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

CONSTITUTION OF INDIA, 1950 – Arts.226 & 227 – Petitioner, an employee of Orissa Handloom Development Corporation – Corporation adopted a Voluntary Separation Scheme (VSS) – Petitioner submitted application on 12.11.2001 to avail the benefit under the scheme but his application was accepted on 04.08.2003 only after disposal of the case on the question of propriety/validity of the Scheme – Petitioner after acceptance of his application on 04.08.2003 claimed the service benefits for the period i.e. from the date of application till the date of acceptance of the application (12.11.2001 to 04.08.2003) – The claim of petitioner was rejected without assigning any reason – The substantial question arose as to whether it is justified by the authority in declining to shift the cut off date from 31.12.2001 to 04.08.2003, and whether the petitioner is entitled to get the benefits for the period from 31.12.2001 to 04.08.2003, as the order accepting VSS application of the petitioner was passed on 04.08.2003? – Held, the petitioner is entitled for the benefits for the period he has worked.

"On perusal of the order impugned dated 07.05.2005 in Annexure-11, it clearly indicates that the authority has not assigned any reason why the petitioner is not entitled to get the benefits under VSS for the period he has rendered his services, i.e., from 31.12.2001 to 04.08.2003. As such, a specific observation was made by this Court, vide order dated 17.03.2005 passed in W.P.(C) No.8359 of 2003, that the order accepting the voluntary retirement cannot be given effect to retrospectively. If that be taken into consideration, the petitioner submitted his application for VSS on 12.11.2001 and effectively, the same has been

accepted on 04.08.2003, then certainly he is entitled to get the benefit for the period from 31.12.2001 to 04.08.2003, till when he has evidently rendered service to the Corporation."
(Para 13)

Case Laws Relied on and Referred to :-
1. 2006(6) SCC 704 : AIR (2006) SC 2876 : Ashok Kumar Sahoo .Vs. Union of India & Ors.
2. (1994) 4 SCC 293 : State of Haryana .Vs. S.K. Singhal.
3. 2016(II) OLR 237 : M/s. Shree Ganesh Construction .Vs. State of Orissa.
4. AIR 1978 SC 851 : Mohinder Singh Gill .Vs. The Chief Election Commissioner, New Delhi.

For Petitioner : M/s. Sidharth Mishra, R.C. Sahoo & R.K. Sahoo.
For Opp. Parties : Mr. B. Senapati, Addl.Govt. Adv.
M/s. R. Nayak, A.R. Majhi & K. Nayak.

JUDGMENT Decided On: 17.07.2019

DR. B.R. SARANGI, J.

The petitioner, by means of this writ petition, seeks to quash the order dated 07.05.2005 passed by the Managing Director, Orissa State Handloom Development Corporation Limited-opposite party no.4 in Annexure-11, by which the representation of the petitioner dated 21.10.2003, for shifting of cutoff date from 31.12.2001 to 04.08.2003 to avail benefits under Voluntary Separation Scheme (VSS), has been rejected.

2. The factual matrix of the case, in hand, is that Orissa State Handloom Development Corporation, a Government of Orissa undertaking, is controlled by Textiles & Handloom Department of Government of Orissa. The Board of Directors has been constituted as per the Memorandum and Articles of Association of the Corporation. Due to mismanagement and lack of endeavour, the Corporation in question could not earn profit for its improvement. The Corporation decided to adopt a scheme for its employees for voluntary relinquishment of their services in lieu of compensation to be paid under the said scheme and other service benefits that would be accrued to them. Accordingly, the Corporation issued notices to the employees to relinquish their services by submitting application voluntarily accepting the scheme, namely, "Voluntary Separation Scheme" introduced by the Government of Orissa in Textiles and Handloom Department, pursuant to which the petitioner applied for the same on 12.11.2001, which was duly acknowledged by opposite party no.4 on 29.11.2001. But the benefit was not extended to him and consequentially, the petitioner filed representation on 12.04.2002 for early release of the dues. The Corporation, vide letter dated 01.05.2002, intimated the petitioner that the High Court of Orissa in Misc. Case No.15296 of 2001 (arising out of OJC No.14611 of 1997) directed the Management not to give effect to the notice dated 01.11.2001 inviting

applications for VSS. The Corporation was unable to process the VSS application and the same was to be recommended only after final order is passed in the said writ petition. Consequentially, the petitioner had to discharge his normal duties till acceptance of the VSS application submitted by him under the Scheme. Thereby, the Corporation neither accepted the VSS application of the petitioner nor relieved him from the services on the plea that the matter is pending before the High Court of Orissa. Finally, the VSS application was accepted by the Corporation on 04.08.2003 with effect from the date he had submitted his application on 12.11.2001, after disposal of OJC 14611 of 1997, vide order dated 25.09.2002. Therefore, the petitioner claimed the benefit for the period from 31.12.2001 to 04.08.2003, which was rejected by opposite party no.4, vide communication dated 07.05.2005. Hence this writ application.

3. Mr. Sidharth Mishra, learned counsel for the petitioner contended that the order dated 07.05.2005 in Annexure-11 has been passed without assigning any reason, therefore, the same cannot sustain in the eye of law. As such, the petitioner is entitled to get the benefit of VSS for the period from 31.12.2001 to 04.08.2003, which has been illegally rejected by opposite party no.4. It is further contended that in view of order dated 17.03.2005 passed by this Court in W.P.(C) No.8359 of 2003, an order accepting the voluntary retirement cannot be given effect to retrospectively. Therefore, if the order accepting VSS application was passed on 04.08.2003 and the petitioner has discharged his duty till that date, he is entitled to get the benefits for the period from 31.12.2001 to 04.08.2003.

4. Mr. B. Senapati, learned Additional Government Advocate contended that since it is a matter between the petitioner vis-à-vis opposite party no.4, the State has no role to play.

5. Mr. R. Nayak and associates have entered appearance for opposite party no.4 and filed counter affidavit. But, none has appeared on behalf of the said opposite party at the time of call. The matter is of the year 2008. In the meantime, 11 years have passed and the pleadings are also complete. Therefore, this Court is not inclined to grant further adjournment.

6. Having heard Mr. Sidharth Mishra, learned counsel on behalf of Mr. R.C. Sahoo, learned counsel for the petitioner; and Mr.B. Senapati, learned Additional Government Advocate, and on perusing the counter affidavit filed by opposite party no.4, the matter is being finally disposed of at the stage of admission.

7. The substantial question that arises for consideration by this Court is, whether opposite party no.4 is justified in declining to shift the cutoff date from 31.12.2001 to 04.08.2003, and whether the petitioner is entitled to get the benefits for the period from 31.12.2001 to 04.08.2003, as the order accepting VSS application of the petitioner was passed on 04.08.2003.

8. In the instant case, the petitioner was appointed on 02.03.1982 as Accounts Assistant in the establishment of opposite party no.4. Department of Public Enterprises, Govt. of Orissa issued a resolution introducing Voluntary Separation Scheme (VSS) for the employees of sick and unviable State Public Sector Undertakings/Co-operative Enterprisers slated for closure/liquidation in Annexure-1. As per the resolution, DFID had agreed to fund the said Scheme to the extent of 80% of ex-gratia plus gratuity and leave encashment. The amount payable towards ex-gratia, gratuity and leave encashment, along with all other statutory dues, such as, Provident Fund, Employees State Insurance Fund shall be released in one installment to ensure disbursement to the employees on the date of separation. Arrear salary shall be paid in installments through post dated cheques, each installment shall cover six months of arrear, and in case the arrear salary is for less than six months the amount shall be paid at the time of separation of the employees, and all other dues shall be paid in two equal half yearly installments through post dated cheques in the next financial year. In view of such order of the Department of Public Enterprises, the Corporation on 01.11.2001 introduced the VSS and invited applications from the eligible and interested employees of its organization on or before 30.11.2001. As per Clause 3.2 of the Model Scheme, the decision of the competent authority regarding acceptance or rejection of VSS application shall be communicated to the employee within 30 days from the date of submission of the application.

9. In compliance of the same, on 12.11.2001 the petitioner submitted his application for VSS before the competent authority of the Corporation with an undertaking that he will not join in any post under the State Govt./State PSUs or any autonomous agency of the State Government, as required under Clause-6.4 of the Model Scheme. The receipt of such VSS application was acknowledged by the Corporation on 29.11.2001. The petitioner submitted a representation on 12.04.2002 for an early action on his application for VSS. But he was intimated on 01.05.2002 that because of order passed by this Court in Misc. Case No.15296 of 2001 arising out of OJC No.14611 of 1997, the Corporation was prohibited not to give effect to the notice dated 01.11.2001, inviting application for VSS and the petitioner's application for

VSS would be processed and recommended only after disposal of the said writ petition.

10. The writ petition bearing OJC 14611 of 1997 was disposed of on 25.09.2002 recording that 175 employees of the Corporation have already opted for the benefits of VRS/VSS and the Corporation and the Government are taking steps to pay such benefits to the said employees. In November, 2002 the petitioner again requested the Corporation for early disposal of his VSS application dated 12.11.2001. In the meantime, the service book of the petitioner got entry showing increments of salary on 31.12.2002 vide Annexure-12 to the writ petition. On 04.04.2003, the Corporation issued a letter to the petitioner in his official address directing him to handover charges immediately to the respective persons, as indicated in the said letter, and also submit clearance certificate with the list of files/records/dead stock handed over to Establishment Section of the Corporation. Further on 30.04.2003, the Corporation intimated the petitioner to finalize the accounts outstanding against him. Ultimately, on 04.08.2003, the Corporation accepted the VSS application of the petitioner with retrospective effect from 31.12.2001.

11. The petitioner and some others filed W.P.(C) No.8359 of 2003 challenging the said order accepting their VSS application retrospectively with effect from 31.12.2001. During pendency of the writ petition, the petitioner was paid Rs.1,93,319/-, which he accepted with protest and without prejudice to the contentions raised in the said writ petition. This Court, vide order dated 17.03.2005, disposed of the said writ petition holding that an order accepting the voluntary retirement cannot be given effect to retrospectively and directed the authorities to consider the representation of the petitioner, along with others, within a period of three weeks from the date of passing of order. This Court also observed in the said order that on scrutiny if it is found that the petitioner has in fact discharged his duty till 04.08.2003 and is entitled to the benefits claimed, necessary steps be taken for disbursement of the same within a period of four months. As such, the petitioner has discharged his duty till 04.08.2003. Though the order dated 17.03.2005 passed by this Court in W.P.(C) No.8359 of 2003 was produced on 30.03.2005, the Corporation rejected the representation dated 21.10.2003 of the petitioner on 07.05.2005 denying to confer service benefits till 04.08.2003 though he was relieved from duty on 04.08.2003 and entitled to get salary/wages and other service benefits under the Scheme.

12. Against the order dated 07.05.2005 of the Corporation rejecting the representation, the petitioner filed CONTC No.800 of 2005, which was dismissed on 02.05.2007 stating that the same cannot be the subject-matter of challenge in a contempt proceeding.

13. On perusal of the order impugned dated 07.05.2005 in Annexure-11, it clearly indicates that the authority has not assigned any reason why the petitioner is not entitled to get the benefits under VSS for the period he has rendered his services, i.e., from 31.12.2001 to 04.08.2003. As such, a specific observation was made by this Court, vide order dated 17.03.2005 passed in W.P.(C) No.8359 of 2003, that the order accepting the voluntary retirement cannot be given effect to retrospectively. If that be taken into consideration, the petitioner submitted his application for VSS on 12.11.2001 and effectively, the same has been accepted on 04.08.2003, then certainly he is entitled to get the benefit for the period from 31.12.2001 to 04.08.2003, till when he has evidently rendered service to the Corporation.

14. In ***Ashok Kumar Sahoo v. Union of India and others***, 2006(6) SCC 704:AIR (2006) SC 2876, the apex Court held as follows:

> "28. Cases of voluntary retirement can broadly be divided into the following three categories:
>
> (i) Where voluntary retirement is automatic and comes into force on the expiry of notice period;
>
> (ii) When it comes into force; unless an order is passed within the notice period withholding permission to retire, and
>
> (iii) When voluntary retirement does not come into force unless permission to this effect is specifically granted by the Controlling Authority."

15. In ***State of Haryana v. S.K. Singhal***, (1994) 4 SCC 293, the apex Court held that the position at what point of time voluntary retirement takes effect has been exhaustively considered. The Court identified two classes of cases:

> *"(a) Where rules are couched in language which results in automatic retirement on expiry of period specified in employees' notice;*
>
> *(b) Where even after the expiry of the specified notice retirement is not automatic but an express order granting permission is required to be communicated i.e. master-servant relationship continue after the period specified in the notice till such acceptance is communicated."*

From the above it follows that even after expiry of the specified notice period, retirement is not automatic but an express order granting permission is required to be communicated i.e. master-servant relationship continue after the period specified in the notice till such acceptance is communicated.

16. Applying the same to the present case, though the petitioner submitted his VSS application on 12.11.2001, effectively the same was accepted on 04.08.2003. Thereby, the master-servant relationship has continued after the period specified in the notice till acceptance is communicated. Therefore, it can be safely held that the petitioner is entitled to get the benefits for the period from 31.12.2001 to 04.08.2003.

17. The plea taken in the counter affidavit filed by opposite party no.4 that applying the doctrine of "no work no pay" the petitioner is not entitled to get the benefit under the Scheme, that has not been indicated in the reasons assigned in the order impugned dated 07.05.2005 in Annexure-11 and the same has been taken for the first time in the counter affidavit. It is well settled in law that the order impugned must reflect the reasons and any reason given subsequently by way of counter affidavit cannot be taken into consideration. Thereby, this Court is unable to accept the reasons assigned in the counter affidavit filed by opposite party no.4 that due to "no work not pay" the petitioner is not entitled to get the benefits, as claimed in the writ petition.

18. The subsequent explanation given in paragraph-10 of the counter affidavit filed by opposite party no.4 cannot be taken into consideration, in view of the judgment of this Court in ***M/s. Shree Ganesh Construction v. State of Orissa***, 2016(II) OLR 237, which was passed following the judgment of the apex Court in ***Mohinder Singh Gill v. The Chief Election Commissioner***, ***New Delhi***, AIR 1978 SC 851. In paragraphs-7 & 8 of the judgment in ***M/s. Shree Ganesh Construction*** (supra) this Court held as follows:

> "*7. In the counter affidavit filed, the reasons have been assigned, which are not available in the impugned order of cancellation filed before this Court in Annexure-4 dated 5.2.2016. More so, while cancelling the tender, the principles of natural justice have not been complied with. It is well settled principle of law laid down by the Apex Court in* ***Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others****, AIR 1978 SC 851 that :*
>
> *"When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise an order bad in the beginning may by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out."*
>
> 8. *In* ***Commissioner of Police, Bombay v. Gordhandas Bhanji****, AIR 1952 SC 16, the Apex Court held as follows :*
>
> *"Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting*

and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. Orders are not like old wine becoming better as they grow older."

Similar view has also been taken in ***Bhikhubhai Vithlabhai Patel and others v. State of Gujarat and another****, (2008)4 SCC 144.*

19. The above being the settled position of law, this Court is of the considered view that the reasons, which have been assigned by opposite party no.4 in the counter affidavit, cannot be taken into consideration. Therefore, the order impugned dated 07.05.2005 in Annexure-11 cannot sustain in the eye of law and the same is hereby quashed.

20. So far as grant of benefits for the period from 31.12.2001 to 04.08.2003 is concerned, this Court is of the considered view that the petitioner is entitled to get the same. Accordingly, this Court directs opposite party no.4 to compute the amount for the period from 31.12.2001 to 04.08.2003, during which the petitioner has rendered service to the Corporation and pay the said amount to the petitioner within a period of three months from the date of communication/production of the certified copy of this order.

21. It is stated at the Bar that the Corporation is under liquidation. If that be so, let the amount be computed and placed before the Official Liquidator for doing the needful at his end.

22. With the above observation and direction, the writ petition stands allowed. However, there shall be no order as to cost.

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2019 (II) ILR - CUT- 556

DR. B.R. SARANGI, J.

W.P.(C) NO. 326 OF 2014

PRAFULLA CHANDRA NAIK .....Petitioner

.Vs.

EXECUTIVE DIRECTOR, BANK OF MAHARASHTRA & ANR. .....Opp. Parties

(A) BANK OF MAHARASHTRA OFFICER EMPLOYEES (CONDUCT) REGULATIONS, 1966 – Regulation 33 Sub-Rule (2) – Compulsory retirement – Release of terminal benefit – Petitioner allowed basic pension of 66.67% out of total admissible pension & remaining 33.3%

withheld – Board of Directors had not been consulted before releasing the said pensionable amount – Petitioner pleads that, as per Sub-Rule (2) of Regulation 33 of the Regulation before awarding less than full compensation pension, Board of Directors must be consulted – Action of the authority challenged – Held, applying sub-regulation (2) of regulation 33, there must be effective consultation with the Board of Directors since pension granted to the petitioner is less than the full compensation pension granted to the petitioner – Had the Board of Directors been consulted, the petitioner could have put forth his grievance claiming for full pension amount, instead of that the authorities have unilaterally granted 2/3rd of pension applying above regulation which is arbitrary, unreasonable, contrary to the provision of law and also violates the rules of natural justice.

(B) WORDS & PHRASES – Consultation – Meaning of – It is a process, which requires meeting of minds between the parties involved in the process of consultation on the material facts and points to evolve a correct or at least satisfactory solution.

Case Laws Relied on and Referred to :-

1. 2007 GLR(3) 2143 : 2008 GHJ (17) 104 : A.N. Puniwala .Vs. Bank of India.
2. (2013) 16 SCC 206 : Ram Takan Singh .Vs. State of Bihar.
3. AIR 1982 SC 149 : S.P. Gupta .Vs. President of India.
4. (2001) 3 SCC 170 : L & T Mcnell Ltd. .Vs. Govt. of T.N.
5. (2006) 6 SCC 162 : M.P. Gangadharan .Vs. State of Kerala.
6. 1993 Supp (I) SCC 730 : Indian Administrative Service (S.C.S.) Assn. .Vs. Union of India.
7. (2002) 4 SCC 524 : Gauhati High Court .Vs. Kuladhar Phukan.
8. (2008) 7 SCC 203 : Andhra Bank .Vs. Andhra Bank Officers.
9. (2013) 16 SCC 206 : Ram Tawakya Singh .Vs. State of Bihar & Ors.
10. 1994(5) SCC 267 : Dr. Rash Lal Yadav .Vs. State of Bihar & Ors.
11. 2006 (7) SCC 800 : In Suresh Chandra Nanhorya .Vs. Rajendra Rajak & Ors.

For Petitioner : M/s. B K. Sharma & A.U. Senapati
For Opp. Parties : Mr. R.C. Ojha, D.N. Mohanty & A.K. Jena

JUDGMENT Decided On: 19.07.2019

DR. B.R. SARANGI, J.

The petitioner, who was working as Senior Manager, Bank of Maharashtra, Raipur Branch, has approached this Court by filing this writ petition with following prayer:

> "Under the aforesaid circumstances, it is humbly prayed that your Lordship would graciously be pleased to issue Rule NISI, calling upon the opp.Parties to show cause as to why the communication dtd. 22.03.2012 under Annexure-1 and the decision dtd. 5.3.2012 recommending 2/3rd Compulsory Retirement Pension as communicated under Annexure-2 shall not be quashed and set aside. If the Opp. Parties fail to show cause or show insufficient cause make the said Rule NISI absolute.

> And further be pleased to issue a writ of certiorari in line with aforesaid Rule NISI quashing the communication dtd.22.03.2012 under Annexure-1 and the decision dtd. 5.3.2012 communicated vide letter dtd. 30.08.2012 under Annexure-2.
>
> And further be pleased to direct the Opp. Party to grant full pension admissible to the petitioner in accordance with provision of Bank of Maharashtra (Employees') Pension Regulation, 1995."

2. The fact of the case, in a nut shell, is that the petitioner joined the service of Bank of Maharashtra in December, 1981 as a Probationary Officer in Scale-I, Junior Management Grade. Subsequently, he was promoted to the post of Manager in Scale-II, Middle Management Grade, in the year 1992, and then to Senior Manager in Scale-III in the same Grade in the year 2002. During his posting as Senior Manager at Raipur Branch, the petitioner was served with a charge-sheet on 23.06.2011 for his alleged mis-conduct during the course of his posting as Branch Manager from 19.07.2006 to 13.09.2008 at Ranchi Branch of the Bank. Accordingly, a departmental proceeding was initiated against the petitioner for violation of Regulation 3(1) of the Bank of Maharashtra Officer Employees (Conduct) Regulations, 1966, which culminated into his compulsory retirement from the service of the bank. After his compulsory retirement, vide order dated 12.10.2011 he made an application to the opposite party-Bank for release of his terminal benefit. The opposite party-Bank vide communication dated 22.03.2012, addressed to the petitioner's place of domicile, allowed him a basic pension of Rs.10,762/- only (66.67%) as against admissible basic pension of Rs.17,755/-, thus withholding Rs.6,993/- (33.3%) of the total pension due. The petitioner sought information under Right to Information Act, 2005, to ascertain the reason for such withholding and partial release of his pension amount. In response to same, the bank communicated on 30.08.2012 to the petitioner that on the basis of Regulation 33 of the Bank of Maharashtra (Employees') Pension Regulations, 1956, the bank has sanctioned 2/3rd Compulsory Retirement Pension. Against such communication, the petitioner has approached this Court by way of this writ petition.

3. Mr. B.K. Sharma, learned counsel appearing for the petitioner, at the outset, did not press the first two prayers made in the writ petition whereby the petitioner sought to quash the communication dated 22.03.2012 in Annexure-1 and the decision taken on 05.03.2012 Annexure-2 recommending 2/3rd Compulsory Retirement Pension. He, however, confined the writ petition to the prayer so far it relates to seeking direction to the opposite party-bank to grant full pension admissible to the petitioner in accordance with the provisions of Bank of Maharashtra (Employees') Pension Regulations, 1995 (in short 'Regulations, 1995'). He thus contended

that as per the provisions contained in Sub-Regulation (2) of Regulation 33, the Board of Directors have not made any consultation with the petitioner before releasing pension under Sub-Regulation(1) of Regulation 33. Thereby, the authorities have not applied their mind, while issuing the order impugned in Annexure-1 dated 22.03.2012, and curtailing the admitted pension and granting only two-third of the pensionary benefits to the petitioner, which is arbitrary, unreasonable and contrary to the provisions of law. To substantiate his contention, he has relied upon the judgment of High Court of Gujarat in ***A.N. Puniwala v. Bank of India***, reported in 2007 GLR(3) 2143=2008 GHJ (17) 104, and ***Ram Takan Singh v. State of Bihar***, (2013) 16 SCC 206.

4. None appears for the opposite party-bank at the time of call. On perusal of record it reveals that pursuant to notice dated 28.01.2014, initially M/s. D.P. Tripathy and associates had entered appearance for opposite party-Bank by filing Vakalatnama on 01.12.2015. When the matter was listed on 07.12.2015, this Court passed the following order:

> *"None appears for the opposite party-Bank even on second call.*
> *To afford another opportunity, call this matter two weeks after."*

When the matter was listed on 31.03.2016, this Court passed the following order:

> *"Learned counsel for the opposite parties-Bank prays for two weeks time to file counter affidavit.*
> *Put up this matter on 06.05.2016."*

Despite that, no counter affidavit was filed by the opposite party-bank. Thereafter, on 30.07.2018, the opposite party-bank changed its counsel and engaged M/s. R.C. Ojha and associates with the consent of previous counsel. Accordingly, their names were reflected on the file as well as in the cause list of the Court. When the matter was listed on 21.06.2019, in spite of opportunity given, none appeared for the bank nor filed any counter affidavit. Since it is a matter of the year 2014, this Court is not inclined either to grant further adjournment or give opportunity to the opposite party-bank to file counter affidavit. Therefore, this Court proceeded to decide the matter on the basis of the pleadings available on record applying the doctrine of non-traverse.

5. It is no doubt true, on the basis of materials available on record, that the petitioner was working as Senior Manager in the opposite party-bank and was visited with penalty of compulsory retirement, for which he was granted two-third of his actual pension.

6. The grant of pension to the employees of the Bank of Maharashtra is regulated by the Bank of Maharashtra Officer Employees (Conduct) Regulations, 1966. Regulation 33, which deals with Compulsory Retirement Pension, reads as follows:

> *(1) An employee compulsorily retired from service as a penalty on or after 1st day of November, 1993 in terms of Discipline and Appeal Regulations or settlement by the authority higher than the authority competent to impose such penalty may be granted pension at a rate not less than two-thirds and not more than full pension admissible to him on the date of his compulsory retirement if otherwise he was entitled to such pension on superannuation on that date.*
>
> *(2) Whenever in the case of a bank employee the Competent Authority passes an order (whether original, appellate or in exercise of power of review) awarding a pension less than the full compensation pension admissible under these regulations, the Board of directors shall be consulted before such order is passed*
>
> *(3) A pension granted or awarded under sub-regulation (1) or as the case may be, under sub-regulation(2), shall not be less than the amount of Rs. Three Hundred and Seventy Five per mensem."*

A bare reading of aforesaid provision would clearly indicate that if an employee compulsorily retired from service as a penalty on or after 1st day of November, 1993 in terms of Discipline and Appeal Regulations or settlement by the authority higher than the authority competent to impose such penalty may be granted pension at a rate not less than two-thirds and not more than full pension admissible to him on the date of his compulsory retirement. But, before granting such benefit to the petitioner Sub-Rule (2) of Regulation 33 has to be complied with meaning thereby whenever in the case of a bank employee the competent authority passes an order (whether original, appellate or in exercise of power of review) awarding a pension less than the full compensation pension admissible under these regulations, the Board of Directors shall be consulted before such order is passed.

7. Mr. B.K. Sharma, learned counsel appearing for the petitioner emphatically submitted that since the petitioner was awarded pension less than the full compensation pension admissible under the Regulations, the Board of Directors should have been consulted before such order being passed. But, no such consultation was made with the Board of Directors before passing such order. It is further contended that when question of consultation comes, it must be an effective consultation, but without doing so, the order so passed granting pension less than the full pension cannot sustain in the eye of law.

8. In view of the above contention, raised on behalf of the petitioner, this Court deems it proper to draw the meaning of "consultation" attached to the provisions of Sub-Regulation-(2) of Regulation-33.

In ***S.P. Gupta v. President of India***, AIR 1982 SC 149 while considering Article 217(1) which has the same meaning under Article 222(1), the apex Court held that "consultation" means full and effective consultation after placing full and identical material before such functionary. It does not mean concurrence.

In ***L & T Mcnell Ltd. v. Govt. of T.N.,*** (2001) 3 SCC 170, the apex Court, while considering Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970, held that the expression "consultation" occurring in Section 10 of the Act does not mean 'concurrence' but the views of the Board are ascertained for the purpose of assisting the Government in reaching its conclusion on the matter. Similar view has also been taken in ***M.P. Gangadharan v. State of Kerala***, (2006) 6 SCC 162.

In ***Indian Administrative Service (S.C.S.) Assn. v. Union of India***, 1993 Supp (I) SCC 730, the apex Court clarified that "consultation" is a process, which requires meeting of minds between the parties involved in the process of consultation on the material facts and points to evolve a correct or at least satisfactory solution.

In ***Gauhati High Court v. Kuladhar Phukan***, (2002) 4 SCC 524, the apex Court held that the word "consultation" occurring in Articles 233 and 234 means 'meaningful, effective and conscious consultation'.

In ***Andhra Bank v. Andhra Bank Officers***, (2008) 7 SCC 203, the apex Court held that the word "consultation" has different connotations in different contexts. Where one authority is required to consult another, such consultation must be meaningful. It must mean conscious and effective consultation but the same would apply where the "consultation" is necessary.

In ***Ram Tawakya Singh v. State of Bihar and others***, (2013) 16 SCC 206, while considering the word "consultation" as used in Sections 10(1) and 12(1) of the Bihar State University Act, 1976, the apex Court held in paragraphs-29 and 30 as follows:

> *"29. The word "consultation" used in Sections 10(2) and 12(1) of the BSU Act and Sections 11(2) and 14(1) of the PU Act is of crucial importance. The work "consult" implies a conference of two or more persons or impact of two or more minds in respect of a topic/subject. Consultation is a process which requires meeting of minds between the parties involved in the process of consultation on the material facts and points to evolve a correct or at least satisfactory solutions. Consultation may be between an uninformed person and an expert or between two experts. In either case, the final decision is with the consultor, but he will not be generally ignoring the advice of the consultee except for good reasons.*
>
> *30. In order for two minds to be able to confer and produce a mutual impact, it is essential that each must have for its consideration fully and identical facts, which can at once*

constitute both the source and foundation of the final decision. Such a consultation may take place at a conference table or through correspondence. The form is not material but the substance is important. If there is more than one person to be consulted, all the persons to be consulted should know the subject with reference to which they are consulted. Each one should know the views of the other on the subject. There should be meeting of minds between the parties involved in the process of consultation on the materials facts and points involved. The consultor cannot keep one consultee in dark about the views of the other consultee. Consultation is not complete or effective before the parties thereto make their respective points of view known to the other and discuss and examine the relative merit of their views."

9. Applying the same to the present context, as required under Sub-Regulation-(2) of Regulation 33, there must be effective consultation with the Board of Directors since pension granted to the petitioner is less than the full compensation pension granted to the petitioner. Had the Board of Directors been consulted, the petitioner could have put forth his grievance claiming for full pension amount, instead of that the authorities have unilaterally granted 2/3rd of pension applying Sub-Regulation (2) of Regulation 33, which is arbitrary, unreasonable, contrary to the provisions of law and also violates rules of natural justice.

10. In ***Dr. Rash Lal Yadav v. State of Bihar and Ors***, 1994(5) SCC 267, the apex Court observed that 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. It is observed that Rules of natural justice, are therefore, devised for ensuring fairness and promoting satisfactory decision making.

11. In ***Suresh Chandra Nanhorya v. Rajendra Rajak and Ors***., 2006 (7) SCC 800, the apex Court has observed that natural justice is inseparable ingredient of fairness and reasonableness. It is even said that the principles of natural justice must be read into unoccupied interestices of statute, unless there is a clear mandate to the contrary. It is also further observed that natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice.

12. In view of aforesaid law laid down by the apex Court, withholding of 33.3% of pension amounting to Rs.6993/- of the admissible basic pension of Rs.17,755/- and payment of basic pension of Rs.10,762/- which is 66.67%, without giving an opportunity of hearing to the petitioner, is in breach of natural justice and requires to be quashed and set aside.

13. It is of relevance to note, under sub-regulation(1) of Regulation 33, if an employee is compulsorily retired from service as a penalty, discretion is vested with the authority to pay pension at a rate not less than two-thirds and not more than full pension, meaning thereby, the authority, in an appropriate case, withhold pension upto a maximum of 25%. However, discretion has been given to the authority to withhold pension of such an employee up to a maximum 33.3%, in view of provisions contained in Sub-Regulation (2) of Regulation 33, if the opportunity of being heard by the Board of Directors is given to the concerned employee, so that he can satisfy the authority that in a given case the order withholding of pension of 33.3% is not warranted. When such a discretion has been given to the authority, that should not be exercised arbitrarily and the same should be exercised judiciously, and the fair play requires that an opportunity of hearing is to be given to the petitioner.

14. In the instant case, when the competent authority passed the order granting less than the full compensation, as pension admissible under the Regulation, no opportunity of hearing was given to the petitioner by the Board of Directors by making an effective consultation. If such opportunity is not given to the petitioner, it amounts to violation of principles of natural justice. Therefore, in the interest of justice, equity and fair play, since the opposite party-bank has already allowed two-thirds pension to be received by the petitioner, for rest one-third, i.e. 33.3% which has been withheld by the authority, let the authority give an opportunity of hearing to the petitioner by effective consultation with the Board of Directors, so that the Board of Directors can apply its mind and grant full compensation pension, as admissible to the petitioner, even though he has been visited with the penalty of compulsory retirement. Such opportunity should be given in compliance of Sub-Regulation (2) of Regulation 33 and final order be passed within a period of four months from the date of communication of the judgment to the opposite parties.

15. The writ petition is thus allowed to the extent indicated above. No order as to cost.

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2019 (II) ILR - CUT- 563

DR. B.R. SARANGI, J.

W.P.(C) NO. 22353 OF 2011

PRAHALLAD MOHANTY & ANR. ..... Petitioners

.Vs.

D.G.P, CRPF & ORS. .....Opp. Parties

SERVICE LAW – Compassionate appointment on rehabilitation ground – Father of the petitioner who was a cook in CRPF declared incapacitated by the Medical Board and was struck off from service w.e.f. 02.07.2004 – Petitioner applied for compassionate appointment after he became major on 17.12.2009 – Application of the petitioner was rejected on the ground of delay – The question arose as to whether the Standing Order No.5 of 2001 issued by the opposite parties putting restrictions on compassionate appointment in case of invalidation on medical ground beyond 5 years is legally justified, though no such limitation has been prescribed in case of death ? Held, No – Reasons explained.

*"**Clause-**VI(h) of the Standing Order No.5 of 2001, resorting to which application for compassionate has been rejected in the instant case, provides that request for compassionate appointment where the death of the Government servant took place long back, say five years or so, may be entertained, but however, in all other cases such as invalidation on medical ground etc. will not be entertained after completion of five years from the date of retirement. But, there is no rationale behind fixation of such restriction in Clause-VI (h) of Standing Order no.5 of 2001, and the object which is sought to be achieved by putting such restriction. If the benefit of compassionate appointment can be extended in case of death of an employee beyond five years, why such benefit cannot be extended to an employee retired on being medically invalidated, beyond five years. The present is a peculiar case where petitioner no.2 was a minor by the time the name of petitioner no.1 was struck off from service on 02.07.2004 and the wife of petitioner no.1 could not submit her application for compassionate appointment because she took care of her husband, who was suffering. When petitioner no.2 attained majority, his date of birth being 05.06.1993, he was prosecuting his studies in + 2 Second Year Arts, and he submitted his application for compassionate appointment, but the same was rejected mechanically relying upon Clause-VI(h)of Standing Order No.5 of 2001 on the ground that the same was submitted beyond the limitation period of 5 years.*

Applying the very same principle to the present context, the claim for compassionate appointment in case of medically invalidated employee, who applied beyond five years, vis-à-vis the application submitted in case of death of an employee beyond 5 years as per Clause VI(h) of Standing Order No.5 of 2001 is discriminatory one and violates Articles-14 and 21 of Constitution of India. Such imposition of restriction cannot sustain in the eye of law.

In view of law discussed above, restriction imposed putting a limitation of five years for making an application for compassionate appointment by the legal heir of a medically invalidated retired employee as per Clause-VI(h) of Standing order No.5 of 2001 and prescribing no limitation in case of death of an employee is discriminatory and violates Articles 14 and 21 of Constitution of India. In the instant case, such restriction should be ignored, particularly when the record clearly reveals that as soon as petitioner no.2 attained majority he applied for compassionate appointment. Therefore, both the orders dated 05.01.2010 and 20.01.2010 in Annexures-4 and 6 respectively cannot sustain in the eye of law and are accordingly

quashed. The matter is remitted back to the opposite parties to reconsider the case of petitioners for compassionate appointment of petitioner no.2, the legal heir of petitioner no.1, who was struck off from service for being invalidated out on medical ground otherwise the very purpose for grant of compassionate appointment will be defeated." (Paras 7,11 & 15)

Case Laws Relied on and Referred to :-

1.(2001 8 SCC 676 : Bharathidasan University .Vs. All India Council for Technical Education.
2. 2018 OLR 652 : Lata Naik .Vs. State of Odisha.
3. AIR 2012 SC 642 : Imtiyaz Ahmad .Vs. State of Utttar Pradesh & Ors.
4. AIR 2016 SC 3506 : Anita Kushwaha .Vs. Pushap Sudan.
5. AIR 2000 SC 1596 : Balbir Kaur & Anr. .Vs. Steel Authority of India Ltd. & Ors.
6. 2014(II) ILR-CUT 608 : Dhira Kumar Parida .Vs. Mahanadi Coal Fields Ltd.
7. (1997) 8 SCC 85 : Haryana State Electricity Board .Vs. Hakim Singh.
8. AIR 1998 SC 2230 : Director of Education .Vs. Pushpendra Kumar.
9. (2005) 7 SCC 206 : Commissioner of Public Instructions Vs. K.R. Vishwanath.
10. (2003) 7 SCC 704 : AIR 2003 SC3797 : State of Haryana .Vs. Ankur Gupta.
11. (2007) 2 SCC481 : AIR 2007 SC1155 : National Institute of Technology .Vs. Niraj Kumar Singh.
12. 2017(II) ILR 896 : Bibhuti Bhusan Pattnaik .Vs. State of Orissa & Ors.

For Petitioners : M/s. B. Senapati & M.K. Panda,
For Opp. Parties : Mr. H.S. Panda,Central Govt. Counsel

JUDGMENT Date of Hearing: 22.07.2019 : Date of Judgment: 30.07.2019

DR. B.R. SARANGI, J.

The petitioners, by means of this writ petition, seek to quash letter dated 05.01.2010 in Annexure-4 issued by opposite party no.1-Director General of Police, Central Reserve Police Force (CRPF), New Delhi, as well as letter dated 20.01.2010 in Annexure-6 issued by opposite party no.3-Deputy Inspector General of Police, Central Reserve Police Force, Group Centre, Bhubaneswar, by which the application submitted for compassionate appointment has not been entertained in view of completion of five years of invalidation of the Government servant on medical ground.

2. The epitome of the facts leading to filing of this writ petition, in a nutshell, is that petitioner no.1 was continuing as a Cook in CRPF, Group Centre, Bhubaneswar. While so working, he suffered from Schizophrenia. After a lot of treatment, when his condition was not developed, he was examined by the medical board. After thorough examination, the medical board found him unfit to perform the duty and recommended for invalidation vide report dated 25.05.2004. On the basis of such recommendation, petitioner no.1, being unfit to discharge his duty as a Cook, was struck off

from service w.e.f. 02.07.2004, vide office order dated 02.07.2004 issued by the Additional Deputy Inspector General of Police, Group Centre, CRPF, Bhubaneswar. Consequentially, he was directed to submit the relevant papers/documents for payment of his risk fund amount. On submission of the same, the amount was duly paid to him by the authority. By the time petitioner no.1 was struck off from service on 02.07.2004, petitioner no.2 the son of petitioner no.1 was minor. Therefore, he could not apply for compassionate appointment under Rehabilitation Assistance Scheme nor the wife of petitioner no.1 could apply as she had to take his care. When petitioner no.2 was continuing his +2 Second Year Arts, he became major and filed an application for compassionate appointment on 17.12.2009, his date of birth being 05.06.1993. But the opposite parties, without taking into consideration the miseries faced by the family, after the name of petitioner no.1, who was the sole bread winner of the family, was struck off from service, rejected the application on 05.01.2010 on the ground that the application was filed beyond the limitation period of five years. Thereafter, the petitioners filed another representation on the very same day citing an example where the dependant son of late Mohan Singh, Constable Force No.801261261, who had been serving in F/52 Bn. CRPF and expired on 18.05.1985 had applied in 2004 and got a job on compassionate ground. In spite of standing order of 05 of 2001, even such representation was rejected on the very same ground stating that the application for compassionate appointment filed by the Government servant invalidated out of medical ground is not entertained after completion of five years, pursuant to letter dated 20.01.2010. Hence this application.

3. Mr. B. Senapati, learned counsel appearing for the petitioner contended that petitioner no.1, after declared invalidated on medical ground and struck off from service, was getting pension of Rs.1,915/- per month, which was even insufficient for medical expenses. The family was in distress condition with effect from 2004 and the same condition is also continuing till date because of meager amount of pension. It is further contended that the sole ground on which the application for compassionate appointment has been rejected by the authority is that in case of struck off of the name of an employee from service due to medical invalidation, the application for compassionate appointment was to be filed within five years, but while rejecting such application the basic ground reality has not been taken into consideration. Meaning thereby, by the time the name of petitioner no.1 was struck off from service on 02.07.2004, petitioner no.2 was a minor and as such, the wife of the petitioner could not make any application as she was

taking care of petitioner no.1. The moment petitioner no.2 became major, he filed an application for compassionate appointment but the authority rejected the same on a ground which is not legally tenable. It is further contended that when in a case of death of an employee in the year 1985, compassionate appointment has been considered in the year 2004, that is to say after 19 years, non-applicable of the same analogy to the present case amounts to discrimination and violates Article 14 of the Constitution of India. In other words, the limitation of five years provided in Clause-VI (h) of the Standing Order in the cases of invalidation and prescription of no limitation for death cases is discriminatory and violates Articles-14 and 21 of the Constitution of India and should be ignored. Therefore, the opposite parties may be directed to accept the application of the petitioners and consider the case of petitioner no.2 for compassionate appointment. To substantiate his contentions, learned counsel for the petitioner has relied upon ***Bharathidasan University v. All India Council for Technical Education***, (2001 8 SCC 676 and ***Lata Naik v. State of Odisha***, 2018 OLR 652.

4. Mr. H.S. Panda, learned Central Government Counsel appearing for the opposite parties contended that in view of the provisions contained in Standing Order No.5 of 2001 the application for compassionate appointment of a family member of a medically retired employee will not be entertained after completion of five years from the date of retirement. Therefore, rejection of application filed by the petitioners for giving compassionate appointment to petitioner no.2, after lapse of five years, is wholly and fully justified. He also contended that so far as death of government servant is concerned, the time limit in such cases may go beyond five years or so far acceptance, and in all other cases, such as, invalidation on medical ground, etc. will not be entertained beyond five years from the date of retirement. It is further contended that the dependent son of late Mohan Singh who got employment on compassionate ground 5 years after the death of his father is acceptable in a death case only, and the said case cannot be compared with the case of the petitioners, thereby seeks for dismissal of the writ petition.

5. Heard Mr. B. Senapati, learned counsel for the petitioners and Mr. H.S. Panda, learned Central Government Counsel for the opposite parties. Pleadings have been exchanged between the parties and with their consent the writ petition is being disposed of finally at the stage of admission.

6. The facts delineated above are not disputed. Therefore, in view of rival submissions of the parties, the only question to be considered in this case is, whether the Standing Order No.5 of 2001 issued by the opposite

parties putting restrictions on compassionate appointment in case of invalidation on medical ground beyond 5 years is legally justified, though no such limitation has been prescribed in case of death.

7. Clause-VI(h) of the Standing Order No.5 of 2001, resorting to which application for compassionate has been rejected in the instant case, provides that request for compassionate appointment where the death of the Government servant took place long back, say five years or so, may be entertained, but however, in all other cases such as invalidation on medical ground etc. will not be entertained after completion of five years from the date of retirement. But, there is no rationale behind fixation of such restriction in Clause-VI (h) of Standing Order no.5 of 2001, and the object which is sought to be achieved by putting such restriction. If the benefit of compassionate appointment can be extended in case of death of an employee beyond five years, why such benefit cannot be extended to an employee retired on being medically invalidated, beyond five years. The present is a peculiar case where petitioner no.2 was a minor by the time the name of petitioner no.1 was struck off from service on 02.07.2004 and the wife of petitioner no.1 could not submit her application for compassionate appointment because she took care of her husband, who was suffering. When petitioner no.2 attained majority, his date of birth being 05.06.1993, he was prosecuting his studies in +2 Second Year Arts, and he submitted his application for compassionate appointment, but the same was rejected mechanically relying upon Clause-VI(h)of Standing Order No.5 of 2001 on the ground that the same was submitted beyond the limitation period of 5 years.

8. In ***Bharathidasan University*** (supra), while considering the provisions contained in Regulations 4 and 12 of All India Council for Technical Education (Grant of Approval for Starting New Technical Institutions, Introduction of Courses or Programmes and Approval of Intake Capacity of Seats for the Courses or Programmes) Regulations, 1994, the apex Court in paragraph-14 of the judgment observed as follows:

> *"14. The fact that the Regulations may have the force of law or when made have to be laid down before the legislature concerned does not confer any more sanctity or immunity as though they are statutory provisions themselves. Consequently, when the power to make regulations is confined to certain limits and made to flow in a well-defined canal within stipulated banks, those actually made or shown and found to be not made within its confines but outside them, the courts are bound to ignore them when the question of their enforcement arises and the mere fact that there was no specific relief sought for to strike down or declare them ultra vires, particularly when the party in sufferance is a respondent to the lis or proceedings cannot confer any further*

> *sanctity or authority and validity which it is shown and found to obviously and patently lack. It would, therefore, be a myth to state that Regulations made under Section 23 of the Act have "constitutional" and legal status, even unmindful of the fact that any one or more of them are found to be not consistent with specific provisions of the Act itself. Thus, the Regulations in question, which AICTE could not have made so as to bind universities/UGC within the confines of the powers conferred upon it, cannot be enforced against or bind a university in the matter of any necessity to seek prior approval to commence a new department or course and programme in technical education in any university or any of its departments and constituent institutions."*

9. Relying upon the aforesaid judgment, Mr. B. Senapati, learned counsel for the petitioner contended that if restriction is imposed under Clause-VI(h) of Standing Order No.5 of 2001, taking into consideration the present position that petitioner no.2 was a minor by the time the name of petitioner no.1was struck off in the year 2004, such restriction could have been ignored and the authority could have considered the application of the petitioners for compassionate appointment.

10. Similarly, in ***Lata Naik*** (supra), this Court while taking into consideration the order dated 22.10.2017 to regulate payment of Grant-in-Aid to Non-Government Educational Institutions (Non-Government Colleges, Junior Colleges and Higher Secondary Schools), namely, the Odisha (Aided Colleges, Aided Junior Colleges and Aided Higher Secondary Schools) Grant-in-Order, 2017, Clause-3 whereof deals with entitlement of the employees, but on the same day, i.e., on 22.10.2017 another order was issued by the Government, vide Annexure-4 prescribing the following terms and conditions:

> *"The employees of Non-Government Aided Colleges who are governed under the provisions of Grant-in-Aid Order 2008, Grant-in-Aid Order 2009 or Grant-in-Aid Order, 2009 (for Upashastri & Shastri Colleges) as on 31st December, 2017 and who are willing for the negotiated settlement may follow the modalities in the Annexure-A."*

Annexure-A of the Modalities provides that the employee has to submit an affidavit in non-judicial stamp paper of value Rs.10/- with due notarization to the effect that he has no court case pending in any legal forum/have withdrawn the said case (as in Annexure-B). The format for affidavit, Annexure-B, stipulates that the employee has to swear an affidavit stating that he is desirous of availing the benefit of negotiated settlement offered by the Government as per the Grant-in-Aid Order, 2017; he has no court case pending before any legal forum to avail Grant-in-Aid as per Grant-in-Aid Order, 1994 or under any special provisions of any Act and Rules made for the purpose; that he has withdrawn the case bearing no.GIA/WPC/SLP or any other (specify) before the learned Tribunal/High Court/Supreme Court.

Added to it, if at any subsequent stage anything is found incorrect/false in connection with the incumbent concerned, the benefit of Grant-in-Aid as per the Grant-in-Aid Order, 2017 shall be withdrawn. He/She shall also be liable to refund the amount received by him/her within a stipulated time and in case of failure to refund, the same shall be recovered as per the provisions of Odisha Public Demands Recovery Act, 1962.

While considering such provision, reliance has been placed on the judgment of the apex Court in ***Imtiyaz Ahmad v. State of Utttar Pradesh and others***, AIR 2012 SC 642 and ***Anita Kushwaha v. Pushap Sudan***, AIR 2016 SC 3506 and this Court in paragraph-13 held as follows:

> ***"13.*** *By the impugned order, the Government have created a distinction between the employees who are willing to avail the benefits and others to pursue the litigation in the court of law. The Government is the ideal employer. As held by the apex Court access to justice is the fundamental right enshrined under Article 14 and 21 of the Constitution. The said right cannot be cabined, cribbed or confined by the impugned order."*

And finally in paragraph-18, this Court held as follows:

> ***"18.*** *The logical sequitur of the analysis made above is that the modalities prescribed in clause-2 under Annexure-A, clause-3 of the affidavit under Annexure-B as well as clause-3 of the declaration under Annexure-C so far as withdrawal of cases pending before different fora are arbitrary and violative of Articles 14 and 21 of the Constitution of India."*

11. Applying the very same principle to the present context, the claim for compassionate appointment in case of medically invalidated employee, who applied beyond five years, vis-à-vis the application submitted in case of death of an employee beyond 5 years as per Clause VI(h) of Standing Order No.5 of 2001 is discriminatory one and violates Articles-14 and 21 of Constitution of India. Such imposition of restriction cannot sustain in the eye of law.

12. The apex Court in **Balbir Kaur and another v. Steel Authority of India Ltd. and others,** AIR 2000 SC 1596, while considering compassionate appointment under the Steel Authority of India, held that compassionate appointment benefit cannot be negatived on the ground of introduction of scheme assuring regular monthly income to disabled employee or dependants of deceased employee. The apex Court observed thus:

> *"8. The employer being Steel Authority of India, admittedly an authority within the meaning of Article 12, has thus an obligation to act in terms of the avowed objective of social and economic justice as enshrined in the Constitution but has the authority in the facts of the matters under consideration acted like a model and an ideal employer — it is in this factual backdrop, the issue needs an answer as to whether we have been able to obtain the benefit of constitutional philosophy of social and economic justice or not. Have the lofty ideals which the founding fathers placed before us any effect in our daily life — the answer cannot however but be in the negative — what happens to the constitutional philosophy as is available in the Constitution itself which we ourselves have so fondly conferred on to*

> *ourselves. The socialistic pattern of society as envisaged in the Constitution has to be attributed its full meaning. A person dies while taking the wife to a hospital and the cry of the lady for bare subsistence would go unheeded on a certain technicality. The bread earner is no longer available and prayer for compassionate appointment would be denied as ―it is likely to open a Pandora's box" — this is the resultant effect of our entry into the new millennium. Can the law courts be mute spectators in the matter of denial of such a relief to the horrendous sufferings of an employee's family by reason of the death of the bread earner? It is in this context this Court's observations in Dharwad Distt. P.W.D. Literate Daily Wage Employees Assn. v. State of Karnataka(1990) 2 SCC 396: (AIR 1990 SC 883; 1990 Lab IC 625) seem to be rather apposite. This Court upon consideration of Randhir Singh v. Union of India(Daily Rated Casual Labour Employed under P & T Dept. through Bharatiya Dak Tar Mazdoor Manch v. Union of India) (1988) 1 SCC 122: (AIR 1987 SC 2342: 1988 Lab IC 37) as also Surinder Singh v. Engineer-in-Chief, (1986) 1 SCC 639: (AIR 1986 SC 584: 1986 Lab IC 551 and D.S.Nakara v. Union of India (1983) 1 SCC 305: (AIR 1983 SC 130: 1983 Lab IC 1) observed in paragraphs 14 & 15 as below:*
>
> *14. We would like to point out that the philosophy of this Court as evolved in the cases we have referred to above is not that of the court but is ingrained in the Constitution as one of the basic aspects and if there was any doubt on this there is no room for that after the Preamble has been amended and the Forty-second Amendment has declared the Republic to be a socialistic one. The judgments, therefore, do nothing more than highlight one aspect of the constitutional philosophy and make an attempt to give the philosophy a reality of flesh and blood."*

13. Referring to the same, this Court in ***Dhira Kumar Parida v. Mahanadi Coal Fields Ltd***., 2014(II) ILR-CUT-608, directed for consideration of compassionate appointment in terms of Clause-9.3.2 of National Coal Wage Agreement-VI.

Examining the case with regard to rationality behind giving compassionate appointment, the apex Court in ***Haryana State Electricity Board v. Hakim Singh***, (1997) 8 SCC 85, explained the rationale of the rule relating to compassionate appointment in following words:

> *"The rule of appointments to public service is that they should be on merits and through open invitation. It is the normal route through which one can get into a public employment. However, as every rule can have exceptions, there are a few exceptions to the said rule also which have been evolved to meet certain contingencies. As per one such exception relief is provided to the bereaved family of a deceased employee by accommodating one of his dependants in a vacancy. The object is to give succor to the family which has been suddenly plunged into penury due to the untimely death of its sole breadwinner. This Court has observed time and again that the object of providing such ameliorating relief should not be taken as opening an alternative mode of recruitment to public employment.*

Similar view has also been taken in ***Director of Education v. Pushpendra Kumar***, AIR 1998 SC 2230, and ***Commissioner of Public Instructions v. K.R. Vishwanath***, (2005) 7 SCC 206.

In ***State of Haryana v. Ankur Gupta***, (2003) 7 SCC 704:AIR 2003 SC3797, the apex Court held that the compassionate appointments cannot be made de hors any statutory policy.

In ***National Institute of Technology v. Niraj Kumar Singh***, (2007) 2 SCC481:AIR 2007 SC1155, the apex Court held that the grant of compassionate appointment would be illegal in the absence of any scheme providing therefor. Such scheme must be commensurate with the constitutional scheme of equality.

14. Keeping in view the aforesaid law, while considering the case in ***Bibhuti Bhusan Pattnaik v. State of Orissa & Ors***., 2017(II) ILR 896 this Court even remanded the matter back to the authority for reconsideration of the case of the petitioner therein for appointment on compassionate ground.

15. In view of law discussed above, restriction imposed putting a limitation of five years for making an application for compassionate appointment by the legal heir of a medically invalidated retired employee as per Clause-VI(h) of Standing order No.5 of 2001 and prescribing no limitation in case of death of an employee is discriminatory and violates Articles 14 and 21 of Constitution of India. In the instant case, such restriction should be ignored, particularly when the record clearly reveals that as soon as petitioner no.2 attained majority he applied for compassionate appointment. Therefore, both the orders dated 05.01.2010 and 20.01.2010 in Annexures-4 and 6 respectively cannot sustain in the eye of law and are accordingly quashed. The matter is remitted back to the opposite parties to reconsider the case of petitioners for compassionate appointment of petitioner no.2, the legal heir of petitioner no.1, who was struck off from service for being invalidated out on medical ground otherwise the very purpose for grant of compassionate appointment will be defeated.

16, The writ petition is thus allowed. However, there shall be no order as to cost.

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2019 (II) ILR - CUT- 572

D. DASH, J.

CRIMINAL REVISION NO. 184 OF 2000

DHARMANANDA PRADHAN .....Petitioner.

.Vs.

STATE OF ODISHA .....Opp. Party

INDIAN PENAL CODE, 1860 – Section 376 – Offence under – Conviction by trial court upheld by the appellate court – Revision – Materials show the accused continued to commit sexual act with the promise of marrying the victim – Victim was sixteen years old at the time of incident and gave birth to a female child later – Plea of consent has no consequence – Conviction and sentence confirmed.

For Petitioner : Mr. A.K. Swain, M/s. D.Nayak, D.P. Pradhan, P.K. Mohanty, M.Mohanty, R.K. Pradhan.

For Opp.Party : Mr. K.K. Nayak, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment : 14.02.2019

D. DASH, J.

The petitioner by filing this revision has assailed the judgment dated 28.01.2000 passed by the learned Addl. Sessions Judge, Nayagarh in Crl. Appeal No. 245/88 of 1997/96 confirming the judgment of conviction and order of sentence dated 14.11.1996 passed by the learned Asst. Sessions Judge-cum-C.J.M., Nayagarh in S.T. Case No.18/121 of 1996.

The petitioner having been convicted by the trial court for offence under section 376 IPC and sentenced to undergo rigorous imprisonment for a period of seven years with payment of fine of Rs.1,000/- in default to undergo rigorous imprisonment for three months had preferred the appeal which has been dismissed.

2. The prosecution case in brief is that the victim (P.W.3) then aged about 15 years, during one evening in the month of Jyestha in the year 1995 while returning home purchasing tobaco for her father (P.W.1) was restrained by the accused who then lifted her to his 'Dhenkisala', near the house and fulfilled his sexual lust by forcibly having sexual intercourse. It is stated that when the victim attempted to raise hulla on being lifted, the accused closed her mouth by putting his hand by force. It is stated that thereafter, the victim was allured by the accused for her marriage with him and with that promise continued to have sexual relationship with her. It is the further case of the prosecution that both the accused and the informant having continued with such relationship, the victim became pregnant and as advised by the accused, she did not disclose these incidents before anybody. The mother of the victim (P.W.2), one day during the sixth month of pregnancy noticing such some symptoms when questioned the victim; all these happenings came to light being so disclosed by the victim. It is further stated that the victim thereafter when went to the house of the accused to stay

with him as his wife, the accused drove her out. So a village meeting was convened where the accused refuted the allegations. However, the villagers decided that the accused should accept the victim. The accused then fled away by giving threat. Later on, the informant convened another meeting which was attended by both the parties. But that attempt to resolve proved to be an exercise in futility. So ultimately the FIR was lodged at Daspalla Police Station on 11.10.1995 leading to the registration of the case. The Investigating Officer on completion of investigation submitted the charge sheet, placing the accused for trial for commission of offence under section 376 IPC.

3. The accused took the plea denial in the said trial.

4. During trial, the prosecution examined nine witnesses and proved the FIR marked Ext. 5, medical examination report of the victim Ext. 1 and other documents.

The trial court on analysis of evidence, both oral and documentary found the prosecution to have established the charge under section 376 IPC against the accused beyond reasonable doubt and accordingly, the accused being convicted for the said offence was sentenced as aforestated. The appeal filed by the accused did not yield any fruitful result. Hence the revision.

5. Learned counsel for the petitioner (accused) submits that the findings of the courts below that the accused has committed the offence under section 376 IPC is the outcome of perverse appreciation of evidence and as such are untenable. In this connection, he has invited the attention of this Court to the evidence of the victim P.W.3 as also her mother P.W. 2. It is submitted that the courts below have mainly been swayed away by the evidence that the victim was found to be pregnant at the relevant time and for that reason, even in the absence of clear, cogent and acceptable evidence on record to establish that the accused is the author of and solely responsible for such pregnancy, having gone for sexual intercourse repeatedly, has held his complicity therein. He therefore, urges for setting aside the judgment of conviction and sentence rendered by the courts below.

6. Learned counsel for the State submits all in support of the findings recorded by the courts below. According to him, the evidence of P.Ws. 3, 4 and 5 being read simultaneously, the findings returned by the courts below as regards the establishment of the charge under section 376 IPC against the accused clearly stand far more above the criticism that it is outcome of perverse appreciation of evidence. He therefore submits that such well

reasoned findings given by the courts below upon detail discussion of evidence on record are not liable to be set at naught in exercise of the revisional jurisdiction as no such glaring infirmity is noticed in that exercise.

7. Keeping in mind the rival submission, let us now proceed to have a glance at evidence on record.

8. The victim girl has been examined as P.W.3 and her father and mother have been examined as P.Ws.4 and 2 respectively. It has been brought out in the evidence that the victim an illiterate. She has stated her age to be 15 years. The victim and the accused hail from the same village. It has been deposed by the victim that one day when she was returning home with tobacco for her father, it is the accused who lifted her to his 'DHINKISALA' and forcibly committed sexual intercourse. It has been further stated that though she tried to raise hullah, her attempt in that direction did not succeed as the accused closed her mouth by forcibly putting his hand. She has further stated that after that incident, the accused allured that he would marry her and having promised so asked her that this incident be not disclosed to anyone. She has further stated that thereafter the accused went on telling her to be his wife and pretended all along to be her husband. The victim has further deposed that in this way, the accused continued to keep the sexual relationship with her. The dispute arose when she having conceived, in the six months of her pregnancy was asked by her mother about that noticing some symptoms in that light. This version P.W.3 finds support from the evidence of her mother P.W. 2 as well as her father P.W.4. The doctor P.W.5 has found the victim to be having pregnancy of 24 weeks old at the time of examination. The courts below have accepted the evidence of the victim that after the first incident when the accused forcibly committed sexual intercourse with her, she did not disclose the same before others because of the promise given by the accused that he would marry and accept her as his wife. The explanation as to the delayed disclosure has been found to be acceptable. The courts below on analysis of evidence of the victim, her parents and the doctor have gone to hold that the victim then was below 16 years of age. Having so held, the consent even if any, is said to be of no significance. Moreover, it appears from the evidence of the victim that after the first incident, the accused continued to have sexual intercourse with her on the basis of the promise that he would marry and stay as husband and wife which has later on been found to be false. In view of that, the consent of the victim who has given birth to a female child even if so, has to be termed to be a snatched one and founded upon false promise. Above being the

evidence on record, this Court is not in a position to say that the findings arrived at by the trial court as confirmed by the lower appellate court, fastening guilt upon the accused-petitioner for offence under section 376 IPC are the result of perverse appreciation of evidence.

For the aforesaid discussion and reason, no such infirmity of fault is found with the judgments passed by the courts below warranting interference in exercise of revisional jurisdiction of this Court.

9. In the result, the revision stands dismissed.

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2019 (II) ILR - CUT- 576

D. DASH, J.

CRA NO. 64 OF 1993

KARTIKA BAG ……..Appellant

.Vs.

STATE OF ORISSA ……..Respondent

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT 1985 – Section 20(a) (i) – Seizure of two hemp (cannabis) plants from the bari of accused person – Trial court convicted the accused/appellant on the ground that the accused had grown the plant – Appeal – Appreciation of evidence – Prosecution failed to establish the factum of growth of such plants by the accused/appellant – No evidence with regard to area and enclosure of bari to establish the exclusive possession – No evidence with regard to availability of any other plant/bushes & cleaning, watering etc. to infer the knowledge of the accused – On the other hand record reveals that land in question stood jointly recorded and other family members were also residing – Held, considering the evidences, it is insufficient to record a finding beyond reasonable doubt that the accused had grown those plants – In that view of the matter, the judgment of conviction cannot be sustained & accordingly set aside.

For the Appellant : M/s.N.C.Pati, B.Rath & A.K.Mishra
For the Respondent : Mr. P.C.Das, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment : 30.07.2019

D. DASH, J.

The appellant, by filing this appeal, has assailed the judgment of conviction and order of sentence dated 12.02.1993 passed by the learned Sessions Judge, Balangir in Sessions Case No.94 of 1992.

The petitioner facing the trial being charged for offence under section 20(a)(i) of the Narcotic Drugs and Psychotropic Substance Act (for short, 'N.D.P.S. Act') has been convicted thereudner and accordingly, has been sentenced to undergo rigorous imprisonment for one year.

2. Prosecution case in brief is that on 30.08.1992 around 10 A.M. during the day time, the Assistant Sub-Inspector and Sub-Inspector, Excise Balangir (P.W.2 and 3) had gone to the house of the accused. They detected two hemp plants to have been grown in the backyard of the accused and seized those.

The case of the accused is that of complete denial.

3. The trial court having examined the evidence of three prosecution witnesses as well as those two examined on behalf of the defence and on scrutiny of the documents proved from both the side has arrived at a conclusion that the accused had grown those two hemp plants seized from his bari. Having said so, the accused has been convicted for the offence under section 20(a)(i) of the N.D.P.S. Act and has been sentenced as aforesaid.

4. Heard learned counsel for the appellant (accused) and learned counsel for the State.

I have perused the judgment of the trial court as also the depositions of all the witnesses and side-by-side have gone through at the documents exhibited in the trial.

5. In the present case, the only question arises for answering as to whether on the basis of evidence on record, the finding of the trial court that the accused had grown those cannabis (hemp) plants in his bari is sustainable or not. For the purpose, let us straight have a look at the evidence of the P.W.2 and 3. It is the evidence of P.W.2 that on his arrival, he noticed that two ganja plants had grown on the backside of the house of the accused. It is also stated by P.W.3 that he noticed two ganja plants growing in the bari of the accused. Except this, they have not gone to further state anything so as to establish any connection between such growing of hemp plants and the accused. No evidence is forthcoming as to the size of the bari or its area. It has not been stated by these two witnesses as to whether the bari or backyard, as we may say, was under any enclosure or not, to show that said area was under the absolute control of the person/persons in occupation of the house. None of the witness has stated that this accused was frequently visiting that backyard and if except these two plants, other bushes or plants were not there so as to infer that the growth of those two plants was within the

knowledge of that accused. It has not been stated by any of the witness that the petitioner used to take care of those plants along with other plants in any manner such as cleaning that area, watering those plants etc. There surfaces nothing in evidence as to any other conduct of the accused that he was at that time attempting to hide the existence of those two plants. On the other hand, the record reveals that the land in question stood jointly recorded and it is there in the evidence that other members of the family were also residing in that house from whose backyard these two plants seized.

Defence has examined the witness to show that other members were also residing there and the house was having a common courtyard and bari in joint possession. The view taken by the trial court that even though the bari was accessible to all, it is highly improbable to say that someone else has planted those two plants; in the absence of any evidence establishing the nexus of the accused with these plants, in my considered view, is not acceptable.

5. The above evidence on record, in my considered view, are insufficient to record a finding beyond reasonable doubt that the accused had grown those two hemp (cannabis) plants seized in this case. In that view of the matter, the judgment of conviction cannot be sustained and so also the order of sentence.

6. In the result, the appeal stands allowed. The judgment of conviction and the order of sentence Dt.12.02.1993 passed by the learned Session Judge, Balangir in Sessions Case No.94 of 1992 are set aside. The bail bonds executed by the appellant shall stand discharged. The LCR be sent back immediately.

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2019 (II) ILR - CUT- 578

S. PUJAHARI, J.

CRLA NO. 349 OF 2007

SONIA PUJARI & ANR. .....Appellants

.Vs.

STATE OF ORISSA ……Respondent

(A) CRIMINAL TRIAL – Offences under sections 20(b) (ii) (B)/29(1) of the N.D.P.S Act – Seizure of "Ganja" from the house of Appellant – Prosecution failed to prove that the house was in exclusive possession

and in the name of the appellant – Neither any inmates of the house was examined nor father of the appellant was examined though he was alive – House constructed over Govt. land – Held, in the above premises, it cannot be safely held that the house in question was in exclusive possession of the appellant at the relevant time or that the alleged recovery was made from his exclusive possession. (Para 9)

(B) CRIMINAL TRIAL – Offences under sections 20(b)(ii)(B)/29(1) of the N.D.P.S Act – Not only the prosecution has failed to prove the station diary entry but also the same has not been intimated to the higher authority – Plea of non compliance of the mandatory provisions of section 42 of the Act raised – Held, it cannot be said that the prosecution has been able to prove due compliance of the mandatory provisions of the N.D.P.S Act or to have proved the charge beyond reasonable doubt against the appellants – The impugned judgement of conviction and order of sentence are held to be not sustainable in law. (Para 11)

For Appellants : M/s. Deepak Kumar Mohapatra, K. Pradhan.
For Respondent : Addl. Standing Counsel

JUDGMENT Date of Judgment: 03.07.2019

S.PUJAHARI, J.

The judgment and order dated 30.06.2007 passed by the learned Addl. Sessions Judge-cum-Special Judge, Malkangiri in Criminal Trial No.79 of 2005 convicting the appellants under Sections 20(b)(ii)(B)/29(1) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the N.D.P.S. Act") and sentencing them to the minimum punishment as provided for those offences, is under challenge in this appeal at the instance of the appellants.

2. Prosecution case, in brief, is that on 21.05.2005 at about 12.30 p.m., Salkhu Murmu, the then S.I. of Police of Orkel Police Station, on receiving reliable information regarding the present appellants and two others being in possession of 'Ganja' inside the house of the appellant – Sonia Pujari for the purpose of transportation of the same, proceeded to the spot being accompanied by other police personnel, and on the way, he procured two independent witnesses. Before proceeding to the spot, S.I. Sri Salkhu Murmu, in absence of the O.I.C. of the Police Station, entered the fact in the Station Diary and intimated the substance of the said entry as well as his intention to proceed to the spot for the purpose of detection of the case, to his superior authorities. On arriving at the spot, he noticed that two persons, namely, Mohadev Pujari and Dinabandhu Pangi managed to flee away on seeing the

police party, and then he gheraoed the house of the appellant – Sonia Pujari from outside, gave his identity to both the appellants, who were present there, explained them about the information received by him regarding the offences, and on observing other legal formalities, he conducted a search of the house of the appellant – Sonia Pujari and recovered from inside the house 7 no. of gunny bags containing 'Ganja', which on weighment came to be 64 kgs. in toto, collected two parts of sample, each weighing 25 grams from each of the bags, packed the sample packets as well as the gunny bags containing the bulk substance, sealed those bags and sample packets by using his personal seal and prepared seizure list in respect of them, left his seal in zima of one independent witness, namely, Sunadhar Khilla, arrested both the appellants at the spot, drew up the plain paper F.I.R. and sent the same to the Police Station for registration of a case and took up investigation at the spot. It further appears that the F.I.R. was registered at Orkel Police Statioin on the same day at 6.45 p.m. by the O.I.C. of the Police Station and further investigation of the case was entrusted to Sri R.K. Dehury (P.W.9), the then S.I. of Police posted at the same Police Station. In course of further investigation, the P.W.9 examined Sri Murmu and other witnesses, forwarded the appellants to Court on 22.05.2005, sent the samples under the order of the Court to R.F.S.L., Berhampur on 25.05.2005 for the purpose of chemical examination, effected seizure of the relevant documents, obtained the report of opinion from the R.F.S.L., Berhampur to the effect that the samples contained 'Ganja', got the spot house demarcated by a Revenue Inspector and on completion of investigation, he submitted charge-sheet under Section 20(b)(ii)(B)/29(1) of the N.D.P.S. Act against the present appellants as well as the other two accused persons, namely, Sukumar Biswas and Gunadhar Kabiraj showing them as absconders.

3. The learned trial Court framed charge against both the appellants under Sections 20(b)(ii)(B)/29(1) of the N.D.P.S. Act and since the appellants pleaded not guilty, trial was held, in course of which, the prosecution examined total ten witnesses and produced documentary evidence vide Exts.1 to 8. The sample packets were also produced before the Court during the trial vide M.Os.I to VII. The appellants adduced no evidence in their defence.

4. The learned trial Court on evaluating the evidence on record held the charge to have been substantiated against the appellants and sentenced each of them to undergo R.I. for ten years and pay fine of Rs.1 lakh, in default, to undergo R.I. for further period of two years for each of the offences, with a further direction that both the substantive sentences shall run consecutively. Hence, the Appeal.

5. I have heard the learned counsel appearing for the appellants as well as the Addl. Standing counsel appearing for the State, and perused the impugned judgment as well as the other materials on record keeping in view the rival contentions advanced before this Court.

6. The learned counsel for the appellants contended, inter-alia, that there is no legal evidence on record much less sufficient to bring home the charge against the appellants and that the learned trial Court rendered the conviction without application of judicial mind to the facts and evidence on record. It is further contended by him that the mandatory provisions under Sections 42 and 50 of the Act have not been complied with, and there is also no material on record to show valid compliance of Sections 52 and 55 of the N.D.P.S. Act. His further submission is that although the learned Addl. Sessions Judge-cum-Special Judge, Malkangiri while recording the evidence of the Investigating Officer noted inherent lacuna in the investigation and suspected the bonafides of the Investigating Officer, but while appreciating the evidence, he lost sight of those features. According to him, the prosecution in this case is a total failure, for which the impugned judgment is legally not sustainable.

7. Par contre, the learned Addl. Standing counsel appearing for the State submitted that mere defect or deficiency in investigation cannot be a ground to throw out the prosecution case when there is ample evidence on record to establish the charge.

8. The evidence of the Police officer, who conducted the alleged search and seizure, could not be procured during the trial due to his death. Out of ten witnesses examined by the prosecution, the independent witnesses, namely, P.Ws.1, 2 and 4 did not support the prosecution case during the trial. The prosecution sought to prove its case through evidence of rest of the witnesses examined who were police personnel. At the outset, it be mentioned here that when the offence is rated to be grave, entailed with heavy punishment, the burden of the prosecution becomes heavy to produce evidence beyond any reproach so as to rule out any iota of doubt regarding complicity of the accused persons. In such premises, the duty of the Court also becomes onerous to give a stricter scrutiny to the evidence on record to find out whether the charge is proved to the hilt leaving no room for any reasonable doubt. In the present case, having carefully gone through the materials of lower Court record, I am constrained to note that although the learned Addl. Sessions Judge-cum-Special Judge while recording the evidence of the prosecution witnesses made some adverse remarks regarding demeanor of

some of the police witnesses including the Investigating Officer (P.W.9) and did not hesitate to reflect his opinion in the deposition of the P.W.9 itself that the investigation lacked bonafides, but what it further appears, he did not exercise the required care and caution while evaluating the evidence on record leading to a verdict of conviction and sentence against the appellants. In the impugned judgment, he has made a reference to some case laws of the Apex Court to inform himself of the settled principle of appreciation of evidence that the Court has to be circumspect in evaluating the evidence in the case of defective investigation and not to allow the contaminated conduct of officials to stand on the way of the evaluating the evidence on record. But, he is not found to have applied the said principle in right perspective. It is the rudimentary principle of appreciation of evidence in criminal trial that the prosecution owes a duty to establish its case beyond reasonable doubt, and it is also the duty of the Court to find out upon scrutiny as to whether or not the evidence adduced by the prosecution in a given case is cogent, reliable and sufficient to establish the charge beyond reasonable doubt. Dehors the defect or laxity in the investigation if the charge is proved by other evidence on record, the defect or laxity in the investigation shall not be allowed to come on the way of convicting the accused. To put it in other words, laxity or defect in investigation cannot be the sole ground to throw out a prosecution by ignoring the other evidence on record.

9. Reverting to the case at hand, the prosecution allegation is that the recovery of contraband 'Ganja' was made from the residential house of the appellant – Sonia Pujari. But, there is no reliable or sufficient evidence on record to prove that the house in question was in exclusive possession of the said appellant. Admittedly, his father was alive, and though the prosecution sought to show that he was staying in a separate house, the investigation has not been directed to establish that as to where exactly the father of Sonia Pujari was residing at the relevant time and whether he had no concern with the spot house or the family of Sonia Pujari. It is also the prosecution case that the appellant – Sonia Pujari was staying at the spot house along with his wife and children, but the details of the inmates of the said house have not been brought on record through evidence. According to the prosecution, the spot house was standing over a piece of Government land being encroached upon by the appellant – Sonia Pujari. P.W.5 is the Revenue Inspector, who deposed to have visited the spot for the purpose of identification pursuant to police requisition. He was not accompanied by any police personnel while making the spot visit nor any other person has been cited as witness to that spot visit. The requisition said to have been issued to him has also not been

produced by the prosecution. Although the P.W.5 stated that there was encroachment case against appellant – Sonia Pujari, he could not say the number of the said encroachment case. In cross-examination he gave out that the spot was bounded by Government land on East, North and South and a canal on the West, and that there was a house over some encroached land towards the North at a distance. To put it in other words, as per his version, there was no house adjacent to or near by the spot house. But, P.W.7, a police personnel who has been cited as a witness to the search and recovery, has stated in paragraph-4 of his cross-examination that there were houses in both the sides of the spot house. None of the prosecution witnesses including the Investigating Officer has claimed any personal or direct knowledge regarding possession of the appellant – Sonia Pujari over the spot house much less by way of encroachment of Government land or otherwise. In the above premises, it cannot be safely held that the house in question was in exclusive possession of the appellant – Sonia Pujari at the relevant time or that the alleged recovery was made from his exclusive possession. In so far as the other appellant – Nikhil Mallick is concerned, there is absolutely nothing from the side of the prosecution to suggest his any connection with the spot house or relationship with the appellant – Sonia Pujari.

10. The other glaring lacuna in the prosecution case is that there is no clear evidence on record regarding sampling and sealing of the seized substance and its safe custody. It reveals from the evidence of the P.W.9 that no seal of himself or the O.I.C. was used in the sample packets, inasmuch as at the relevant time, there was only one seal which belonged to the deceased – Salkhu Murmu. In paragraph-15 of his evidence, during cross-examination the P.W.9 stated that four days after the detection he sent the seized items to the Court on 25.05.2005 and till then, those items had been kept in the Malkhana of the Police Station under the control of the then O.I.C., Sri Himanshu Lal, IPS under training. But, neither the O.I.C. was examined nor the Malkhana register or any other document maintained in the Police Station was produced during the trial to vouchsafe the custody of the seized items. Apparently, the gunny bags containing bulk substance were not produced as material objects during the trial. There are also discrepancies in the evidence of the police witnesses regarding collection of sample or custody of the contraband articles. According to P.W.3, only one sample weighing 25 grams was collected. According to P.W.6, vide paragraph-7 of his evidence, two sample packets weighing 25 grams each were collected. There also arises grave doubt regarding the factum of seizure, when the versions of the P.Ws.8 and 10 are taken note of in this context. P.W.8 has no idea as to whether the

house in question belonged to the appellant – Sonia Pujari or his father. In paragraph-9 of his evidence, during cross-examination he stated that the seized 'Ganja' was left in the zima of Home Guard – Subrat Haldar. He further stated that the 'Ganja' was kept inside the house being left in the zima of one person at the spot and the house was locked with key being retained by the raiding party. P.W.10, the driver of the police jeep, who had carried the raiding party to the spot, has stated in his evidence that he did not witness any seizure and that he brought back the police staff to the Police Station and no item (seized items) was brought in his vehicle. He also added that he did not bring the accused persons from the spot in the vehicle and no independent witness also returned in his vehicle. It may be mentioned here, the prosecution has not attributed any hostility to the aforesaid witnesses during the trial.

11. As per the F.I.R. drawn by the deceased - Salkhu Murmu on receiving reliable information regarding the alleged possession or preparation for transportation of the contraband 'Ganja', he proceeded to the spot after making Station Diary entry and giving intimation to the higher authorities in purported compliance of Section 42 of the N.D.P.S. Act. But, during the trial, the prosecution does not appear to have proved the relevant Station Diary entry or intimation said to have been sent by the deceased police officer to his higher authorities. As already noted, the then O.I.C. of the Orkel Police Station was not examined during the trial. Hence, the prosecution cannot claim to have proved due compliance of Section 42 of the N.D.P.S. Act. For the discussion of evidence made hereinbefore, it cannot be said that the prosecution has been able to prove due compliance of the mandatory provisions of the N.D.P.S. Act or to have proved the charge beyond reasonable doubt against the appellants. The impugned judgment of conviction and order of sentence are held to be not sustainable in law.

12. Resultantly, this Criminal appeal is allowed and the impugned judgment of conviction and order of sentence passed against the appellants are set-aside. Consequently, the appellants are acquitted of the charge and they be set at liberty forthwith, if in custody, unless their detention is required otherwise. L.C.R. received be sent back forthwith along with a copy of the Judgment.

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2019 (II) ILR - CUT- 585

S. PUJAHARI, J.

CRLA NO. 46 OF 2010
AND
CRLA NO. 131 OF 2010

CRLA NO.46 OF 2010
PASKUL BEHERA & ANR. .....Appellants

.Vs.

STATE OF ORISSA …….Respondent

For Appellant No.1 : M/s. Bramhananda Tripathy, P.K. Nigam & K. Gaya.
For Appellant No.2 : M/s. Amit Prasad Bose, S.K. Nayak, D.J. Sahoo, S.S. Dash & S.K. Hota.
For Respondent : Addl. Govt. Adv.

CRLA NO.131 OF 2010
AMIT SENAPATI .....Appellant

.Vs.

STATE OF ORISSA ……..Respondent

For Appellant : M/s. Amit Prasad Bose, S.K. Nayak, D.J. Sahoo, S.S. Dash & S.K. Hota.
For Respondent : Addl. Govt. Adv.

CRIMINAL TRIAL – Offence under section 20(b) (II) (C) of the N.D.P.S Act 1985 – Conviction – Prosecution case based upon the official witnesses – No major discrepancy or contradiction are found in the cross-examination of such witnesses – Independent witnesses did not support the prosecution case – Admissibility and evidentiary value of the official witnesses and sustainability of the conviction on such evidence of official witnesses – Held, although two independent witnesses examined by the prosecution have not supported the prosecution case, that per se cannot be a ground to distrust the official witnesses whose evidence stands judicial scrutiny – Apathetic attitude of independent witnesses towards the process of investigation or prosecution is not uncommon, and in that backdrop, a well made out prosecution cannot be allowed to suffer for want of independent support – That apart, the evidence of official witnesses like that of any other witnesses is entitled to the same treatment and weightage, and independent corroboration is not sine-qua-none for placing reliance on the testimony of the official or departmental witnesses. (Para 12)

JUDGMENT Date of Judgment: 19.07.2019

S. PUJAHARI, J.

The judgment dated 18.01.2010 passed by the learned Addl. Sessions Judge-cum-Special Judge, Rayagada in C.T. No.75 of 2008 convicting the

present appellants in both the appeals under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the N.D.P.S. Act") and sentencing each of them to undergo R.I. for a period of ten years and pay a fine of Rs.1 lakh, in default, to undergo R.I. for a further period of two years, is under challenge in both these appeals. For the sake of convenience, both the appeals are being disposed of by this common judgment.

2. Prosecution case, in substance, is as follows :-

On 11.10.2008 at 4 a.m., Sri Laxman Dandasena (P.W.6), S.I. of Police, and other police personnel of Gunupur Police Station during course of night patrolling at Sanyasipur area, detected the appellants being engaged in transportation of 'Ganja' in a Tata Indica car bearing registration No.CG-07-2414. The P.W.6, on requisition, procured presence of an Executive Magistrate (P.W.5) at the spot and in presence of the P.W.5 and other witnesses, he conducted personal search of the appellants and recovered cash of Rs.13,096/-, one Nokia Mobile set, one telephone diary etc., and during search of the aforesaid vehicle, the P.W.6 recovered nine gunny bags containing 'Ganja' which on weighment was found to be 149 kgs. and 410 grams in toto. The P.W.6 then collected samples from the bags and after effecting seizure of the recovered 'Ganja' as well as involved vehicle, produced the same and the appellants before the I.I.C., Gunupur Police Station (P.W.7). The P.W.6 also lodged a written report of the incident, which was treated as F.I.R. and investigation was taken up by the P.W.7. The P.W.7 kept the seized 'Ganja' and sample packets in safe custody in the P.S. Malkhana and subsequently, he produced the same along with the appellants before the Court, and sent the sample to Regional Forensic Science Laboratory, Berhampur, under order of the Court, for chemical examination. The P.W.7 also sent a detailed report of the incident to his higher authority, i.e., the Superintendent of Police, Rayagada. The P.W.7 recorded statements of the P.W.6 and other witnesses, visited the spot, collected chemical examination report, took other steps in connection with investigation and upon his transfer, he made over charge of the investigation to Sri A.C. Barik (P.W.9), the then Inspector, Gunupur Police Station. The P.W.9 submitted the charge-sheet against the appellants suggesting their trial under Section 20(b)(ii)(C) of the N.D.P.S. Act.

3. Since the appellants pleaded not guilty to the charge, trial was held, in course of which the prosecution examined nine witnesses in toto and produced documentary evidence vide Exts.1 to 24. The samples of the seized

substance were also produced during the trial vide M.Os.I to XI. The appellants adduced no evidence in defence.

4. The learned trial Court on evaluating the evidence on record held the prosecution to have proved the charge against the appellants beyond reasonable doubt, and accordingly, the appellants were convicted and sentenced as aforesaid. Hence, the Appeal.

5. The conviction of the appellants is challenged on the grounds, inter-alia, that the alleged recovery having been made from a vehicle, the same cannot be attributed to the physical and conscious possession of the appellants, especially when the investigation has not been directed as to the ownership of the involved vehicle, there is no independent corroboration to the evidence of P.W.6 and other official witnesses, there is no sufficient evidence to show compliance of the mandatory requirements of Section 55 of the N.D.P.S. Act, there are discrepancies and errors in the documents, such as, noting of dates, Station Diary entry, G.R. Case no. etc. which are suggestive of the documents being fabricated for the purpose of the case. It is contended by the learned counsel for the appellants that in the face of the discrepancies and contradictions in the testimonies of the official witnesses, and there being no independent corroboration, the learned trial Court ought not to have placed reliance on those official witnesses who were highly interested for the success of prosecution. According to him, the learned trial Court failed to appreciate the evidence in right perspective, for which the impugned judgment is liable to be set-aside.

6. It is, however, the submission of the learned Addl. Standing counsel appearing for the State that the evidence of the official witnesses being cogent, credible and sufficient, and the findings recorded by the learned Court below being based upon proper scrutiny of the entire materials on record, and discrepancies as pointed out by the appellants having already been dealt with and rightly ignored by the learned trial Court, there remains no scope for this Court to interfere with the impugned judgment.

7. I have gone through the impugned judgment as well as the evidence adduced by the prosecution during the trial. P.W.6, who spearheaded the patrolling and the exercise at the spot, has deposed in detail regarding the detection, seizure and the follow up taken at the spot. As stated by him, the appellant – Alok Chakrabarty was driving the involved vehicle and the other two appellants were sitting in the front seat, and nine gunny bags with contents emitting ‘Ganja’ smell were found loaded in the rear seat of the

vehicle. He has further deposed that on his requisition, the B.D.O.-cum-Executive Magistrate, Gunupur (P.W.5) arrived at the spot and in presence of the P.W.5 and other witnesses personal search of the appellants was conducted, followed by a search of the involved vehicle. The written offer given to the appellants inviting their option under Section 50 of the N.D.P.S. Act have been proved vide Exts.6/1, 7/1 and 8/1 and their endorsement with signatures regarding exercise option find place at Exts.6/3, 7/3 and 8/3. The P.W.6 has further deposed to have recovered nine packets containing 'Ganja' from inside the vehicle, got the contents weighed at the spot to find the same to be 149 Kgs. and 410 grams and to have collected samples in two parts from the individual packets. He has also proved formal seizure of the contraband substance vide the seizure list marked as Ext.2/1 and the seizure of cash, mobile phone etc. recovered during the personal search of the appellants vide a separate seizure list marked as Ext.1/1. The F.I.R. containing the details of the exercise undertaken by him at the spot has been proved as Ext.9 which affords a piece of documentary corroboration to his oral evidence. During cross-examination, the defence elicited from him that though the seizure list vide Ext.2/1 had been prepared by him at the spot before registration of the F.I.R., the F.I.R. number was found noted in Ext.2/1. The P.W.6 in this regard gave clarification that when from the spot he intimated the incident to the I.I.C. of the Police Station over telephone, the latter told him the F.I.R. number.

P.W.6 has also deposed that his personal brass seal which had been used by him in sealing the contraband articles and samples, was left in the custody of the P.W.1, independent witness. As it appears, although during the trial the P.W.1 disowned his knowledge about the factum of seizure of the contraband articles and was declared hostile by the learned prosecution counsel, he admitted to have taken in his custody the personal brass seal under a zimmanama executed by him.

8. P.W.5, the Executive Magistrate, has deposed, inter-alia, that as per the order of the S.D.M., Gunupur, he reached the spot and that in presence of himself and two local witnesses, the S.I. of Police (P.W.6) took personal search of the appellants and recovered one mobile phone, cash etc. From the possession of the appellant – Paskul Behera and prepared seizure list in that respect. He further claimed to have witnessed recovery of nine bags of 'Ganja' from the Indica car, weighment of the contents thereof, collection of samples therefrom etc. by the P.W.6. As a witness to the factum of seizure, he has also signed both the seizure lists.

9. P.Ws.3 and 4, who were two police witnesses, have also claimed their direct knowledge about the detection, recovery and seizure at the spot and nothing substantial appears to have been elicited by the defence during their cross-examination much less to suspect their credibility.

10. P.W.7, the I.I.C., Gunupur Police Station, has deposed about the steps taken by him in course of the investigation. His evidence is that the P.W.6 presented a written report vide Ext.9 and produced the accused-appellants, seized 'Ganja', seized involved vehicle, seized sample packets etc. He further deposed that treating the Ext.9 as F.I.R. he registered P.S. Case No.105 of 2008, took charge of the seized properties, re-sealed nine packets of 'Ganja' by affixing the impression of his personal seal, kept those articles in the Malkhana of the Police Station, retained the key of the Malkhana with himself and made entries in the Malkhana register. He has further stated that he forwarded the accused persons along with the seized 'Ganja' and sample packets to the Court, and on his prayer, the samples were sent by the Court to the Regional Forensic Science Laboratory, Berhampur for chemical examination. Ext.15 is the chemical examination report. The detailed report submitted by the P.W.7 to his superior authority, i.e., Superintendent of Police, Rayagada has been proved vide Ext.20. The defence during cross-examination elicited from him that he did not re-seal each sample packet by using his personal seal. To this, P.W.7 explained that on keeping all the individual sample packets in one big packet, he re-sealed the same by affixing impression of his personal brass seal. The defence confronted to him some discrepancies regarding the mention of dates, noting of the number of the S.D. entry etc. in some papers or documents, but those from their very nature do not appear to be of any consequence.

11. P.W.8, the S.I. of Police of Gunupur Police Station, has deposed that on the relevant date he was in-charge of the Malkhana register maintained at the Police Station. The said register has been seized by the P.W.7 from his possession under a seizure list marked as Ext.12. The relevant entry in the Malkhana register has also been proved as Ext.24 through the P.W.8.

12. All the official witnesses referred to above, have been subjected to cross-examination by the defence, but what it appears, no major discrepancy or contradiction has been elicited from them by the defence so as to shake their credibility or suggest their any bias or prejudice against the accused-appellants, much less to affect the probative value of the prosecution case. The P.Ws.3, 4, 5 and 6 are corroborative of one another, and the prosecution has also proved through the P.Ws.6 and 7, compliance of the mandatory

provisions of the Act. Although two independent witnesses examined by the prosecution have not supported the prosecution case, that *per se* cannot be a ground to distrust the official witnesses whose evidence stands judicial scrutiny. Apathetic attitude of independent witnesses towards the process of investigation or prosecution is not uncommon, and in that backdrop, a well made out prosecution cannot be allowed to suffer for want of independent support. That apart, the evidence of official witnesses like that of any other witnesses is entitled to the same treatment and weightage, and independent corroboration is not sine-qua-none for placing reliance on the testimony of the official or departmental witnesses. The learned trial Court appears to have made detail analysis and scrutiny of the materials on record and has rightly rendered the findings of guilt against the appellants. The discrepancies and omissions as pointed out by the learned counsel for the appellants, have been dealt with by the learned trial Court, and the same has been rightly ignored as being of no consequence. This Court finds no reason to interfere with the impugned judgment.

13. In the result, both the criminal appeals are found to be devoid of merit and, as such, stand dismissed. The impugned judgment of conviction and order of sentence are hereby confirmed. L.C.R. received be sent back forthwith along with a copy of this Judgment.

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2019 (II) ILR - CUT- 590

BISWANATH RATH, J.

ARBA NO. 38 OF 2018

PARADEEP PORT TRUST, REPRESENTED BY ITS CHAIRMAN ……..Appellant

.Vs.

UDAYANATH ROUT ……...Respondent

ARBITRATION AND CONCILIATION ACT, 1996 – Section 37 – Appeal – Challenge is made to the order passed under section 34 of the Act by the District Judge with regard to grant of pre and pendent lite interest – Grant of interest – Scope of – Held, considering the question of entitlement of interest pre and pendent lite and going through the above decision, this Court finds the legal position involving above issue is already settled to the extent that the Arbitrator had the jurisdiction and authority to award interest for three different

periods, namely, the pre reference period i.e. the period between the date of cause of action to the date of reference, pendent lite i.e. the period between date of reference to the date of award and future period i.e. period between the date of award to the date of payment provided there is no express bar in the contract regarding grant of interest – However, where there is bar on the entitlement of pre and pendent lite interest, the Arbitrator as well as the District Judge erred in granting interest pre and pendent lite. (Paras 6 & 8)

Case Laws Relied on and Referred to :-

1. (2010) 8 SCC 767 : Sree Kamatchi Amman Constructions .Vs. Divisional Railway Manager (Works), Palghat & Ors.

For Appellant : M/s. Gautam Mishra, A.Dash, J.R.Deo & A.Khandal.
For Respondent : M/s.V.Narasingh, S.Das, S.Devi & S.Swain.

JUDGMENT Date of Hearing & Judgment 12.4.2019.

BISWANATH RATH,J.

In this arbitration appeal the order passed by the District Judge involving a proceeding under Section 34 of the arbitration and Conciliation Act, 1996 is assailed. Though there are several grounds assailed the impugned order but during argument on admission and hearing of the appeal, Sri Gautam Mishra, learned counsel appearing for the appellant restricted his submission to the extent of grant of pre and pendent lite interest involving the award under Section 34 proceeding.

2. Sri Mishra, learned counsel to substantiate his submission referred to the decisions of the apex Court in the Case of ***Sree Kamatchi Amman Constructions v. Divisional Railway Manager (Works) , Palghat and others***, *(2010) 8 SCC 767* and in the case of ***Jiprakash Associates Ltd. (Jal) Through its Director v. Tehri Hydro Development Corporation India Ltd. (THDC) Through its Director***, *2019 SCC Online SC 143* involving Civil Appeal No(s). 1539 of 2019 decided on 7.2.2019. Sri Mishra, learned counsel thus claiming the support through above decisions claimed interference in the impugned order.

3. Sri V.Narasingh, Learned counsel appearing for the for the respondent however has no dispute to the settled position of law through the judgments involved herein**.**

4. Considering the ***submission*** of learned counsel appearing for the respective parties and going through the judgment referred to hereinabove, this Court from the decision in the case of *Sree Kamatchi Amman*

Constructions (supra) finds clearly such issue vide paragraphs 13 to 19 observed as follows:

> "13. The Legislature while enacting the Arbitration and Conciliation Act, 1996, incorporated a specific provision in regard to award of interest by Arbitrators. Sub-section (7) of Section 31 of the Act deals with the Arbitrator's power to award interest. Clause (a) relates to the period between the date on which the cause of action arose and the date on which the award is made. Clause (b) relates to the period from the date of award to date of payment. The said Sub-section (7) is extracted below:
>
> "31.7(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.
>
> (b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment."
>
> Having regard to sub-section (7) of Section 31 of the Act, the difference between pre-reference period and pendente lite period has disappeared in so far as award of interest by arbitrator. The said section recognises only two periods and makes the following provisions:
>
> (a) In regard to the period between the date on which the cause of action arose and the date on which the award is made (pre-reference period plus pendente lite), the arbitral tribunal may award interest at such rate as it deems reasonable, for the whole or any part of the period, unless otherwise agreed by the parties.
>
> (b) For the period from the date of award to the date of payment the interest shall be 18% per annum if no specific order is made in regard to interest. The arbitrator may however award interest at a different rate for the period between the date of award and date of payment.
>
> 14. The decisions of this Court with reference to the awards under the old Arbitration Act making a distinction between the pre-reference period and pendente lite period and the observation therein that arbitrator has the discretion to award interest during pendente lite period in spite of any bar against interest contained in the contract between the parties are not applicable to arbitrations governed by the Arbitration and Conciliation Act 1996."
>
> 14. We may also refer to the decision of this court in Union of India v. Saraswat Trading Agency [2009 (16) SCC 504] this court reiterated that if there is a bar against payment of interest in the contract, the arbitrator cannot award any interest for the pre-reference period or pendente lite. In view of the specific bar under Clause 16(2), we are of the view that the arbitral tribunal was justified in refusing interest from the date of cause of action to date of award.
>
> 15. We may at this juncture refer to the contention of the appellant that even if the appellant was not entitled to interest for the pre-reference period, that is date of cause of action to date of reference, the appellant will be entitled to interest pendente lite, that is for the period from the date of reference to date of award, having regard to the decisions of this court in Board of Trustees for the Port of Calcutta v. Engineers-De-Space-Age and Madnani Construction Corporation Pvt. Ltd. v. Union of India.
>
> 16. In Engineers-De-Space-Age (supra) this court held: (SCC p.520, para 4)
>
> "4. We are not dealing with a case in regard to award of interest for the period prior to the reference. We are dealing with a case in regard to award of interest by the arbitrator post

reference. The short question, therefore, is whether in view of Sub-Clause (g) of Clause 13 of the contract extracted earlier the arbitrator was prohibited from granting interest under the contract. Now the term in Sub-Clause (g) merely prohibits the Commissioner from entertaining any claim for interest and does not prohibit the arbitrator from awarding interest. The opening words `no claim for interest will be entertained by the Commissioner" clearly establishes that the intention was to prohibit the Commissioner from granting interest on account of delayed payment to the contractor. Clause has to be strictly construed for the simple reason that as pointed out by the Constitution Bench, ordinarily, a person who has a legitimate claim is entitled to payment within a reasonable time and if the payment has been delayed beyond reasonable time he can legitimately claim to be compensated for that delay whatever nomenclature one may give to his claim in that behalf. If that be so, we would be justified in placing a strict construction on the term of the contract on which reliance has been placed. Strictly construed the terms of the contract merely prohibits the Commissioner from paying interest to the contractor for delayed payment but once the matter goes to arbitration the discretion of the arbitrator is not, in any manner, stifled by this term of the contract and the arbitrator would be entitled to consider the question of grant of interest pendente lite and award interest if he finds the claim to be justified. We are, therefore, of the opinion that under the Clause of the contract the arbitrator was in no manner prohibited from awarding interest pendente lite.

17. In Madnani (supra) the arbitrator had awarded interest pendente lite, that is from the date of appointment of arbitrator to date of award. The High Court had interfered with the same on the ground that there was a specific prohibition in the contract regarding awarding of interest. This court following the decision in Engineers-De-Space-Age reversed the said rejection and held as follows :

"39. In the instant case also the relevant Clauses, which have been quoted above, namely, Clause 16(2) of GCC and Clause 30 of SCC do not contain any prohibition on the arbitrator to grant interest. Therefore, the High Court was not right in interfering with the arbitrator's award on the matter of interest on the basis of the aforesaid Clauses. We, therefore, on a strict construction of those Clauses and relying on the ratio in Engineers find that the said Clauses do not impose any bar on the arbitrator in granting interest."

18. At the outset it should be noticed that Engineers-De-Space-Age and Madnani arose under the old Arbitration Act, 1940 which did not contain a provision similar to section 31(7) of the new Act. This court, in Sayeed Ahmed held that the decisions rendered under the old Act may not be of assistance to decide the validity of grant of interest under the new Act. The logic in Engineers-De-Space-Age was that while the contract governed the interest from the date of cause of action to date of reference, the arbitrator had the discretion to decide the rate of interest from the date of reference to date of award and he was not bound by any prohibition regarding interest contained in the contract, insofar as pendente lite period is concerned. This Court in Sayeed Ahmed (supra) held that the decision in Engineers-De-Space-Age would not apply to cases arising under the new Act. We extract below, the relevant portion from Sayeed Ahmed:

"23. The observation in Engineers-De-Space-Age (supra) that the term of the contract merely prohibits the department/employer from paying interest to the contractor for delayed payment but once the matter goes to arbitrator, the discretion of the arbitrator is not in any manner stifled by the terms of the contract and the arbitrator will be entitled to consider and grant the interest pendente lite, cannot be used to support an outlandish argument that bar on the Government or department paying interest is not a bar on the arbitrator awarding interest. Whether the provision in the contract bars the employer from entertaining any claim for interest or bars the contractor from making any claim for interest, it amounts to a clear prohibition regarding interest. The provision need not contain another bar prohibiting

Arbitrator from awarding interest. The observations made in the context of interest pendente lite cannot be used out of contract.

24. The learned Counsel for appellant next contended on the basis of the above observations in Engineers-De-Space-Age, that even if Clause G- 1.09 is held to bar interest in the pre-reference period, it should be held not to apply to the pendente lite period that is from 14.3.1997 to 31.7.2001. He contended that the award of interest during the pendency of the reference was within the discretion of the arbitrator and therefore, the award of interest for that period could not have been interfered by the High Court. In view of the Constitution Bench decisions in G.C. Roy and N.C. Budharaj (supra) rendered before and after the decision in Engineers-De- Space-Age, it is doubtful whether the observation in Engineers-De-Space- Age in a case arising under Arbitration Act, 1940 that Arbitrator could award interest pendente lite, ignoring the express bar in the contract, is good law. But that need not be considered further as this is a case under the new Act where there is a specific provision regarding award of interest by Arbitrator."

The same reasoning applies to the decision in Madnani also as that also relates to a case of under the old Act and did not independently consider the issue but merely relied upon the decision in Engineers-De-Space-Age.

19. Section 37(1) of the new Act by using the words "unless otherwise agreed by the parties" categorically clarifies that the arbitrator is bound by the terms of the contract insofar as the award of interest from the date of cause of action to date of award. Therefore where the parties had agreed that no interest shall be payable, arbitral tribunal cannot award interest between the date when the cause of action arose to date of award.

5. Similarly, again deciding such issue, Hon'ble Apex Court in the case of *Jiprakash Associates Ltd. (Jal) Through its Director (supra),* in paragraphs 13, 15, 16 and 17 has observed as follows*:*

13) Insofar as power of the arbitral tribunal in granting pre-reference and/or pendente lite interest is concerned, the principles which can be deduced from the various judgments are summed up below:

(a) A Constitution Bench judgment of this Court in the case of Secretary, Irrigation Department, Government of Orissa & Ors. v. G.C. Roy5 exhaustively dealt with this very issue, namely, power of the arbitral tribunal to grant pre-reference and pendente lite interest. The Constitution Bench, of course, construed the provisions of the 1940 Act which Act was in vogue at that time. At the same time, the Constitution Bench also considered the principle for grant of interest applying the common law principles. It held that under the general law, the arbitrator is empowered to award interest for the pre-reference, pendente lite or post award period. This proposition was culled out with the following reasoning:

"43. The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:

(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.

(ii) An arbitrator is an alternative form (sic forum) for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party 5 (1992) 1 SCC 508 claiming it would have to approach the court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.

(iii) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

(iv) Over the years, the English and Indian courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. Thawardas [Seth Thawardas Pherumal v. Union of India, (1955) 2 SCR 48 : AIR 1955 SC 468] has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until Jena case [(1988) 1 SCC 418 : (1988) 1 SCR 253] almost all the courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.

(v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre- reference period). For doing complete justice between the parties, such power has always been inferred."

It is clear from the above that the Court decided to fall back on general principle that a person who is deprived of the use of money to which he is legitimately entitled to, has a right to be compensated for the deprivation and, therefore, such compensation may be called interest compensation or damages.

(b) As a sequitur, the arbitrator would be within his jurisdiction to award pre-reference or pendente lite interest even if agreement between the parties was silent as to whether interest is to be awarded or not.

(c) Conversely, if the agreement between the parties specifically prohibits grant of interest, the arbitrator cannot award pendente lite interest in such cases. This proposition is predicated on the principle that an arbitrator is the creature of an agreement and he is supposed to act and make his award in accordance with the general law of the land and the agreement. This position was made amply clear in G.C. Roy case in the discussion that ensued thereafter:

"44. Having regard to the above consideration, we think that the following is the correct principle which should be followed in this behalf:

Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes — or refer the dispute as to interest as such — to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should

necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view."

(d) Insofar as 1940 Act is concerned, it was silent about the jurisdiction of the arbitrator in awarding pendente lite interest. However, there is a significant departure on this aspect insofar as 1996 Act is concerned. This distinction has been spelt out in Sayeed Ahmed case in the following manner:

"Re: Interest from the date of cause of action to date of award

7. The issue regarding interest as noticed above revolves around Clause G1.09 of the Technical Provisions forming part of the contract extracted below:

"G. 1.09. No claim for interest or damages will be entertained by the Government with respect to any money or balance which may be lying with the Government or any become due owing to any dispute, difference or misunderstanding between the Engineer-in-Charge on the one hand and the contractor on the other hand or with respect to any delay on the part of the Engineer-in-Charge in making periodical or final payment or any other respect whatsoever." xx xx xx

14. The decisions of this Court with reference to the awards under the old Arbitration Act making a distinction between the pre-reference period and pendente lite period and the observation therein that the arbitrator has the discretion to award interest during pendente lite period in spite of any bar against interest contained in the contract between the parties are not applicable to arbitrations governed by the Arbitration and Conciliation Act, 1996."

15) In a recent judgment in the case of Reliance Cellulose Products Limited v. Oil and Natural Gas Corporation Limited 9, the entire case law on the subject is revisited and legal position re- emphasised. That was also a case which arose under the 1940 Act. The Court held that under the 1940 Act, an arbitrator has power to grant pre-reference interest under the Interest Act as well as pendente lite and future interest, however, he is constricted only by the fact that an agreement between the parties may contain an express bar to the award of pre-reference and/or pendente lite interest. Further, the Court has evolved the test of strict construction of such clauses, and unless there is a clear and express bar to the payment of interest that can be awarded by an arbitrator, clauses which do not refer to claims before the arbitrators or disputes between parties and clearly bar payment of interest, cannot stand in the way of an arbitrator awarding pre-reference or pendente lite interest. Further, unless 9 (2018) 9 SCC 266 a contractor agrees that no claim for interest will either be entertained or payable by the other party owing to dispute, difference, or misunderstandings between the parties or in respect of delay on the part of the engineer or in any other respect whatsoever, leading the Court to find an express bar against payment of interest, a clause which merely states that no interest will be payable upon amounts payable to the contractor under the contract would not be sufficient to bar an arbitrator from awarding pendente lite interest. Further, the grant of pendente lite interest depends upon the phraseology used in the agreement, clauses conferring power relating to arbitration, the nature of claim and dispute referred to the arbitrator, and on what items the power to award interest has been taken away and for which period. Also, the position under Section 31(7) of the 1996 Act, is wholly different, inasmuch as Section 31(7)of the 1996 Act sanctifies agreements between the parties and states that the moment the agreement says otherwise, no interest becomes payable right from the date of the cause of action until the award is delivered.

17) After discussing and analysing almost all the judgments on this subject, the legal position is summed up in the following manner:

"24. A conspectus of the decisions that have been referred to above would show that under the 1940 Act, an arbitrator has power to grant pre-reference interest under the Interest Act,

> 1978 as well as pendente lite and future interest. However, he is constricted only by the fact that an agreement between the parties may contain an express bar to the award of pre-reference and/or pendente lite interest. Since interest is compensatory in nature and is parasitic upon a principal sum not having been paid in time, this Court has frowned upon clauses that bar the payment of interest. It has therefore evolved the test of strict construction of such clauses, and has gone on to state that unless there is a clear and express bar to the payment of interest that can be awarded by an arbitrator, clauses which do not refer to claims before the arbitrators or disputes between parties and clearly bar payment of interest, cannot stand in the way of an arbitrator awarding pre-reference or pendente lite interest. Thus, when one contrasts a clause such as the clause in Second Ambica Construction case [Ambica Construction v. Union of India, (2017) 14 SCC 323 : (2018) 1 SCC (Civ) 257] with the clause in Tehri Hydro Development Corpn. Ltd. [Tehri Hydro Development Corpn. Ltd. v. Jai Prakash Associates Ltd., (2012) 12 SCC 10 : (2013) 2 SCC (Civ) 122] , it becomes clear that unless a contractor agrees that no claim for interest will either be entertained or payable by the other party owing to dispute, difference, or misunderstandings between the parties or in respect of delay on the part of the engineer or in any other respect whatsoever, leading the Court to find an express bar against payment of interest, a clause which merely states that no interest will be payable upon amounts payable to the contractor under the contract would not be sufficient to bar an arbitrator from awarding pendente lite interest under the 1940 Act. As has been held in First Ambica Construction case [Union of India v. Ambica Construction, (2016) 6 SCC 36 : (2016) 3 SCC (Civ) 36] , the grant of pendente lite interest depends upon the phraseology used in the agreement, clauses conferring power relating to arbitration, the nature of claim and dispute referred to the arbitrator, and on what items the power to award interest has been taken away and for which period. We hasten to add that the position as has been explained in some of the judgments above under Section 31(7) of the 1996 Act, is wholly different, inasmuch as Section 31(7) of the 1996 Act sanctifies agreements between the parties and states that the moment the agreement says otherwise, no interest becomes payable right from the date of the cause of action until the award is delivered."
>
> 17) In this whole conspectus and keeping in mind, in particular, that present case is regulated by 1996 Act, we have to decide the issue at hand. At this stage itself, it may be mentioned that in case clauses 50 and 51 of GCC put a bar on the arbitral tribunal to award interest, the arbitral tribunal did not have any jurisdiction to do so. As pointed out above, right from the stage of arbitration proceedings till the High Court, these clauses are interpreted to hold that they put such a bar on the arbitral tribunal. Even the majority award of the arbitral tribunal recognised this. Notwithstanding the same, it awarded the interest by relying upon Board of Trustees for the Port of Calcutta case. The High Court, both Single Bench as well as Division Bench, rightly noted that the aforesaid judgment was under the 1940 Act and the legal position in this behalf have taken a paradigm shift which position is clarified in Sayeed Ahmed and Company case. This rationale given by the High Court is in tune with the legal position which stands crystallised by catena of judgments as noted above.

6. Considering the question of entitlement of interest pre and pendent lite and going through the above decision, this Court finds the legal position involving above issue is already settled to the extent that the Arbitrator had the jurisdiction and authority to award interest for three different periods, namely, the pre reference period i.e. the period between the date of cause of action to the date of reference, pendent lite i.e. the period between date of reference to the date of award and future period i.e. period between the date of award to the date of payment provided there is no express bar in the contract regarding grant of interest.

7. Coming back to the case at hand, more particularly, taking into account the request of the appellant confining the challenge involving Annexure-1 to the extent of non-entitlement of pre and pendent lite interest by the respondent, this Court finds the appellant and respondent are bound by the contract clause contained in Clause 68. 1.2 of the agreement which reads as follows:

> "68.1.2 No claim for interest will be entertained by the Board with respect to any money or balances which may be in its hand owing to any dispute between itself and the Contractor or with respect to any delay on the part of the Board in making Interim or Final Payments or otherwise".

8. There is no disagreement between the parties on their being binding by the above restriction. For the parties bound by condition at Clause 68.1.2 taken note herein above, this Court finds force in the submission of Sri Mishra, learned counsel for the Appellant and this Court therefore observes for clear bar on the entitlement pre and pendent lite interest, the Arbitrator as well as the District Judge erred in granting interest pre and pendent lite and thus, both the orders of the Arbitrator and the District Judge so far it relates to pre and pendent lite need to be interfered and accordingly set aside.

9. This Court, thus interfering in the award and the judgment of the District Judge to the above extent holds that the respondent shall not be entitled to pre and pendent lite interest involving the arbitration award. Rest part of the award shall remain intact.

10. The ARBA succeeds but however to the extent indicated hereinabove. Parties are directed to bear their respective cost.

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2019 (II) ILR - CUT- 598

BISWANATH RATH, J.

ARBA NO. 1 OF 2011

THE MARWAH COMPANY ……..Appellant

.Vs.

NATIONAL THERMAL POWER CORPORATION LTD. ……Respondent

ARBITRATION AND CONCILIATION ACT, 1996 – Section 37 – Appeal challenging the order of District Judge passed in the proceeding under section 34 of the Act – Arbitration award – Award challenged under section 34 of the Act – During pendency of the proceeding under section 34 of the Act, an additional award passed allegedly without

notice to the claimant – Claimant owing to delay in receiving the pending dues for a long time issued no due certificate and received the payment after adjustment as per the additional award – After that the claimant challenged the additional award and stated that the no due certificate has been obtained by coercion and duress – District Judge rejected the application holding that, the claimant had no scope for raising dispute involving the award or the additional award for his signing no claim certificate, granting a no due certificate and receipt of amount offered by the respondent – Whether such a finding is legal and justified? – Held, No – Reasons explained.

(i) Merely because the contractor has issued "No Due Certificate", if there is acceptable claim, the court cannot reject the same on the ground of issuance of "No Due Certificate".

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such "No-claim Certificate".

*(iii) Even after execution of full and final discharge voucher/receipt by one of the parties, if the said party able to establish that he is entitled to further amount for which he is having adequate materials, is not barred from claiming such amount merely because of acceptance of the final bill by mentioning "without prejudice" or by issuing `No Due Certificate'." **(R.L.Kalathia & Company vrs. State of Gujarat** : (2011) 2 SCC 400 followed.) (Para 9)*

Case Laws Relied on and Referred to :-

1. (2009) 4 SCC (Civ) 203 : Asian Techs Ltd. .Vs. Union of India & Ors.
2. (2011) 2 SCC 400 : R.L.Kalathia & Company .Vs. State of Gujarat.
3. (2003) 8 SCC 245 : Pooran Chand Nangia .Vs. National Fertilizers Ltd.
4. (2009) 4 SCC (Civ) 203 : Asian Techs Ltd. .Vs. Union of India & Ors.
5. (2011) 2 SCC 400 : R.L.Kalathia & Company .Vs. State of Gujarat.
6. (2004) 2 SCC 663 : Chairman & MD. NTPC Ltd. .Vs. Reshmi Construction, Builders & Contractors :

For Appellant : M/s. B.Routray, D.K.Sahoo, D.Mohapatra, P.K. Sahoo, K.Mohanty & S.Das.

For Respondent : Mr. B.S.Tripathy

JUDGMENT Date of Hearing : 05.04.2019 : Date of Judgment : 17.04.2019

BISWANATH RATH, J.

This is an Appeal under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 assailing the judgment dated 19.11.2010 passed in Arbitration Petition No.139 of 2003 by the learned District Judge, Dhenkanal involving Arbitration Award dated 17.4.2003.

2. Short background involved in the case is that the appellant herein was entrusted with a construction contract involving construction of three identical RCC overhead tanks of 450 Cu.M. capacity each and one number of RCC underground tank of 2000 Cu.M. capacity with a pump house. The construction was to be undertaken in the township of Talcher Super Thermal Power Corporation, Kaniha in the district of Angul and value of contract being Rs.49,10,287.71. The tenure of the contract dated 14.2.1994 involved eighteen months period and the original date of completion of the work was 13.8.1995. For difficulties involving entrusting the supervision of the complicated civil engineering job by the non-civil engineers, defective bill of quantities given in the agreement, defective engineering design and several breaches of terms of the agreement caused huge delay and loss. Ultimately, the respondent was unable to hand over possession of the site to the appellant for construction of remaining overhead tank even after three and half years after commencement of the contract. The respondent-Company fore-closed the contract and issued a completion certificate for the contract on 29.7.1997 certifying completion of contract, which involved 50% cancellation of the contract work. The appellant submitted claim to the respondent-Company, which refused to entertain the claim of the appellant. The appellant invoked arbitration clause. In the mediation process, some of the disputes were resolved but as the matter still involved some claims and counter-claims, the dispute was referred to the Arbitrator, Mr.Jha. Mr. M.Jha, while continuing as the sole Arbitrator resigned, consequent upon which Mr. B.P.Bagchi was appointed as the sole Arbitrator in place of Mr.Jha. Award was passed involving the arbitration proceeding. On the premises of defect in the award, the appellant challenged the award before the learned District Judge involving a proceeding under Sections 34(2)(a)(iii)(iv)(v) and 34(2)(b)(ii) of the Act, 1996. When the Section 34 proceeding was pending before the learned District Judge, Dhenkanal, the sole Arbitrator, Mr.D.P.Bagchi passed another award alleged to be behind the back of the appellant purportedly entertaining the application under Section 33 of the Act. In the meantime, in the fax message on 11.8.2003 the respondent asked the appellant to attend its Office at Kaniha to receive the payment involving the arbitration award. Appellant reached the Office of the respondent on 19.8.2003. On 20.8.2003 the respondent gave the appellant a photocopy of the additional award dated 11.7.2003. It is at this point of time the appellant came to know about the additional award. In spite of the appellant's attempt to convince the respondent about the illegality in the additional award and being passed behind the appellant, the respondent remained adamant and informed the

appellant that in terms of the award dated 17.4.2003, a sum of Rs.7,20,668.15 was payable to the appellant and for the additional award dated 11.7.2003, the respondent deducting a sum of Rs.4,00,370/-, the balance amount of Rs.3,20,290/- would be payable to the appellant but only in the event the appellant signed all papers and certified that he has received the payment in full and final and also to give a no due certificate. Considering the delay involving the payment of the dues of the appellant and finding that the respondent was in no mood of releasing any amount without a certificate is endorsed on receipt of the amount on full and final payment and further no demand certificate is issued under coercion and compulsion, the appellant gave the demanded certificates and received a cheque of Rs.3,05,959.00 and also took back the security deposit over lakhs of rupees. On the next date itself, i.e., 28.8.2003 the appellant reaching at his Office wrote a protest letter to the respondent on receipt of the lesser amount indicating the payment made is unacceptable and continued to challenge such payment by the respondent. Subsequently, the appellant also sent a letter by registered Post on 29.8.2003, which was received by the respondent on 1.9.2003. Consequent upon the above development, the appellant filed amendment of the original petition under Section 34 of the Act to bring on record the illegal additional award and also has challenged to the same thereby taking the ground that not only the additional award was passed beyond limitation period but also without notice or opportunity to the appellant herein. Section 34 proceeding was disposed of by the judgment of the learned District Judge, Dhenkanal on 19.11.2010 thereby rejecting the Arbitration Proceeding holding that the appellant had no scope for raising dispute involving the award or the additional award for his signing no claim certificate, granting a no due certificate and receipt of amount offered by the respondent.

3. Assailing the order passed by the learned District Judge, Dhenkanal dated 19.11.2010 involving Arbitration Petition No.139 of 2003, Sri Saswat Das, learned counsel for the appellant submitted that for his taking the plea, the endorsement of no claim certificate and giving a certificate of no dues were under peculiar situation further coupled with duress and coercion adopted by the respondent and for the inordinate delay in resolving the issue raised by the appellant, the appellant remains compelled to provide such certificate on receipt of the amount and further for the involvement of challenge to the additional award on the premises of entertaining an issue after inordinate delay and passing an additional award behind the back of the appellant that too without issuing notice to the appellant even, Sri Das, learned counsel for the appellant contended that the learned District Judge

failed in appreciating the above aspect and has arrived at the wrong and illegal conclusion, which unless be interfered with it will lead to a bad judgment.

Taking help of the decisions of the Hon'ble apex Court in the case of ***Asian Techs Ltd. vrs. Union of India & others*** : (2009) 4 SCC (Civ) 203 and ***R.L.Kalathia & Company vrs. State of Gujarat*** : (2011) 2 SCC 400, Sri S.Das, learned counsel for the appellant drawing attention of this Court to the decisions as cited above submitted that the appellant's case has the support of the above decisions. It is in the premises, Sri Das, learned counsel for the appellant prayed this Court for interfering with the impugned judgment passed by the learned District Judge, Dhenkanal and setting aside the same.

4. Sri B.S.Tripathy, learned counsel for the respondent-N.T.P.C. while seriously objecting the submissions made by Sri Das, learned counsel for the appellant, taking this Court to the materials available on record more particularly the endorsement of the appellant for having received the dues in full and final settlement of the dispute, further for the appellant also furnishing a certificate of no dues to the respondent, further the learned District Judge taking into account the above issues and giving his finding that for the above development there did not remain any dispute to be considered in the arbitration case, submitted that there is no infirmity in the impugned judgment requiring this Court to interfere with the same.

Sri Tripathy, learned counsel for the respondent apart from the above submission taking this Court to several decisions of the Hon'ble apex Court, such as ***Pooran Chand Nangia vrs. National Fertilizers Ltd.*** : (2003) 8 SCC 245 and ***New India Assurance Company Ltd. vrs. Genus Power Infrastructure Ltd.*** involving Civil Appeal No.10784 of 2014 (Special Leave Petition (Civil) No.24652 of 2013) for the support of law, submitted that the impugned judgment is legally sustainable, therefore, requiring no interference in the same.

5. Considering the rival contentions of the parties, this Court finds, the admitted facts involving the dispute remained that the appellant was awarded with a contract, which was rescinded for some reasons or other. There has been dispute involving non-payment of the dues of the appellant, for which Arbitration Clause has been invoked, the arbitration award is also passed. During course of challenge of the arbitration award before the learned District Judge involving Arbitration Petition No.139 of 2003 and a development particularly the additional award is coming to picture in view of additional award the respondent deducts the awarded amount involving the

additional award from the original awarded amount and making the payment of the balance dues of the appellant involved herein. The appellant again being noticed receiving dues on furnishing certificate of receipt of the same as full and final payment and also granting certificate of no dues, on the very next date, the appellant issuing a protest letter involving such refusal of payment and on a day or two after again issuing a registered Post notice resisting such demand indicating that the certificate whatever has been kept by the respondent are under compulsion besides on duress and coercion. Considering all the above, the learned District Judge disposed of the Section 34 application dismissing the claim of the appellant on the premises of receipt of balance dues on issuing certificate of full and final settlement of the amount as well as no dues debars the person to continue with such litigation.

6. This Court, therefore, is called upon to examine a question as to whether the appellant had the scope to challenge the award and the additional award involved herein even after furnishing the certificate of full and final payment and "no dues certificate" and there applies the principle of acquiescence ?

7. Coming to the factual aspect involved in the case as borne from the pleading, the submission and the recording of the learned District Judge, this Court finds, after the additional award was passed, the respondent informed the appellant that in terms of the award dated 17.4.2003, it was entitled to a sum of Rs.7,20,668.15 and at the same time for the involvement of additional award in favour of the respondent allowing deduction of Rs.4,00,370.00, the appellant was told to be entitled to a sum of Rs.3,20,298.00. It is consequent upon such information and after obtaining the certificate indicated herein above, the respondent handed over a cheque of Rs.3,05,959.00 along with T.D.S. Certificate of Rs.10,631/- on 27.8.2003 to the appellant as final payment. Records also borne on 28.8.2003, i.e. after a day the appellant wrote a protest letter to the respondent indicating that it has received the amount under duress and it is not accepting such payment as final payment. Further it also appears, the appellant again sent a letter by registered Post with A.D. on 20.8.2009 to the respondent and the respondent received the same on 1.9.2003 as per the Postal Acknowledgement. This development was thus brought by way of amendment to the Arbitration Petition No.139/2003. Looking to the contents in the letters and the pleading herein by the respective parties including no denial by the respondent even after receipt of such protest, this Court finds, for the appellant's suffering for a long period involving payment of dues to it, the appellant had no other option than to

accede to the demand of the respondent to grant the above two certificates. Further while accepting the dues whatever paid by the appellant on 27.8.2003 within one day thereafter, the appellant sent a protest on 28.8.2003 not only that on 29.8.2003 also sent a registered Post protest, which was received by the respondent on 1.9.2003. For the development taking place indicated herein above, this Court finds, even though the rights and obligations of the party is worked out, the contract does not come to an end and although it may not be strictly in place but for the development taking place in quick succession thereafter, this Court cannot shut its eyes to the ground reality. It is at this stage, considering the impugned order involved herein, this Court finds, the learned District Judge failed in appreciating the above aspect and simply relying on a decision of the Hon'ble apex Court in Pooran Chand Nangia (supra) dismissed the Arbitration Petition on the premises the appellant granting appropriate certificates indicated herein and as such has no scope to continue with the Arbitration Petition and challenging the award involved therein. Looking to the said decision, this Court finds, the case involved therein was a clear case of the petitioner therein accepting the award unequivocally and accepting the awarded amount without any reservation. This Court further finds, the decision of the Hon'ble apex Court relied on did not involve a case like this where there is serious objection to the payment made in between and involving a written protest in quick succession. This Court finding this glaring difference in the judgment relied on by the learned District Judge and for non-consideration of the effect of material aspect, such as the appellant having a serious response to the payment involving the dispute, this Court is to answer the question framed herein in favour of the appellant observing that for the peculiar situation involved herein, the appellant had still a chance to continue with the arbitration proceeding and there is no application of law of acquiescence to the appellant.

8. For the citations at Bar, this Court now proceeds to take the citation at the instance of Sri Tripathy, learned counsel for the respondent involving Civil Appeal No.10784/2014 (Special Leave Petition (Civil) No.24652/2013 decided on 4th December, 2014. This Court finds, this decision deals with a case of bald plea of fraud of coercion, duress or undue things and the party therein failing to establish a prima facie case at least. For the learned District Judge involving the case at hand not entering into a decision on the allegation/protest of the petitioner involved therein as of now, this decision has no application to the case at hand.

9. Taking into account the decision cited at the Bar by the appellant, the decision in ***Asian Techs Ltd. vrs. Union of India & others*** : (2009) 4 SCC (Civ) 203, in paragraphs-17 & 18, the Hon'ble apex Court held as follows :-

> "17. It has been held by this Court in National Insurance Company Ltd vs. Boghara Polyfab Pvt. Ltd(2009) 1 SCC 267 that even in the case of issuance of full and final discharge/settlement voucher/no-dues certificate the arbitrator or Court can go into the question whether the liability has been satisfied or not. This decision has followed the view taken in Chairman and Managing Director, NTPC Ltd. vs. Reshmi Constructions, Builders and Contractors (2004) 2 SCC 663 (vide paragraphs 27 and 28).
>
> 18. Apart from the above, it has been held by this Court in Board of Trustees, Port of Calcutta vs. Engineers-De-Space-Age (1996) 1 SCC 516, that a clause like clause 11 only prohibits the department from entertaining the claim, but it did not prohibit the arbitrator from entertaining it. This view has been followed by another Bench of this Court in Bharat Drilling & Treatment Pvt. Ltd. vs. State of Jharkhand & others in Civil Appeal No. 10216 of 2003 decided on 20th August, 2009."

Similarly getting into the decision in ***R.L.Kalathia & Company vrs. State of Gujarat*** : (2011) 2 SCC 400, this Court finds, the Hon'ble apex Court in paragraphs-12 & 13 discussed and held as follows :-

> "12. In National Insurance Company Limited vs. Boghara Polyfab Private Ltd., (2009) 1 SCC 267, the question involved was whether a dispute raised by an insured, after giving a full and final discharge voucher to the insurer, can be referred to arbitration. The following conclusion in para 26 is relevant:-
>
> "26. When we refer to a discharge of contract by an agreement signed by both the parties or by execution of a full and final discharge voucher/receipt by one of the parties, we refer to an agreement or discharge voucher which is validly and voluntarily executed. If the party which has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of fraud/coercion/undue influence practised by the other party and is able to establish the same, then obviously the discharge of the contract by such agreement/voucher is rendered void and cannot be acted upon. Consequently, any dispute raised by such party would be arbitrable."
>
> 13) From the above conclusions of this Court, the following principles emerge:
>
> (i) Merely because the contractor has issued "No Due Certificate", if there is acceptable claim, the court cannot reject the same on the ground of issuance of "No Due Certificate".
>
> (ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such "No-claim Certificate".
>
> (iii) Even after execution of full and final discharge voucher/receipt by one of the parties, if the said party able to establish that he is entitled to further amount for which he is having adequate materials, is not barred from claiming such amount merely because of acceptance of the final bill by mentioning "without prejudice" or by issuing `No Due Certificate'."

Reading the aforesaid decision, this Court finds, the claim of the appellant has also the support of the decision in (2009) 1 SCC 267, (2009) 4 SCC (Civ) 203 and also (2011) 2 SCC 400. This Court here taking into account another

decision of the Hon'ble apex Court in ***Chairman & MD. NTPC Ltd. vrs. Reshmi Construction, Builders & Contractors*** : (2004) 2 SCC 663 involving the NTPC, the respondent herein getting into a case of similar situation, the Hon'ble apex Court in paragraphs-18 & 27 held as follows :-

> "18. Normally, an accord and satisfaction by itself would not affect the arbitration clause but if the dispute is that the contract itself does not subsist, the question of invoking the arbitration clause may not arise. But in the event it be held that the contract survives, recourse to the arbitration clause may be taken (See Union of India v. Kishorilal Gupta and Naihati Jute Mills Ltd. v. Kyaliram Jagannath).
>
> 27. Even when rights and obligations of the parties are worked out, the contract does not come to an end inter alia for the purpose of determination of the disputes arising thereunder, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in a case where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a "No-Demand Certificate" is signed. Each case, therefore, is required to be considered on its own facts."

10. For the view of this Court in paragraphs-6 and 7 and the support of the decisions, vide (2004) 2 SCC 663, (2009) 4 SCC (Civ) 203 and also (2011) 2 SCC 400, this Court finds, the impugned judgment by the District Judge involving Arbitration Petition No.139 of 2003 is not sustainable in the eye of law. In the result, this Court interfering with the impugned judgment and setting aside the same remits the matter back to the District Judge, Dhenkanal or the District Judge competent presently involving NTPC to take up the issue involved and decide the Arbitration Petition No.139 of 2003 on its own merit afresh.

11. The Arbitration Appeal succeeds. There is no order as to cost.

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2019 (II) ILR - CUT- 606

BISWANATH RATH, J.

S.A.O. NO.17 OF 2012

SAUDAMINI DAS, SINCE DEAD HER LEGAL HEIRS & ORS. .....Appellants

.Vs.

PURUSOTTAM PANY .....Respondent

CODE OF CIVIL PROCEDURE, 1908 – Order 43 Rule 1(u) read with Order 41 Rule 23, 23-A and 25 – Appeal against the remand order by the first appellate court – The question of law arose as to whether in view of interference of the lower appellate court in one of the findings of the lower court while not interfering in the findings in respect of other issues, if the lower appellate court was justified in remanding for fresh trial on all issues? and if the remand order is in terms of Order 41 Rule 25 of C.P.C.? – Held, No – Reasons indicated.

"Perusing the discussion in paragraph-9 and the findings and the direction in paragraph-9.7, this Court finds, in paragraphs-9 to 9.7 the lower appellate court has its intention on decision of the trial court. It is reading the whole of discussions and findings from paragraphs-9 to 9.7, this Court nowhere finds, the lower appellate court interfering with the finding on Issue Nos.III & IV and reversing the same, in absence of which direction in paragraph-9.7 was impermissible. It is at this stage of the matter, this Court finds, the lower appellate court should have decided the matter in terms of Order 41 Rule 25 of C.P.C. The appellate court failing to do so, the impugned judgment and decree are not sustainable." *(Para 9)*

Case Laws Relied on and Referred to :-

1. 2004(II) OLR-229 : Shri Mahadev Bisi & OrsVs. Niranjan Bisi.
2. 2017(II) OLR-82 : Keshab Sahu & Ors .Vs. Nakul Sahu & Ors.

For Appellants : M/s. A.P.Bose, R.K.Mahanta, N.Hota, M.Pradhan, S.S.Routray & V.Kar.

For Respondent : M/s.B.Pradhan, G.Sahoo, D.Mishra & S.Mohapatra

JUDGMENT Date of Hearing:19.04.2019 : Date of Judgment : 26.04.2019

BISWANATH RATH, J.

This is an Appeal under Order 43 Rule 1(U) of C.P.C. involving an order of remand by the lower appellate court arising out of R.F.A. No.2/2011 on the file of Civil Judge (Sr.Divn.), Kamakhyanagar. Plaintiffs, the contesting respondent nos.1 to 5 in the court below are the appellants in the present Appeal. Defendant no.1(a), the appellant in the court below is the contesting respondent no.1. The other respondents are proforma.

2. For the involvement of questions of law as to whether in view of interference of the lower appellate court in one of the findings of the lower court while not interfering in the findings in respect of other issues even by the trial court, if the lower appellate court was justified in remanding the Appeal of the trial court for fresh trial on all issues ? and if the remand order is in terms of Order 41 C.P.C.?, this Court finds, there is no necessity of discussion on the facts involving the case except taking decision on the legal

point and taking note of little facts whatever necessary for disposal of the issue at hand. Hence this Court proceeds as follows :-

3. Trial court involving the pleading of the parties framed the following issues :-

> "I) Is the suit maintainable in the eye of law ?
>
> II) Is there any cause of action to file this suit ?
>
> III) Whether the suit is barred by law of limitation ?
>
> IV) Whether the plaintiff has right, title, interest and possession over the suit land ?
>
> V) Whether the plaintiff is entitled to the relief of permanent injunction as prayed for ?
>
> VI) What other relief the plaintiff is entitled ?
>
> VII) Whether the original plaintiff Jayakrushna Dash was possessing the suit land till 20.6.05 and has been possessed by defendants since 20.06.05 ?"

4. On the basis of pleading and analysis of the evidence; material and oral recorded therein, the trial court deciding Issue Nos.III & IV observing that the suit was in time and further also declared that the plaintiffs have right, title and interest over the disputed property thereby answering both the Issues in favour of the plaintiffs. Deciding Issue Nos.I, II, V, VI & VII consequent upon the findings involving Issue Nos.III & IV answered the Issues accordingly almost in favour of the plaintiffs. The suit was thus decreed against the contesting defendant nos.1(a) and 1(b) and decreed ex parte against defendant nos.2 to 14 thereby declaring right, title and interest of the plaintiffs over the suit land, further directing the defendants to vacate the possession of the suit land with immediate effect and further restraining the defendants permanently from entering into the suit land.

5. On Appeal being filed by the judgment-debtor, the contesting defendant no.1(a) and respondent herein, the appellate authority as appearing from the judgment impugned herein in paragraph-9 framed the question as to whether in the facts and circumstances of the case, the defendants have encroached upon any portion of the plaintiffs' purchased land, that too the suit land ? Inviting statement of the respective parties on this question in paragraphs-9.1 to 9.6, the appellate court driving its attention to the measurement aspect involving the disputed land so as to come to the encroachment aspect in paragraph-9.6 ultimately observed that the relief granted by the trial court is beyond the scope of the pleadings of the plaintiffs and in the result, in paragraph-9.7 observed as follows :-

> "9.7-In the result the appeal is allowed. The judgment and decree of the court below are set aside. I would, however, require the trial court to depute the same or a fresh Commissioner at the instance of the plaintiffs with the following directions :-
>
> i) The Commissioner shall vary out the measurement from fided point in existence and locate the plaintiffs' purchased land vis-à-vis defendant(s) ancestral land in connection with the suit ;
>
> ii) If fixed point is not traceable, nor there is any survey stone available near the suit land then the measurement should be commenced from a fixed boundary line where both the parties agree with the common boundary and thereafter the Commissioner shall determine the lands of both the parties in connection with the suit;
>
> iii) The Commissioner shall have to find out whether the suit land is included in Hal Plot No.2255 or Hal Plot No.2258, as asked by the plaintiffs in the Court below.
>
> iv) Thereafter, the Commissioner shall demarcate the suit land and find out as to whether defendants have encroached the suit land or any portion thereof belonging to the plaintiffs' purchased land and
>
> v) While carrying out measurement, it is needless to mention that the Commissioner will serve notice to the parties enabling them to remain present at the time of inspection/demarcation."

This order is impugned herein on the premises that for the provision contained in Order 41 of C.P.C. unless and until all the findings of the trial court were interfered with, there was no occasion on the part of the lower appellate court for remanding this matter as a whole.

6. Sri A.P.Bose, learned counsel for the appellants taking this Court to the provisions contained in Order 41 Rules 23-A, 24 & 25 contended that for the attraction of Order 41 Rule 25 of C.P.C. to the case at hand, the impugned judgment and decree become bad for the reason that firstly, the impugned judgment is passed without interference with the findings of the trial court in all Issues involved therein, further the remand order also becomes bad for the reason of not framing any Issue while remitting the matter back to the decision of the trial court. Taking to the findings of the lower appellate court and the direction part therein, Sri Bose, learned counsel for the appellants attacked the impugned judgment in two counts. On the above two counts, Sri Bose prayed this Court for remitting the matter for fresh disposal by the lower appellate court. Further Sri Bose referring to two reported decisions of this Court in ***Shri Mahadev Bisi & others vrs. Niranjan Bisi*** : 2004(II) OLR-229 and ***Keshab Sahu & others vrs. Nakul Sahu & others*** : 2017(II) OLR-82 submitted that for the support of law as well as support of the above decisions to the case of the appellants, the impugned judgment ought to be interfered with and set aside and the S.A.O. be disposed of by appropriate orders.

7. Sri B.Pradhan, learned counsel for respondent no.1 though did not dispute to the legal contentions raised by the learned counsel for the appellants and the application of the decisions to the case at hand yet taking this Court to the discussions of the lower appellate court in paragraph-9 more particularly contended that for the discussions therein, there appears, there is no infirmity in the impugned judgment.

8. Considering the rival contentions of the parties and particularly keeping in view the questions framed by this Court in paragraph-2, this Court must look to the legal provision involving the matter and in the process, records the provisions at Order 41 Rules 23, 23-A & 25, which read as follows :-

> "**23**. **Remand of case by Appellate Court**-Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.
>
> **23-A**-**Remand in other cases-**Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.
>
> **25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from**- Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor within such time as may be fixed by the Appellate Court or extended by it from time to time."

Reading the provision at Rule 23, this Court finds, this is a contingency in the case of remand of the case involving a suit being disposed of on the basis of preliminary point, which is not a contingency in the case at hand. Coming to Rule 23-A, this Court finds, while the decree is reversed in Appeal and a re-trial is considered to be necessary, which action has also no application to the case at hand. Keeping in view that the decision boils down to applicability of the provision at Rule 25 of Order 41 of C.P.C., this Court now proceeds to decide accordingly.

9. Perusing the discussion in paragraph-9 and the findings and the direction in paragraph-9.7, this Court finds, in paragraphs-9 to 9.7 the lower appellate court has its intention on decision of the trial court. It is reading the whole of discussions and findings from paragraphs-9 to 9.7, this Court nowhere finds, the lower appellate court interfering with the finding on Issue Nos.III & IV and reversing the same, in absence of which direction in paragraph-9.7 was impermissible. It is at this stage of the matter, this Court finds, the lower appellate court should have decided the matter in terms of Order 41 Rule 25 of C.P.C. The appellate court failing to do so, the impugned judgment and decree are not sustainable. Taking into account the decision cited by the learned counsel for the appellants in Mahadev Bisi (supra) in paragraphs-10 to 13 this Court in similar situation held as follows :-

> "10. Thus, in view of the above provisions of the Code of Civil Procedure and on examining the impugned judgment, I find that the learned appellate court was in error in remanding the suit in its entirety for fresh disposal though a specific issue has been framed by the lower appellate court, as it felt necessary that such issue is required to be determined for the right decision of the suit. Such procedure is not prescribed under any of the aforementioned rules.
>
> 11. Thus even though no appeal can be preferred against an order of remand under Rule 25 of Order 41 of the C.P.C. but since the impugned judgment is not strictly in accordance with Rule 25, I am inclined to entertain this appeal.
>
> 12. On hearing the parties and on consideration of the materials available on record, I find that the learned lower appellate court was correct in holding that it is necessary to find out whether the suit plot no.448/662 corresponds to the portion of plot no.448 marked 'A' in the sketch map attached to the sale deed (Ext.1) and accordingly, has framed an issue to that effect but the said Court has committed an error of law in remanding the entire suit to the trial Court for fresh disposal.
>
> 13. I am, therefore, of the view that the order of remand, impugned in this appeal, should be treated as an order under Rule 25 of Order 41 of the C.P.C. I therefore direct that the appeal be retained in the learned lower appellate court and the learned trial court should try the issue framed by the learned lower appellate court in the impugned judgment, by giving opportunity to the parties to adduce evidence on the said issue and return its finding thereon and the reasons therefor, to the lower appellate court. After receiving the evidence so adduced, if any, by the parties and the findings of the learned trial court, the learned lower appellate court should hear the appeal and give a fresh judgment. This exercise should be completed within a period of six months from the date of receipt of this order by the trial court and the appeal be disposed of within three months from the date of receipt of the evidence and findings of the trial court, by the lower appellate court. The parties are directed to appear before the learned trial court on 21st April, 2004."

Similarly, in the case of Keshab Sahu (supra), another Bench of this Court again in similar situation in paragrapsh-6 to 9 held as follows :-

"6. Besides the power contemplated under Order 41 rule 23 & 23 A, C.P.C. a further power has also been conferred under Order 41 Rule 25 on the appellate court to frame issues and refer them for trial to the court whose decree has been appealed from, if such additional issues appear essential for just decision of the suit. The scope and ambit of the provision of remand was exhaustively dealt with in the case of Ashwinkumar K. Patel v. Upendra J. Patel and others (supra) by the apex Court. In that judgment the following observation finds place in paragraph-7.

"In our view, the High Court should not ordinarily remand a case under Order-41, Rule 23, C.P.C. to the lower court merely because it considered that the reasoning of the lower court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case mentioned in the order of the trial court and considered whether the order of the trial court ought to be confirmed or reversed or modified. It could have easily considered the documents and affidavits and decided about the prima facie case on the material available. In matters involving agreements of 1980 (and 1996) on the one hand and an agreement of 1991 on the other, as in this case, such remand orders would lead to further delay and uncertainty. We are, therefore, of the view that the remand by the High Court was not necessary."

The same principle has also been noted by this Court in the cases of Shri Mahadev Bisi and others v. Niranjan Bisi (supra) and Sarat Chandra Sahu v. State of Orissa and another (supra) and the High Court of Bombay and the High Court of Patna in the cases of **Narayan v. Malappa,** AIR 1956 Bombay 246 and **Delho Hansda v. Charani Hansda** AIR 1953 Patna 341 respectively. So the judicial pronouncement on the point says that where there is need for framing of additional issues for proper adjudication of the dispute between the parties, the first appellate court should normally take recourse to the provisions of Order 41 Rule 25, C.P.C. and remand the matter to the trial court to frame that specific issue and record its own finding on the issue or may direct the trial court to record the evidence of the parties on the specific issue and resubmit the matter to the first appellate court for adjudication of the issue. It is, however, clear that even if a specific issue has not been framed by the trial court, but the parties were aware of the pleadings and led evidence on that score, then the first appellate court should record its finding on the issue.

7. In the present case admittedly there was plea of the plaintiff appellants that they acquired title over the suit land not only through the unregistered sale deed but also by continuously remaining in possession over the same for a period of 30 years, hostile to the interest of others. This claim was denied by the defendants in the written statement. The parties were therefore, aware of the plea of adverse possession and led evidence on that score. Similarly, the execution of the unregistered sale deed and the validity thereof had been challenged by the defendants in the written statement and evidence was led on that aspect by the parties and the learned trial court decided the said controversies in Issue No.5. The evidence, the pleadings and the findings of the trial court were available before the first appellate court. So even if there was no specific issue on the above noted aspects learned first appellate court could have framed specific issues on that score and adjudicated those issues or in the worst case after framing those additional issues could have sent the matter to the trial court to record any additional evidence on those issues and to resubmit the record for final adjudication by the first appellate court. Without adopting these steps, remanding the suit to the trial court for

fresh adjudication was not only against the judicial mandate recorded in the above noted cases, but also amounted to a process which would lead the case to further delay and uncertainty.

8. Regarding additional issues about the relationship of landlord and tenant and the jurisdiction of this Civil Court it was not the case of any of the parties and therefore, such additional issue was not at all necessary for proper adjudication of the suit.

9. For the aforesaid reason, the impugned order is unsustainable in law and the same is accordingly set aside. Consequently, the matter will go back to the first appellate court for fresh adjudication of the appeal on its own merit, keeping in mind the legal process and the observations noted above. Considering the fact that the first appeal is of the year 2000, the learned first appellate court would do well to dispose of the same as early as possible, preferably within a period of six months from the date of receipt of this order."

This Court here observes that both the above decisions have the direct support to the case of the appellants.

10. In the circumstance and for the support of the above two decisions and further application of the provision at Order 41 Rule 25 of C.P.C. to the case at hand, this Court finds, the impugned judgment is unsustainable in law and the same is accordingly set aside. As a consequence, the matter will go back to the First Appellate Court for fresh adjudication of the Appeal on its own merit and in terms of the legal process and the observations made herein above. In the result, the S.A.O. is allowed on contest. No cost.

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2019 (II) ILR - CUT- 613

S.K. SAHOO, J.

CRLMC NO. 2560 OF 2018

SURESH CHANDRA SUARA .....Petitioner

.Vs.

STATE OF ORISSA (VIG.) .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Petitioner facing trial for commission of offence under section 13(2) read with section 13(1)(e) of the Prevention of Corruption Act, 1988 – Files petition under section 311 calling for certain documents – Rejected – Challenge is made to such order under section 482 of Cr.P.C. – Objection raised that the petition is not maintainable against the impugned order in view of section 9 of the Odisha Special Courts Act, 2006 – Held, the petition under section 482 is maintainable – Reasons indicated.

"*Coming to the question of maintainability as pointed out by the learned Addl. Standing Counsel for the Vigilance Department, it appears that so far as the section 5 of the Odisha Special Courts Act, 2006 is concerned, if a declaration is made by the State Government that there is prima facie evidence relating to commission of offence under the Prevention of Corruption Act alleged to have been committed by a person who held high public or political office in the State of Odisha, such declaration shall not be called in question in any Court. So far as section 9 of the said Act is concerned, it clearly stipulates that against the judgment and sentence passed by the Special Court, an appeal is maintainable to the High Court both on facts and law and except such appeal, no appeal or revision shall lie in any Court from any judgment, sentence or order of a Special Court. If sub-sections (1) and (2) of section 9 are read together, it is clear that an appeal will only be maintainable against the judgment and sentence passed by the Special Court. In this case, however the petitioner has challenged the rejection of his petition under section 311 Cr.P.C. The Hon'ble Supreme Court in the case of* ***Sethuraman -Vrs.- Rajamanickam reported in (2009) 5 Supreme Court cases 153*** *has held that the orders passed by the trial Court refusing to call the documents and rejecting the application under section 311 Cr.P.C. are interlocutory orders and as such, the revision against those orders is clearly barred under section 397(2) Cr.P.C. I am of the humble view, if any illegality is committed by rejecting such petition, an aggrieved person cannot be left remediless. The inherent powers of the High Court is there to prevent abuse of process of any Court or otherwise to secure the ends of justice. Therefore, an application under section 482 of Cr.P.C. is maintainable against such order. Thus the objection relating to maintainability of this petition which was raised by the learned Addl. Standing Counsel for the Vigilance Department is not sustainable."*

Case Laws Relied on and Referred to :-

1. (2016) 63 OCR (SC) 426 : Yogendra Kumar Jaiswal .Vs. State of Bihar.
2. (2009) 5 SCC 153 : Sethuraman .Vs. Rajamanickam.

For Petitioner : Miss Anima Kumari Dei
For Opp. Party : Mr. Niranjan Moharana, Addl. Standing Counsel (Vig)

JUDGMENT Date of Hearing and Order: 24.06.2019

S. K. SAHOO, J.

This is an application under section 482 of the Code of Criminal Procedure filed by the petitioner Suresh Chandra Suara, OAS-I (SB), the Ex-Project Director, D.R.D.A. challenging the impugned order dated 19.07.2018 passed by the learned Special Judge, Special Court, Bhubaneswar in T.R. Case No.2/18 of 2012/2008 in rejecting the petition under section 311 of Cr.P.C. dated 19.04.2018 filed by the petitioner to summon the Secretary to the Government in Home Department to cause production of the file in which notification No.SRO No.294/2011 dated 30.04.2011 was issued through a competent officer to depose as to the contents of the said file relying upon the

ratio laid down by the Hon'ble Supreme Court in case of **Yogendra Kumar Jaiswal -Vrs.- State of Bihar reported in (2016) 63 Orissa Criminal Reports (SC) 426**.

It appears that the petitioner is facing trial for commission of offence under section 13(2) read with section 13(1)(e) of the Prevention of Corruption Act, 1988 and the evidence from the prosecution side is under progress.

Learned counsel for the petitioner, Miss Anima Kumari Dei submitted that if such notification is produced by the competent officer and proved during trial, then it would show that the petitioner was not holding any "high public or political office" in the State of Odisha as contemplated under the Odisha Special Courts Act, 2006 at the relevant point of time.

Mr. Niranjan Moharana, learned Addl. Standing Counsel for the Vigilance Department on the other hand submitted that in **Yogendra Kumar Jaiswal** (supra) case, the Hon'ble Supreme Court has held that the words 'high public or political office' not being defined does not create a dent in the provision. Those words convey a category of public servants which is well understood and there is no room for arbitrariness. In the context of the Odisha Special Courts Act, 2006, it is associated with high public office or with political office which are occupied by people who control the essential dynamic of power which can be a useful weapon to amass wealth adopting illegal manner. It is further contended by the learned counsel for the Vigilance Department that the notification has been published in the Government Gazette and the petitioner can obtain the same by filing proper application and if such notification is produced at the appropriate stage, it can be marked as an exhibit from the side of the defence and at this stage, when the prosecution evidence is going on, filing of such petition under section 311 of Cr.P.C. by the petitioner to call a particular witness to produce the document is not permissible and such method has been adopted just to delay the proceeding. It is further submitted that the petition under section 482 of Cr.P.C. is not maintainable against the impugned order in view of section 9 of the Odisha Special Court Act, 2006.

Coming to the question of maintainability as pointed out by the learned Addl. Standing Counsel for the Vigilance Department, it appears that so far as the section 5 of the Odisha Special Courts Act, 2006 is concerned, if a declaration is made by the State Government that there is prima facie evidence relating to commission of offence under the Prevention of

Corruption Act alleged to have been committed by a person who held high public or political office in the State of Odisha, such declaration shall not be called in question in any Court. So far as section 9 of the said Act is concerned, it clearly stipulates that against the judgment and sentence passed by the Special Court, an appeal is maintainable to the High Court both on facts and law and except such appeal, no appeal or revision shall lie in any Court from any judgment, sentence or order of a Special Court. If sub-sections (1) and (2) of section 9 are read together, it is clear that an appeal will only be maintainable against the judgment and sentence passed by the Special Court. In this case, however the petitioner has challenged the rejection of his petition under section 311 Cr.P.C. The Hon'ble Supreme Court in the case of **Sethuraman -Vrs.- Rajamanickam reported in (2009) 5 Supreme Court cases 153** has held that the orders passed by the trial Court refusing to call the documents and rejecting the application under section 311 Cr.P.C. are interlocutory orders and as such, the revision against those orders is clearly barred under section 397(2) Cr.P.C. I am of the humble view, if any illegality is committed by rejecting such petition, an aggrieved person cannot be left remediless. The inherent powers of the High Court is there to prevent abuse of process of any Court or otherwise to secure the ends of justice. Therefore, an application under section 482 of Cr.P.C. is maintainable against such order. Thus the objection relating to maintainability of this petition which was raised by the learned Addl. Standing Counsel for the Vigilance Department is not sustainable.

So far as the notification issued by the Government in Home Department is concerned which was sought for by the petitioner in the midst of the prosecution evidence, I am of the humble view that the learned trial Court has not committed any illegality in rejecting such petition at that stage though on a different ground.

Section 5 of the Prevention of Corruption Act, 1988 prescribes procedure and powers of the Special Judge wherein it is mentioned that in the trial of the offence under Prevention of Corruption Act, the trial of warrant cases by the Magistrates as prescribed by the Cr.P.C. is to be followed. Trial of warrant cases by Magistrate comes under Chapter-XIX of the Cr.P.C. Section 243 of Cr.P.C. which relates to the evidence for defence, in sub-section (2), it is stated that if the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application

should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing. Needless to say, the petitioner will get ample opportunity at the stage of adducing defence evidence to summon any witness or any document and in that respect he has to file appropriate application at that stage which is to be considered by the learned trial Court in accordance with law.

Therefore, in view of the foregoing discussions, I am not inclined to interfere with the impugned order dated 19.07.2018. Accordingly, the CRLMC application being devoid of merits, stands dismissed.

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2019 (II) ILR - CUT- 617

S. K. SAHOO, J.

CRLMC NO. 3231 OF 2017

MAMTA TRIPATHY & ANR. .....Petitioners

.Vs.

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

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 41-A – Provisions under – Non-compliance thereof – Whether can be a ground for quashing the criminal proceeding under section 482 – Held, No, even though the provision is mandatory, non-compliance of the provision under section 41-A of Cr.P.C. by an investigating officer can be a ground for initiating proceedings against him as contemplated in case of Arnesh Kumar but that by itself would not justify in quashing the entire criminal proceeding against the accused concerned otherwise lapses on the part of the investigating officer would be a paradise for the criminals.

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Inherent power – Offence under sections 341, 342, 323, 294, 504, 506 read with section 34 of the Indian Penal Code – Charge sheet filed mentioning therein that the accused persons not arrested – Prayer for quashing of the criminal proceeding on the ground that the ingredients of the offences alleged absent – When can be exercised? – Held, the inherent powers possessed by the High Court under section 482 of the Code requires great caution in its exercise and should not be exercised

to stifle a legitimate prosecution – If the allegations do not constitute the offences of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under section 482 of the Code.

Case Laws Relied on and Referred to :-

1. (2014) 58 OCR (SC) 999 : Arnesh Kumar .Vs. State of Bihar.
2. 2015 (22) R.C.R (Criminal) 495 : Gauri Shankar Roy .Vs. State of Bihar.
3. 2018 (2) Crimes 601 : Amandeep Singh Johar .Vs. State of N.C.T.
4. A.I.R. 1955 S.C. 196 : H.M. Rishbud .Vs. State of Delhi.
5. (2014) 16 SCC 285 : Union of India .Vs. T.Nathamuni
6. (2017) 16 SCC 126 : R.A.H. Siguran .Vs. Shankare Gowda.
7. 1996 CLJ 1134 (SC) : Krishna Pal .Vs. State of U.P.
8. 1999 SCC (Criminal) 104 : Paras Yadav .Vs. State of Bihar.
9. A.I.R. 2001 S.C. 3846 : Kamaladevi Agarwal .Vs. State of West Bengal.

For Petitioners : Mr. Bijoy Anand Mahanti, (Sr. Adv.)
Mr. B.B. Mishra, P.RK. Patro

For Opp. Parties: Mr. Priyabrata Tripathy, Addl. Standing Counsel

JUDGMENT Date of Hearing: 25.06.2019 Date of Judgment: 08.07.2019

S. K. SAHOO, J.

Petitioners Mamta Tripathi and Bharat Bhusan Sethi have filed this application under section 482 of the Code of Criminal Procedure challenging the impugned order dated 11.07.2017 passed by the learned S.D.J.M., Bhubaneswar in C.T. Case No.3728 of 2016 in taking cognizance of offences under sections 341, 342, 323, 294, 504, 506 read with section 34 of the Indian Penal Code and issuance of process against them. The said case arises out of Chandrasekharpur P.S. Case No.349 of 2016.

2. On 22.08.2016, one G.S. Rath, President, The Arcon Retreat Owners' Welfare Association (hereafter in short 'Association') lodged the first information report before the Inspector in charge of Chandrasekharpur police station alleging therein that on 21.08.2016 while the General Body Meeting of the Association, which is a registered body was going on in the community hall of the Society under the Presidentship of the informant and in presence of the Secretary, Treasurer and other members and also the staff of the Association, at the final phase, the petitioner no.1 Mamta Tripathi started speaking in a louder tone with aggressiveness accusing one Tusar Behera. When the Secretary of the Association namely Padmanav Sahoo tried to intervene, the petitioner no.2 Bharat Bhusan Sethi, who is the husband of the petitioner no.1 rose from his seat and shouted to Sri Tusar Behera as well as the Secretary Sri Sahoo and threatened them with dire consequence

challenging the decisions taken by the previous as well as present Managing Committee. In spite of the request of the informant to both the petitioners to remain seated and to calm down, there was no effect, for which the informant adjourned the meeting and requested the members to disperse. The petitioner no.1 was shouting and creating nuisances in the hall accusing some other members using filthy languages and bolted the door of the hall from inside and stood at the exit gate. The petitioner no.2 also exhibited similar attitude and both the petitioners did not allow anybody to come out of the hall even though the informant requested the petitioners to allow him and others to go out of the hall. The petitioner no.1 obstructed them and told that she would not open the door and allow anybody to go out unless the matter is sorted out. The petitioner no.1 also became more furious and rushed towards the informant and pushed him. It is further alleged that the petitioners also indulged in similar type of activities in the past abusing the previous President and Secretary of the Association and disturbing the meeting. It is stated that both the petitioners prevented the informant, the Secretary and the Treasurer of the Association to discharge their responsibilities by exhibiting uncivilized conduct.

On the basis of such first information report, Chandrasekharpur P.S. No. 349 of 2016 was instituted under sections 341, 342, 323, 294, 504, 506 read with section 34 of the Indian Penal Code against the two petitioners. During course of investigation, the Investigating Officer Shri H.K. Pradhan, S.I. of police, Chandrasekharpur Police Station visited the spot, examined the informant and other witnesses and recorded their statements, searched for the petitioners in the locality and ascertained that the petitioner no.1 is a lawyer and the petitioner no.2 is a high rank officer in Para military force and on completion of investigation, after receipt of the order from Addl. D.C.P., Bhubaneswar UPD, charge sheet was submitted on 26.04.2017 against the petitioners under sections 341, 342, 323, 294, 504, 506 read with section 34 of the Indian Penal Code showing them as *'not arrested*', on receipt of which the learned S.D.J.M., Bhubaneswar passed the impugned order.

3. Mr. Bijoy Anand Mahanti, learned Senior Advocate appearing for the petitioners challenging the impugned order contended that the investigation has been conducted in a perfunctory manner and without examining the petitioners and recording their statements, charge sheet has been submitted. It is further stated that since during course of investigation, the mandate of section 41-A of Cr.P.C. has not been followed and notice of appearance has not been issued to the petitioners, which all the actions taken by the police as

well as the Court becomes null and void and liable to be quashed in view of the decision of the Hon'ble Supreme Court in case of **Arnesh Kumar -Vrs.- State of Bihar reported in (2014) 58 Orissa Criminal Reports (SC) 999** which was followed by a single Judge of Patna High Court in case of **Gauri Shankar Roy -Vrs.- State of Bihar reported in 2015 (22) R.C.R (Criminal) 495** and a Division Bench of Delhi High Court in case of **Amandeep Singh Johar -Vrs.- State of N.C.T. reported in 2018 (2) Crimes 601**. It is further submitted that the entire dispute between the parties emanates from illegal and arbitrary usurpation of power by a group of people who fraudulently registered the Association under the Societies Registration Act, 1860 as a cultural and charitable society though they are in fact running the same as Apartment Owners' Society, which is mandatorily registerable under the Odisha Apartment Ownership Act, 1982 which was subsequently amended in 2015. It is further submitted that there has been delay in lodging the F.I.R. and the ingredients of the offences under which the charge sheet has been submitted are not attracted and there was civil litigation between the parties for which the first information report was lodged and since the criminal proceeding has been instituted maliciously, therefore, invoking the inherent powers of this Court under section 482 of Cr.P.C., the impugned order and the entire criminal proceeding in C.T. Case No.3728 of 2016 should be quashed.

Mr. Priyabrata Tripathy, learned Addl. Standing Counsel on the other hand produced the case diary and placed the first information report as well as statements of the witnesses and contended that at the stage of taking cognizance, neither the cognizance taking Magistrate nor this Court should consider the defence plea which is the duty of the trial Court at the appropriate stage. It is further contended that the charge sheet itself reveals that both the petitioners were remaining present in their respective offices and therefore, taking into account the nature of accusation and the background of the case, the petitioners were shown as 'not arrested' in the charge sheet and therefore, non-issuance of appearance notice under section 41-A of Cr.P.C. cannot be a ground to quash the entire criminal proceeding against the petitioners particularly when prima facie case is well made out.

4. In the case of **Arnesh Kumar** (supra), the Hon'ble Supreme Court after discussing sections 41 and 41-A of the Cr.P.C. has held, inter alia, that notice of appearance in terms of section 41-A of Cr.P.C. be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to

be recorded in writing and failure to comply with the directions aforesaid, shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of Court to be instituted before High Court having territorial jurisdiction. The Hon'ble Court held that the directions issued shall not only apply to the cases under section 498-A of the Indian Penal Code or section 4 of the Dowry Prohibition Act, but also to such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years; whether with or without fine. In the case of **Gauri Shankar Roy** (supra), it is held that in case the police officer decides not to arrest, he has to record the reasons to that effect and thereafter, he is mandatorily required to issue notice to the person concerned under section 41-A(1). The use of word 'shall' in section 41-A(1) of the Code reflects that the provision is mandatory in nature. In the case of **Amandeep Singh Johar** (supra), some procedure were laid down keeping in view the provision under section 41-A of the Cr.P.C. and it was directed that the procedure shall be mandatorily followed by the Delhi police.

There is no dispute that the offences under which charge sheet has been submitted, except for the Part II of section 506 of the Indian Penal Code, punishment prescribed is lesser than seven years. So far as Part II of 506 of the Indian Penal Code is concerned, the punishment may extend to seven years, or with fine, or with both. Therefore, section 41-A of Cr.P.C. is squarely applicable and if the police officer feels that the arrest of a person is not required, not only he has to record the reasons in writing for not making the arrest in view of the proviso to section 41(1)(b) of the Code but also he has to issue notice of appearance as mentioned in section 41-A of the Code. In the present case, no notice of appearance under section 41-A of the Code has been issued to the petitioners and it is only mentioned that both the petitioners are remaining present in their respective offices.

The question that arises for consideration in this case is whether for non-compliance of the provision under section 41-A of the Code, the entire criminal proceeding against the petitioners should be quashed. The purpose behind introduction of section 41-A of the Code is to avoid unnecessary arrest or threat of arrest looming large on accused. The Hon'ble Supreme Court in case of **Arnesh Kumar** (supra) considering such provision of the Code issued certain directions to ensure that police officers do not arrest the accused unnecessarily and the Magistrates do not authorize detention casually and mechanically. In none of the three decisions placed by the learned

counsel for the petitioners, it is held that for non-compliance of the provision under section 41-A of the Code, the entire criminal proceeding against an accused is to be quashed.

Section 465 of the Code prescribes that subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby. In case of **H.M. Rishbud -Vrs.- State of Delhi reported in A.I.R. 1955 S.C. 196**, it is held that a defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. In case of **Union of India -Vrs.- T.Nathamuni reported in (2014) 16 Supreme Court Cases 285**, it is held (para-13) that invalidity of the investigation does not vitiate the result unless a miscarriage of justice has been caused thereby. In case of **R.A.H. Siguran -Vrs.- Shankare Gowda reported in (2017) 16 Supreme Court Cases 126**, it is held that the High Court was not justified in quashing the proceedings merely on the ground that the investigation was not valid. In case of **Dr. Krishna Pal -Vrs.- State of U.P. reported in 1996 Criminal Law Journal 1134 (SC)**, it is held that it would not be proper to acquit the accused in case of defective investigation, if the case is otherwise established conclusively as it would tantamount to be falling in the hands of an erring investigating officer. In case of **Paras Yadav -Vrs.- State of Bihar reported in 1999 Supreme Court Cases (Criminal) 104,** it is held that lapses on the part of the investigating officer should not be taken in favour of the accused.

It is no doubt true that after receipt of the notice of appearance, if an accused appears before the investigating officer and his statement is recorded by the police and he cooperates with the investigation, it would be helpful for the investigating agency in intelligently scrutinizing and testing the probabilities, truthfulness, genuineness or otherwise dependability of the accusation leveled against such accused so that a correct picture relating to the occurrence can be ascertained. I am of the humble view that though non-compliance of the provision under section 41-A of Cr.P.C. by an investigating officer can be a ground for initiating proceedings against him as contemplated in case of **Arnesh Kumar** (supra) but that by itself would not

justify in quashing the entire criminal proceeding against the accused concerned otherwise lapses on the part of the investigating officer would be a paradise for the criminals.

Therefore, I am not inclined to accept the contention raised by the learned counsel for the petitioners to quash the criminal proceeding for non-compliance of the provision under section 41-A of the Code.

5. Coming to the contentions raised by the learned counsel for the petitioners that on account of delay in lodging the F.I.R., the criminal proceeding should be quashed, I find that the occurrence in question stated to have taken place on 21.08.2016 (time not noted) and the F.I.R. was lodged on 22.08.2016 at about 12.45 p.m. and therefore, it cannot be said that there was any such inordinate delay in lodging the report. In a criminal case, where there is delay in lodging the F.I.R., the informant can get chance during investigation as well as during trial to explain the delay aspects. There may be variety of reasons for an informant to lodge a report at a belated stage relating to the commission of a crime. Whether such explanation would be acceptable or not, is the duty of the trial Court at the appropriate stage. No time limit is fixed for lodging an F.I.R. particularly when the offence is punishable with imprisonment for seven years as in the present case. At the stage of taking cognizance or even at the stage of framing of charge, delayed lodging of the F.I.R. cannot be a ground to quash the criminal proceeding.

6. It is not disputed by the learned counsel for the respective parties that civil litigations are pending between the parties prior to the date of occurrence. The petitioner no.1 has filed a civil suit bearing C.S. No.7846 of 2015 which is stated to be pending in the Civil Court at Bhubaneswar. The petitioner no.1 has filed another case vide FAO No.28 of 2016 in the Court of learned Addl. District Judge, Bhubaneswar. In the case of **Kamaladevi Agarwal -Vrs.- State of West Bengal reported in A.I.R. 2001 S.C. 3846**, it is held that criminal cases have to be proceeded with in accordance with the procedure as prescribed under the Code of Criminal Procedure and the pendency of a civil action in a different court even though higher in status and authority, cannot be made a basis for quashing of the proceedings. It appears that relating to some previous dispute between the parties, remedy as available under the civil law has been resorted to, however, since the accusation leveled in the criminal case took place on 21.08.2016, no fault or illegality can be found with institution of the criminal case.

7. Charge sheet has been submitted under section 294 of the Indian Penal Code. The offence prescribes punishment for doing any obscene act in any public place or singing, reciting or uttering any obscene songs, ballad or words, in or near any public place to the annoyance of others. According to New Standard Dictionary (L.D. Wagnalls), 'obscene' means offensive to chastity, delicacy or decency. According to Black's Law Dictionary, 'obscenity' means character or quality of being obscene, conduct, tending to corrupt the public merely by its indecency or lewdness. According to Webster's New International Dictionary, word 'obscene' means disgusting to the senses, usually because of some filthy grotesque or unnatural quality, grossly repugnant to the generally accepted notions of what is appropriate. Verbal abuse is a pattern of behaviour that can seriously interfere with one's positive emotional development and even can lead to significant detriment to one's self-esteem, emotional well-being, and physical state. To understand what verbal abuse is, the Court must dig a little deeper into the signs, symptoms, and effects of verbal abuse in different situations, in different contexts and on different people. Just by saying that the accused hurled abusive words without stating anything regarding nature of obscenity and its effect on others would not be sufficient. Except the statements of the witnesses that the petitioners abused the informant and others, there is nothing on record to show the nature of abusive words hurled or that it caused annoyance to the members of the public. Thus, the ingredients of the offence under section 294 of the Indian Penal Code are not attracted.

Charge sheet has also been submitted under section 506 of the Indian Penal Code which deals with punishment for 'criminal intimidation' which is defined under section 503 of the Indian Penal Code. Threatening a person with any injury to his person, reputation or property or to the person or reputation of anyone in whom that person is interested is called 'criminal intimidation'. Similarly threatening a person with intention to cause alarm to that person, or to cause the person to do any act which is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat is called 'criminal intimidation'. If threat is given to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or with imprisonment for life, or with imprisonment for a term which may extend to seven years or to impute unchastity to a woman, Part-II of section 506 of the Indian Penal Code would be attracted. Mere statement that the petitioners threatened the informant and others without any specific materials to show the nature of threat is not sufficient to attract materials

to show the nature of threat is not sufficient to attract the ingredients of the offence. Sometimes many words are uttered by a person during sudden quarrel in the heat of the moment unpremeditated. The threat should be a real one and not just mere words when the person uttering it does not exactly mean what he says and also when the person at whom threat is launched, does not feel threatened actually. Therefore, I am of the view that the ingredients of the offence under section 506 of the Indian Penal Code are not attracted.

Coming to section 504 of the Indian Penal Code, it requires that there must be intentional insult so as to give provocation to the person insulted with further intention that such provocation would cause, or knowledge that it is likely to cause, the person so insulted to break the public place, or to commit any other offence. In the case in hand, the prosecution case is that during the general body meeting, the petitioners raised their grievances in a forceful manner regarding the decisions taken by the previous as well as present Managing Committee and blamed one Tusar Behera which was opposed to by the informant and others. It cannot be prima facie said that the conduct of the petitioners was to give intentional insult to anyone so as to create any provocation in him. Everybody has a way of presenting a thing before others. The way of presentation of the grievances might not be appealing to the informant and some others but that by itself would not attract the ingredients of offence under section 504 of the Indian Penal Code.

Section 341 of the Indian Penal Code prescribes punishment for '*wrongful restraint*' which is defined under section 339 of the Indian Penal Code and section 342 of the Indian Penal Code prescribes punishment for '*wrongful confinement*' which is defined under section 340 of the Indian Penal Code. The statements of the witnesses indicate that when the meeting was adjourned, the petitioner no.1 bolted the door of the hall from inside and stood at the exit gate and told that she would not open the door and allow anybody to go out unless the matter is sorted out. It seems that when the grievances of the petitioners were not attended to and the President adjourned the meeting, the petitioner no.1 wanted the matter to be sorted out and that was probably her reaction in closing the gate so that the meeting could resume once again. The requisite *mens rea* for committing the alleged offences as described under sections 339 and 340 of the Indian Penal Code are lacking in the case and therefore, I am of the view that the ingredients of the offences under sections 341 and 342 of the Indian Penal Code are not attracted.

Section 323 of the Indian Penal Code deals with punishment for voluntarily causing hurt, which is defined under section 321 of the Indian Penal Code. Even though the informant has mentioned in the F.I.R. that the petitioner no.2 rushed towards him and pushed him physically but most of the witnesses who were stated to be present in that meeting have not stated anything about such physical push given by the petitioner no.2 to the informant. Only when bodily pain, disease or infirmity is caused to any person, whosoever causes the same can be said to have caused '*hurt*' in view of the definition provided under section 319 of the Indian Penal Code. In absence of any cogent material relating to causing hurt to the informant and that to '*voluntarily*' as defined under section 319 of the Indian Penal Code, it cannot be said that the ingredients of the offence under section 323 of the Indian Penal Code are attracted.

8. The inherent powers possessed by the High Court under section 482 of the Code requires great caution in its exercise and should not be exercised to stifle a legitimate prosecution. If the allegations do not constitute the offences of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under section 482 of the Code.

9. In view of the foregoing discussions, I am of the humble view that the continuance of the criminal proceeding against the petitioners would be an abuse of process and therefore, for the ends of justice, I am inclined to accept the prayer made by the petitioners in this application under section 482 of the Code. Accordingly, the impugned order dated 11.07.2017 passed by the learned S.D.J.M., Bhubaneswar in C.T. Case No.3728 of 2016 and the entire criminal proceeding in the said case stands quashed. The CRLMC application is allowed.

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2019 (II) ILR - CUT- 626

S. K. SAHOO, J.

CRIMINAL APPEAL NO. 187 OF 2012

HAREN MANDAL .....Appellant

.Vs.

STATE OF ODISHA .....Respondent

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 20 (b) (ii) (C) – Conviction under – Appeal – Plea of the appellant that there has been violation of the mandatory provisions like

Sections 42, 55 and 57 of the Act – Scope of interference in the order of conviction – Held, in view of the forgoing discussions, since there is absence of cogent material relating to keeping of the seized articles along with the sample packets in safe custody till its production in the Court, the delay in production of the seized articles along with the sample packets in Court has not been explained by the prosecution with satisfactory evidence, there is non-compliance of the provision under sections 42 (2) and 57 of the N.D.P.S. Act and moreover P.W.4 being the officer, who after conducting search and seizure has also investigated the matter and submitted prosecution report which creates doubt in the fairness in the process of recovery and investigation – Held, it would be risky to uphold the impugned judgment and the order of conviction and sentence passed against the appellant.

Case Laws Relied on and Referred to :-

1. (2018) 72 OCR (SC) 196 : Mohan Lal .Vs. State of Punjab
2. (2018) 70 OCR 340 : Ramakrushna Sahu .Vs. State of Orissa.
3. (2009) 44 OCR (SC) 183 : Karnail Singh .Vs. State of Haryana.
4. (2018) 69 OCR (SC) 409 : Gorakh Nath Prasad -.Vs. State of Bihar.
5. (2013) 2 SCC 212 : Sukhdev Singh .Vs. State of Haryana.
6. (1994) 7 OCR (SC) 283 : State of Punjab .Vs. Balbir Singh & Ors.

For Appellant : Mr. Jugal Kishore Panda
For Respondent : Mr. Priyabrata Tripathy, Addl. Standing Counsel

JUDGMENT Date of Hearing and Judgment: 11.07.2019

S. K. SAHOO, J.

The appellant Haren Mandal faced trial in the Court of learned Additional Sessions Judge -cum- Special Judge, Nabarangpur in C.T. No. 86 of 2007 for offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') on the accusation that on 09.11.2007 he was found in unlawful possession and transportation of Ganja (cannabis) weighing 36 kg. in Majhiguda forest footway.

The learned trial Court vide impugned judgment and order dated 17.02.2011 found the appellant guilty of the offence charged and sentenced him to undergo rigorous imprisonment for a period of twelve years and to pay a fine of Rs.1,25,000/- (rupees one lakh twenty five though), in default, to undergo further rigorous imprisonment for period of three years.

2. The prosecution case, in short, is that on 09.11.2007 at about 4.00 p.m. while P.W.4 Dillip Kumar Gouda, S.I. of Excise, Umerkote was

performing patrolling duty along with his staff near village Majhiguda under Umarkote police station, at that time, he received information through reliable sources that one man was illegally transporting contraband ganja on the forest footway of village Majhiguda. On receipt of such information, P.W.4 immediately took down the information in writing and sent it to his superior officer, i.e., Excise Superintendent, Nabarangpur vide Ext.3 and then proceeded to Majhiguda jungle. While P.W.4 and the other excise staff were concealing themselves in the jungle awaiting arrival of that man, they found the appellant was coming on that way carrying two gunny bags in a 'bahungi'. The appellant was stopped by the excise officials and P.W.4 gave his identity before him and also told him the reasons for obstructing him. At that time, P.W.1 Sankar Das was passing by that road and he was called to the place where the appellant was detained. Suspecting that the gunny bags were containing contraband ganja, P.W.4 expressed his intention to search the appellant as well as the gunny bags which he was carrying and gave the option of search to the appellant in presence of the Executive Magistrate. After disclosing his name, the appellant gave his option to be searched by an Executive Magistrate. On the basis of the written option (Ext.4) given by the appellant, P.W.4 deputed a constable to the Tahasildar, Umerkote with a written requisition (Ext.5) to come to the spot and to assist in the search. The Tahasildar (P.W.3) reached at the spot at 6.00 p.m. and he took the personal search of P.W.4 and other excise staff and in his presence, the gunny bags carried by the appellant were opened. P.W.4 tested the contents of the gunny bags by rubbing it in his own hand and he came to know that the articles found inside the gunny bags were nothing but ganja. The ganja was weighed which was found to be 36 kg. and each gunny bag was containing 18 kg. of ganja. P.W.4 collected 50 grams of ganja from each of the gunny bags towards sample and divided it into four packets and each of the sample packets were sealed properly with the personal brass seal of P.W.4, on which P.W.3 and other witnesses signed. The residual ganja in the gunny bags were also sealed in presence of the witnesses and the Executive Magistrate (P.W.3). P.W.4 prepared the seizure list (Ext.1) and a copy of the seizure list was handed over to the appellant, in token of receipt of which the appellant put his L.T.I. on the back of the seizure list. The brass seal of P.W.4 with which gunny bags and sample packets were sealed, was handed over to P.W.3 under zimanama (Ext.2). The appellant was arrested on 09.11.2007 and he was produced before the learned Special Judge, Nabarangpur on 10.11.2007 in the residential office, as it was a holiday. P.W.4 investigated the case and on 11.11.2007 he visited the spot, recorded the statements of

witnesses. On 13.11.2007 he took the seized articles again to be produced before the learned Special Judge, Nabarangpur, but since the Malkhana Clerk did not agree to keep the articles in the Malkhana, P.W.4 again returned back to the headquarters and kept the articles in safe custody. On 17.11.2007, P.W.4 again took the seized articles to the Court of learned Special Judge and produced it and as per the orders of the Court, he deposited the residual ganja in the gunny bags in the Court Malkhana vide C.M.R no. 36 of 2007 and produced the sample packets before the learned S.D.J.M., Nabarangpur who sent it for chemical analysis. The Chemical Examiner after analysis, on the basis of description and identification tests performed opined that the two samples, i.e. A-1 and B-1, were Ganja (cannabis) as defined under section 2(iii)(b) of the N.D.P.S. Act. After completion of investigation, P.W.4 submitted the prosecution report against the appellant under section 20(b)(ii)(C) of the N.D.P.S. Act.

3. The appellant was charged under section 20(b)(ii)(C) of the N.D.P.S. Act to which he pleaded not guilty and claimed to be tried.

4. During course of trial, the prosecution examined four witnesses.

P.W.1 Sankar Das did not support the prosecution case for which he was declared hostile by the prosecution and cross-examined by the Public Prosecutor.

P.W.2 Tripati Prasad Panda was the constable attached to Umerkote Excise Office and he accompanied P.W.4 in the patrolling duty. He stated about the recovery of contraband Ganja from the possession of the appellant in two gunny bags, collection of the samples by P.W.4, sealing of the sample packets after weighment, giving of the brass seal in the zima of P.W.3 as per zimanama (Ext.2).

P.W.3 Pitambar Bhoi was the Tahasildar, Umerkote and he came to the spot on receipt of the requisition from P.W.4 and was present when the contraband ganja found in the two gunny bags was weighed, samples were prepared and sealed and he also took the zima of the brass seal with which the sample packets and the gunny bags were sealed.

P.W.4 Dillip Kumar Gouda was the S.I. of Excise of Umerkote, who not only detected the appellant carrying contraband Ganja in Majhiguda jungle, but also prepared the seizure list after weighment of contraband ganja and sample collection and he also arrested the appellant and produced him in Court with the seized articles. He is also the Investigating Officer in the case.

The prosecution exhibited seven documents. Ext.1/1 is the seizure list, Ext.2 is the zimanama, Ext.3 is the copy of information given to the Superintendent of Excise, Nabagarnagpur on 09.11.2007, Ext. 4 is the written option given by the appellant, Ext.5 is the copy of the requisition, Ext.6 is the copy of the letter of S.D.J.M., Nabarangpur regarding sending of exhibits for chemical examination and Ext.7 is the Chemical Examination report.

The prosecution also proved the sample packets as M.O.I and M.O.II.

5. The defence plea of the appellant was one of denial and it was pleaded that nothing was seized from his possession and a false P.R. has been filed against him.

6. The learned trial Court after analysing the evidence on record came to hold that notwithstanding the hostile attitude shown by the independent witness (P.W.1), the evidence of P.W.2 and P.W.4 can be considered to be credible one. It is further held that the entire search, seizure and taking of sample having been effected in presence of the Executive Magistrate (P.W.3) and therefore, it can be safely deduced that the evidence of P.W.2 and P.W.4 are credible and beyond reproach and that P.W.3 can be considered to be a witness of sterling worth. It is further held that the brass seal having been handed over to the Executive Magistrate (P.W.3) at the spot in presence of the witnesses, it can be deduced that the sample packets sent to the Chemical Examiner have not been tampered with. The learned trial Court considered the contentions of the defence counsel regarding non-compliance of the provision under section 42 of the N.D.P.S. Act and came to hold that the search and seizure having been taken place in the public place, the strict compliance under section 42 is not required except under section 43 of the said Act. Considering the contention of the defence counsel regarding non-compliance of the provision under section 55 of the N.D.P.S. Act, the learned trial Court came to hold that P.W.4 being invested with the power of the officer in charge of the police station of his jurisdiction, he is entitled to keep the seized articles in his custody and therefore, the contention raised regarding non-compliance of provision under section 55 of the N.D.P.S. Act vitiating the trial was held to be misconceived in law. The learned trial Court further held that the excise officials being empowered by the State Government under sections 41 and 42 of the N.D.P.S. Act to effect search and seizure of the contraband articles and as per the notification issued by the Commissioner of Excise, Government of Odisha, they are vested with the power of the officer in charge of the police station for investigation of the offences under N.D.P.S. Act, it is not required on their part to submit the

seized articles before the officer in charge of any police station and they can themselves keep the seized articles till the same is produced before the Special Court. The learned trial Court also considered the contentions raised by the learned defence counsel relating to the delay in production of the seized ganja as well as the sample packets before the Court and held that since the S.I. of Excise submitted a detailed report along with production of the appellant and the seized articles before the Special Judge within seventy two hours of arrest and seizure, it is the sufficient compliance of section 57 of the N.D.P.S. Act and since the Special Judge or the Magistrate is the immediate superior officer of the investigating officer and therefore, the record should not be submitted to the higher officer except to the Special Judge or the Magistrate. It is further held that no illegality has been committed by P.W.4 in conducting the investigation as the same is duly approved by the statutory provision and by the special notification issued by the State Government. Ultimately the learned trial Court came to hold that the prosecution has successfully proved the case against the appellant beyond all reasonable doubt that he was in exclusive possession of the contraband ganja and accordingly, found him guilty under section 20(b)(ii)(C) of the N.D.P.S. Act.

7. Mr. Jugal Kishore Panda, learned counsel appearing for the appellant challenging the impugned judgment and order of conviction contended that since P.W.4 conducted search and seizure and also arrested the appellant, he should not have investigated the case and submitted the prosecution report against the appellant inasmuch as a fair investigation, which is the very foundation of a fair trial, necessarily postulates that the informant and the investigator must not be the same person. He relied upon the decision of the Hon'ble Supreme Court in the case of **Mohan Lal -Vrs.- State of Punjab reported in (2018) 72 Orissa Criminal Reports (SC) 196**. It is further contended that there is non-compliance of sections 55 and 57 of the N.D.P.S. Act and even though the articles were seized and samples were taken on 10.11.2007 but those were not produced before the learned Special Judge, Nabarangpur when the appellant was produced and it was produced only on 17.11.2007, on which date the sample packets were dispatched for chemical analysis and the seized gunny bags containing the residual ganja were kept in the Court Malkhana. It is submitted that there is lack of evidence relating to the safe custody of the seized ganja as well as the sample packets before its production in Court and the explanation furnished by P.W.4 relating to delay in production is not at all acceptable. It is further contended that there are contradictions in the evidence of the official witnesses relating to the date of

seizure of contraband ganja and even though it is the prosecution case that the brass seal of P.W.4, which was utilized in sealing the gunny bags as well as the sample packets was handed over to P.W.3 but the brass seal was not produced in Court for verification when the seized ganja in gunny bags and sample packets were produced and even in Court during trial. He relied upon the decision of this Court in the case of **Ramakrushna Sahu -Vrs.- State of Orissa reported in (2018) 70 Orissa Criminal Reports 340** and contended that it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Priyabrata Tripathy, learned Addl. Standing Counsel for the State, on the other hand, supported the impugned judgment and contended that merely because P.W.4, who conducted search and seizure, also submitted prosecution report after investigation, it cannot be said that the investigation is perfunctory and without any material relating to the malafideness in the conduct of P.W.4, the entire prosecution case cannot be disbelieved on that score. It is further contended that when P.W.4 was invested with the power of the officer in charge of the police station by virtue of the notification issued by the Commissioner of Excise, Government of Odisha and he has kept the contraband ganja in the gunny bags as well as the sample packets with him in a sealed condition in safe custody before its production in Court, the contention of the learned counsel for the appellant that there was non-compliance of section 55 of the N.D.P.S. Act cannot be accepted. It is further contended that P.W.4 in his evidence has explained as to why there was delay in production of the seized articles in the Special Court and when there is absence of any material regarding tampering with the seized articles, which was kept in sealed condition and the brass seal was handed over to P.W.3, the delay cannot be held to be fatal. It is further submitted that when the seized articles were produced on 17.11.2007, it was verified by the learned Special Judge, Nabarangpur and as per the direction of the learned Special Judge, the learned S.D.J.M., Nabarangpur also verified the same before sending the samples to the chemical examiner for analysis and no infirmities were noticed and therefore, the learned trial Court has rightly relied upon the evidence of the witnesses i.e. P.Ws.2, 3 and 4, which is corroborated by the documentary evidence i.e. Exts.1 to 7 and there is no illegality in the impugned judgment and therefore, the appeal should be dismissed.

8. Adverting to the contentions raised by the learned counsel for the respective parties, it appears from the evidence of P.W.4 that while he was performing patrolling duty with the excise staff near Majhiguda village, he received information through reliable source regarding carrying of

contraband ganja by a person. He stated to have sent information in writing to his superior officer, i.e. Superintendent of Excise, Nabarangpur vide Ext.3. The evidence of P.W.4 is silent as to who took Ext.3 to the superior officer. Ext.3 as such does not indicate that it was received by the Superintendent of Excise, Nabarangpur. Neither any official seal nor any signature of the Superintendent of Excise is found on Ext.3 in token of its receipt. No witness has been examined to say that he produced Ext.3 before the Superintendent of Excise, Nabarangpur. No one from the office of Superintendent of Excise, Nabarangpur has been examined to say about the receipt of Ext.3 in that office. No register from the office of Superintendent of Excise, Nabarangpur has also been proved in this case to substantiate such aspect. The evidence of P.W.4 is not corroborated by any other witness. Therefore, except the bald statement of P.W.4 that he sent in writing about the reliable information received relating to carrying of contraband ganja by a person vide Ext.3 to his superior officer, there is nothing on record that in fact any such intimation has been given to the Superintendent of Excise, Nabarangpur and that it was received by him. If clinching oral and documentary evidence is not insisted for compliance of section 42(2) of the N.D.P.S Act then the very purpose of enactment of such a provision would be rendered meaningless.

It is not the case of P.W.4 that he suddenly carried out the search of the appellant at a public place and detected ganja. It is a case where P.W.4 stated to have received reliable information beforehand while he was on patrolling duty with his staff and he has also come up with a case of compliance of section 42 of the N.D.P.S. Act. In the case of **Karnail Singh -Vrs.- State of Haryana reported in (2009) 44 Orissa Criminal Reports (SC) 183,** it is held in the concluding paragraph as follows:-

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

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

Even though P.W.4 was on patrolling duty with his staff when he received the reliable information and according to him, he tried to comply the requirements of sections 42(1) and 42(2) of the N.D.P.S. Act and in that respect, the prosecution has proved Ext.3 but since the dispatch of Ext.3 to the superior officer i.e. Superintendent of Excise, Nabarangpur becomes a doubtful feature, I am of the humble view that for the non-compliance of section 42(2) of the N.D.P.S. Act, the prosecution case relating to fairness in the process of recovery becomes doubtful.

9. With regard to non-compliance of section 55 of the N.D.P.S. Act as contended by the learned counsel appearing for the appellant, it appears that even though as per the notification issued by the Commissioner of Excise, Government of Odisha dated 03.03.1998, all the officers of and above the rank of S.I. of Excise of the Excise Department of the State are invested with the power of the officer in-charge of police station for investigation of the offence under the N.D.P.S. Act and the Excise Officers from the rank of S.I. of Excise have been empowered with the power of officer in charge of the police station to investigate into the case but mere statement of P.W.4 that he

kept the articles in safe custody in the headquarters is not sufficient without any clinching documentary evidence in that respect.

P.W.4 has stated that on 10.11.2007 he produced the accused *along with the seized articles* before the learned Special Judge, Nabarangpur, but the order sheet of the learned Special Judge, Nabarangpur dated 10.11.2007 does not indicate anything relating to production of the seized articles before him on that day. It only reflects about the receipt of forwarding report along with the seizure list, memo of arrest, option query of the Investigating Officer, option of the accused, intimation letter of the I.O., zimanama and requisition letter when the appellant was produced before the Court. Therefore, the statement of P.W.4 that the seized articles were also produced on 10.11.2007 cannot be accepted. Though P.W.4 has stated that on 13.11.2007 he again took the seized articles to be produced before the learned Special Judge, Nabarangpur and the Malkhana clerk did not agree to keep the same in the Malkhana, but there is absence of any documentary evidence in that respect. The Malkhana clerk has also not been examined. When there is no order of the Court on 13.11.2007 to show that the seized articles were produced and it was directed to be kept in Malkhana, the statement of P.W.4 is not believable. The prosecution evidence is totally silent as to why not only on 10.11.2007 but also prior to 17.11.2007 the seized contraband articles in gunny bags along with the sample packets were not produced before the learned Special Judge, Nabarangpur. When there is absence of any documentary evidence as well as oral evidence relating to the safe custody of the seized articles before its production in Court and the explanation furnished by P.W.4 is not acceptable and it runs contrary to the order-sheet of the case record, I am of the humble view that the delay in production of the seized articles is fatal to the prosecution case. It is the duty of the prosecution to adduce cogent, reliable and unimpeachable evidence to prove that the contraband articles after its seizure were not only properly sealed and kept in safe custody before its production in Court and that there was no chance of tampering with the same, but also the articles which were produced in the Court, were the very articles which were seized in the case. The entire path right from the point of the seizure of contraband articles till its production before the Court for its dispatch to the chemical examiner has to be covered by the prosecution by adducing clinching evidence as the punishment prescribed for the offences under the N.D.P.S. Act are very stringent in nature.

10. The brass seal which was handed over to P.W.3 was not produced in Court when the seized ganja in gunny bags and sample packets were produced for verification. The order-sheet dated 17.11.2007 clearly reveals that only the sample of the seized property vide Exts. A-1, A-2, B-1 and B-2 were produced and a prayer was made by the S.I. of Excise, Umerkote to send it to the Chemical Examiner and accordingly, the learned Special Judge sent it to the learned S.D.J.M., Nabarangpur to open a part file and to send the samples to the Chemical Examiner and there was a further direction that the other seized materials are to be deposited in the Court Malkhana. P.W.3 has also not stated that he produced the brass seal which he had taken in zima at the time of production of the seized articles in Court. Even the brass seal was not produced during trial of the case. The seized gunny bags containing ganja which were kept in Court Malkhana were also not produced during trial.

In the case of **Gorakh Nath Prasad -Vrs.- State of Bihar reported in (2018) 69 Orissa Criminal Reports (SC) 409**, it is held as follows:-

> "8. The remaining prosecution witnesses being police officers only, it will not be safe to rely upon their testimony alone, which in any event cannot be sufficient evidence by itself either with regard to recovery or the seized material being Ganja. No explanation has also been furnished by the prosecution for non-production of the Ganja as an exhibit in the trial. The benefit of doubt will, therefore, have to be given to the Appellant and in support of which learned Senior Counsel Shri Rai has relied upon **Jitendra and Anr. -Vrs.- State of M.P., (2004) 10 SCC 562**, and reiterated in **Ashok alias Dangra Jaiswal -Vrs.- State of Madhya Pradesh, (2011) 5 SCC 123**, as follows:
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> "12. Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the Appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the Appellant or the other accused.
>
> 13. It may be noted here that in **Jitendera -Vrs.- State of M.P., (2004) 10 SCC 562**, on similar facts this Court held that the material placed on record by the prosecution did not bring home the charge against the Accused beyond reasonable doubt and it would be unsafe to maintain their conviction on that basis. In Jitendra (supra), the Court observed and held as under: (SCC pp. 564-65, paras 5-6)
>
> "5. The evidence to prove that charas and ganja were recovered from the possession of the Accused consisted of the evidence of the police officers and the panch witnesses. The panch witnesses turned hostile. Thus, we find that apart from the testimony of Rajendra Pathak (PW 7), Angad Singh (PW 8) and Sub-Inspector D.J. Rai (PW 6), there is no independent witness as to the recovery of the drugs from the possession of the accused. The charas and ganja alleged to have been seized from the possession of the Accused were not even produced before the trial court, so as to connect them with the samples sent to the Forensic Science Laboratory. There is no material produced in the trial, apart from the interested testimony of the police officers, to show that the

> charas and ganja were seized from the possession of the Accused or that the samples sent to the Forensic Science Laboratory were taken from the drugs seized from the possession of the accused.....
>
> 6.....The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned....."

11. The evidence of P.W.4 is totally silent regarding compliance of section 57 of the N.D.P.S. Act which states that within forty eight hours next after the arrest or seizure under the Act, the person making such arrest or seizure has to make a full report of all the particulars of such arrest or seizure to his immediate official superior. In case of **Sukhdev Singh -Vrs.- State of Haryana reported in (2013) 2 Supreme Court Cases 212,** it is held that once the contraband is recovered, then there are other provisions like section 57 of the N.D.P.S. Act which the empowered officer is mandatorily required to comply with.

The observation of the learned trial Court that the S.I. of Excise (P.W.4) submitted a detailed report along with production of the appellant and the seized articles before the Special Judge within seventy two hours of arrest and seizure and that it is the sufficient compliance of section 57 of the N.D.P.S. Act and the further observation that the Special Judge or the Magistrate are the immediate superior officer of the investigating officer and therefore, the record should not be submitted to the higher officer except the Special Judge or the Magistrate, is totally misconceived. The seized articles were never produced before the learned Special Judge within seventy two hours of arrest and seizure. It was produced after seven days. Full report of all the particulars of arrest or seizure has to be made by the person making arrest or seizure to his immediate official superior. Submission of such report to the Special Judge or the Magistrate without submitting the same to the immediate official superior is not contemplated under section 57 of the N.D.P.S. Act. As held by the Hon'ble Supreme Court in case of **State of Punjab -Vrs.- Balbir Singh & others reported in (1994) 7 Orissa Criminal Reports (SC) 283** that if there is no strict compliance of section 57 of the N.D.P.S. Act, that by itself cannot render the acts done by the officers null and void and at the most it may affect the probative value of the evidence regarding arrest or search and in some cases it may invalided such arrest or search but such violation by itself does not invalided the trial or the

conviction if otherwise there is sufficient material. The officers, however, cannot totally ignore these provisions and if there is no explanation for non-compliance or where the officers totally ignore the provisions then that will definitely have an adverse effect on the prosecution case and the Courts have to appreciate the evidence and the merits of the case bearing these aspects in view.

12. Even though the date of seizure has been stated as 07.11.2007 by the Executive Magistrate (P.W.3) while P.W.2 and P.W. 4 stated it to be 09.11.2007, but in view of the materials available on record, it can be said that the occurrence took place on 09.11.2007 and the date, which has been stated by P.W.3 is a mistake.

13. In view of the forgoing discussions, since there is absence of cogent material relating to keeping of the seized articles along with the sample packets in safe custody till its production in the Court, the delay in production of the seized articles along with the sample packets in Court has not been explained by the prosecution with satisfactory evidence, there is non-compliance of the provision under sections 42 (2) and 57 of the N.D.P.S. Act and moreover P.W.4 being the officer, who after conducting search and seizure has also investigated the matter and submitted prosecution report which creates doubt in the fairness in the process of recovery and investigation, I am of the humble view that it would be risky to uphold the impugned judgment and the order of conviction and sentence passed against the appellant.

Accordingly, the impugned judgment and order of conviction of the appellant under section 20(b)(ii)(C) of the N.D.P.S. Act and the sentence passed thereunder is hereby set aside.

The Criminal Appeal is allowed. The appellant is acquitted of the charge under section 20(b)(ii)(C) of the N.D.P.S. Act. The appellant, who is in jail custody, shall be set at liberty forthwith, if his detention is not required in any other case.

Lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

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2019 (II) ILR - CUT- 639

K.R. MOHAPATRA, J.

MACA NO. 933 OF 2003

SMT. AMBIKA BHUYAN & ANR. …….Appellants

.Vs.

SAUKAT ALLI & ANR. …….Respondents

(A) MOTOR VEHICLES ACT, 1988 – Section 163 A read with Clause 6 of Second Schedule – Special provision for payment of compensation on structural formula basis – Death of a minor child – Computation of compensation – Held, section 163-A and clause 6 of Second Schedule of the Act does not discriminate between minor and able bodied major, who is capable of earning – It is applicable to all irrespective of the age, where the victim of an accident has no known source of income –Thus the annual notional income of the deceased, who was a non-earning minor child is Rs.15, 000/- per annum. (Paras 7 & 8)

(B) MOTOR VEHICLES ACT, 1988 – Section 163-A – Computation of compensation – Structural formula basis – Death of a minor – Payment of annual notional income – Question raised that, what would be deducted from the notional income of the deceased towards the personal/living expenses and what would be the multiplier – Claimants pleaded that, no personal expenses would be deducted as the same is borne by the parents – But the insurer pleaded that 50% shall be deducted from the notional income – Held, taking into consideration of the structured formula, this court adopts multiplier 15 for determination of loss of dependency and hold that the income shall be reduced by 1/3rd towards her personal/living expenses while determining the compensation. (Paras 8 & 9)

(C) MOTOR ACCIDENT CLAIM – Death of a minor child – What would be the loss of future prospect of income of the deceased? – Held, Rs.75, 000/- is the loss of future prospect. (R.K.Malik & Anr. – Vrs- Kiran Pal & Ors.2009 (3) TAC 1 (SC) Followed) (Para 10)

(D) MOTOR ACCIDENT CLAIM – Death of a minor child – Whether the Court/Tribunal can award compensation in the head loss of consortium when the deceased is a child? – Held, the Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims – In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of filial consortium. (Para 12)

Case Laws Relied on and Referred to :-

1. (2003) 96 CLT 515 : Smt. Sunanda Nayak Vs. Divisional Manager, Oriental Insurance Company & Anr.
2. (2009) 6 SCC 121 : Sarala Verma Vs. Delhi Transport Corporation.
3. (2015) 6 SCC 347 : Munna Lal Jain & Anr. Vs. Vipin Kumar Sharma & Ors.
4. AIR 2002 SC 2607 : United India Insurance Company Limited & Ors. Vs. Patricia Jean Mahajan & Ors.
5. (2017) 16 SCC 680 : National Insurance Company Ltd. .Vs. Pranay Sethi.
6. 2009 (3) TAC 1 (SC) : R.K. Malik & Anr. Vs. Kiran Pal & Ors.
7. 2018 (4) T.A.C. 345 (SC) : Magma General Insurance Co. Ltd. Vs. Nanu Ram alias Chuhru Ram & Ors.

For Appellants : M/s. Patitapaban Mishra, Pradeep Ku. Mishra, A.Dash & Pranaya Ku.Mishra.

For Respondents : M/s. S.S. Mohanty, P.N.Sahu & N.Mukharjee, M/s Mahitosh Sinha, P.R.Sinha,Prasanna Ku. Mahali.

JUDGMENT Date of Judgment : 29.04.2019

K.R. MOHAPATRA, J.

This appeal under section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as the 'Act') has been filed by the Claimants-appellants against the Award dated 29.04.2003 passed by learned Second Motor Accident Claims Tribunal, Cuttack (hereinafter referred to as 'the Tribunal"), in Misc. Case No.582 of 1994 awarding a sum of Rs.37,500/- to the claimants-appellants along with 6% interest per annum from the date of filing of the claim petition, i.e., 12.08.1994 till realization along with cost.

2. Bereft of unnecessary details, the case of claimants as revealed from the Claim Petition is that on 31.07.1994, a truck bearing registration No.WB-23-1207 (for short, 'offending truck') being driven in a rash and negligent manner ran over a 13 years old girl, a student (hereinafter referred to as "the deceased") causing her instantaneous death. The offending truck had valid insurance policy issued by respondent No.2-Insurance Company covering the date of accident. As such, the claim petition under Section 166 of the Act was filed claiming compensation of Rs.80,000/-. Taking into consideration the materials on record, the impugned award has been passed.

3. At the outset, learned counsel for the appellants submitted that appellant No.1 (mother of the deceased) died on 13.08.2009) during pendency of the appeal leaving behind her husband (appellant No.2) as her only legal heir who is already on record. Hence, no substitution is necessary. In support of his submission, learned counsel submitted an attested photocopy of death certificate of appellant No.1 which is taken on record. As such, the name of appellant No.1 is deleted from the cause title of the appeal memo.

4. Learned counsel for appellant No.2 argued that the instant appeal has been filed for enhancement of the compensation amount. Learned Tribunal, while adjudicating the claim petition, did not take into consideration the materials on record and the case law cited on behalf of the claimants. A meager compensation of Rs.37,500/- as awarded by learned Tribunal is also without any basis. Learned Tribunal ought to have taken into consideration the legal position while assessing the compensation for death of a minor girl. The 2nd Schedule of Section 163-A of the Act clearly provides that notional income of a non-earning person should be Rs.15,000/- per annum. Further, the deceased being 13 years old at the time of her death, multiplier 15 should have been applied while assessing the compensation. The appellant No.1 is also entitled to compensation on heads of non-pecuniary damages like loss of estate and loss of consortium etc. In that view of the matter, the compensation as awarded by learned Tribunal warrants interference and the same is liable to be enhanced.

5. Learned counsel for respondent No.2-Insurance Company, on the other hand, submitted that the deceased being a minor girl of 13 years old and a student at the time of her death, the notional income as prescribed in the 2nd Schedule is not applicable. Further, when the deceased is a non-earning person, question of adopting multiplier to assess the loss of income does not arise. The plea of loss of consortium is also a misnomer in the instant case. It is only applicable in case of death of a spouse or an earning child of the parents. In absence of any such material, learned Tribunal has arrived at a just conclusion, which needs no interference.

6. Heard learned counsel for the parties and perused the materials available on record. The first and most important issue that arises for assessment of compensation, is income of the deceased. The deceased was a girl of 13 years old and a student at the time of her death. Naturally, she did not have any income of her own. Learned counsel for the appellant submitted that in absence of any known source of income of the deceased, the compensation can be assessed on the basis of structured formula as envisaged in Section 163-A read with Second Schedule of the Act. Learned counsel for the Insurance Company, however, submits that when the claimants have not prayed for assessment of the compensation on the basis of structured formula as envisaged under Section 163-A of the Act, such a plea at a belated stage in the appeal is not acceptable. I am unable to accept the submissions of learned counsel for the Insurance Company for the reason that provisions have been made in the Act to award a just compensation to

the claimant for the loss sustained in a motor accident. The claims Tribunal constituted under the Act have jurisdiction to award compensation more than what is claimed in the claim petition under Section 166 of the Act, if it feels in the facts and circumstances of a particular case, to award so which would be a just compensation. In my view, a just compensation cannot be less than the amount to be assessed under the structured formula prescribed under Section 163-A of the Act. My view gets support from a decision of this Court in the case of ***Smt. Sunanda Nayak –v- Divisional Manager, Oriental Insurance Company and another***, reported in Vol. 96 (2003) CLT 515.

> "14. In another decision reported in Fatama Matul Bibi v. Oriental Insurance Co. Ltd., 2003 ACJ 365 (Calcutta), a Division Bench of Calcutta High Court while dealing with a case of death of two children who were aged 12 years and were students of classes III and IV, held thus:
>
> "Different High Courts considered the future prospects of the child and also dependency benefits or accretion to the estate, but fact remains that in ultimate analysis in the matter of assessment, no guideline was applied and we do not find any reason on what basis ultimately the amount which was awarded in each case, which appears to us, to be quite nugatory. We are not inclined to follow such decisions. The reason is as pointed out hereinbefore, although we are concerned that in determination of compensation element of speculation may be more in case of a minor, and future dependency benefit or accretion to the estate in such cases can be determined after taking into consideration the family background, academic achievement of the child and other material available, but even such determination, it appears to us, remains in the realm of speculation. We are of the view that structured formula is a safer guidance for arriving at the amount of compensation in any other matter, even in case when the child is victim…"

Thus, the contention of learned counsel for the Insurance Company is not sustainable. It is held that in absence of any other mode of assessment, the structured formula as provided in Section 163-A read with Second Schedule of the Act is applicable, even if the claimant has not taken a specific plea to that effect in the claim petition under section 166 of the Act.

7. True it is that the deceased was a girl of 13 years old and a student at the time of her death, but Clause-6 of Second schedule of Section 163-A of the Act does not discriminate between a minor and an able-bodied major, who is capable of earning. It is applicable to all irrespective of the age, where the victim of an accident has no known source of income. It prescribes as follows:-

> *"xx xx xx*
>
> *6. Notional income for compensation to those who had no income prior to accident:*

Fatal and disability in non-fatal accidents:
(a) Non-earning person Rs.15,000 p.a.
(b) Spouse Rs.1/3rd of income of the earning surviving spouse.
In case of other injuries only "general damage" as applicable."

8. Thus, I have no hesitation to assess the annual notional income of the deceased, who was a non-earning minor child at Rs.15,000/- per annum.

There is some controversy as to what amount would be deducted from the income of the deceased towards her personal/living expenses and what would be the multiplier. An argument is advanced by learned counsel for the claimant-appellant that the deceased being a child of 13 years at her death, no personal expenses would be deducted from the notional income, as all her expenses was being borne by her parents. On the other hand, learned counsel for the Insurance Company contended that since the deceased was a bachelor, 50% should be deducted from her notional income towards personal and living expenses. He placed reliance on the case of ***Sarala Verma –v- Delhi Transport Corporation***, reported in (2009) 6 SCC 121, wherein it has been held as follows:-

> "25. We have already noticed that the personal and living expenses of the deceased should be deducted from the income, to arrive at the contribution to the dependants. No evidence need be led to show the actual expenses of the deceased. In fact, any evidence in that behalf will be wholly unverifiable and likely to be unreliable. The claimants will obviously tend to claim that the deceased was very frugal and did not have any expensive habits and was spending virtually the entire income on the family. In some cases, it may be so. No claimant would admit that the deceased was a spendthrift, even if he was one.
>
> 26. It is also very difficult for the respondents in a claim petition to produce evidence to show that the deceased was spending a considerable part of the income on himself or that he was contributing only a small part of the income on his family. Therefore, it became necessary to standardise the deductions to be made under the head of personal and living expenses of the deceased. This lead to the practice of deducting towards personal and living expenses of the deceased, one-third of the income if the deceased was married, and one-half (50%) of the income if the deceased was a bachelor. This practice was evolved out of experience, logic and convenience. In fact one-third deduction got statutory recognition under the Second Schedule to the Act, in respect of claims under Section 163-A of the Motor Vehicles Act, 1988 ("the MV Act", for short). But, such percentage of deduction is not an inflexible rule and offers merely a guideline."

Law is well-settled that there cannot be a straitjacket formula to determine the compensation in a motor accident. However, a structured formula has been provided under Section 163-A read with Second Schedule of the Act to determine the compensation. Although Hon'ble Supreme Court has found mistakes/inaccuracy in the Second Schedule of the Act, in the case

of ***Munna Lal Jain and Another v. Vipin Kumar Sharma and Others,*** reported in (2015) 6 SCC 347. It is held as under:-

> "2. In the absence of any statutory and a straitjacket formula, there are bound to be grey areas despite several attempts made by this Court to lay down the guidelines. Compensation would basically depend on the evidence available in a case and the formulas shown by the courts are only guidelines for the computation of the compensation. That precisely is the reason the courts lodge a caveat stating "ordinarily", "normally", "exceptional circumstances", etc., while suggesting the formula."

Hon'ble Supreme Court in the said case has discussed the ratio decided in ***Sarala Verma (supra)*** and ***Reshma Kumar v. Madan Mohan***, reported in (2013) 9 SCC 65 and other leading cases in this field.

In the case of ***United India Insurance Company Limited and Others v. Patricia Jean Mahajan and Others***, reported in AIR 2002 SC 2607, Hon'ble Supreme Court held as follows:-

> "22. We therefore, hold that ordinarily while awarding compensation, the provisions contained in the Second Schedule may be taken as a guide including the multiplier, but there may arise some cases, as the one in hand, which may fall in the category having special features or facts calling for deviation from the multiplier usually applicable."

Thus, in my view, when the structured formula under Section 163-A of the Act has not yet been declared invalid/void/ultra vires, it still holds the field. As there is no special features in the case at hand, and this Court has resorted to the structured formula, it should not in the mid-way leave it and adopt any other method/formula for assessment of compensation. Thus, restriction provided/prescribed in the Second Schedule is applicable in the case at hand.

In the **'Note'** to Second Schedule it is prescribed as follows:

> "Note- The amount of compensation so arrived at in the case of fatal accidents claims shall be reduced by 1/3rd in consideration of the expenses which the victim would have incurred towards maintaining himself had he been alive."

9. Thus, I don't find any force in the submission of either learned counsel for the claimant-appellants or respondent-Insurance Company. Taking into consideration the structured formula, this Court adopts multiplier 15 for determination of loss of dependency and hold that the same shall be reduced by 1/3rd towards her personal and living expenses while determining the compensation. Accordingly, the compensation on pecuniary damages is assessed as under:-

- Deducting 1/3rd from the income of the deceased, which comes to Rs.5,000/- per annum, the annual notional income of the deceased would be Rs.10,000/-.

- Further adopting multiplier 15, it comes to Rs.10,000/- x 15 = Rs.1,50,000/-. Thus, the total pecuniary damages due to the death of the deceased is assessed at Rs.1,50,000/-.

10. Again, another important issue that needs consideration is, what would be the loss of future prospect of the income of the deceased. The principles laid down in ***National Insurance Company Ltd. v. Pranay Sethi***, reported in (2017) 16 SCC 680 has great relevance in this **aspect**. It is held in paragprah-59 of ***Pranay Sethi (supra***) as follows:

> "59. In view of aforesaid analysis, we proceed to record own conclusions:
>
> 59.1 xxx xxx xxx
>
> 59.2. xxx xxx xxx
>
> 59.3. While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.
>
> 59.4. In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component."

However, it does not specifically consider the case of a child of tender age. In the case of ***R.K. Malik and another v. Kiran Pal and others***, reported in 2009 (3) TAC 1 (SC), the said issue has been specifically taken care of. In the said case, 29 innocent of school going children between the age group of 10 to 18 years and three of them being less than 10 years died in a road accident, when the bus in which they were proceeding to school fell in Yamuna River at Wazirbad Yamuna Bridge. In the said case, Hon'ble Supreme Court on the issue of future prospect, held as follows:-

> "34. In view of the discussion made hereinbefore, it *is quite clear that the claim with regard to future prospects should have been addressed by the courts below. While considering such claims, child's performance in school, the reputation of the school, etc. might be taken into consideration.*
>
> *35. In the present case, records show that the children were good in studies and studying in a reasonably good school. Naturally, their future prospects would be presumed to be good and bright. Since they were children, there is no yardstick to*

measure the loss of future prospect of these children. But as already noted, they were performing well in studies, natural consequence supposed to be a bright future.

36. In Lata Wadhwa [(2001) 8 SCC 197] and M.S. Grewal [(2001) 8 SCC 151: 2001 SCC (Cri) 1426] the Supreme Court recognized such future prospects as the basis and factor to be considered. Therefore, denying compensation towards future prospects seems to be unjustified. Keeping this in background, the facts and circumstances of the present case, and following the decision in Lata Wadhwa[(2001) 8 SCC 197] and M.S. Grewal [(2001) 8 SCC 151 : 2001 SCC (Cri) 1426] , we deem it appropriate to grant compensation of Rs 75,000 (which is roughly half of the amount given on account of pecuniary damages) as compensation for the future prospects of the children, to be paid to each claimant within one month of the date of this decision. We would like to clarify that this amount i.e. Rs 75,000 is over and above what has been awarded by the High Court."

The case of ***R.K. Malik (supra)*** being more akin and apt to the facts and circumstances of the case, I assess the future prospect at Rs.75, 000/-.

11. Now, let me consider the compensation for non-pecuniary damages, i.e., loss of estate, loss of consortium and future prospect etc. As held in the case of ***Pranay Sethi (supra***), the loss of estate should be Rs.15,000/- and it appears to be reasonable in the facts and circumstances of this case.

12. The next and a vital issue that arises for consideration is the loss of consortium and whether the Court/Tribunal can award compensation on this head, when deceased is a child, as it is generally awarded in a case of death of spouse or parents.

The issue is well- settled in the case of ***Magma General Insurance Co. Ltd. Vs. Nanu Ram alias Chuhru Ram and others***, reported in 2018 (4) T.A.C. 345 (SC), wherein the Hon'ble Supreme Court at paragraph-8.7, held as under:-

"8.7 A Constitution Bench of this Court in Pranay Sethi (supra) dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is Loss of Consortium. In legal parlance, "consortium" is a compendious term which encompasses 'spousal consortium', 'parental consortium', and 'filial consortium'.

The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse, Rajesh and Ors. V. Rajbir Singh and Ors., (2013) 9 S.C.C. 54 : 2013 (3)T.A.C. 679.

Spousal consortium is generally defined as rights pertaining to the relationship of a husband wife which allows compensation to the surviving spouse for loss of "company, society, cooperation, affection, and aid of the other in every conjugal relation." [BLACK'S LAW DICTIONARY (5TH E.1979]

Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training."

Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world over have recognized that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child.

The Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of Filial Consortium.

Parental Consortium is awarded to children who lose their parents in motor vehicle accidents under the Act.

A few High Courts have awarded compensation on this count.[Rajasthan High Court in Jagmala Ram @ Jagmal Singh and Ors. V. Sohi Ram and Ors., 2017 (4) R.L.W.3368 (Raj.); Uttarakhand High Court in Smt. Rita Rana and Anr. V. Pradeep Kumar and 6 Ors., 2014 (3) U.C. 1687; Karnataka High Court in Lakshman and Others v. Susheela Chand Choudhary and Otherrs, (1996) 3 Kant. L.J.570 (DB)]. However, there was no clarity with respect to the principles on which compensation could be awarded on loss of Filial Consortium.

The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under 'Loss of Consortium' as laid down in Pranay Sethi (supra).

In the present case, we deem it appropriate to award the father and the sister of the deceased, an amount of Rs. 40,000 each for loss of Filial Consortium."

13. On a plain reading of the case laws referred to above, it can be safely said that a 'filial consortium' is the right of the parents, namely, the appellants (now appellant No.2), in the instant case, when they lose their minor child in a motor accident. The compensation of loss of filial consortium would be guided by the principles laid down in case of ***Pranay Sethi (supra)***.

Adopting guidelines as aforesaid in the case of ***Pranay Sethi (supra)***, I assess the loss of filial consortium at Rs.25,000/-. Further, the parents

(appellants) must have spent some amount towards funeral expenses. In absence of any materials and taking into consideration the ratio of ***Pranay Sethi (supra***), I assess the same at Rs.15, 000/-.

Thus, the appellant No.2 would be entitled to compensation.—

(i)	For death	Rs.	1, 50, 000.00
(ii)	Funeral expenses	Rs.	15, 000.00
(iii)	Loss of filial consortium	Rs.	25, 000.00
(iv)	Loss of estate	Rs.	15, 000.00
(v)	Future prospect Total	Rs.	75, 000.00
		Rs.	2, 80, 000.00

14. Accordingly, I direct that the appellant No.2 shall be entitled to Rs.2, 80, 000/- (two lakh eighty thousand rupees) only with 6% interest per annum from the date of filing of the claim petition, i.e., 12.08.1994 till its realization.

15. It is submitted by learned counsel for respondent No.2-Insurance Company that the insurer has already satisfied the impugned award. In that event, the amount so deposited by the Insurance Company-respondent No.2 shall be set off from the aforesaid amount. It is further directed that the awarded compensation along with interest shall be deposited within a period of eight weeks hence, which shall be released in favour of the appellants forthwith. Needless to mention that the aforesaid compensation amount shall be released in favour of appellant No.2 on payment of requisite court fee.

16. Before parting with the case, I must record my note of appreciation to Mr. Bibhudendra Dash, Advocate and Mr. Santosh Mohanty, who have effectively assisted the Court for adjudication of the issues involved in this appeal.

17. The instant appeal is allowed to the aforesaid extent.

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2019 (II) ILR - CUT- 648

K.R. MOHAPATRA, J.

W.P.(C) NO.14 OF 2003

DHRUBA CHARAN SWAIN & ANR. .....Petitioners

.Vs.

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

ORISSA SURVEY AND SETTLEMENT RULES, 1962 – Section 61 – Provisions under for declaration of villages – Writ petition challenging the order passed by the Commissioner, Land Records and Settlement, Odisha, Cuttack, whereby a separate revenue village has been created by separating hamlet 'Darudhipa' from the revenue village 'Baladia Nuagaon' under Fategarh PS in the district of Nayagarh – Plea that the authorities have not followed the prescribed procedure – Interference by court – Scope of – Held, the Rules make clear that the proceeding for bifurcation of the village can be initiated by the Settlement Officer keeping in mind the requirement prescribed in Rule 61 – Further, sub-rule(2) provides that such proceeding has to be initiated prior to attestation of the draft ROR, but the certified copy of the ROR of the village Baladia Nuagaon annexed to the writ petition, prima facie discloses that notice for bifurcation of the village was issued much after the publication of the final ROR – Further, it is not clear from the impugned order that the Assistant Settlement Officer was duly authorized to issue notice and the objectors (petitioners) were given any opportunity of being heard –The impugned order is conspicuously silent about adherence of the procedure prescribed – From the entire episode, it appears that the functionaries of the Government have acted very casually in a matter which has a serious repercussion – Order set aside. (Para 8)

Case Laws Relied on and Referred to :-

2000 (II) OLR 177 : Suryamani Mohanty & Ors. Vs. Secretary to Government of Orissa, Panchayatiraj Department & Ors.

For Petitioner : M/s. S.K.Dash, S.K.Mishra, B.Mohapatra, Miss S.Dash & Miss A.Dhalasamanta

For Opp. Parties : Mr.Pravat Kumar Muduli, Addl. Govt. Adv.

ORDER Heard and Disposed of on 11.07.2019

K.R. MOHAPATRA, J.

Heard Mr.Narendra Kumar Dash, learned counsel on behalf of Mr.Susanta Kumar Dash, learned counsel for the petitioners and Mr. Prabhat Kumar Muduli, learned Additional Government Advocate appearing for the State-opposite parties.

2. Petitioners in this writ petition assail the order dated 19.12.2002 (Annexure-2) passed by the Commissioner, Land Records and Settlement, Odisha, Cuttack, whereby a separate revenue village has been created by separating hamlet 'Darudhipa' from the revenue village 'Baladia Nuagaon' under Fategarh PS in the district of Nayagarh.

3. Mr.Dash, learned counsel for the petitioners submitted that the initiation of proceeding for bifurcation of revenue village is without jurisdiction, as it has been initiated by the Assistant Settlement Officer, who had no jurisdiction under Rule-61(1) of Odisha Survey and Settlement Rules, 1962 (for short, 'the Rules'). Further, there is violation of Rule 62(2) of the Rules, 1962 as the proceeding for bifurcation of revenue village was initiated after publication of final ROR. It is further submitted that by virtue of bifurcation/creation of a new revenue village, the villagers of Baladia Nuagaon are seriously affected. It is also his submission that no opportunity of hearing was given by learned Commissioner before passing the order under Annexure-2. As such, the impugned order under Annexure-2 is liable to be quashed and set aside.

4. Mr.Muduli, learned Additional Government Advocate prays for some time to file counter affidavit in this case. But, on perusal of order sheet, it appears that on 31.10.2017, a Division Bench of this Court passed the following order:-

> "As a last opportunity, learned Addl. Government Advocate appearing for the State-opposite parties prays for and is granted two weeks further time to file counter affidavit and petitioner shall have a week thereafter to file rejoinder affidavit.
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> List this matter after three weeks before the assigned Bench."

In spite of specific direction of this Court by order dated 31.10.2017, no counter affidavit is filed. Hence, prayer for grant of time to file counter affidavit cannot be accepted and this matter is heard in absence of counter affidavit on behalf of the State-opposite parties.

5. Mr.Muduli, learned Additional Government Advocate, submits that sub-rule (3) of Rule 61 of the Rules empowers the Assistant Settlement Officer to issue notices at the initiation of the proceeding, if he is so authorized. Further, in absence of any instruction he is not in a position to make any submission as to whether the proceeding was initiated after publication of the final ROR or beforehand. He, however, submits that in absence of any material to the contrary, it cannot be held that the proceeding for bifurcation of village was bad in law.

6. Heard learned counsel for the parties and perused the record. For convenience, Rule 61 of the Rules, which is relevant for the purpose of discussion, is reproduced hereunder.

> *61.* ***Procedure for declaration of villages.****– (1) Where proceedings in pursuance of an order made under Sections 11, 18 or 36 are in progress, the Settlement Officer*

may, if he deems fit, start proceedings for effecting changes in the boundaries of an existing village or for constitution of a new village :

Provided that when a portion of the village has been declared or will be declared to be a reserved forest under the provisions of Section 20 of the Indian Forest Act 16 of 1927 of Section 16 of the Madras Forest Act, 1882 (Madras Act 5 of 1882) or when a portion of the village has been deemed to be a reserved forest under Section 20A of the Indian Forest Act 16 of 1927. The changes in the boundaries of the village shall be effected according to such declaration or the deeming provisions, as the case may be, and it shall not be necessary to start proceedings under this rule for affecting such changes.

(2) Such proceedings shall be started before attestation of the draft record-of-rights or fixation of fair and equitable rent, as the case may be.

(3) At the commencement of the proceedings, the Settlement Officer or any other officer authorised by him in this behalf, shall issue a general notice in Form No. II inviting objections to the proposed changes in the boundaries of an existing village, or to the constitution of a new village, as the case may be, such notice shall be published in the manner provided in Rule 6 and a copy of the notice shall be transmitted to the Collector.

(4) Objections, if any, received within the period specified in the notice, which shall not be less than thirty days from the date of service of the notice, shall be considered by the Settlement Officer along with opinion of the Collector, if any, received during the said period. He shall then forward his proposals with a summary of the objections and opinion of the Collector, if any, to the Board of Revenue for orders :

Provided that when the proceedings are conducted by an officer other than the Settlement Officer under Sub-rule (3), the objections and opinions of the Collector, if any, shall be considered by him and he shall thereafter submit his proposals to the Settlement Officer who shall formulate and forward his proposals with a summary of objections and opinions of the Collector to the Board of Revenue for orders.

(5) On receipt of the proposals from the Settlement Officer, the Board of Revenue may sanction it with or without amendment of may return the same for revision by the Settlement Officer or for further enquiry:

Provided that before passing final orders on the proposal of the Settlement Officer, the Board of Revenue may, if it considers necessary give a hearing to any person or persons who have filed objections in response to the notice under Sub-rule (3).

(6) The attestation of the draft record-of-rights and fixation of fair and equitable rent, as the case may be, shall be taken up only after giving effect to the orders of the Board of Revenue in the map and the draft record-of-rights or the record-of-rights, as the case may be.

(7)The aforesaid powers of the Settlement Officer shall be exercised by the Collector when proceedings in pursuance of an order made under Section 11, 18 or 36 are not in progress:

Provided that no notice required to be issued to the Collector in Sub-rule (3) shall be necessary in such a case.

Provided further that on receipt of orders of the Board of Revenue the Collector shall transmit a copy thereof to the Tahasildar for effecting necessary corrections in the map and record under Chapter IV of these rules."

7. So far as the first submission of Mr.Dash is concerned, notice under Annexure-1 has been issued by the Assistant Settlement Officer, but that by itself does not make the initiation of the proceeding without jurisdiction in absence of any material to the effect that he was not so authorized. However, his submission to the effect that sub-rule (2) of Rule 61 of the Rules has not been complied with, which is mandatory in nature, has some force. Prima facie, it appears that final ROR in respect of Village Baladia Nuagaron was published on 28th June, 1991 (Annexure-5) and notice for bifurcation of the village was issued on 28.01.2000. If that be so, then initiation of proceeding for bifurcation of village Baladia Nuagaon appears to have been undertaken much after the publication of the final ROR in respect of the said village. Further, Sub-rule (6) provides that final ROR in respect of the Village can only be published after giving effect to the order of Board of Revenue. The impugned order under Annexure-2 does not reveal that as to when the proceeding was initiated and what necessitated initiation of such proceeding for bifurcation of the village for creation of a new revenue village, namely, 'Darudhipa'. In absence of any such material, this Court also is not in a position to come to a conclusion that bifurcation of the village was in fact necessary and it was done in accordance with law. Further, there is no material on record to show that any opportunity of hearing was given to the petitioners, who had filed objections pursuant to the notice issued dated 28.01.2000 (Annexure-1). This Court in the case of ***Suryamani Mohanty and others Vs. Secretary to Government of Orissa, Panchayatiraj Department and others***, reported in 2000 (II) OLR 177 held as follows:

"3. In the above background of the" procedural requirements, the present case is to be judged. There is no dispute that objections were filed on behalf of the present petitioner. However, the Collector had not furnished any opinion. It further appears that the Commissioner has not given any opportunity of hearing to the petitioners who had filed objection. Even though the proviso contemplates that the Board of Revenue may, if it considers necessary, give a hearing, principles of natural justice require that such opportunity should be given to the objectors unless, for weighty reasons, it is decided by the Board of Revenue not to afford such opportunity of hearing. Since in the present case, such opportunity has not been given and opinion of the Collector has not been elicited, I deem it just and proper to remand the matter to the Commissioner, Land Records and Settlement (opposite party No. 2)

> *for fresh disposal. The Commissioner shall obtain necessary opinion from the Collector and give opportunity of hearing to the petitioners who have filed objection and thereafter dispose of the matter in accordance with law without being influenced by any observations in the earlier order. In order to facilitate early disposal of the matter, the present petitioners are directed to appear before the Commissioner through lawyer or in person on 1st August, 2000."*

Thus, it is apparent that although proviso to sub-rule (5) to Rule-61 of the Rules provides that Board of Revenue, if considers necessary, may give an opportunity of hearing to the person(s), who have filed objection, but doctrine of *audi alteram partem* is a *sine qua non* before passing any final order by the Board of Revenue.

8. The Rules make clear that the proceeding for bifurcation of the village can be initiated by the Settlement Officer keeping in mind the requirement prescribed in Rule 61. Further, sub-rule(2) provides that such proceeding has to be initiated prior to attestation of the draft ROR, but the certified copy of the ROR of the village Baladia Nuagaon annexed to the writ petition as Annexure-5, *prima facie* discloses that notice for bifurcation of the village was issued much after the publication of the final ROR. Further, it is not clear from the impugned order that the Assistant Settlement Officer was duly authorized to issue notice under Annexure-1 and the objectors (petitioners) were given any opportunity of being heard. The impugned order under Annexure-2 is conspicuously silent about adherence of the procedure prescribed. From the entire episode, it appears that the functionaries of the Government have acted very casually in a matter which has a serious repercussion.

9. In that view of the matter, impugned order under Annexure-2 is not sustainable and the same is set aside. The matter is remitted back to the Commissioner, Land Records and Settlement, Odisha, Cuttack to hear the matter afresh giving opportunity of hearing to the parties following due procedure of law. The parties, if so advised, may also file their objections/written statements along with documents in support of their case.

10 Accordingly, the writ petition is allowed to the extent indicated above.

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2019 (II) ILR - CUT- 654

DR. A. K. MISHRA, J.

CRIMINAL REVISION NO. 299 OF 2001

AKSHYA KUMAR MOHANTY .....Petitioner

.Vs.

STATE OF ORISSA .....Opp. Party.

CODE OF CRIMINAL PROCEDURE, 1973 – Section 397 and 401 – Revisional power of High court – Challenge is made to the conviction and sentence confirmed by the lower appellate court – Scope of interference in revision – Held, in its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order – In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice – But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction – Ordinarily, therefore, it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice – Material contradictions create doubt about the credibility – Conviction and sentence set aside.

For Petitioner : M/s.B. Panda, B. R. Mohanty, S. R. Mohapatra, G. P. Panda & Sudipto Panda.

For Respondent : Mr. S. Das, Addl. Standing Counsel.

JUDGMENT Date of Hearing and Judgment : 05.02.2019

DR. A. K. MISHRA, J.

This revision by accused petitioner is directed against the judgment dtd.27.03.2001 of learned Sessions Judge, Keonjhar in Criminal Appeal No.55 of 1995 in dismissing the appeal and thereby confirming the conviction of the accused – petitioner U/s.393 of the Indian Penal Code and upholding the sentence R.I. for two years and fine of Rs.1000/-, in default, R.I. for further two months in the judgement dated 25.08.1995 passed by learned J.M.F.C., Keonjhar in G.R. Case No.282 of 1991.

2. Put simply, the prosecution case is that on 11.5.1991 at about 8.45 P.M. the informant (P.W.5), a salesman had been to the shop of Santosh

Kumar Behera (P.W.1) at Raisuan Bazar and after collecting money of Rs.1800/-, kept the same in the hand bag. While coming back, the accused threatened him at the point of sword and causing injury, committed robbery of the bag containing money. On the filing of F.I.R. (Ext.4), Keonjhar Sadar P.S. Case No.39 dtd.11.5.1991 was registered U/s.394 of I.P.C. After completion of investigation charge-sheet was submitted.

3. Accused took the plea of denial.

4. Prosecution examined 5 witnesses, including the informant as P.W.5, the investigating officer as P.W.4, two occurrence witnesses as P.W.1 and P.W.2 and the medical officer as P.W.3. The injury reports of Santosh Kumar Behera (P.W.1) and one Padmanava Mohanta were marked as Ext.1 & 2.

5. The informant – injured (P.W.5) did not disclose anything about the occurrence admitting compromise. He admits his signature (Ext.4/2) in the F.I.R. but stated that the same was not readover and explained to him. The investigating officer (P.W.4) has no direct knowledge about the incident so also P.W.3 – Medical Officer. Basing upon the evidence of P.Ws.1 and 2, learned Lower Court convicted the accused U/s.393 I.P.C. and sentenced as above. In the appeal no fault was found therein.

6. In this revision, learned counsel for the petitioner submits that when the informant – injured has not stated anything, the evidence of P.Ws.1 and 2 being contradictory to each other with regards to bag containing money, the same cannot be relied upon to base conviction.

7. Learned Addl. Standing Counsel supports the judgment on the grounds stated therein.

8. The revisional jurisdiction of this court U/s.397 and 401 of Cr.P.C. is limited and that is clearly stated in the decision reported in AIR 2018 SC 3173, **Kishan Rao Vrs. Sankar Gouda** wherein their Lordships of Hon'ble Apex Court have held as follows:-

> *"11. This Court has time and again examined the scope of Section 397/401 Cr.P.C. and the ground for exercising the revisional jurisdiction by the High Court. In State of Kerala vs. Puttumana Illath Jathavedan Namboodiri, 1999 (2) SCC 452, while considering the scope of the revisional jurisdiction of the High Court this Court has laid down the following:*
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> *"5.....In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for*

correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."

9. The evidence of P.W.1 discloses that after overpowering the accused, he made over the cash bag to the agent and thereafter the accused threatened him to see. P.W.2 testified in his examination-in-chief that P.W.1 somehow overpowered the accused when he threw the cash bag outside and Sisira Mohapatra (informant) took away the bag and then the accused left the shop threatening P.W.1.

This material contradiction in the evidence of P.Ws.1 and 2 is sufficient to create doubt about their credibility. Further no weapon is seized. Added to that, P.W.1 stated about that accused was armed with Bhujali, while F.I.R. disclosed the use of Sword. When informant-injured does not come forward to unfold the incident on the ground of compromise, the edifice of prosecution is found crumbled down due to above material discrepancies and inter se inconsistencies. It is unsafe to base conviction based on such doubtful version.

9. In view of the above discussions I am of the considered opinion that both the courts below have failed to appreciate the evidence on record in its proper perspective. This glaring feature creating doubt in the prosecution story has been overlooked by both the courts below and thereby miscarriage of justice has been caused. The order of conviction and sentence to follow, are unsustainable.

10. The conviction and sentence of the petitioner-accused passed in the judgment dtd.25.8.1995 in G.R. Case No.282 of 1991 by learned JMFC, Keonjhar and upheld in Criminal Appeal No.55 of 1995 are hereby set aside. The accused is acquitted therefrom.

He be set at liberty forthwith.

The Revision is allowed.

Sent back the L.C.R.

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